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Moral Pluck: Legal Ethics in Popular Culture

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Favorable portrayals of lawyers in popular culture tend to adopt a distinctive ethical perspective. This perspective departs radically from the premises of the "Conformist Moralism" exemplified by the official ethics of the American bar and the arguments of the proponents of President Clinton's impeachment. While Conformist Moralism is strongly authoritarian and categorical, popular culture exalts a quality that might be called "Moral Pluck"—a combination of resourcefulness and transgression in the service of basic but informal values. This Essay traces the theme of Moral Pluck through three of the most prominent fictional portrayals of lawyers in recent years—the novels of John Grisham and the TV series L.A. Law *and* The Practice. *It suggests that these works have two potential contributions to legal ethics—as evidence of popular moral understanding and as a guide to ethical conduct. With respect to the latter contribution, the Essay acknowledges various limitations but argues that the works deserve to be taken seriously as ethical discourse, and in particular, that it holds up well in comparison to Conformist Moralism.*

INTRODUCTION

In a speech to a North Carolina bar association during the Clinton impeachment crisis, Kenneth Starr invoked Atticus Finch as an ethical role model. Many people scoffed at what they took to be an implied self-comparison.[1] Starr's zeal in pursuing President Clinton did not seem comparable to Finch's courage in defending a falsely-accused black man in a racist town, and the justice of Starr's cause was less clear than that of Finch's.

Yet the most important difference between the ethics of Kenneth Starr and those of the hero of *To Kill a Mockingbird* remains to be noted. At the climax of Harper Lee's novel, the hermit Boo Radley emerges from seclusion and kills the villainous Bob Ewell. He does so in defense of Finch's children, whom Ewell was trying to kill.[2] In the novel's final pages, a fascinating development occurs. Finch and Heck Tate, the sheriff, agree to lie to the town by saying that Ewell died accidentally by falling on his knife.

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Editors' Note: Except where supported by specific references, the discussions of television shows in this Essay rely on the author's memory and have not been verified by the Editors.

1. See David E. Kendall, To Distort a Mockingbird, N.Y. Times, June 3, 1998, at A25.
2. See Harper Lee, To Kill a Mockingbird 274–80 (1960).

There is no question that the killing was justifiable. Nonetheless, the sheriff convinces Finch that the local court system, which has just sent the patently innocent Tom Robinson to his death, cannot be trusted to vindicate Radley. So, the sheriff persuades Finch to go along with the accident story. In other words, the novel concludes with Atticus Finch engaging in what today could only be called obstruction of justice.[3] Finch initially resists the sheriff's suggestion with arguments that would have done credit to a House Impeachment Manager. He says it would set a bad example for children. He says it would encourage further lawlessness. He says it would be dishonorable. But eventually he yields, and the novel does not leave any doubt that, in doing so, he does the right thing.

The sheriff exhorts Finch in this scene to a quality that I call Moral Pluck.[4] It involves a combination of transgression and resourcefulness in the vindication of justice. Moral Pluck is pervasive in favorable portrayals of lawyers in recent decades. I am going to support and elaborate this claim with illustrations from three prominent examples—the novels of John Grisham and the TV series *L.A. Law* and *The Practice.*

The ethical perspective of these works contrasts sharply with that of more established doctrines, in particular, the official ethics of the American bar. The latter perspective, as articulated in the professional responsibility codes the states have taken from the American Bar Association, is uncompromisingly categorical and authoritarian. It has a penchant for black-letter injunctions designed to minimize hard judgment and for unreflective compliance with the commands of institutionalized authority. The categorical, authoritarian qualities of professional responsibility rhetoric are shared across a broad range of elite moral rhetoric. They are strong in the doctrines of such public moralists as William Bennett and Sissela Bok, and were especially salient in the rhetoric of journalists and political leaders during the impeachment crisis.[5]

A study of legal ethics in popular culture has two possible payoffs. First, popular culture is a source of evidence about popular moral understanding. The Conformist Moralism of the Bar and the impeachment proponents is based in part on factual premises about popular morality. The Conformists justify their precepts partly as responsive to categorical and authoritarian tendencies in the moral thinking of ordinary people. The evidence to be examined here suggests that these assumptions are

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3. See id. at 286–91; Rob Atkinson, Lucifer's Fiasco: Lawyers, Liars, and L'Affaire Lewinsky, 68 Fordham L. Rev. 567, 592–95 (1999) (discussing this scene as an example of a justified "cover-up").

