15. Judging Inter-legality

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I. Introduction

During the 1920s, one of the most notorious criminal trials in the history of the United States took place. Two young men of Italian descent, capable of speaking only broken English and going by the names Nicola Sacco and Bartolomeo Vanzetti, were found guilty of murder in the first degree. Subsequent investigations suggested that not all evidence had been equally credible, and proceedings were organized with a view to possibly re-opening the case. The judge in these proceedings, however, a gentleman named Thayer, found no problem with the initial decision, and dismissed the case. Felix Frankfurter, then a young law professor at Harvard on his way to becoming an influential Supreme Court Justice, wrote a scathing commentary, concentrating in large part on the role of Judge Thayer.

Some of Frankfurter's words are worth quoting in full and all focus on, one might say, Judge Thayer's epistemic virtues – or rather, lack thereof:

> By what is left out and by what is put in, the uninformed reader of Judge Thayer's opinion would be wholly misled as to the real facts of the case… I assert with deep regret but

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> without the slightest fear of disproof, that certainly in modern times Judge Thayer's opinion stands unmatched, happily, for discrepancies between what the record discloses and what the opinion conveys. His 25,000 word document cannot accurately be described otherwise than as a farrago of misquotations, misrepresentations, suppressions and mutilations… The opinion is literally honeycombed with demonstrable errors, and infused by a spirit alien to judicial utterance.[2]

And if this were not bad enough, Frankfurter goes on to quote an editorial in the (to his mind) conservative *Boston Herald*, suggesting that Judge Thayer's opinion 'carries the tone of the advocate rather than the arbitrator'.[3]

The performance of Judge Thayer reminds us that judges are human, all too human perhaps, and that their humanity – or the absence thereof – affects their reasoning and their decisions. Indeed, judges have to be human; there is too much at stake for the individuals who find themselves in court to let their fate be decided on the basis of an algorithm or by some electronic device, and the popularity of jurimetrics as a decision-making device proved happily short-lived. But with human performance come human fallibilities, and uncertainty enters the picture on a deep, fundamental level. This has always been recognized, of course: Justice Cardozo could conclude his lectures on the nature of the judicial process almost a century ago by suggesting that the judge must 'balance all his [sic] ingredients, his philosophy, his logic, his analogies, his histories, his customs, his sense of right, and all the rest, and

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[2] Felix Frankfurter, *The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen* (New York: Little, Brown & Co., 1961 [1927]), at 104.

[3] *Ibid*., at 104-105.

adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales.'[4] And Ronald Dworkin famously devised a judge of 'superhuman skill, learning, patience and acumen'[5], 'an imaginary judge of superhuman intellectual power and patience', and christened him (again, him) Hercules.[6] The point to note, of course, is that Dworkin's Hercules is supposed to be no mere ordinary mortal, but is rather imagined to be superhuman.

Regardless of the setting, it appears to be commonly accepted that judges are usually constrained by the political environment in which they work. Richard Posner, himself a judge for many decades, suggests that judges tend to realize that they should not go 'too far' in their politics, for fear of retaliation or at least a response by the political branches of government.[7] And Sir Hersch Lauterpacht, in the rather different setting of a still-developing international law, in the 1930s acknowledged that international judges should exercise circumspection and restraint, lest governments would turn away from judicial dispute settlement altogether.[8]

But if it is generally accepted that there is more to judging than technical competence alone, it is by no means clear what this 'more' is and how it can be conceptualized. In addition, if inter-legality is taken seriously, it is not even clear anymore (assuming it ever was) what technical competence stands for: if the hallmark of inter-legality is the overlapping of distinct legal orders which can each plausibly claim

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[4] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven CT: Yale University Press, 1991 [1921]), at 162.

[5] Ronald Dworkin, *Taking Rights Seriously* (Cambridge MA: Harvard University Press, 1978), at 105.

[6] Ronald Dworkin, *Law's Empire* (London: Fontana, 1986), at 239.

[7] Richard A. Posner, *How Judges Think* (Cambridge MA: Harvard University Press, 2008), at 375.

[8] Sir Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, 2011 [1933]), at 112.

applicability, then it would seem that technical competence in only one of these overlapping legal orders is no longer sufficient. And this, in turn, may well come to be accompanied by practical problems: many law schools, e.g., prove unable or unwilling to properly distinguish between foreign law and international law, typically suggesting that questions of, say, American law or Chinese law will be handled by the international law section. Sadly, this is not limited to law schools alone: during his confirmation hearings, US Supreme Court Justice Neil Gorsuch displayed that he suffered from the same lack of understanding.[9]

In other words, inter-legality will demand a broader type of skill-set from judges than what has hitherto been the standard. Judges will need to be competent not only in the legal system in which they have been predominantly trained and socialized, but also in applying legal rules and principles stemming from other legal systems – at least if they want to do justice in individual cases.[10] The remainder of this paper will discuss the sorts of qualities judges will need generally, eventually zooming in on the specific demands stemming from inter-legality. It will do so from a largely virtue ethical perspective, recently heralded by Luban and Wendell as a promising avenue for further thinking in legal ethics, even if only

[9] Anthea Roberts, 'Pledging American Exceptionalism? US Supreme Court Justice Gorsuch on International Law', available at http://opiniojuris.org/2017/05/23/33125/ (visited 12 December 2017).

[10] While there is not all that much literature on inter-legality just yet, what there is tends to be confined to sketching normative conflicts or conflicts between regimes without specifically addressing the role of the judiciary. Still, what follows is consistent with this literature; see, e.g., Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Frankfurt am Main: Surhkamp, 2006), 34-40.

as a complement to more rule-based or situationist ethics: '… any account of legal ethics that leaves out the actor and the judgments we pass on the actor misses something crucial…'.[11]

Even so, one probably does not need to be a virtue ethicist to acknowledge that judging is a matter of not just mechanistically applying a given set of rules to a given set of facts. Indeed, such a perspective falls into the familiar vicious circle: to figure out what the relevant facts are, one needs to have an inkling about the relevant rule; but to figure out what the relevant rule is, one needs to have inkling about the relevant facts. Hence, judging requires something additional, and this has been acknowledged by even die-hard 'law and economics' scholars, socialized into thinking about individuals mostly in the aggregate, and trained in assuming behavioral patterns. If even rationalists such as Eric Posner and Adrian Vermeule can acknowledge that judging may involve a degree of 'epistemic humility' (a version of one of the virtues), then it would seem that there is some room to explore the virtues.[12]

One final remark: this chapter is limited to discussing the qualities necessary or desirable for rendering judgment in cases reaching the bench and on the assumption that the judge need not make up her mind about the broader setting in which she operates. These are, however, not the only questions with an ethical component reaching judges. Thus, some judges may want to ask themselves to what extent their work is helping to prop up an unlawful regime; some may feel they have to join a majority opinion to send a strong political message even though privately they would have thought of dissenting or concurring; some may need to reflect on whether their earlier or their extra-judicial activities may affect

[11] David Luban and W. Bradley Wendel, 'Philosophical Legal Ethics: An Affectionate History', (2017) 30 *Georgetown Journal of Legal Ethics*, 337-364, at 364.

