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Beyond the Model Rules: The Place of Examples in Legal Ethics

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The *Model Rules of Professional Conduct* defined the agenda for the post-Watergate renaissance in legal ethics. While there had been some form of codified precepts for American lawyers since at least 1908,[1] Watergate inspired a desire to clean up a disgraced profession. The American Bar Association (ABA) promulgated the *Model Rules*; law schools instituted mandatory courses;[2] and scholars debated and analyzed the new *Model Rules*. The organized bar devoted much time and attention to developing these guidelines.[3] The mainstream media covered both the bar's original efforts and the subsequent adoption of the *Model Rules* by particular jurisdictions.[4] Today, forty-three American jurisdictions have adopted ethics guidelines based closely on the *Model Rules*.[5]

Lawyers who violate the *Model Rules* can lose their license to practice, among other sanctions.[6] While critics question the ability and motivation of state bar

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1. In 1908, the American Bar Association adopted the *Canons of Professional Ethics*. In 1969, the ABA replaced the Canons with the *Model Code of Professional Responsibility*, which was in turn supplanted by the *Model Rules of Professional Conduct* in 1983. For helpful discussion of history of these shifts, see Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249–60 (1991).

2. In 1983, the ABA required, as a condition of accreditation, that law schools include mandatory instruction in professional responsibility in their curricula. APPROVAL OF LAW SCHOOLS: AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE, STANDARD 302(a)(iv).

3. *See* Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 243 (1985) ("The legal profession . . . recently endured a six year debate over rules it would adopt to describe the professionally responsible conduct of its members."); Leslie Griffin, *Dirty Hands*, 8 GEO. J. LEGAL ETHICS 219, 235 (1995) (discussing the Kutak Commission, the ABA taskforce that drafted proposed rules, held public hearings on them, and eventually wrote the final version of the Model Rules); Hazard, *supra* note 1, at 1251 (describing the drafts and debates that preceded the ABA's adoption of the *Model Rules* and calling the process "controversial throughout").

4. *See, e.g.*, Stuart Taylor, *Lawyers Vote Against Disclosure of Fraudulent Activities by Clients*, N.Y. TIMES, Feb. 8, 1983, at A1, col. 2; George Bentley, *Proposed Lawyers Code Includes New Provision on Informing Clients: Revised "Model Rules of Professional Conduct" to be Considered*, ARK. GAZETTE, Aug. 18, 1985, at 11B; Charles Mount, *Lawyers Council Urges Stricter Ethics Code*, CHI. TRIB., Dec. 9, 1987, at 4.

5. Robert F. Drinan, *Joke's on Us-But Shouldn't Be*, 84-May A.B.A. J. 112 (1998).

6. *See generally* Thomas D. Morgan, *Sanctions and Remedies for Attorney Misconduct*, 19 S. ILL. U. L.J. 343 (1995). Morgan groups attorney sanction into three categories: those imposed by public authorities, such professional discipline and criminal liability; those initiated by clients seeking private remedies, such as legal malpractice judgments; and those sought by third-parties affected by lawyer misconduct, such as injunctions

disciplinary authorities to enforce these sanctions effectively,[7] their existence certainly affects the teaching of professional responsibility in law schools. Professional responsibility teachers quite rightly want to make sure their students understand the *Model Rules* and the consequences that may attach to breaking them.

The need to understand the rules prompted scholarly analysis of their proper scope and application. In the late 1980s and very early 1990s, much legal ethics scholarship focused directly on the *Model Rules*. Some articles concentrated on particular *Model Rules*.[8] Other works evaluated possible resolutions of particular issues under the *Model Rules* as a whole.[9] Scholars also considered whether the *Model Rules* resolved specific issues clearly or satisfactorily.[10]

Alongside this scrutiny of the *Model Rules* themselves came a wave of scholarly attention to the more general principles that seem to animate the *Model Rules*. In 1988, David Luban published *Lawyers and Justice: An Ethical Study*,[11] incorporating and elaborating his landmark article, *The Adversary System Excuse*.[12] In these works, Luban attacked the principle of zealous advocacy, a

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against attorneys acting wrongfully on behalf of clients with interests adverse to the third party complainant. *Id.* at 344.

7. George L. Hampton IV, *Toward an Expanded Use of the Model Rules of Professional Conduct*, 4 GEO. J. LEGAL ETHICS 655, 656–58 (1991); *see* Deborah Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 546–51 (1985) (criticizing bar disciplinary committees for using a double standard for entry to the bar versus disbarment). As Hampton notes, the ABA itself strongly criticized bar disciplinary efforts as early as 1970. Hampton, *supra*. ABA Special Comm. On Evaluation of Discplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970). Eventually, the ABA issued specific recommendations for improving bar disciplinary procedures. ABA Joint Comm. On Discipline, ABA Standards for Lawyer Discipline and Disability Proceedings (1979). Concern about the diligence of disciplinary enforcement has been expressed in the popular press also. Editorial, *Confused About Attorney Ethics*, PHOENIX GAZETTE, December 18, 1989.

8. *See, e.g.*, Kevin M. Smith, *Model Rule 4.2: Ethical Restrictions on Communications with Former Employees*, 9/22/89 Employee Rel. L.J. 239252; Stephen Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 GEO. J. LEGAL ETHICS 289 (1987); Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. REV. 1003 (1984); Note, *Model Rule 2.2 and Divorce Mediation: Ethics Guidelines or Ethics Gap*, 65 WASH. U. L.Q. 223 (1987); Richard A. McKinney, *Proposed Model Rule 1.6: Its Effect on a Lawyer's Moral and Ethical Decisions With Regard to Attorney-Client Confidentiality*, 35 BAYLOR L. REV. 561 (1983).

9. *See, e.g.*, Nathan M. Crystal, *Disqualification of Counsel for Unrelated Matter Conflicts of Interest*, 4 GEO. J. LEGAL ETHICS 273 (1990); Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 AM. J. CRIM. L. 323 (1989); Marc I. Steinberg, *Attorney Conflicts of Interest in Corporate Acquisitions*, 39 HASTINGS L.J. 579 (1988); Stephen E. Kalish, *The Sale of a Law Practice: The Model Rules of Professional Conduct Point in a New Direction*, 39 U. MIAMI L. REV. 471 (1985).

10. *See, e.g.*, Marc I. Steinberg & Timothy U. Sharpe, *Attorney Conflicts of Interest: The Need for a Coherent Framework*, 66 NOTRE DAME L. REV. 1 (1990); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989); Joel C. Dobris, *Ethical Problems for Lawyers Upon Trust Terminations: Conflicts of Interest*, 38 U. MIAMI L. REV. 1 (1983).

11. David Luban, *Lawyers and Justice: An Ethical Study* (1989).

12. David Luban, *The Adversary System Excuse, in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban ed. 1983). Luban provides an excellent history of an earlier stage in the legal ethics literature than the period I am discussing in this Foreward in David Luban, *Reason and Passion in Legal Ethics*,

principle that appears to underlie some of the more extreme *Model Rules*, such as the almost complete prohibition on revealing client confidences[13] and the fairly stringent safeguards against conflicts of interest that could blunt a lawyer's dedication to any single client.[14] Others joined Luban's fierce attack on the adversary ethic.[15] At the same time, some scholars, such as Monroe Freedman, ardently defended the zealous advocacy principle and worried that the *Model Rules* infringed it.[16] Others, following Charles Fried,[17] endorsed the ideal of loyalty they perceived latent in zealous representation.[18] Gradually, scholarship advocating alternatives to the ideal of zealous advocacy emerged. Some thinkers advocated the primacy of the lawyer's obligations as an officer of the court.[19] Others emphasized the personal and professional qualities important to problem-solving or mediation.[20]

This batch of legal ethics scholarship took a step back from the *Model Rules*, exploring principles and values that seem relevant to lawyers and their work. But this body of work sprang from debate over the zealous advocacy principle, and the status of the zealous advocacy principle implicates the legitimacy of the

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51 STAN. L. REV. 1, 4–7 (forthcoming) (surveying the major philosophical works in legal ethics published in the 1970s).