4. My title was inspired by the title essay in Bernard Williams, Moral Luck: Philosophical Papers 1973–1980, at 20–39 (1981). However, the argument here is largely different from Williams's. See infra note 67.

5. See William Bennett, The Death of Outrage: Bill Clinton and the Assault on American Ideals (1998); Sissela Bok, Lying: Moral Choice in Public and Private Life (1978); infra notes 7 and 44 (describing the rhetoric of the Congressional impeachment proponents). For criticism, see William H. Simon, Virtuous Lying: A Critique of Quasi-Categorical Moralism, 12 Geo. J. Legal Ethics 433, 433 (1999).

mistaken. At least in some moments, popular morality is disposed to a style of moral judgment considerably different from the one Conformist Moralism attributes to it. Second, Moral Pluck is a substantive challenge to Conformist doctrine. The challenge is made, not through an explicit argument, but through dramatic representations of a type of ethical predicament and of styles of response to it. To be sure, these works romanticize lawyering, just as "lawyer jokes" demonize it, but their distortions are no greater than those of established professional responsibility doctrine. While popular culture is utopian about the possibilities of individual initiative, established doctrine is utopian about the reliability of official institutions.

I begin by recalling the categorical and authoritarian themes of Conformist Moralism and especially established professional responsibility doctrine. I proceed to describe the challenge to those themes in Grisham's novels, *L.A. Law*, and *The Practice*. I then consider the potential contributions of these works to legal ethics.

1. The Conformist Perspective

Elite moralism in general and professional responsibility doctrine in particular is strongly categorical and authoritarian. Ethics is categorical when it insists on appraising conduct in terms of rigid rules, with few if any exceptions and excuses. To take the most famous and extreme example, Kant insisted that lying is *always* wrong, even when necessary to save an innocent life.[6] In the impeachment crisis, the President's prosecutors denied that either the private nature of the conduct involved or its marginal relevance to the Paula Jones case excused or even mitigated his perjury. They insisted that excusing any kind of perjury would threaten the "rule of law."[7]

Professional responsibility doctrine is categorical in its proclivity for rules insensitive to the contingencies of particular situations. Such rules tend to require mecbanical judgment or literal application.[8] They frequently mandate that the decisionmaker take actions that she correctly

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6. Immanuel Kant, Grounding for the Metaphysics of Morals, with On a Supposed Right to Lie from Altruistic Motives 65 (James W. Ellington trans., Hackett Publishing Co., Inc. 1981).

7. See, e.g., The 4 Elements of Perjury: An Oath, an Intent, Falsity and Materiality, N.Y. Times, Jan. 16, 1999, at A13 (quoting the remarks of Rep. Steve Chabot):

> [I]f the actions of the President are ultimately disregarded or minimized, we will be sending a sorry message to the American people: that the President of the United States is above the law. We will be sending a message to our children . . . that telling the truth doesn't really matter . . . .

See also Linking the People's Trust in the President to the World's Trust in America, N.Y. Times, Jan. 17, 1999, at A31 (quoting the remarks of Rep. Henry Hyde at the Impeachment Trial: "The issue here is whether the President has violated the rule of law . . . .").