[12] Eric Posner and Adrian Vermeule, 'The Votes of Other Judges', (2016) 105 *Georgetown Law Journal* 159-190, e.g. at 163.

their judgment[13]; some may worry about the compatibility (*vel non*) of rules stemming from two distinct yet overlapping legal orders[14]; and others may have to come to terms with finding themselves on the bench on what are essentially show trials.[15] Such situations raise profound ethical issues, but this is not the place to address these.

II. The Setting: Inter-legality

Much of the literature on the theory of ethics of judging (or lawyering more broadly), for all its merits, remains a little abstract. One basic distinction is that between civil and criminal cases, and it is generally assumed that these come with different demands. The lawyer in a criminal trial, it is often claimed, is subject to different ethical demands than those that inform or should inform the company lawyer or

[13] One of the judges at the Special Court for Sierra Leone, e.g., had written rather strong words about acts he was later expected to adjudicate, and this caused some understandable havoc. Given the judge's refusal to recuse himself, his colleagues had to disqualify him from the proceedings. The episode is recorded in Daniel Terris, Cesare Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (Oxford University Press, 2007), at 198-199. For more in-depth discussion see Frédéric Mégrét, 'International Judges and Experts' Impartiality and the Problem of Past Declarations', (2011) 10 *The Law and Practice of International Courts and Tribunals*, 31-66.

[14] A possible example may involve the 1989 *Rainbow Warrior* arbitration between New Zealand and France, which could have resulted in the confinement of two French secret service agents possibly in violation of habeas corpus or fair trial rights under the European Convention of Human Rights.

[15] See, e.g., Jan Klabbers, 'Principled Pragmatist? Bert Röling and the Emergence of International Criminal Law', in Frédéric Mégrét and Immi Tallgren (eds.), *The Dawn of a New Discipline* (forthcoming).

the lawyer in civil cases, partly because in the criminal case there is no equality of arms between the parties. When the lawyer's client is pitted against the almighty power of the prosecuting state, as in criminal proceedings, the lawyer may be allowed to engage in practices and tactics that would otherwise not be acceptable. Where, on the other hand, there is equality of arms to begin with (as is presumed to be the case in civil proceedings), the ethical standards might be a little stricter.[16]

But beyond this basic distinction between criminal and civil proceedings, much of the literature takes a one-size-fits-all approach, in which lawyers and judges are expected or supposed to behave in certain ways regardless of the circumstances. It is supposed not to matter much whether the dispute is about child custody or an inheritance or an unfriendly corporate take-over. It is supposed not to matter a great deal whether the dispute involves individual citizens or large multinational companies, or whether it concerns the interpretation of an obscure municipal regulation or a country's constitution. And it is supposed not to matter all that much in which jurisdiction the matter comes before court. In a word, much of the literature abstracts from concrete circumstances and posits an ideal-type of reasoning.

There is, one should hasten to add, nothing particular wrong or surprising about this. Much moral philosophy assumes a similar approach: reasoning from first principles, set in an abstract universe, so as to provide possible guidelines for concrete action in concrete circumstances. This is useful in that it can provide considerable clarification. The one problem, however, is that the concrete circumstances rarely match the abstract universe in which the guidelines were first formulated. As Ignatieff puts it with admirable economy: 'We are always in a particular situation, a context, a moment – a place in

[16] See, e.g., David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988); Arthur Isak Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton University Press, 1999).

space and time – and we are always with others, with people whose opinion shapes us and whose views we wish to shape.'[17]

With this in mind, it is no good to just adopt the main insights derived from virtue jurisprudence and boldly proclaim that these also apply in the inter-legality setting. Instead, it might be useful first to set out what types of legal issues judges may be confronted with under conditions of inter-legality. This is not to show how widespread (or not) inter-legality is – for this purpose, one is best referred to several of the other contributions to this volume.[18] But what should be appreciated is that inter-legality comes with its own sets of demands, above and beyond those we regularly associate with judging. In what follows I will outline two different but complicated scenarios, derived from real-life situations (if a little stylized so as not to overcomplicate things[19]).

One caveat is in order. What follows will not specifically discuss the familiar trope of how judges should address judgments of foreign courts. This is a related issue, but distinct. The question of how to handle foreign judgments may play a role in inter-legality settings in that those judgments may form part of the corpus of law to be applied. Inter-legality is distinct though in suggesting that the application of foreign law is not limited to following foreign judgments as if they were precedents, or drawing inspiration from them.

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[17] Michael Ignatieff, *The Ordinary Virtues: Moral Order in a Divided World* (Cambridge MA: Harvard University Press, 2017), at 209.

[18] See the chapters in the section on Sampling Inter-legality above.

[19] What matters here, after all, is not descriptive accuracy, but to gain a heuristic understanding.

The first scenario is a familiar one, derived from the well-known plight of Mr Kadi.[20] Mr Kadi, a Saudi businessman, found much to his dismay that on instigation of the Security Council, his European bank account had been frozen, on the suspicion that he was involved in the financing of terrorism. Needless to say, he was not particularly pleased with this development. The source of his displeasure was, eventually, an European Union (EU) Regulation, implementing verbatim the relevant Security Council decision. This decision, so he suggested, did not respect several of his recognized human rights (the right to property, as well as the rights to access to justice and a fair trial) and thus should be null and void, and he went to the courts of the EU in order to achieve justice.

The case pits two different jurisdictions against each other. On the one hand, there is the Security Council of the United Nations (UN), and it is uncontested that, for member states of the UN, decisions of the Security Council prevail over other relevant considerations and, indeed, prevail over conflicting obligations resting on those member states. This does not solve all issues, of course: one could argue, albeit not without problems[21], that the Security Council ought to respect or at least consider human rights in its decision-making, and that when it takes decisions that do not do so, these shall be void. On

[20] See especially Case C-402/05 P, *Kadi and Al Barakaat* v *Council and Commission*, ECLI:EU:C:2008:461. Commentary is by now voluminous; see, e.g., Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, 2009).

[21] The main problem here is that the UN Charter does not unequivocally instruct the Security Council to respect human rights in its decision-making and it is not immediately clear where a legal obligation to respect human rights would stem from. See more generally Jan Klabbers, 'The Sources of International Organizations' Law: Reflections on Accountability', in Samantha Besson and Jean d'Aspremont (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford University Press, 2017), 987-1006.

such a reading, the case would be a simple one: the decision would legally be non-existent, and thus there is no need, let alone an obligation, to implement it. Hence, his bank accounts should be opened again and perhaps, if he suffered damage, the UN could be held liable for such damage.[22]

The Court of Justice of the EU (CJEU) took a different approach. The EU legislator is bound to respect human rights. This is considered to be among the constitutional values of the European Union, and it was on this basis that the CJEU eventually reached its decision. It held that the implementing regulation was an EU legislative instrument which, accordingly, should meet the EU's constitutional criteria. Seeing that it violated Mr Kadi's human rights, the CJEU held that the EU regulation was void. Mr Kadi should be taken off the blacklist, and his accounts unfrozen.