13. MODEL RULES Rule 1.6 (regarding confidentiality of information).

14. MODEL RULES Rule 1.7 (stating the general rule conflict of interest).

15. *See, e.g.*, Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988).

16. Monroe H. Freedman, *Are the Model Rules Unconstitutional*, 35 U. MIAMI L. REV. 685 (1981) (arguing that the Fifth and Sixth Amendments to the U.S. Constitution protect zealous advocacy as part of the adversary system of justice); Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467 (1992) ("In its simplest terms, an adversary system is one in which disputes are resolved by having the parties present their conflicting views of fact and law before an impartial and relatively passive judge and/or jury, who decides which side wins what. In the United States, however, the phrase 'adversary system' is synonymous with the American system for the administration of justice, as that system has been incorporated into the Constitution and elaborated by the Supreme Court for two centuries.") *See* Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court*, 1988 WIS. L. REV. 65 (1995) (arguing that even when representing mentally impaired criminal defendants, defense lawyers should give great weight to the duty of zealous representation rather than undue weight to their duties as officer of the court)

17. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) (justifying the role of zealous advocacy as a form of loyalty).

18. *See* Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 21 (1986) (noting and basically endorsing the idea of a lawyer as a friend); Stephen Ellman, *Lawyers and Clients*, 34 U.C.L.A. L. REV. 717, 761 (DATE) (claiming a morally important connection between client autonomy and the instrumentally zealous advocate).

19. Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989); *see* Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. REV. 199, 212 (1994) (reiterating the equal importance of the lawyer as officer of the court compared to lawyer as zealous advocate).

20. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 U.C.L.A. L. REV. 74 (1984); Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 115–24 (1994) (urging that lawyers be trained in how to avoid litigation by exercising good counseling skills).

Model Rules approach to legal ethics. To this extent, much of the scholarly work in legal ethics has remained tethered to the *Model Rules*.

Now, *The Georgetown Journal of Legal Ethics* presents the following theme issue, entitled *Beyond the Model Rules*. I imagine that the editors chose this title because all the articles and Notes address issues not specifically covered by the *Model Rules of Professional Conduct*. None of the pieces is about the scope, application, or interpretation of a particular Model Rule. Nor do any consider how to resolve an issue or issues according to the *Model Rules* as a whole. These authors do not debate the principle of zealous advocacy nor its relationship to the lawyer as officer of the court. They do not consider zeal in contrast to other traits arguably more relevant to lawyers outside the litigation setting. Where the authors do discuss the *Model Rules*, they cast them in broad perspective, moving well beyond questions of the content and validity of role-morality.

Professionalism and Expert Witnesses,[21] by Steven Lubet, addresses the conduct of expert witnesses, legal actors not even covered by the *Rules*. *Enforcement of Settlement Contracts: The Problem of the Attorney Agent*,[22] by Grace M. Giesel, argues that agency law rather than ethics rules should govern challenges to settlements negotiated by attorneys. In *The New Casuistry*,[23] Paul Tremblay recommends casuistry as a nontheoretical, pragmatic method for answering ethical questions that arise outside the scope of positive law governing lawyers. William H. Simon's contribution, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*,[24] argues that regardless of the mandates of the *Model Code of Professional Responsibility* — a predecessor of the *Model Rules*, retained in a minority of jurisdictions[25] — some lying by lawyers is not only ethically permissible but is ethically laudatory.

All four student-written pieces grew out of papers written for a seminar in legal ethics called *Can Good Lawyers Be Good Ethical Deliberators?* that I taught at Georgetown University Law Center in the spring of 1998. The goal of the seminar is to have students think about the relationships between skilled lawyering and the requirements of classical moral theories, such as utilitarianism, Kantianism, and virtue ethics. At the outset of the course, I asked the students to acquaint themselves with the *Model Rules*. In successive weeks, students read some standard works in utilitarian, Kantian, and virtue theory as well as articles by contemporary moral philosophers and legal commentators. The contemporary articles spanned a number of topics, ranging from specialized ideas about the nature of moral value and morally right action to the current state of the legal

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21. Steven Lubet, *Professionalism and Expert Witnesses*, 12 GEO. J. LEGAL ETHICS ___ (1999).

22. Grace Giesel, *Enforcement of Settlement Contracts: The Problem of the Attorney Agent*, 12 GEO. J. LEGAL ETHICS ___ (1999).

23. Paul Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS ___ (1999).

24. William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 GEO. J. LEGAL ETHICS ___ (1999).

25. *See supra* note 5.

profession to the limits of role-based theories of professional ethics, particularly those based on the ideal of the zealous advocate. For their seminar assignment, students had to interview a practicing attorney, and ask the subject to discuss an ethically complex or troubling professional situation the attorney had encountered during his or her career. I directed the students to find out what ethical issues the attorney thought the situation raised, how the attorney did or would have analyzed those issues at the time, what decisions the attorney made with regard to the situation or actions she or he took, and whether upon reflection the attorney would now address any of these questions differently than he or she did at the time. In their papers, the students were to evaluate their interview attorney's analysis and treatment of the situation, and then decide and explain whether the attorney had performed well as a lawyer, and whether he or she had performed well as an ethical deliberator. I required the students to make these evaluations in light of at least one of the ethical theories or topics covered in the assigned reading for the seminar. The students refined this format so that they could raise and address more specific theses. Four of the seminar students developed their papers into contributions to this theme issue.

In *Decision-Making in the Law: What Constitutes a Good Decision — The Outcome or the Reasoning Behind It?*,[26] Stephanie Loomis-Price compares utilitarian and deontological approaches to one lawyer's ethical dilemma, and considers whether the attorney's reasoning process, its outcome, or both contribute to the estimation of her deliberation. In her contribution, *Ethical Rules of Lawyering: An Analysis of Role-based Reasoning from Zealous Advocacy to Purposivism*,[27] Shannan E. Higgins compares factors relevant to analysis under the *Model Rules* (which she regards as the product of role-based morality) to the factors relevant to more traditional moral theories. Higgins concludes that an analysis according to the *Model Rules* ignores morally important emotional and practical features of a particular ethical dilemma. Lisa M. Greenwald presents *A Critique of an Ethics Committee with a Deontological Face and a Consequentialist Voice: The Quest for Loyalty in the Good Ol' Days*.[28] She argues that firm ethics committees could create a climate of loyalty among partners and associates, if these committees committed themselves to deontological, rather than consequentialist, principles and choices. The fourth Note, *Encouraging Unprofessionalism: The Magic Wand of the Patent Infringement Opinion*,[29] does not explicitly invoke classical moral theory. Instead, Imron T. Aly, argues that patent

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26. Stephanie Loomis-Price, *Decision-Making in the Law: What Constitutes a Good Decision — The Outcome or the Reasoning Behind It?*, 12 GEO. J. LEGAL ETHICS ___ (1999).