8. An avowed purpose of the drafters of the ABA Model Rules of Professional Conduct was to create black letter rules that would obviate difficult judgments. See

sees as unjust or contrary to important public values. Notoriously, for example, the confidentiality rules require that the lawyer keep secrets even in some situations where disclosure might save an innocent life and the client's interests are trivial.[9]

Ethics is authoritarian when it conflates moral authority with the explicit commands or enactments of government institutions. For the impeachment proponents, it was sufficient that the President had violated a judge's order and the terms of a federal statute. Even if they had been convinced that the judge's order was wrong or that the statute, as applied, would subvert fundamental privacy values, they would not have deemed these considerations relevant.[10] The President's lawyers seemed to concede this authoritarian view by focusing their arguments, not on appeals to the privacy values that were threatened by an inquisition into consensual sex, but on casuistic claims that the President's deceptive answers did not amount to perjury.[11]

The authoritarian disposition appears in professional responsibility doctrine in the tendency to define law and legal authority in terms of the state. The Model Code distinguishes legal authority from moral, economic, social, and political factors that, though sometimes important, must take a back seat.[12] Lawyers are obliged to press for their clients' interests subject only to the constraints of formally-enacted commands. At the same time, lawyers are obliged to respect any norm that qualifies as law by formal enactment, even where such respect contributes to injustice. There is no tolerance, for example, for civil disobedience—principled noncompliance with unjust positive law. The Bar's norms condemn "even minor violations of law by a lawyer."[13] They insist that the only appropriate response to unjust law is to petition institutions with formal legislative authority to enact revisions.[14]

All these themes contribute to a pervasive hostility to independent judgment in professional responsibility rhetoric. This hostility is transparent in the Multistate Professional Responsibility Examination, which

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Geoffrey C. Hazard, Jr., Legal Ethics: Legal Rules and Professional Aspirations, 30 Clev. St. L. Rev. 571, 574 (1982).

9. For three examples, see Fred C. Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 351, 409 (1989) (see hypotheticals 1–3).

10. E.g., 144 Cong. Rec. 11862 (daily ed. Dec. 18, 1998) (statement of Rep. Oxley) (suggesting that enacted law must be obeyed in all circumstances).

11. See Response of the President's Lawyers to Independent Counsel's Report, N.Y. Times, Sept. 13, 1998, at A30.

12. See Model Code of Prof'l Responsibility EC 7-8 (1986).

13. Id. The Model Rules take a more moderate line.

> Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. . . . A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Model Rules of Prof'l Conduct R. 8.4 cmt. (1999).

14. See Model Code of Prof'l Responsibility EC 8-2 (1986).

in most states is the only testing of legal ethics in connection with admission to the bar. The examination is preoccupied with black-letter disciplinary rules. Since it is multiple-choice and machine-graded, it focuses on situations that lend themselves to glib black-and-white responses. Bar review instructors commonly advise applicants: "What they are testing is your ability to memorize."[15]

In informal legal ethics discussions, a variety of rhetorical tropes are routinely deployed to penalize independent judgment. When lawyers appeal to informal norms of justice to explain either violations of enacted law or refusals to push client interests to the limits of enacted law, they are charged with self-righteousness and self-aggrandizement: 'playing God', 'arrogating power to herself', 'imposing her own values,' 'undermining the established process.' In the academic literature, frequent disapproval of discretionary norms is linked to concerns about "accountability."[16] Although it is not always clear to whom accountability is sought, it usually appears that the authors contemplate control by the state.

The moral premises of popular fictional portrayals of lawyering are often quite different from this Conformist tradition. Popular fiction is anti-categorical and anti-authoritarian. Categorical norms require us to disregard all but a narrow range of the particularities of the situation. But fiction is committed to particularity.[17] These works tend to evoke situations in which general norms are at war with more powerful particularistic intuitions. The authoritarianism of Conformist Moralism implies a consistently benign and reliable state. But popular culture warns that the state is often incompetent or corrupt and draws attention to the frightening and unjust consequences of its failings.

II. THE LEGAL POPULISM OF JOHN GRISHAM

John Grisham's novels exude a populist contempt for government and big business. They give us a creepily titillating view of a world dominated by vast criminal conspiracies. The conspiracies are identified with the mob, political terrorist organizations, or large corporations.[18] They

15. Jamie Heller, Letter to the Editor, N.Y. Times, Dec. 16, 1994, at A38 (describing advice of lecturers in New York bar review course).

16. E.g., Stephen McG. Bundy and Einer Elhauge, Knowledge Ahout Legal Sanctions, 92 Mich. L. Rev. 261, 265–66, 313–16 (1993) (doubting the efficacy of discretionary legal ethics norms); David B. Wilkins, Legal Realism for Lawyers, 104 Harv. L. Rev. 469, 511–13 (1990) (same).