The decision was widely welcomed and heralded as a victory for human rights, but it is important to realize that it was not self-evident that this ought to have been the obvious legal outcome. The Court's judgment proved possible only upon assuming that the facts of the case took place within the closed universe of the EU; it proved possible only upon the assumption that the EU Regulation at issue was a self-standing instrument rather than, in reality, implementing a Security Council decision. One may expect, in the EU, that EU decisions live up to human rights standards, but this places the member states of the EU in a bind when the EU aims to implement instruments emanating from elsewhere. Under the UN Charter, they are expected to give effect to Security Council decisions, and therewith keep Mr Kadi's accounts frozen; under EU law, by contrast, they are asked to ignore the EU regulation implementing

[22] This presumes a lot though. It would seem more than likely that the UN would invoke its well-nigh absolute immunity against any suit for damages in this scenario.

the Security Council decision, as it must be considered invalid. Hence, the UN expects them to do X; the EU expects those same states to do non-X.[23]

What the case makes clear is that matters cannot be convincingly reduced to a single jurisdiction, or a single body of expertise. A case such as *Kadi* involves questions concerning the relationship between international law and EU law, a topic on which legislative guidance is largely missing and, indeed, could hardly be present: the EU could, hypothetically, close itself off for any effect of UN law, but even then, it is by no means certain why such a closing off would need to be respected by UN law – there is no meta-rule in existence on the relations between legal orders, nor could there be such a meta-rule, in all likelihood. To make things more complicated still: the first EU judicial decision, taken by its lower-level court, actually suggested that the EU courts have a limited right of judicial review of UN regulations. This would apply to the extent that these are alleged to violate what are known as *jus cogens* rules: peremptory norms from which no derogation is permitted.[24]

What is important to appreciate is that as a technical matter, the case could easily have had a different outcome. The Court of Justice could have decided (unlikely as this may sound in light of its earlier

[23] A recent monograph on normative conflict is Valentin Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma* (Oxford University Press, 2017).

[24] Case T-315/01, *Kadi* v *Council and Commission*, ECLI:EU:T:2005:332. The Court of First Instance found, *in casu*, that no such rules were involved, and that accordingly, there was nothing wrong with the Security Council decision and thus not with the EU regulation either. In other words: it tested the legality of the relevant instruments against what it held to be general international law, but not against the EU's constitutional provisions.

jurisprudence[25]) to respect the supremacy of UN law. This would not have been too difficult to substantiate. While UN law does not, as such, bind the EU (the EU not being a member of the UN itself), nonetheless all its member states are bound by the Charter, and the Charter itself proclaims supremacy, something confirmed in other instruments.[26] It is, moreover, not all that eccentric to herald the main purpose of the UN (to achieve peace and security) as one of the supreme values of the international community. On such a line of reasoning, the global war on terror and the need to secure peace and security would trump the protection of the individual rights to property and access to justice of a wealthy businessman.

On the other hand, the Court's actual outcome is also clearly defensible: opting to have human rights prevail over the global war on terror (and, in the process, solidifying the European integration project a little more). The Court, in other words, had a genuine choice between two options, both of them technically justifiable and both of them intuitively morally plausible as well. The Court was required to exercise some discretion, and needed to display an understanding of both EU law and public international law. Indeed, it is at least arguable that this is where the first instance case faltered: the Court of First Instance, by implying that Security Council decisions can be tested against *jus cogens*, seemed to suggest that *jus cogens* norms are not merely substantively peremptory, but also grant

[25] Jan Klabbers, 'The Reception of International Law in the EU Legal Order', in Robert Schütze and Takis Tridimas (eds.), *Oxford Principles of European Union Law. Volume I: The European Union Legal Order* (Oxford University Press, 2018), 1208-1233.

[26] See Article 30 of the Vienna Convention on the Law of Treaties.

jurisdiction to each and every court willing to look at them – and this is a construction that would strike most international lawyers as implausible, perhaps even simply incorrect.[27]

The second example is different, and stems from the United States. It regularly happens that foreign nationals have been suspected of crimes and prosecuted for those crimes. Under international law, those foreign nationals must be offered the possibility of consular assistance (at least if both states concerned are parties to the Vienna Convention on Consular Relations[28]), but in the rough and tumble world of crime and punishment, this does not always happen – local police officers and sheriffs may not always be aware of the obligation, or they may not be aware that a suspect is actually a foreign national, and more sinister reasons for not informing arrested individuals of their right to consular assistance cannot categorically be excluded.[29]

This raises several possible (and sometimes actual) issues. One of these is that sometimes the International Court of Justice gets involved, with the home state of the foreign national asking the ICJ to order the US (to stick to the example) to stay the execution of criminals found guilty and sentenced to death. This, in turn, raises issues about the relationships between courts: should US courts follow orders issues by the ICJ? The US Supreme Court has been very reluctant to acknowledge as much, sometimes suggesting orders of the ICJ are mere recommendations; and more recently suggesting that

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[27] And perhaps this helps explain why in a later decision the International Court of Justice made a sharp distinction between substantive rules (including *jus cogens*) and procedural rules: see *Jurisdictional Immunities of the State* (Germany v Italy; Greece Intervening), [2012] ICJ Reports 99.

[28] Article 36 of the Convention is relevant here. The chance that both states involved are bound by the terms of the convention is large: it has 179 parties, as of December 2017.

[29] See e.g. *Avena and Other Mexican Nationals* (Mexico v USA), [2004] ICJ Reports 12.

while the US might be bound by a treaty's terms, it need not immediately accept the interpretation thereof by a court as authoritative.[30]

What adds a further complication is that in cases such as this, it is not merely several substantive sets of rules demanding attention, but there are also procedural rules involved, and those rules may come to have an impact on the final decision. That such a scenario is not entirely impossible is illustrated by the 'procedural default' rule applicable in US criminal law. The rule, in a nutshell, prohibits criminal defendants from raising on appeal issues that were not raised at the first instance. This may work well in normal events and clearly serves the goal of trial economy, but creates problems in cases where foreign nationals have stood trial without having been informed of their right to consular assistance. Having been convicted in first instance without assistance, they cannot on appeal invoke the wrongful absence of consular assistance, even if it is precisely this that may have contributed to a guilty verdict or a strict sentence.[31]

These examples may suffice to sketch the sort of issues that may be at stake: the interplay of rules emanating from different jurisdictions or legal systems but relating to the same conduct; the complexities involved in having sufficient knowledge and competence in a variety of legal systems, and the interplay between law and justice that may accompany the application of procedural rules. In other

[30] See *José Ernesto Medellín* v *Texas*, US Supreme Court, 552 US 1 (2008).