27. Shannan Higgins, *Ethical Rules of Lawyering: An Analysis of Role-based Reasoning from Zealous Advocacy to Purposivism*, 12 GEO. J. LEGAL ETHICS ___ (1999).

28. Lisa M. Greenwald, *A Critique of an Ethics Committee with a Deontological Face and a Consequentialist Voice: The Quest for Loyalty in the Good Ol' Days*, 12 GEO. J. LEGAL ETHICS ___ (1999).

29. Imron T. Aly, *Inviting Unprofessionalism: The Use of Lawyers' Opinions in Patent Infringement Cases*, 12 GEO. J. LEGAL ETHICS ___ (1999).

lawyers should not mix the roles of advisor and advocate and recommends changes in substantive patent law that would prevent such mixing.

If the only common trait the theme pieces possessed were the absence of analysis of specific *Model Rules*, it might not be especially important to present or read them as a group. The pieces in this theme issue, however, share another, quite striking feature. Each one relies on examples, in one form or another, used in a variety of ways. In the final section of this Foreword, I discuss the example with which William Simon begins *Virtuous Lying*. I also discuss Loomis-Price's, Higgins', and Greenwald's student Notes in that section.

Even though I devote more detailed attention to the examples in Simon's Article and these three student Notes than I do to those used by other contributors, every contribution to the theme issue includes examples. Steven Lubet and Grace Giesel both commence their articles with a sprinkling of abbreviated examples. In his first paragraph, Lubet writes:

> Experts may be retained in commercial cases to interpret complex financial data, in tort cases to explain the nature of injuries, or in criminal cases to translate underworld "gang codes" into everyday language. Properly qualified, an expert can be asked to peer into the past, as when an accident reconstructionist recreates the scene of an automobile collision. Other experts may predict the future, as when an economist projects the expected life earnings of the deceased in a wrongful death case.[30]

In her opening paragraph, Giesel sketches an example of attorney involvement in settlements.

> The representative action of the lawyers very often includes negotiation and discussion of settlement and intimate involvement in the ultimate settlement agreement. Typically the attorney for one party states orally or in writing to the attorney for the other party that the client agrees and that action comprises the settlement agreement. Often, one or both attorneys inform the relevant court of the settlement so that trial or other proceedings can be averted. Only later do the attorneys and the parties develop more formal, detailed, and complete documents of agreement.[31]

Giesel then lists some examples — she calls them "possible scenarios" — of settlement challenges.

> Perhaps a renegade attorney agrees to a settlement on behalf of a client even though the client gave the attorney explicit instructions not to so act. Perhaps an attorney in good faith believes the client has authorized a settlement and so the attorney agrees to the settlement only to discover that the client did not authorize the action. Perhaps an attorney agrees to a settlement on behalf of the

30. Lubet, *supra* note 21, at ___ (citations omitted).

31. Giesel.

> client believing in good faith that the client has authorized the action and in fact the client has authorized the attorney. The client later has second thoughts and disputes the agreement. Perhaps the attorney has, in addition, informed the court of the settlement and the court has relied by taking the matter off the trial docket.

While Lubet uses case citations for most of his examples, Giesel presents hers as hypotheticals.

Paul Tremblay does not begin his article on *The New Casuistry* with an example. But he does provide one a bit further into the article. Tremblay constructs an apparently fictitious example of a lawyer engaged in "plain person" moral deliberation. Tremblay describes an attorney, "Mark," whose client may lose her welfare benefits for failure to provide appropriate documentation to the welfare agency. In the course of interviewing the client, the attorney learns that the documentation problem can be solved easily, but he also learns from the client other information that, if revealed to the welfare agency, would disqualify her for aid. Tremblay then has the attorney think out loud for us readers; Tremblay gives voice to the character's thought processes as he reasons about how to resolve the dilemma.

Encouraging Unprofessionalism: The Magic Wand of the Patent Infringement Opinion, by Imron T. Aly opens with a description of the events that gave rise to *Therma-Tru v. Peachtree Doors, Inc.*,[32] a case upholding a jury finding of willful patent infringement despite the defendant's having obtained an opinion letter from an attorney recommending that it was legally permissible to proceed with production and sale of the allegedly infringing product. Aly's Note is the only contribution to the symposium with a major example drawn directly and explicitly from case law.

The connections between legal ethics and examples are more opaque than the ones between legal ethics and *Model Rules*. The relevance of the *Model Rules* to legal ethics is straightforward. The *Model Rules* are pragmatically relevant to lawyers, because they form the basis of professional discipline. At a minimum, the *Model Rules* — as interpreted by bar disciplinary committees, courts, and commentators — instruct lawyers how best to act if they want to avoid professional sanctions. What, in contrast, do examples have to tell lawyers about how they ought to conduct themselves? How could they have anything to say about this? How could examples rationally assist us in forming true beliefs and making correct practical judgments about legal ethics? If, as the pieces collected here indicate, examples will feature prominently in legal ethics as the field moves beyond the *Model Rules*, it seems worthwhile to reflect on the work examples can and should do for legal ethics, particularly for scholarship in the field. This Foreword attempts a preliminary study of examples, both to enable readers of the

32. 44 F.3d 988 (Fed. Cir. 1995).

theme issue to think critically about the role of the authors' examples in their arguments, and to promote more self-conscious use of examples in future work in legal ethics scholarship.

I. PURPOSES AND KINDS OF EXAMPLES

Examples may facilitate the acquisition of knowledge, either for the example's author, its reader, or both. I say "may" because questions remain about whether examples convey knowledge or merely appear to do so. For the moment, however, let us shelve these worries and instead presume that examples can further our knowledge. Furthermore, I restrict my attention here to how examples can *rationally* advance our knowledge. While I am happy to adopt a very broad conception of rationality, one that includes a role for our sentiments and emotions, I do want to distinguish between rational and nonrational acquisition of beliefs. Beliefs we acquire nonrationally may turn out to be true, but when this happens, the connection seems to be fortuitous. Whatever the precise relation between rational acquisition and truth in belief — admittedly, a relation that remains obscure — the connection is not merely a lucky one. Indeed, the hallmark of epistemic rationality is a reliable, sensible connection between our processes of belief formation and the truth of the resulting beliefs.

To appreciate that an example can advance knowledge either rationally or nonrationally, it helps to focus on rhetorical examples. Rhetorical examples illustrate an author's more general claim, thereby facilitating the reader's comprehension of the author's ideas rather than conveying information about matters other than the author's meaning. Rhetorical examples can work rationally or nonrationally. That is, they may appeal to the reader's reason, enabling her to rationally deduce or infer the meaning or implications of the author's more general point. Or, they may prompt a gestalt reaction from the reader, whereby she "gets" the point, although not through a rational process. This second sort of operation does not concern me here. In the following philosophical catalogue, I concentrate on philosophical work on investigative examples. Such examples attempt to provide both author and reader with knowledge of matters that lie beyond the author's thoughts or meaning. As with rhetorical ones, investigative examples could function nonrationally, fortuitously sparking true beliefs. But only examples that function rationally can contribute rationally to true beliefs or judgments about legal ethics.

True beliefs and judgments may be theoretical or practical: they may concern the way things are or how we should act. Philosophical inquiry into examples indicates that they may afford either kind of knowledge. With regard to theoretical beliefs, some ethicists argue that through reading fiction we may acquire true beliefs about the quality of a human life. Some also maintain that through considering fictions we may form true beliefs about the constitution of the social world and the beliefs, desires, and attitudes of human actors within it. Other

philosophers argue that through reading fictions we can gain true beliefs about the content of concepts, about their meaning. Philosophers of science focus on examples that yield theoretical knowledge about the non-human material world, true beliefs about the ontology of the universe and its causal laws.