17. See Martha C. Nussbaum, Poetic Justice: The Literary Imagination and Public Life 7, 32 (1995).

18. See John Grisham, The Chamber (1994) [hereinafter Grisham, The Chamber] (terrorist organization); John Grisham, The Client (1993) (mob); John Grisham, The Firm (1991) [hereinafter Grisham, The Firm] (mob); John Grisham, The Partner (1997); John Grisham, The Pelican Brief (1992) [hereinafter Grisham, The Pelican Brief] (corporation). Grisham's novels also include the following: John Grisham, The Brethren (2000) [hereinafter Grishman, The Brethren]; John Grisham, The Rainmaker (Dell 1996) (1995) [hereinafter Grisham, The Rainmaker]; John Grisham, The Runaway Jury (1996);

are operations of staggering power, integration, and efficiency. Agents of the government often play willing parts in them, but more often are simply too selfish, arrogant, or stupid to check them.[19]

Grisham is also populist in seeing ordinary people—that is, people who are not mobsters, millionaires, or government bureaucrats—as more than occasionally good and capable of effective resistance to evil. Most of Grisham's books are coming-of-age novels that chronicle the moral growth of a new lawyer. The hero learns two lessons through participation in a series of adventures. First, you cannot plausibly understand legal or professional responsibility norms as the categorical injunctions they purport on their surface to be. To apply them in a manner that would make them worthy of respect requires a flexible, dialectical judgment. Second, to the extent the social order functions, it is not because of a system of promulgated rules more or less routinely enforced by a self-propelling governmental system of checks and balances, but through creative, transgressive moral entrepreneurialism on the part of individuals in crisis.

These crises arise when the hero steps unwittingly into the midst of a conspiracy. It is a premise of thrillers of this genre that the hero would be foolish to respond to danger in the morally-conventional manner. The morally conventional manner is to remain passive and law-abiding, and to rely on the government for protection from the lawless violence of the conspiracy. For the most part, however, the government is neither willing nor able to provide this protection. Its agents have been bought off, are pursuing selfish political agendas without regard to the interests of the people they are supposed to be protecting, or are simply reckless and stupid. Even where officials are more able and committed (and a few are), they are at a tremendous disadvantage vis-à-vis the menace. They have to play by the rules, while the mob and its analogues do not. The mob can shoot people in the back, torture, and bribe; the government generally cannot.

And, of course, the government, unlike the mob, can generally act only on the basis of proof. Grisham's novels are not detective stories organized around a quest by the hero to identify the villain. The hero and the reader know fairly early who the villain is. So do the police. The crisis arises from the fact that the government cannot act effectively in the absence of proof; a central impetus of the story is the hero's effort to get sufficient proof to enable or force the government to act.

In such situations, the hero has to extricate himself through cleverness and initiative. His efforts invariably require violations of various enacted norms. Sometimes the violations affront professional responsibility norms: Rudy Baylor in *The Rainmaker* engages in bedside solicitation of a

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John Grisham, The Street Lawyer (1998) [hereinafter Grisham, The Street Lawyer]; John Grisham, The Testament (1999) [hereinafter Grisham, The Testament].

19. See Mary Beth Pringle, John Grisham: A Critical Companion 21–23 (1997).

personal injury victim.[20] Gray Grantham, a reporter in *The Pelican Brief*, spies to discover the identity of a telephone source after promising not to do so.[21] Sometimes the violations are major felonies: Baylor and Mitch McDeere of *The Firm* both commit homicides. McDeere's seems to be without legal justification or excuse, and although Baylor's might be legally excusable self-defense (or defense of another), he contrives an elaborate and flagrantly lawless cover-up.[22]

Grisham clearly intends us to accept these actions as morally justified. When Baylor makes the bedside solicitation, he is on the verge of destitution (having been screwed by a prestigious corporate law firm that reneged on an agreement to employ him[23]) and fully intends to do a good job for the client. Grantham plausibly believes that identifying the source may save innocent lives, including the source's. The two homicides are in self-defense and both victims are vicious predators (one a professional killer), but in neither case could the law, the police, or the courts be trusted to vindicate the hero.