[31] The example is derived from criminal proceedings against Mr Breard, as this came before the ICJ in the late 1990s. See *Case Concerning the Vienna Convention on Consular Relations* (Paraguay v USA); Request for Indication of Provisional Measures, [1998] ICJ Reports 248; for comments and references see, briefly, Jan Klabbers, 'Executing Mr Breard', (1998) 67 *Nordic Journal of International Law*, 357-364.

words, inter-legality places heavy demands on judges, both in terms of their competence and in terms of their attitude.

III. On Virtue Jurisprudence

While people have been discussing what makes a good or decent judge for many decades, it has been over the last decade or two that virtue jurisprudence has made some waves. Virtue jurisprudence derives, as the label suggests, from virtue ethics (or virtue theory, as it sometimes referred to), a distinct branch of ethics often traced back to the writings of Aristotle in the West and the not all that dissimilar writings of Confucius in the East. The idea behind virtue ethics is that one should not so much evaluate the ethical nature (*vel non*) of specific acts, but rather concentrate on the ethical qualities of the actor. This allows not just for assessing events, but also inquiring into why they happened. After all, sometimes it is difficult or awkward to assess an act without looking into the context: getting an abortion after being raped is rather different from getting an abortion in order to make money on a reality television show. Even those who are 'pro-choice' might, while accepting the former, be opposed to the latter, yet regular deontological or consequentialist accounts might not offer the tools to make the differentiation. Virtue ethics, however, does: a virtuous person, one might suppose, however 'virtuous' is precisely defined, is unlikely to have an abortion (or endorse one) for financial gain.

For Aristotle, who was far more explicit on the virtues than Confucius, the virtues played a role in a teleological existence. The purpose of life, briefly put, resides in achieving excellence, happiness or flourishing (*eudaimonia*). The virtues then are character traits, developed from a young age and

inculcated through education, experience, and imitation, that make for a happy, flourishing life. These include honesty and humility, courage and magnanimity, temperance and patience.[32] Some of the virtues Aristotle listed are no longer generally accepted as such: wittiness, e.g., is not generally considered particularly virtuous anymore, although in some professions it may nonetheless be highly desired (stand-up comedy, e.g., can hardly do without). Other virtues have been added by later thinkers: most notably, faith, hope and charity were considered by Aquinas to have some use for a religious life, and perhaps beyond as well.[33]

It seems well accepted that even if the virtues may be of universal application (this is debated, although sometimes on false premises[34]), there is nonetheless an argument to be made that different professional or social roles come with different virtues or, more accurately perhaps, that the same virtue plays out in specific ways in specific roles.[35] One concrete example may be this: typically, one

[32] Aristotle set this out predominantly in his *Ethics*. I have used the version as published by Penguin in 1976, translated by J.A.K. Thomson and with an introduction by Jonathan Barnes. Confucius' best-known teachings are known as *The Analects* (London: Penguin, 1979, D.C. Lau transl.).

[33] St. Thomas Aquinas, *Treatise on the Virtues* (Notre Dame IN: University of Notre Dame Press, 1984, John Oesterle transl).

[34] Often, in everyday parlance, virtues and values are conflated. While the relationship between the two is a complicated one, the universality of values may legitimately be doubted. Whether virtues are by definition parochial seems less certain – it is hard to think, e.g., of cultures where honesty or courage or humility would not be appreciated. On the former, see e.g. Elizabeth M. Meade, 'The Commodification of Values', in Larry May and Jerome Kohn (eds.), *Hannah Arendt: Twenty Years Later* (Cambridge MA: MIT Press, 1997), 107-126.

[35] Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press, 2001); R.S. Downie, *Roles and Values: An introduction to Social Ethics* (London: Methuen and Co., 1971).

would expect one's doctors to be honest (although the degree of honesty can be subject to local variations); but even where a doctor is generally expected to be honest, he or she should not be so bluntly honest as to tell a terminally ill child that she will be dead within a week. One can construe this as a particular form honesty should take, or perhaps as the necessity to combine honesty with empathy, or some related construction.

By contrast, the accountant is expected to be brutally honest at times. An accountant who does not provide insight into her client's finances with great transparency is not doing her job properly; and an accountant who aims to hide an unpleasant truth behind opaque representations (let alone one who 'cooks the books') is eventually doing her client a disservice. Thus, it seems, specific professional roles can come with specific versions of the virtues. Honesty demands different demeanor from a doctor than from an accountant. It is not the case, one may presume, that people's character changes when they take on different roles: Cohen has persuasively suggested that the individual as teacher is not essentially different from the same individual as parent.[36] But it is plausible to suggest that different roles come with different responsibilities which, in turn, make different demands on the character of the individuals occupying such roles. The roles, in turn, may be professional roles, but not exclusively so: social roles too, constructed by social expectations, may come with ideas about virtues. Thus, a

[36] G.A. Cohen, 'Beliefs and Rôles', (1966-67) 67 *Proceedings of the Aristotelian Society*, 17-34.

'good parent' is often distinguished from a 'bad parent', even though the law might not make a distinction[37] and there are no formal job descriptions available as to what makes for a 'good parent'.[38]

On this line of thinking, it is not eccentric to propose that judges too can be expected to possess certain characteristics, and it is this thought that has been picked up in a set of writings loosely referred to as 'virtue jurisprudence'. The underlying premise is the idea that the judge too is not just a cog in the machine of justice (or administration), but is also a moral actor and, what is more, has a moral obligation towards his or her role or, as Jefferson Powell once put it, the 'obligation to remain within the role is itself a moral obligation'.[39] There can be little doubt that part of this obligation is an obligation to uphold the law – this can be cast, it seems, as an obligation equally strong in both law and morals. Burton puts the matter in plain terms: 'We simply cannot conceive of a legal system that did not hold its judges to such a duty.'[40]

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[37] The law typically does not distinguish between good and bad parenting, but may make punishable specific acts which in turn may be associated with bad parenting. Surely though, the parent who would only do the bare minimum, that what is legally required, is unlikely to be considered a good parent.

[38] Marion Smiley, *Moral Responsibility and the Boundaries of Community* (Chicago: University of Chicago Press, 1992). There are unofficial descriptions available of course: see e.g. Bruno Bettelheim, *A Good Enough Parent* (New York: Vintage, 1988).

[39] H. Jefferson Powell, *Constitutional Conscience: The Moral Dimension of Judicial Decision* (Chicago: University of Chicago Press, 2008), at 41.

[40] See Stephen Burton, *Judging in Good Faith* (Cambridge University Press, 1992), at 219. Burton grounds the duty in the oath judges take when sworn in in conjunction with the entrustment of the judicial task by the public at large (at 218).