Philosophers argue that examples teach practical judgment in ethics and in the application of our concepts. In ethics, philosophers see different kinds of practical judgments demonstrated by examples. Some claim that fictions instruct us how to live or what sort of personal qualities we should try to realize. Others use more pointed examples to establish situational judgments about what we may or may not do.

This section presents a slightly but not terribly idiosyncratic review of some philosophical research into the epistemic potential of examples. Rather than a full accounting of the strengths and weaknesses of each philosophical position, I sympathetically reconstruct them. The somewhat inchoate philosophical literature ranges from discussion of the relationship between literature and ethics to the relationship between thought experiments and science. I regard this entire span as pertinent to the question of how examples might function in legal ethics: I am considering examples in the broadest sense of the term. Whether an illustration, a model, a thought-experiment, or a literary fiction, a work serves as an example if, despite – and perhaps even because of – its particularity, it suggests, illuminates, or establishes more general true beliefs or judgments. This epistemic relationship between the particular and the general defines the class of works under consideration here.

II. SUSPICIONS

Not all philosophers trust examples. Two who have expressed skepticism are Onora O'Neill, a Kantian ethicist who raises doubt about the role for examples in ethics, and Daniel Dennett, a metaphysician and philosopher of mind who questions the legitimacy of thought experiments in philosophical discussions of free will.

In 1986, Onora O'Neill published *The Power of Example*,[33] in which she noted a two-fold resurgence of examples in ethics after the demise of mid-twentieth century logical positivism.[34] O'Neill distinguished "Wittgensteinian" moral philosophy from "problem-centred" (sic) moral philosophy,[35] and argued that despite the differences in the two camps and the sorts of examples they employed, both relied too unreflectively on examples. According to O'Neill, neither the detailed, literary examples preferred by Wittgensteinians nor the public, professional cases examined in problem-centered ethics can aid practical reasoning

33. 61 Philosophy 5 (1986).
34. *Id.* at 6.
35. *Id.*

unless the examples are accompanied by moral principles or theories.[36] This is because the relevance of an example to our own moral dilemmas is never transparent: "It is difficult to see how the transition from articulated and intelligible literary or hypothetical examples to moral decisions is to be made without the mediation of principles or theories which indicate which sorts of correspondence between example and actual case are important and which trivial."[37] Furthermore, O'Neill worries that both literary and hypothetical examples can mislead us about the true nature of and challenges to ethical thought and action. As O'Neill sees it, dense, literary examples and hypothetical cases drawn from the realms of law, politics, medicine, and so forth prepackage moral dilemmas for us, rather than confront us with the real world problem of figuring out whether a situation involves a moral dilemma.[38] Even if we realize that a moral challenge looms in our circumstances, we still must ascertain the appropriate specification of those circumstances for purposes of seeing what is salient to challenge and its resolution.[39] When moral philosophers borrow situations specified by novelists or professional discourse, they may neglect to ask whether the novelist or the technical vocabulary highlights what is of genuine moral significance in the circumstances underlying the example. In other words, whether generated by a novelist or from a professional context, an example can exert an unchecked, prejudicial influence on how the moral philosopher and her audience react to the situtation depicted.

In his 1984 book *Elbow Room*,[40] Daniel Dennett voiced concern about the potential for philosophical misleadingness even in examples specifically constructed in good faith by philosophers attempting to further philosophical enquiry.[41] Dennett called such examples "intuition pumps."[42] He said various things about them, the upshot of which seems to be a deep ambivalence on his part as to their value:

> Here I want to point to a dangerous philosophical practice that will receive considerable scrutiny in this book: the deliberate over-simplification of tasks to be performed by the philosopher's imagination. A popular strategy in philosophy is to construct a certain sort of experiment I call an *intuition pump*. . . . [Its] point is to entrain a family of imaginative reflections in the reader that ultimately yield not a formal conclusion but a dictate of "intuition." Intuition pumps are cunningly designed to focus the reader's attention on "the impor-

36. *Id.* at 8.
37. *Id.* at 18.
38. *Id.* at 22.
39. *Id.* at 22.
40. DANIEL DENNETT, ELBOW ROOM (1984).
41. *Id.* at 4.
42. *Id.* at 12. Lawyers and legal academics will probably be most familiar with the sort of example Dennett has in mind through Judith Jarvis Thomson's breakthrough piece on abortion. Judith Jarvis Thomson, *A Defense of Abortion, reprinted in* RIGHTS, RESTITUTION, AND RISK (William Parest ed. 1986).

> tant" features, and deflect the reader from bogging down in hard-to-follow details. There is nothing wrong with this in principle. . . . But intuition pumps are often abused, though seldom deliberately.[43]

Dennett's biggest worry is that intuition pumps over-simplify and thereby cause us to rush to wrong judgments. He cautions against taking our intuitive reactions to thought experiments at face value. We need, according to Dennett, to figure out whether the feature of the example that prompts the intuition occurs or has a close analogue in the situation the simplified thought experiment is meant to help us understand. The author of an example aims to have us draw the analogy between the example and the situation under analysis. We must guard against being misled.

Unlike O'Neill, however, Dennett does not call for articulated maxims and principles; he does not worry that examples might illicitly substitute for them. Dennett's area of philosophy explains why his concerns differ from O'Neill's. In *Elbow Room*, Dennett explores metaphysical truths rather than studying how we ought to act. He does not aspire to learn how we should live. He seeks theoretical rather than practical knowledge. For O'Neill, the problem with examples is that, without a set of mediating principles or operating instructions, she cannot see how they could guide or direct our lives and actions, the central goal of ethical knowledge, in her view. Dennett's philosophical project does not raise the question of how examples could possibly directly guide us. Instead, it introduces the puzzle of how an example could instruct or enable our reasoning about metaphysical truths, propositions about how things are, rather than directives about what to do.

III. FICTIONS

Cora Diamond's and Martha Nussbaum's discussions of the relationship between novels and moral philosophy counter O'Neill's suspicions. Diamond rejects the claim that practical reason is the central moral philosophical topic — the conception of moral philosophy adopted by O'Neill. Rather than an exclusive concern with action, with what we should do, Diamond, following Nussbaum, argues that equally important to moral philosophy is the question of what a good human life is.[44] She goes on to argue that in order to evaluate human lives we must have them depicted in great detail. Diamond quotes Iris Murdoch:

> When we apprehend and assess other people we do not consider only their solutions to specificiable practical problems, we consider something more elusive which may be called their total vision of life, as shown in their mode of speech or silence, their choice of words, their assessments of others, their

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43. Dennett, *supra* note 40, at 12.

44. Cora Diamond, *Having a Rough Story About What Moral Philosophy Is?*, *in* THE REALISTIC SPIRIT 372 (1991).

> conception of their own lives, what they think attractive or praiseworthy, what they think funny: in short the configurations of their thought which show continually in their reactions and conversation. These things, which may be overtly and comprehensibly displayed or inwardly elaborated and guessed at, constitute what, making different points in the two metaphors, one may call the texture of a man's being or the nature of his personal vision.[45]

Through reading (the right sort of) fiction closely we can arrive at judgments about the worth of different kinds of human life. Perhaps these judgments will be practical, giving us reason to live one way rather than another, but they need not be to qualify as knowledgable conclusions. A judgment of the ethical texture of a literary character's being may be primarily or solely theoretical, expressing knowledge that a certain life is base or noble, benevolent or mean, even if the judgment does not in any direct way tell us what to do in any particular circumstance. Diamond's point is that acquiring this kind of knowledge is a worthwhile philosophical objective.