In three early novels—*The Pelican Brief*, *The Chamber*, and *The Rainmaker*—Grisham delivers his moral lesson explicitly through dialogue. In *The Pelican Brief*, a law student, Darby Shaw, stumbles into a conspiracy that has led to the murder of two Supreme Court Justices. Chased by killers, she teams up with Gray Grantham, a *Washington Post* reporter, who is introduced as a "serious, ethical reporter with just a touch of sleaze."[24] The detective on whom he occasionally calls for "dirty trick[s]" likes him because "he was honest about his sleaziness," not "pious" like his peers.[25]

Grantham plays an important "trick" in the story. An anonymous source phones him repeatedly, indicating he knows something about the conspiracy but feels unable to work up the courage to pass it on. Grantham traces one of his calls to a pay phone and sends his detective to watch the phone. When the source phones next, Grantham signals the detective, who photographs the caller at the pay phone.

When he shows Darby the picture at a time when killers are hot on their trail, she immediately raises the ethical issue:

> "I take it he didn't just pose for this."
> "Not exactly." Grantham was pacing.
> "Then how'd you get it?"
> "I cannot reveal my sources."
> "You're scaring me, Grantham. This has a sleazy feel to it. Tell me it's not sleazy."

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20. Grisham, The Rainmaker, supra note 18, at 95–101.

21. Grisham, The Pelican Brief, supra note 18, at 230–31.

22. Grisham, The Firm, supra note 18, at 412–13 (describing McDeere's murder of Aaron Rimmer by strangling him while he lies unconscious); see also Grisham, The Rainmaker, supra note 18, at 568–70 (recounting Baylor's killing of Cliff Riker during a break-in).

23. See Grisham, The Rainmaker, supra note 18, at 45–46.

24. Grisham, The Pelican Brief, supra note 18, at 129.

25. Id.

"It's just a little sleazy, okay. The kid was using the same pay phone, and that's a mistake."
"Yes, I know. That's a mistake."
"And I wanted to know what he looked like."
"Did you ask if you could take his photograph?"
"No."
"Then it's sleazy as hell."
"Okay. It's sleazy as hell. But I did it, and there it is, and it could be our link to Mattiece."[26]

Grisham does not appear to intend irony or humor in portraying his characters as concerned with this matter of professional ethics at a time when their lives and indeed the fate of the republic are in jeopardy. Even Darby's statement that Grantham's ethical lapse is "scaring" her at a time when she has just survived two murder attempts is not supposed to be funny, just charming. But Grisham does judge Darby as naive. The photograph does no harm to the source, and does in fact turn out to be a critical link to the villain. The implication is that willingness to engage in a small, considered amount of "sleaze" is essential to being effectively "ethical."[27]

In *The Chamber*, a young lawyer and a law professor organize a group of students to make repeated phone calls to the governor, falsely identifying themselves as local voters, and urging him to grant clemency to a death row convict. As the hero explains to his sister what's going on, she asks:

"Is it legal?"
"It's not illegal."
"Is it ethical?"
"What are they planning to do with Sam?"
"Execute him."
"[I]t's murder, Carmen. Legal murder. It's wrong, and I'm trying to stop it. It's a dirty business, and if I have to bend a few ethics, I don't care."[28]

The sister's ethical qualm arises from the hero's deception of a constituted authority, the governor. But the novel has made clear that the governor is cynically indifferent to the moral values of the clemency decision. The ethics the hero has to "bend" in order to avert "wrong" are the categorical precepts of Conformist Moralism.

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26. Id. at 230.

27. In course of another breathless chase in *The Client*, a young boy teaches the same lesson to attorney Reggie Love, as she reluctantly helps him escape from the custody of the authorities, who are recklessly endangering his family and otherwise blundering a murder investigation. Reggie points out that, by escaping from custody, the boy has committed a crime, which "was wrong." She suggests that he return and make a deal with the FBI. The boy replies, "I don't completely trust the FBI, do you?" Reggie has to concede the point, and the boy persuades her that the safest course is a more elaborate, but illegal, plan. See Grisham, The Client, supra note 18, at 349–51.