But surely, to posit a duty to uphold the law is only the starting point of any analysis – it cannot be its final conclusion. The interesting point is not merely *that* the judge should uphold the law; it is also a question of *how* best to do so, and whether this applies *in all circumstances*. On the latter point, opinions vary widely and deeply, with some positing that the duty is an absolute one, and others suggesting that if the law is deeply flawed from a moral point of view, the judge may set it aside. This is a debate of long-standing pedigree, and need not detain us here[41]; it is usually taught under the label Hart-Fuller debate[42], with Hart standing for the proposition that law demands absolute fidelity, and Fuller standing for the proposition that the law should reveal a minimal moral content.[43]

Different authors provide different, though largely overlapping, depictions of the judicial virtues, and even non-philosophers seem to grasp intuitively that character traits are of relevance. As Terris, Romano and Swigart write in a throwaway remark, such traits as 'wisdom, common sense, and empathy' are 'essential to good judgment'.[44] Perhaps the most authoritative list is the one provided by

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[41] There is a point to be made though: the judge looking to go beyond the law should do so only if well-endowed with judicial integrity and judicial wisdom. See Lawrence B. Solum, 'A Virtue-Centered Account of Equity and the Rule of Law', in Colin Farrelly and Lawrence B. Solum (eds.), *Virtue Jurisprudence* (New York: Palgrave MacMillan, 2008), 142-166, at 157-158.

[42] H.L.A. Hart, 'Positivism and the Separation of Law and Morals', (1958) 71 *Harvard Law Review*, 593-629; Lon L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart', (1958) 71 *Harvard Law Review*, 630-672.

[43] Usually Radbruch is placed in the same box as Fuller. For Radbruch, however, it seemed that the matter was rather one of balancing: the positivist value of legal certainty (itself an ethical concern) could be outweighed if the legal certainty this ensured would be manifestly unjust. See Gustav Radbruch, *Einführung in die Rechtswissenschaft*, 13th edn. (Stuttgart: Koehler Verlag, 1980, Zweigert ed.), at 14.

[44] See Terris et al., *The International Judge*, at 193.

Farrelly and Solum.[45] They note, for instance, that there is widespread agreement that judges should be *incorruptible* – corruption undermines the rule of law and whatever values the legal order aims to represent and protect, and does so even if the outcome of a corrupted decision would itself be acceptable, or indistinguishable from one arrived at honestly. Similarly, they suggest that judicial *sobriety* is a virtue: the judge who is easily swayed by drink or drugs, or generally by a desire for the finer things in life, might not be fully focused on the task at hand. Here, perhaps, MacIntyre's distinction between goods internal to a practice and goods external to a practice proved inspirational[46]: the individual who becomes a judge only in order to achieve fame and glory, or to earn a good salary, misses an important dimension of what it means to be a judge.

Farrelly and Solum also nominate judicial *courage* as a judicial virtue, and explain that this may come in two forms. On the one hand, there is *physical courage*: the judge who is easily intimidated by physical violence may not be very suitable, although some settings might be more prone to threats of such violence than others. In organized crime trials[47] or, more surprisingly perhaps, family court (where emotions can run deep), physical threats may play a greater role than in traffic court. On the other

[45] What follows draws on Colin Farrelly and Lawrence B. Solum, 'An Introduction to Aretaic Theories of Law', in Farrelly and Solum (eds.), *Virtue Jurisprudence*, 1-23.

[46] Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2nd ed. (London: Duckworth, 1985).

[47] Former ICTY Prosecutor Carla del Ponte could picture herself as a courageous prosecutor partly under reference to her role in fighting organized crime while a prosecutor in Switzerland. See Carla del Ponte with Chuck Sudetic, *Mevrouw de aanklager* (Amsterdam: Bezige Bij, 2008, Van der Waa transl.)

hand, there is *civic courage*: a judge deciding a controversial case must be ready to be socially ostracized or face public opprobrium, and 'not be tempted to sacrifice justice on the altar of public opinion'.[48]

Judicial temperament and *impartiality* are next on Farrelly and Solum's list. Judges should not let themselves be guided by anger; they should keep their temper in check, if only to prevent them from becoming partial. Anger at the crimes of a suspect may easily morph into partiality, clouding judgment. An absence of anger, on the other hand, might not be all that conducive either: to some extent, a judge may need to tap into her sense of right and wrong – though without it rendering her approach partial. Aristotle aimed to formulate some such approach by positing his 'doctrine of the mean': too much of any virtue would not be good, but neither would be too little. Too much courage becomes recklessness; too little courage equals cowardice. Likewise, too little anger spells cold-bloodedness and a lack of compassion or empathy[49], whereas too much anger may create a red mist.[50] Be that as it may, if there is universal or near-universal agreement on one judicial virtue it regards impartiality, mentioned in well-nigh all codes of ethics for the judiciary as indispensable.[51]

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[48] Farrelly and Solum, An Introduction, at 10.

[49] Farrelly and Solum do not explicitly list compassion or empathy, though it would appear that the absence thereof can have dire consequences for judging. Elsewhere, I discuss the example of the *Perincek* cases of the European Court of Human Rights (coming very close to genocide denial) in such terms in Jan Klabbers, 'Doing Justice? Bureaucracy, the Rule of Law and Virtue Ethics', (2017) 6 *Rivista di Filosofia del Diritto*, 27-50.

[50] Not everyone is convinced by the philosophical underpinnings of the doctrine of the mean: see, e.g., Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge MA: Harvard University Press, 1985).

[51] See also Mégrét, International Judges and Experts' Impartiality.

Judicial *diligence* is a virtue of a different nature, but a virtue nonetheless. Judging can be hard work, and judges may be tempted to cut corners, not read all the briefs equally carefully, refer to familiar case law from memory, recommend settlements so as to reduce their workload, or rely disproportionately on their clerks. Closely related, dixit Farrelly and Solum, is *carefulness*: judges ought to ensure that their work is careful and meticulous, carefully drafted and written, well-researched, et cetera. Needless to say (but here we are entering the level of technical competence) judges should possess and display judicial intelligence and learning, as well as craft and skill.

Farrelly's and Solum's list is not carved in stone, but provides a useful starting point. Others have been more economical. Burton, e.g., writing in the early 1990s, aimed to capture most of the above under the heading of good faith: a judge acting in good faith would be a virtuous judge.[52] Powell, writing fifteen years later and limiting himself to the specific setting of the US Supreme Court, was more expansive and spelled out a handful of judicial virtues, largely overlapping with Farelly's and Solum's list. For Powell, it seems the most relevant virtues include faith (in the intelligibility of the Constitution), integrity and candor, humility, and acquiescence, i.e. the willingness to accept the premises underlying binding precedent even if and when convinced those premises are mistaken.[53]

More recently, the notion of friendship (which itself can be seen as having Aristotelian overtones, relating to his idea of *philia*), has assumed some prominence, in two distinct ways. The first of these suggests, without explicit reference to the virtues, that judges can learn from those who are their methodological friends: originalists, e.g., might take notice if fellow-originalists reach a different

[52] Burton, *Judging in Good Faith*.