Martha Nussbaum argues for a related, but different role for fiction in the pursuit of ethical knowledge. Throughout much of her work, Nussbaum argues for the centrality and priority of particulars in ethical life.[46] She insists that good ethical deliberation involves responding to very specific, particular features of people and situations;[47] that it requires imagination and flexibility in response to these features, demanding from us constant and skilled improvisation.[48]

According to Nussbaum, novels teach this priority of particularity. Our encounters with novels yield metaethical lessons, revealing information about the form and structure our best substantive ethical theories will take, perhaps even suggesting that in the field of ethics we should not seek theories; at least to the extent that theories collect general principles and rules and attempt to organize the world accordingly. Nussbaum's point is that ethical life is not susceptible to this sort of taxonomy, and if we attempt it we will not gain ethical knowledge.

Nussbaum contrasts the concrete perceptions that novelists depict with the rules and standing terms traditional moral philosophy elaborates. She draws this contrast in the course of her discussion of Henry James' novel, *The Golden Bowl*, and two of the book's central characters, Maggie and Adam.

> [W]ithout the ability to respond to and resourcefully interpret the concrete particulars of their context, Maggie and Adam could not begin to figure out which rules and standing commitments are operative here. Situations are all

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45. Iris Murdoch, Vision and Choice in Morality, Supplementary Vol. 30 Proceedings of the Aristotelian Society 32, 32–33 (1956).

46. *See* Martha Nussbaum, *Non-scientific deliberation*, *in* THE FRAGILITY OF GOODNESS 290, 298–306 (contrasting a Platonic vision of a universalistic ethical science with and Aristotelian vision of a particularistic ethical art).

47. *Id.* at 303.

48. Martha Nussbaum, *Finally Aware and Richly Responsible: Literature and the Moral Imagination*, *in* LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE 148, 156 (1990).

> highly concrete, and they do not present themselves with duty labels on them. Without the abilities of perception, duty is blind and therefore powerless.[49]

Nussbaum seems to agree with O'Neill that principles — say, of duty — matter to practical reason, but she suggests that morally responsible perception does not depend on knowing or having these principles. Nussbaum deeply distrusts morality's "standing terms."

> It is not just that standing terms need to be rendered more precise in their application to a concrete text. It is that all by themselves, they might get it all wrong; they do not suffice to make the difference between right and wrong. . . . Obtuseness is a moral failing; its opposite can be cultivated. By themselves, trusted for and in themselves, the standing terms are a recipe for obtuseness. To respond "at the right times, with reference to the right objects, towards the right people, with right aim, and in the right way, is what is appropriate and best, and this is characteristic of excellence."[50]

According to Nussbaum, novels serve a double purpose for ethics. Through their depictions of certain characters they show us who deliberates ethically well and who does not. They also provide us with opportunities to flex our talents as ethical deliberators, because to be an effective reader requires attention to particularity and detail in the novel.[51]

Another ethicist interested in the relationship between morality and fiction is Daniel Jacobson. Jacobson does not work in either the Wittgensteinian or Aristotelian philosophical traditions. Grounded in analytic metaethics and Anglo-American aesthetics, Jacobson has offered a preliminary sketch of how we might gain authentic moral knowledge from narrative art.[52] Jacobson considers the tension between narrative art's status as fiction and claims that it can convey truths.

> If the [narrative artist] makes assertions (whether empirical, phenomenological, or normative), then [narrative art] is subject to daunting epistemological worries. But what other relations might the [narrative artist] stand in to "what should be" besides assertion?[53]

Jacobson persuasively points out that narrative authors are not experts in truth, nor do they purport to be.[54] We have no special reason to assume that what they tell us, implicitly or explicitly, is true. Nor, as Jacobson also notes, can fictions

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49. *Id.* at 155–56.

50. Nussbaum, "Finely Aware" 156 (quoting Aristotle, Nichomachean Ethics 1106b21–23).

51. *Id.* at 162.

52. By "narrative art," Jacobson means to include "nearly all literature and drama, but also much film and some painting" but not "music or abstract visual art." Daniel Jacobson, *Sir Philip Sidney's Dilemma: On the Ethical Function of Narrative Art*, 54 J. AESTHICS & ART CRITICISM 327 (1996).

53. *Id.* at 332.

54. *Id.* at 331.

provide inductive evidence for how the world is or even how actual people's experience of the nonfictional world actually is.[55]

Yet Jacobson maintains that we can learn from narrative art. He advances an "acquaintance model," according to which "the primary ethical function of narrative art is to provide imaginative acquaintance with the *ethical perspectives* which works of narrative art characteristically trade in, but may or may not advocate."[56] Jacobson introduces the idea of an ethical perspective to draw a very interesting link between the way fictions engage our emotional or sentimental responses and their ability to show us what it would be to see the world stained in a particular ethical light.[57]

Jacobson argues that our emotional responses to fiction are proto-ethical, because of the intimate — if hard to understand — connection between our sentiments and how we choose to live.[58] Fictions invite us to feel certain ways about what the fiction depicts, to assume attitudes that are appropriate from the perspective of the fiction itself. In this way, our emotional responses to fiction are normative: some responses count as correct according to the perspective presented. When a fiction elicits these responses, we discover what it is to see the world from the ethical perspective of that fiction. Jacobson writes, "[I]t is not primarily propositional knowledge we get from narrative art, but something better described as a perceptual capacity: knowledge of how things look from an ethical perspective."[59] Jacobson does not deny that we may react to the fiction with emotions others than those invited by it, nor does he deny that these other reactions themselves may be normative — correct according to another, possibly rival ethical perspective, perhaps our own. Indeed, Jacobson takes pains to emphasize the fact of pluralism in ethical perspective in the modern world. He regards broad acquaintance with ethical perspectives as "a prerequisite of nondogmatic ethical debate."[60] As Jacobson puts it:

> [W]e can choose to be parochial, and direct our ethical arguments only at those who share our perspective, at the cost of excluding nonbelievers from our normative discourse and excluding ourselves from theirs. Or we can encourage them to see things from our perspective and, in fairness, offer as much in return. Then our narrative art is likely to provide our best hope for influence, and theirs, our best opportunity for understanding.[61]

To date, Jacobson has provided only a preliminary sketch of his view of narrative

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55. *Id.* at 330.

56. *Id.* at 333 (emphasis added).

57. For discussion of the relationship between sentimental or thick concepts, evaluative taxonomies, and discrete evaluative perspectives, see Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187, 1197–1212 (1994).

58. Jacobson, *supra* note 52, at 334.

59. *Id.* at 334.

60. *Id.* at 335.

61. *Id.* at 335.

art and its place in ethical discourse. But his work provides one of the most exciting, ambitious, and, I believe, promising visions of the possible relationship between examples and ethical knowledge.

Ethicists are not the only philosophers to consider the role of literature in philosophical thought. Like Jacobson, Eileen John, a specialist in metaphysics and aesthetics, works in the tradition of analytic philosophy. But as a metaphysician, John investigates the epistemic potential novels hold for advancing our understanding of all sorts of concepts, not just ethical ones. She concentrates on the information about conceptual meaning and use that can be gathered through literary experience, rather than addressing how fiction might shed light on ethical or political concerns.