[53] See Powell, *Constitutional Conscience,* esp. 85-99.

conclusion in a particular case, more so than when a different conclusion is reached or endorsed by colleagues with whom they have little methodological affinity. While it remains a little unclear whether the authors aim to describe or rather to endorse (or both perhaps) methodological friendship, nonetheless the underlying idea taps into judicial humility: when confronted with methodological friends reaching different conclusions, the judge would be well-advised to take notice and perhaps adjust her opinion in the light of that of her colleagues.[54]

If this idea of friendship taps into a predominantly American discussion, concerned with such questions as to what explains the voting behavior of judges, the second notion of friendship is more interesting, and was developed recently by Iris van Domselaar, inspired in part, it seems, by the work of Martha Nussbaum.[55] To Van Domselaar's mind, judges should display what she calls a 'six-pack of judicial virtues', largely overlapping with the list provided by Farrelly and Solum: judicial perception, judicial courage, judicial temperance, judicial justice, judicial impartiality and judicial independency are the six elements of her six-pack. This, however, on its own is not sufficient, she suggests, as it does not yet

[54] William Baude and Ryan D. Doerfler, 'Arguing with Friends', available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2985032 (visited 27 December 2017).

[55] Iris van Domselaar, 'Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship', (2015) 44 *Netherlands Journal of Legal Philosophy*, 24-46. Van Domselaar's broader work clearly has Nussbaumian overtones: see e.g. Iris van Domselaar, *The Fragility of Rightness: Adjudication and the Primacy of Practice* (doctoral thesis, University of Amsterdam, 2014).

meet a demand that is 'crucial for the legitimacy of the exercise of state power: the demand of equal respect'.[56]

The argument goes as follows. It is one thing for judges to be virtuous, and for courts to reach their decisions virtuously. This implies, however, that different judges or courts can reach different conclusions concerning the same cases – an appeal to the virtues, it seems, weakens the authority of the law, which becomes less certain, predictable and stable. This creates a legitimacy deficit: why would a disaffected individual have to accept an outcome that is negative for her, if the outcome might just as well have been positive, and the only difference between outcomes resides in the character of the judge? Van Domselaar proposes to fill the gap under reference to Aristotle's notion of friendship, characterized as it is by 'mutual well-wishing'[57] and therewith furthering mutual trust. Both judges and citizens involved in legal proceedings should foster a civic friendship attitude. With respect to citizens, this would express their support for the common good, even in the face of an adverse decision; for the judge, it implies empathy for the situation of all parties involved, and thus reassuring citizens that their interests are taken seriously.

Van Domselaar's approach raises a few questions. She takes her cues from private law settings (civil cases), and it seems plausible enough that here the judge can operate as a friend to both parties. One

[56] Van Domselaar, Moral Quality, at 40. Elsewhere she explains in greater detail why the regular model of judging as an exercise in applied moral theory is insufficient: see Iris van Domselaar, 'A Neo-Aristotelian Notion of Reciprocity: About Civic Friendship and (the Troublesome Character of) Right Judicial Decision', in Liesbeth Huppes-Cluysenaer and Nuno M.M.S. Coelho (eds.), *Aristotle and the Philosophy of Law: Theory, Practice and Justice* (Dordrecht: Springer, 2013), 223-248.

[57] Van Domselaar, Moral Quality, at 41.

wonders though whether the same can, or even whether it should, happen also in criminal proceedings. Defendants in criminal trials may be most strongly in need of a friendly attitude from the bench, but may be the least likely to receive it, and if there is something to the insight that friendship must be earned, then it is indeed precisely in criminal proceedings that *philia* might end up lacking.[58]

Another question is how Van Domselaar's civic friendship model relates to other models where a strict and mechanistic reliance on the law is replaced by something closer to wisdom, whether it concerns the *kadi* justice discussed by Max Weber a century ago or the more modern incarnations in the form of commissions of wise (and often white) men, or the powers of courts to occasionally decide *ex aequo et bono*.[59] In other words, is there anything that remains specifically *legal* about the work of judges exercising civic friendship?

Be that as it may, the great merit of Van Domselaar's approach is that she realizes that judicial decision-making is an exercise of state power and thus, like all exercises of state power, in need of justification. Her model explicitly links judicial virtues to political theory[60], in ways that Aristotle would probably have appreciated but that have often gone missing.[61] A similar disposition is displayed by Powell, for whom

[58] Elsewhere, she rather briefly suggests that the civic friendship also applies to criminal proceedings, as committing a serious wrong does not need to spell the end of friendship. See Van Domselaar, A Neo-Aristotelian Notion, at 242-244.

[59] See Article 38(2) Statute ICJ.

[60] It is a little more common to link citizen virtue to political theory, in particular republicanism. Fine examples include Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997) and Iseult Honohan, *Civic Republicanism* (London: Routledge, 2002).

[61] Farrelly and Solum, e.g., for all their merits, in Aretaic Theories largely discuss virtue jurisprudence in isolation from political theory.

constitutional virtue is placed against the background of – or correlates with - three (what he calls) 'substantive commitments'.[62] The first of these is the priority of the political: the US Constitution (this, after all, is the context in which he writes) channels political struggle, but cannot and should not displace it. Second, constitutional orthodoxy is to be avoided: the Constitution might facilitate decision-making, but does not carve into stone values that need to be accepted by all; instead, it recognizes the 'legitimacy of disagreement'.[63] Third, the Constitution is thought to be all-inclusive, which is a different way of saying that no one can legitimately be excluded from the political community.

In their different ways then, both Powell and Van Domselaar point to the political setting in which judicial decision-making takes place, and while this is not a particularly novel insight, it is useful to be reminded every now and then, precisely because much work on judging portrays judging as a non-political activity. But if there is a political context to reckon with, then one of the hallmarks of inter-legality is that this context is undergoing change - and this cannot but affect the judicial virtues.

IV. Inter-legality and the Judicial Virtues

Inter-legality, as noted before, involves the overlapping of legal spaces to such an extent that it is conceivable that behavior illegal in one of these spaces is perfectly legal in another relevant space, or that behavior conducted in one the relevant spaces is affected by legal considerations in another one.

[62] Powell, *Constitutional Conscience*, at 110.

[63] *Ibid*., at 112.