John claims that reading fiction can yield conceptual results. Certain fictions add to our comprehension of the conditions of application for a concept or to our understanding of basic competence in using the concept.[62] Comprehending fiction can also expand our conceptual knowledge in broader ways, by showing us that a concept can have a broader or different "domain" or "point" than we previously thought. By "domain," John refers to the set of concepts among which a concept operates; by "point," our aim in bringing this set of concepts into play.[63]

To illustrate and prove her claims about fiction and conceptual knowledge, John presents a sensitive, careful reading of Grace Paley's short story *Wants*. John's reading simultaneously interprets Paley's text and John's own reaction to the text. John demonstrates that an exchange between the two main characters in the story — a woman and her ex-husband — throws into question the concept of want or wanting. In this exchange, the ex-husband accuses his former wife of never wanting anything, and much of the story turns on her reaction to this charge. As John artfully shows, an effort to understand the story calls forth certain questions. What is the relationship between wanting as desiring and wanting as lacking? Is it coherent to want the impossible? Can want-as-desire still be want-as-desire if the want has no motive force for the wanter? Can a user meaningfully use a charge of not wanting as a criticism of somebody else? If the story is to make sense, at least some of these questions will require affirmative answers. And it may come as a surprise to learn, for example, that wanting or not wanting has evaluative force — that the concept can function to assess somebody's character — or to discover that the possibility of satisfaction is not a precondition for the application of the concept.

John does a wonderful job of demonstrating that the story itself forces questions about the concept of want upon the reader. John shows that to make sense of the story requires recognizing and resolving at least some of these questions. Paley's story does not merely spark or spur readers already prone to

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62. Eileen John, *Reading Fiction and Conceptual Knowledge: Philosophical Thought in Literary Context*, 56 J. AESTHETICS & ART CRITICISM 331, 333 (1998).

63. *Id.* at 336.

thinking of such questions or readers with such questions already in mind. Rather, for any reader, comprehending the story will involve comprehending how wanting can be an admirable trait or not wanting a troubling one; and appreciating that one can appropriately describe somebody as wanting the impossible.

To appreciate John's success in establishing these claims, one must read her analysis for oneself. As John notes, part of what she is arguing is that "it is typically not possible to show how experience with a work of fiction generates conceptual inquiry without conveying some quite specific features of that experience."[64] Not only does John rely on an example to substantiate her views about the how reading fiction can lead us to conceptual knowledge; her own reading of Paley's *Wants* is itself an example of the process.

IV. THOUGHT EXPERIMENTS

As with fictions, philosophers use and study thought experiments, another genre of example. Thought experiments overtly aim to yield general knowledge by presenting a particular scenario for consideration. The philosopher Judith Jarvis Thomson crafted the philosophical thought experiments probably most well known to contemporary non-philosophers.[65] In 1971, Thomson published *A Defense of Abortion.*[66] In that article, Thomson grants that after a very brief gestational period, a fetus is a person, but denies that this concession settles any important questions about the fetus' right to life.[67] Through a series of thought experiments, Thomson asks the reader to investigate the conditions under which one person may withhold her body or her services from another, even if that means death to the other. Thomson has the reader imagine various situations in which one's body becomes host to another person's, such as having a world-famous violinist who suffers kidney failure attached to your body while you are asleep, so his body can use your kidneys.[68] She also asks us to picture a situation where despite your conscientious efforts to prevent "people-seeds" from entering your home and taking root, some seeds enter through your fine-meshed screens and start growing in your living room.[69] Thomson's own thinking through of these situations leads her to endorse only the most minimal obligation to use one's body to keep someone else alive. Thomson's thought experiments invite the reader to reach the same conclusion.

Some might charge that Thomson's thought experiments really belong in Dennett's category of problematic intuition pumps. Certainly, her experimental

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64. *Id.* at 336.

65. Donald H. Regan made Thomson's work familiar to lawyers and legal in scholars in Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979).

66. Thomson, *supra* note 42.

67. *Id.* at 2.

68. *Id.* at 2–3, 9.

69. *Id.* at 12.

design focuses our attention on certain features that the experimental situations share with pregnancy rather than others that make the experimental conditions different. Therefore, even if we reach the same judgment about right to life that Thomson does, we must be confident that the experimental situation analogizes to pregnancy in the right way. Thomson certainly appreciates this problem. Each of her thought experiments demonstrates sensitivity to the need for the right analogy. Thomson constructs her experiments carefully. Each one isolates and manipulates different variables. They come in a sequence that allows the thought-experimenter to build upon reactions to earlier experiments in a systematic way. Without a more explicit account of analogical appropriateness, however, we cannot be positive that our conclusions about the experimental situations properly correlate to those we should draw about the actual situation under consideration.[70]

Even if we grant that Thomson's experimental design properly parallels pregnancy, we may still wonder what we actually learn from the results of her thought experiments. We certainly ascertain some of our intuitions about when one person must allow her body to sustain somebody else's. The question still remains, how does knowing these intuitions relate to knowing whether it is right or wrong to withdraw one's body from somebody whose life depends upon it? I cannot even attempt an answer to this question within the confines of this Foreword. Yet noting the question helps distinguish normative thought experiments from the sorts philosophers of science usually consider.

In normative thought experiments, even if we think the experiment elicits valid intuitions, we still need to decide how these intuitions relate to moral truth or rightness or to correctness in the application of a concept. For both ethics and conceptual meaning we need a story about the adjudicative role our intuitions play. Presumably, this story belongs to a longer one about the complicated relationship between human interests, needs, and attitudes and the nature of truth in these areas. Science, in contrast, investigates truths about how the world is, independently of our interest in, or our attitudes toward, it. We do not expect to rely on our intuitions as arbiters of human-independent truths. So they play no adjudicative role in what counts as true or correct scientific judgments.

Yet scientists still use thought experiments. Philosophers of science debate the precise ingredients for a scientific thought experiment, seeking to distinguish thought experiments from general counterfactual reasoning and from observation. Whatever the best final definition, we can divine some key features of scientific thought experiments through a brief look at a famous one: Galileo's imagined ball and plane apparatus proving inertia.[71] The experiment begins with

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70. *See* Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993) (discussing the workings of analogical reasoning in legal practice).

71. *See* ROY A. SORENSON, THOUGHT EXPERIMENTS 8–9 (1992) (describing Galileo's experiment in detail). My description is based heavily on Sorenson's.

a defined initial set-up involving an imagined physical apparatus. Galileo has us begin by picturing a ball rolling up and down in a U-shaped track resting on a level plane in a frictionless world. The Galilean experiment then asks us to mentally manipulate the apparatus. We fold down one side of the U, notch by notch, until it lies flat along the plane, extending into infinity. As we lower the track, we roll the ball from the high side to the low, until the final roll when one side of the track runs along the plane. Finally, we imaginatively observe the state of the device to see if it teaches us anything. We see that a ball rolled in the U will obey the law of equal heights, always reaching the same height from which it started before reversing course. In our final drop, a ball started from the high side of the former U will run along the side of the track that now is level. Since it will never reach the height from which it was initially dropped, it will continue rolling infinitely. The thought experiment has demonstrated the phenomenon of inertia.

Galileo's experiment shows how scientific thought experiments start from a defined situation, have the experimenter mentally manipulate a particular variable, and imaginatively observe what happens to the other parts in the set-up. Both the designer of the thought experiment and others who perform it intend cognitive results. They mean to construct a scenario that others can use to gain information about a specific problem that the designer of the experiment also has in mind.

V. THE CONTRIBUTORS' EXAMPLES

At the outset of this Foreword, I asked what epistemic role there might be for examples in legal ethics. Now, using the foregoing philosophical catalogue of examples and their possible functions, I want to examine the epistemic purposes served by some of the examples presented by the contributors to this theme issue. Probably because the use of examples in legal ethics has so far received little or no reflective consideration, the authors all use their examples without stating the epistemic purpose they intend them to fulfill. Examples can also have epistemic effects other than those intended by their authors or presenters. So, my survey of the epistemic functions of the contributors' examples makes no assumptions about whether the authors themselves intend the functions I identify.

William Simon provides one of the richest examples in the theme issue, in that the example serves or could serve several functions. Simon introduces *Virtuous Lying* with "An Illustration," written in the first person and the first person plural. He describes a situation involving a legal aid office's representation of a client having trouble obtaining food stamps from the local welfare office. Simon himself was working as a lawyer at the legal aid office, and his example depicts his own conduct in tricking the welfare office director into speaking to him on the telephone, so that Simon could pressure the director into providing immediate assistance to the client.

Simon's example emphasizes his own involvement in the situation. Simon

describes the client walking into "our legal aid office" and steps taken by "our paralegal."[72] He reports: "I called the [welfare] office";[73] "I proposed that the paralegal call the office back";[74] "I was thus flushed with pride as I related this story [about the trick and its success] to my supervisor and disappointed when he remained impassive as I finished."[75] Simon ends his presentation of the example with some dialogue between himself and the supervisor, with the supervisor having the last word as he accuses Simon of having violated the *Model Code of Professional Responsibility*. The supervisor tells Simon, who has not already appreciated this, that Simon lied, making a false statement of fact, in violation of the *Code*.

Simon apparently intends the example to contribute to lawyers' practical knowledge of how to act. He takes it to show that lawyers should lie to serve justice, at least sometimes. Interestingly, Simon recounts that when he told a group of seminar students the illustration, they did not infer this judgment, instead disputing it. This disagreement pushed Simon to develop the expository argument in defense of lying that he presents in the remainder of *Virtuous Lying*. Simon's experience with the example might seem to vindicate Onora O'Neill's contention that an example without articulated mediating principles cannot establish a practical judgment. But just because the seminar students disputed the judgment Simon takes the illustration to establish does not mean that the example does not in fact establish the correctness of the judgment. We must distinguish between the warrant for a judgment an example may provide and an audience's accurate appreciation of this warrant. If we had a more fully worked out account of precisely when (if ever) examples directly warrant practical judgments, we would be able to tell when an example fails and when an audience has failed to appreciate the example.

When I first read Simon's illustration, however, I anticipated a different purpose for it than providing warrant for a practical judgment about when lawyers should lie. It seemed most promising as a vehicle for learning about the concept *lie*, much as John uses Paley's short story to investigate the concept *want*. Assume that the supervisor's interpretation of the *Model Code* is correct: the *Code* classifies any false statement of fact as a lie. Applying the concept *lie* to a proposition carries evaluative and prescriptive consequences: lies are prima facie morally bad and presumptively ought not to be told. The *Code's* application of the concept attaches these consequences to any false statement of fact. But this might be error. Simon himself did not even experience his deception of the director as involving a lie, hence Simon's surprise at his own supervisor's reaction. If Simon is a competent user of the concept, his reaction counts against the *Code's* use.

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72. Simon, *supra* note 24, at ___.
73. *Id.* at ___.
74. *Id.* at ___.
75. *Id.* at ___.

Perhaps the *Code* simply mistakes the content of *lie*, incorrectly extending its application to all false statements of fact, regardless of the context in which a speaker makes them.

We have reason to wonder how probative either Simon's or his supervisor's intuitions about *lie* are. Both may have corrupted intuitions, although tainted by different influences. The supervisor's intuitions may be overly influenced by the *Model Code*, whose use of the concept we mean to question. Simon's own intuitions may be skewed because he perceives himself as the hero in his example — he tells us "Getting Food Stamps for somebody who would go hungry without them is satisfying work, especially when you can do it in 10 minutes. I was thus flushed with pride as I related this story to my supervisor . . . ."[76] This self-understanding would disincline him to apply a condemnatory concept like *lie* to his conduct.

In general, we should be wary of first-person examples depicting and presented by the actor himself. The worry becomes especially acute when the example purports to establish a practical moral judgment or illuminate a moral concept. For it is precisely in the area of ethics that we have most reason to worry that considerations of self-love, selfishness, and self-interest bias our outlook on the world, and therefore our sense of which episodes in our own life accurately convey ethical knowledge. To put the point in Dennett's terms, first-person examples presented by an author who aims for our approval or agreement might easily degenerate into self-serving intuition pumps.

Another, related, caution follows from this one. An author who presents an example depicting his own conduct must realize that the example may yield knowledge, but not the knowledge he takes it to reveal. Another reading of Simon's illustration locates it among those examples that reveal theoretical knowledge about the quality of a human life. To borrow Iris Murdoch's phrase, the illustration — both the raw facts and Simon's depiction of them — tell us about "the texture of a man's being or the nature of his personal vision." While Simon may intend the example to demonstrate his heroism or cleverness, a reader may respond to it with other conclusions about Simon's qualities and character.

Three of the student Notes present examples that, like Simon's, potentially play multiple epistemic roles. Stephanie Loomis-Price's Note, *Decision-Making in the Law*, presents a "Statement of Facts" after a very brief introduction. Drawn from the author's interview with a practicing attorney, this example tells how, on the eve of trial, a client told the attorney-interviewee facts that, if acknowledged, would completely undermine the attorney's carefully planned trial strategy. The example continues by recounting the attorney's thought processes as she considers the relevant *Model Rules* and various pragmatic considerations. At this point, the Note's author, Loomis-Price, suspends her description of the example, but

76. *Id.* at ___.

drops a footnote telling the reader where in the Note he can learn how the interviewee handled the dilemma.[77] Loomis-Price resumes the narrative in the midst of the interviewee's thought processes at the time the client disclosed the information to her. Then, Loomis-Price quotes the attorney's reflective analysis of her own motives as they seemed to the attorney at the time of the interview.

Shannan Higgins also delivers a "Statement of the Facts," in which she recounts events described to her in an interview with a practicing attorney.[78] After a relatively brief description of the legal situation that gave rise to her subject's ethical quandary, Higgins devotes a great deal of attention to the attorney's own characterization of his dilemma and his conduct, including the attorney's examination of the *Model Rules* and his retention of outside counsel to advise him.

After a somewhat detailed introduction to deontology, consequentialism, and a currently popular perspective on changes in law practice, Lisa Greenwald, the student author of *Critique of an Ethics Committee*, presents what she terms a "case study."[79] Again based on an attorney interview, this comparatively lengthy example describes the factual circumstances that led a law firm ethics committee to require one of the firm's partners to withdraw from litigation after opposing counsel raised the question of a conflict of interest, despite the absence of a conflict under the *Model Rules*. Greenwald gives a thick description of all the elements in this example: the allegedly conflicted partner's history at the relevant law firms, the various clients' relations with these firms, opposing counsel's tactical accusation alleging the conflict, the law firm's procedures for avoiding and resolving conflicts of interest, the ethics committee partner's involvement in this particular situation, his conversations with the allegedly conflicted partner, and the ethics partner's own analysis of the situation.