Needless to say, this rules out the simple situation where, say, one would argue against the death penalty in the US on the grounds that it is prohibited in the Netherlands. Inter-legality might come to play a role though if the individual on trial is a US citizen suspected of committing a crime on Dutch soil. An early, and highly intriguing, example is the *Short* case, concerning the murder of a civilian committed by a US soldier based in the Netherlands, on Dutch soil. The Dutch refused to extradite, precisely because of death penalty concerns, and eventually the US authorities agreed to drop the possibility of the death penalty in the case at hand, therewith facilitating the extradition of Mr Short to the US.[64]

Some of the virtues will retain their familiar contours and contents (if that is a proper word to use), regardless of whether the setting can be described as involving inter-legality. Thus, *sobriety* as a virtue is unlikely to be affected, and if judicial *incorruptibility* is a virtue, as Farrelly and Solum sensibly contend, its contents are unlikely to be affected by inter-legality, except in the largely hypothetical setting where one of the legal spaces involved would place a premium on corruption in ways the other(s) would not. More likely is, perhaps, the setting where different conceptions of corruption or incorruptibility may be at stake. A judge from a jurisdiction where, e.g., nepotism is regarded as innocent or even as praiseworthy, might have to adapt this position when confronted with different incorruptibility standards elsewhere. Even this, though, seems rather unlikely, partly because

[64] See *Short* v *The Netherlands* (Hoge Raad, 1990), reproduced in (1990) 29 *International Legal Materials* 1378; for brief discussion see Rain Liivoja, *Criminal Jurisdiction over Armed Forces Abroad* (Cambridge University Press, 2017), at 4.

disapproval of the most rampant forms of corruption is widely shared (even if not always honoured), and partly because issues involving nepotism may be unlikely to involve several distinct legal spaces.[65]

With other judicial virtues, however, inter-legality might affect how judges act. Largely epistemological virtues such as *craft*, *skill*, *learning* and *intelligence* will need to be expanded: craft, skill and learning will need to encompass the craft, skill and learning to work across legal spaces. It is hypothetically possible that a judge who is very good in her own jurisdiction lacks the necessary skill or craft to accommodate a multitude of legal spaces.[66] This will, in practice, owe something to language skills, but other factors may also come to the fore. For instance, the interaction between civil and common law systems may introduce elements of unfamiliarity, as may differences relating to doctrines such a monism and dualism. All this will demand a certain judicial intelligence and application, although it is difficult to say whether demands on intelligence per se will be affected. *Diligence* and *carefulness* will need to be expanded, no doubt, in settings of inter-legality, but as with intelligence, this may entail a difference of degree rather than of kind.

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[65] Unlikely, but not excluded: the hiring of her dentist and a lawyer-acquaintance as policy advisors by Edith Cresson, at the time a member of the EU Commission, raised quite a few eyebrows outside France, while inside France few seemed to be surprised. See Case C-432/04, *Commission* v *Edith Cresson*, ECLI:EU:C:2006:455.

[66] The possibility is more than merely hypothetical though: the lawyers occupying the CJEU, brilliant in their handling of EU law, often apply international law in ways that international lawyers might consider flawed, either applying customary international law in unexpected manner or making categorical mistakes in applying institutions from the law of treaties. Some examples are listed in Jan Klabbers, 'In Defense of the Realm', in Robert Schütze and Takis Tridimas (eds.), *Oxford Principles of EU Law* (Oxford University Press, forthcoming).

Inter-legality is more likely to affect the virtues of *courage* and *impartiality*, as influenced by *temperament*. The highly nationalist judge, who regards his own legal system as the best invention since sliced bread, might quickly be offended by even the slightest hint at an inter-legality aspect, and this might affect his impartiality: his tendency to uphold his national legal order may prompt him not to look any further, and ignore the possible inter-legality aspects of the case before him. If so, this affects his impartiality. If nationalism is a matter of temperament, then the temper and the partiality may end up going hand in hand, in directions not easily reconcilable with any conception of judicial virtue.

Moreover, it is here that the legitimacy aspect comes in. Being an exercise of state power, judgments need to be justified in terms recognizable within the relevant political community, as both Powell and Van Domselaar intimate.[67] But the hallmark of inter-legality is that it changes the contours of the relevant political community: this can no longer be defined solely in terms of territory and national boundaries (and the accompanying jurisdictional apparatus), but will need to consider the question how a judgment can be justified also in terms recognizable (and preferably acceptable) to other jurisdictions involved. It is here that the aforementioned *Kadi* decision of the CJEU generated the greatest doubt: the CJEU reached its decision by sweeping the relevant international law under the rug,

[67] See the discussion in the previous section.

by conjuring up a world where no international law existed, and as a result, the decision will always remain vulnerable to criticism from that angle.[68]

But perhaps the most obviously affected (or affectable) of the judicial virtues is the virtue of *courage*. Decisions involving inter-legality may be expected (more so than ordinary, single legal space decisions) to involve national sentiments and affinities, therewith stimulating the sort of jingoism that judges may fear. If domestic decisions can already raise the emotions so much that individuals involved may have to fear for their lives (think of the risks run by doctors who are known to have performed abortions[69]), then situations with an inter-legality element may involve even greater risks. Hence, a judge's *physical courage* may be severely tested.

More severely tested though will be her *civic courage*: if civic courage is all about withstanding social disapproval and ostracism, about resisting peer pressure in various forms (including pressure from those whose peer status merely derives from being a fellow national), inter-legality scenarios may potentially add explosive elements to the mix: how is one to withstand demonstrations, nasty press comments or comments on social media, the pressure from fellow-judges and pundits, et cetera? If a British Member of Parliament sees fit to enquire after the identity of law professors teaching EU law[70]

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[68] It nonetheless has a fair amount of defenders. Among the more sophisticated defenses of the CJEU's position even in light of international law is Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press, 2011).

[69] https://splinternews.com/these-are-the-11-americans-who-have-been-murdered-by-an-1793853233 (visited 7 November 2017).

[70] https://www.theguardian.com/education/2017/oct/24/universities-mccarthyism-mp-demands-list-brexit-chris-heaton-harris (visited 8 November 2017).

and US Presidents (well, one of them) can dismiss the judiciary as 'so-called judges'[71], then surely serious pressure can also be exercised on judges involved in inter-legality cases, outlandish as this may (and does) sound.

V. Inculcating the Virtues

Aristotle already realized that the virtues were mostly obtained through education, whether in the family or at school, although he reserved a place for legislating the virtues as well – something followed by others, and often in such a way as to impose a particular version of the virtues on society.[72] On this line of thought, there might be some merit in fine-tuning codes of judicial ethics with inter-legality in mind, but not too much should be expected, for the familiar reason that deontological rules (of which codes of ethics are a species) can never apply themselves; they would still need to be read and interpreted with the very virtues they demand, including practical wisdom – and practical wisdom is not something one can be told to engage in, in much the same way that one cannot be ordered to be spontaneous.

To the extent that the judicial virtues rely on regular everyday virtue, one can only hope that future judges will be taught from early days onwards to be sufficiently courageous, honest, et cetera. Here,

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[71] https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm_term=.bbafc00d8d04 (visited 8 November 2017).

[72] Among the more sophisticated examples is Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Clarendon Press, 1993).

there is little that can be done to prepare judges specifically for inter-legality. Things may be different though with the intellectual or epistemological virtues: since judges will by definition be trained in the law, legal training can enhance the sort of (technical) competence required for judging in conditions of inter-legality. That is not to say that lawyers can, or even should, be trained in the details of two or more legal orders, but it is to say that legal training can focus more on understanding and less on comprehensive knowledge than is currently often the case.