Loomis-Price's, Higgins', and Greenwald's examples arguably yield specific theoretical insights about particular qualities of the attorneys depicted — the sort of true beliefs Murdoch and Diamond argue can be gained through careful reading. But the students' examples also function more ambitiously. They include depictions of the factual setting in which the attorneys operated; descriptions of the attorneys' conduct; reports of the attorneys' self-understanding of their conduct and reasoning; and, in some cases, the students' reactions to or interpretations of the attorneys' conduct and self-understanding. The Note-authors present each of these layers in rich detail.

These vivid, complex examples are good candidates for the sort of narratives that portray and communicate ethical perspectives, of the kind discussed by Jacobson. Although not fictional — an aspect to which I will return shortly — these examples afford windows into distinctive ethical outlooks. In the context of

77. Loomis-Price, *supra* note 26, at ___.

78. Higgins, *supra* note 27.

79. Greenwald, *supra* note 28, at ___.

a longer description, Loomis-Price's report of a young public defender's reaction to her client's confession of guilt — a desperate desire to put her hands over her ears and sing "I can't hear you. I can't hear you"[80] — communicates to us how the world looks to this lawyer, which aspects engage which sentiments of hers, and when she perceives ethical trouble. Likewise, Higgins' analysis isolates three different attitudinal responses from an attorney confronted with a distraught but dodgy client. Higgins does not simply describe these responses; she recounts the attorney's perspective on the events that triggered them, thereby enabling the reader to vicariously inhabit it. Greenwald achieves a similar result by presenting two attorneys' perspectives on a situation in which one lawyer saw integrity at stake, but the other lawyer did not. On the basis of any of these examples, we may or may not come to endorse or share the outlooks and concomitant sentiments they elicit and warrant. But each example affords us an epistemic opportunity, by positioning us to perceive the situations faced by these attorneys as they themselves did, and thereby enabling us to know their attitudinal responses.

Several features of the students' examples and their role in their larger arguments suggest that their examples hold special promise of helpfulness in our efforts to gain knowledge relevant to legal ethics. Because the examples are drawn from the real world, rather than a fictional one, we can be confident that the ethical perspectives they deliver actually obtain among lawyers. We need not worry that we are taking up perspectives that have no place in real professional life. While we might, on occasion, wish to experimentally try on imaginary perspectives lawyers might come to have, we have special reason to want to know the perspectives they currently do occupy. By trying on these perspectives we can compare lawyers' current ethical perspectives with those of nonlawyers, in an effort to use each group's outlook to enhance the other's.

Although non-fictional, the students' examples are rich narratives. This wards off the schematism O'Neill complained about in philosophical examples that skeletally depict stock situations posing canned moral dilemmas. Higgins' and Greenwald's examples especially depict situations both more subtle and more mundane than the usual chestnuts of the professional responsibility curriculum. The disbursement of escrow funds or the structure of a firm's conflict-of-interest apparatus are not as dramatic as examples based on cases like *Spaulding v. Zimmerman*[81] or *In re Armani*.[82] But the ordinariness of the students' examples ensures relevance to the lives lawyers actually live; their subtlety prevents cliched, knee-jerk interpretations of the lawyers depicted.

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80. Loomis-Price, *supra* note 26, at ___.

81. Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962) (upholding lower court's decision to set aside a settlement because defense counsel had failed to disclose that plaintiff suffered from life-threatening medical condition of which plaintiff was unaware).

82. *In re* Armani, 371 N.Y.S.2d 563 (N.Y. Co. Ct. 1975) (awarding attorneys' fees in excess of statutory limits in case where defense attorney, on grounds of client confidentiality, failed to disclose location of murder victims' corpses).

The students' discussion of their examples provides another safeguard against drawing sloppy conclusions from them. At their best, the student Notes actively use the examples to reason about legal ethics, rather than immediately deriving principles or judgments. Greenwald repeatedly reviews and relies upon the example in her Note as she considers how the law firm's conflict of interest procedures relate to individual integrity and loyalty between partners. Loomis-Price interrupts the telling of her example to analyze the lawyer's situation according to act utilitarianism, rule utilitarianism and a *Model Rules*-based deontology; her analysis simultaneously clarifies the dynamics of the lawyer's situation and the workings of moral deliberation according to these three approaches. This strategy brings the lawyer's actual process of deliberation, to which Loomis-Price eventually returns, into sharp relief. Higgins also achieves double insight, both into the ethical outlook of the attorneys she discusses and into role-based based moral deliberation, by repeatedly examining each in light of the other throughout her Note. As the students' reflections move between example and moral theory, they suggest metaethical lessons, in a process reminiscent of the one Nussbaum describes with regard to reading Henry James. The students' use of their examples generate hypotheses about the aptness of certain moral theories or kinds of moral theory for understanding legal ethics. Whether or not the students themselves articulate, pursue, or prove such hypotheses, their Notes serve the epistemic function of precipitating them.

Loomis-Price's Note demonstrates how examples in legal ethics might serve as thought experiments, potentially furnishing both descriptive and normative results. Recall that Loomis-Price interrupts the presentation of her example before telling us what the attorney she interviewed did or how the attorney decided what to do. This invites us to perform a thought-experiment, to predict what the attorney or we ourselves would do in this situation and, perhaps on the basis of these predictions, to decide what somebody in that situation ought to do. Certainly, a thought-experiment that predicts human action rather than events in the natural world raises complications not present in the scientific thought experiment. If examples like Loomis-Price's are to function plausibly as predictive thought experiments, they must be developed for this purpose more self-consciously, situating the experimentor carefully and systematically manipulating variables to produce persuasive, reliable results.

CONCLUSION

This Foreword introduces the contributions to *Beyond the Model Rules*. Each piece makes many arguments and points I have not even mentioned. All can be read profitably for these, rather than as instances of scholarship that rely on example. The Foreword also begins an inquiry into the epistemic role or roles for examples in legal ethics. Notwithstanding my sympathetic reading of and reliance upon the philosophical work on the epistemic power of examples, both

that work and the present discussion leave unanswered important questions about whether and how examples exert epistemic power. Most importantly, we need to develop standards for when to trust the beliefs and judgments examples yield.

In concluding, I will address one lingering issue, because one of the contributions to the symposium makes it pressing. In *The New Casuistry*, Paul Tremblay advocates a case-based approach to legal ethics. Although there are affinities between this approach and the role for examples that I have been discussing, the two projects are importantly different. Tremblay's focuses on the role that reasoning from cases can play in resolving specific ethical disputes, much as courts use common law precedents to decide disputes over property, personal injury, and so forth. Tremblay supports an institutionalized process of case-based reasoning, which would treat professional responsibility much like any other area of common-law dispute resolution. Putatively injured parties could bring causes of action against attorneys on grounds of allegedly improper conduct, and tribunals would rely on precedent to resolve the dispute. But precedent cases might serve as vehicles of dispute resolution without serving an epistemic function. Perhaps a case-based approach to professional responsibility would operate more effectively if reasoning from precedent does in fact deliver truths, at least when done rightly. But the connection is not a necessary one. The pragmatic function need not depend on the epistemic capacity of cases. A case-based method of policing lawyers might produce more acceptable, more ethical conduct among attorneys without expanding our knowledge. In short, casuistry could work, even if it does not deliver truth. If scholarship, however, is to rely on examples to gain knowledge about legal ethics, scholars must become confident that examples lead rationally to true beliefs and judgments. This means scholars will have to probe the difficult questions that remain about how examples could do this.