In a hilarious essay, Lon Fuller once suggested that legal education in the US was overly concentrated on isolated and decontextualized legal problems – lawyers would be too much trained in litigation, and too little in thinking through the problems of social and economic order, never mind justice.[73] In continental Europe, the problem is often of a different nature: legal studies are too much geared on mastering knowledge of the rules, without much interest in the why and how of those rules, or even in how to apply them. Grossly generalizing: if in the US law is taught as abstract problem-solving, in continental Europe it is often taught as a game of memory. Neither method is bound to be particularly helpful in conditions of inter-legality.

Inter-legality demands an understanding of rules rather than a comprehensive knowledge of what they say, and demands this across jurisdictions. Since it is impossible or impracticable to memorize the details of a variety of legal systems, even in a narrow domain (say, consumer protection, or corporate governance), the focus will need to come to rest on understanding the law, and understanding that law always exists in context – various contexts, in fact. Europe's policy-makers may have grasped this when

[73] Lon L. Fuller, 'On Legal Education', reproduced in Kenneth I. Winston (ed.), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Oxford: Hart, 2001), 293-303.

stimulating student exchanges within Europe from the 1990s onwards[74]: the Finnish law student specializing in corporate governance may learn much from how corporate governance is regulated in France or Portugal; the German law student specializing in consumer protection may learn much from studying consumer protection law in Greece or Ireland. In reality, however, it rarely works this way: students on exchange tend to follow those courses that they can use to replace courses they should otherwise have taken at their home universities, such as public international law, EU law, or legal theory – but rarely take courses that present them a mirror, helping them to understand their own legal systems better through an encounter with other systems.

That said, the great heuristic value of studying public international law resides in the circumstance that as a single domain it is so broad that a focus on studying it through its rules is literally impossible.[75] Public international law encompasses most domains familiar from domestic law (ranging from contract and property to administration and criminal matters), but usually these are taught in a single course by a single professor in a limited amount of time; the result is that any such course must by definition concentrate on basic principles and on inculcating an understanding as to why the system is what it is.[76]

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[74] In fact, it is more likely that student exchanges were created for other reasons, not least of them the creation of a supranational sense of European identity and solidarity.

[75] See also Jan Klabbers, 'Legal Education in the Balance: Accommodating Flexibility', (2006) 56 *Journal of Legal Education*, 196-200.

[76] If there is a law school with separate chairs in international organizations law, international human rights law, international environmental law, international criminal law, international economic law and international humanitarian law as well as general international law (which could address general issues, diplomatic law, adjudication, law of treaties, et cetera), I am not aware of its existence.

If inter-legality demands the flexibility of mind to work across jurisdictions and with a view to doing justice in individual cases, then it would seem to follow that judges need to be trained, at least to some extent, along those lines. A familiarity with the main legal systems may be useful, suggesting that there is a bigger place in the curriculum for substantive comparative law than is usually granted.[77] An understanding of the different conceptions of justice and the disagreements surrounding it may be useful, which suggests perhaps a greater place for justice-oriented legal philosophy in the curriculum than is often the case, and perhaps integrated in other domains as well. One example might be to study private law in part by concentrating on how it strives to contribute to justice, and what concept of justice may underpin it.[78]

Finally, an under-appreciated method of learning is imitation. On some level, this is perhaps the most effective method. As Michael Oakeshott once remarked, 'practical knowledge can neither be taught nor learned, but only imparted and acquired… and the only way to acquire it is by apprenticeship to a master … because it can be acquired only by continuous contact with one who is perpetually practicing it.'[79] In later writings this is sometimes referred to as learning from exemplars, or *exempla* – role models

[77] Typically, comparative law courses focus on method rather than substance, and are considered of marginal relevance at most law schools at any rate.

[78] What I have in mind is something along the lines of Ernest J. Weinrib, *The Idea of Private Law*, rev. edn. (Oxford University Press, 2012), while realizing that his approach draws on libertarian philosophies that may not be universally shared.

[79] Michael Oakeshott, 'Rationalism in Politics', reproduced in Michael Oakeshott, *Rationalism in Politics and Other Essays* (London: Methuen and Co., 1962), 1-36, at 11. Elsewhere in the same piece, he suggests that morality learned by memorizing moral precepts is to reduce it to a technique, not worthy of the name (at 35).

widely admired and appreciated for being good (both technically and in terms of virtue) at what they do, and serving as sources of inspiration.[80]

VI. Final Remarks

Dworkin's Hercules had it relatively easy: he was never asked to engage with more than one jurisdiction at the time, and to the limited extent that his reconstructed version of international law envisaged a judicial organ, this court was mostly involved in judicial review rather than in the settlement of disputes.[81] The discussion above lists a number of the judicial virtues that may be implicated in inter-legality. If inter-legality involves the attempt to do justice in individual cases across overlapping legal spaces, however, it would seem that other virtues too may meaningfully be discussed. Thus, it would seem that *practical wisdom* remains of great relevance, regardless of the number of legal spaces involved: judges must retain a sense of which rules to apply to in relation to which facts. Thus put, however, inter-legality may complicate the puzzle, but does not alter it fundamentally.

More likely to be affected is the virtue of *justice*, but if so, then with a twist. Curiously, none of the lists of judicial virtues discussed earlier singles out justice as a judicial virtue, and Aristotle himself seemed to treat justice as something of an overarching virtue, presenting the proverb that 'In justice is summed

[80] For lucid discussion, see Amalia Amaya, 'Exemplarism and Judicial Virtue', (2013) 25 *Law & Literature*, 428-445. I have elsewhere discussed novelist and essayist Albert Camus as an exemplar of virtue; see Jan Klabbers, 'The Passion and the Spirit: Albert Camus as Moral Politician', (2016) 1 *European Papers*, 13-28.

[81] Ronald Dworkin, 'A New Philosophy for International Law', (2013) 41 *Philosophy and Public Affairs*, 2-30, esp. at 28.

up the whole of virtue'.[82] And yet, he also suggested that 'the object of the judge is to be a sort of personified Justice'.[83] Perhaps there is merit in the suggestion, made by Bernard Williams some time ago, that injustice can flow from neglect of the other virtues[84]: the judge who is lazy or ill-tempered may end up with an unjust judgment, not unlike the judge at work in the Sacco and Vanzetti proceedings.

In the end, there is a lot to be said for Hutchinson's claim that 'The test of good judging might well be less about getting it right than about doing it well.'[85] This applies to ordinary, single jurisdiction cases, but would also have an application in the inter-legality setting. Where various outcomes may be equally compelling, at the very least the judge addressing inter-legality should make sure that no legal interest is left unaddressed. Where several outcomes are equally compelling and persuasive from the perspectives of their own legal orders, one can only hope for a virtuous judge.

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[82] Aristotle, *Ethics*, book V, at 173.

[83] *Ibid*., at 181.

[84] Bernard Williams, 'Justice as a Virtue', in Amélie Oksenberg Rorty (ed.), *Essays on Aristotle's Ethics* (Berkeley CA: University of California Press, 1980), 189-199.

[85] Allan C. Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (Cambridge University Press, 2012), at 268.