28. Grisham, The Chamber, supra note 18, at 429.

The Rainmaker also contains an elaborate telephone fraud, which the book portrays as a justified response to unlawful conduct, on the part of an opposing lawyer. However, the most explicit ethics discussion occurs earlier, when the hero is schooled by a sleazy but decent paralegal on the bedside solicitation of accident victims, a flagrant professional responsibility violation,[29] but one that does no harm here and probably benefits the victim.

> "You see, Rudy, [Deck says] in law school they don't teach you what you need to know. It's all books and theories. . . . It's an honorable calling, governed by pages of written ethics."
> "What's wrong with ethics?"
> "Oh, nothing, I guess. I mean, I believe a lawyer should fight for his client, refrain from stealing money, try not to lie, you know, the basics."[30]

Rudy finds that a more succinct statement of the valid principles of legal ethics than anything he recalls from law school.

> "But [Deck continues] what they don't teach you in law school can get you hurt."[31]

Not only is solicitation the only way he can make a living, it is in the interest of at least the clients *he* solicits. They plan to do a good job for their clients, and if they refrained from soliciting, someone else would get them who might not be as loyal to them.

Again, the way to virtue involves transgression and resourcefulness.

III. The You-Can-Have-It-All Glamour Fantasy of *L.A. Law*

L.A. Law is situated in a safer, more comfortable world than Grisham's novels.[32] Grisham portrays elite law firms as dens of iniquity and treachery. The McKenzie Brackman firm of *L.A. Law* is not exempt from these qualities, but is, above all, glamorous. Subject to preliminary and episodic struggles, the heroes enjoy abundant wealth, stylish consumption, good looks, sex, and above all, exciting work. Family and

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29. Model Rules of Prof'l Conduct R. 7.3(a) (1999) (prohibiting direct personal contact with prospective clients when motivated by personal gain—regardless of the truthfulness of the communication).

30. Grisham, The Rainmaker, supra note 18, at 187.

31. Id. The Moral Pluck themes remain prominent in Grisham's more recent novels. In *The Street Lawyer* the hero steals a client file from his law firm and breaches confidentiality norms to expose wrongful conduct that has caused the death of a homeless family. See Grisham, The Street Lawyer, supra note 18, at 130. In *The Testament*, the hero lies to the court by saying he has authority to represent the legatee of a large fortune. He does so in order to prevent the estate from being devoured by a group of ne'er-do-well relatives and their bottom-feeding counsel. See Grisham, The Testament, supra note 18, at 69. *The Runaway Jury* and *The Partner* are revenge fantasies in which the heroes pull off massive, flagrantly criminal (but nonviolent) scams against wrongdoers who have previously victimized them.

32. *L.A. Law* was broadcast on NBC from 1986 to 1994.

friends, the *summum bonum* of older popular genres, are conspicuously low on the list.

Exciting work means high-profile roles in disputes over cutting-edge issues that attract media attention. The McKenzie Brackman lawyers spend little time slogging through construction contract disputes or analyzing the minutia of bond indentures or marshalling financial records for the IRS. Rather, they spend most of their time in court, litigating issues like a hospital's right to terminate life support, a psychiatrist's duty to warn about a dangerous patient, or the grey areas of insider trading liability.[33] Their remarkable firm and staffing structures require few lawyers in subordinate roles; almost all the lawyers act as lead attorneys all the time.

Perhaps the most distinctive feature of the *L.A. Law* glamorous work fantasy is its ethical component. Part of being glamorous is being ethical, which does not mean avoiding unsavory conduct and associations, but rather actively and ingeniously confronting difficult issues—showing Moral Pluck.

The show's ethical commitments are incarnated in its central thirty-something characters—Michael Kuzak, Victor Sifuentes, Anne Kelsey, and Arnold Becker. They are set off by the two senior partners, who serve as contrasting negative role models. Leland McKenzie is a Polonius figure. He is appealingly wry and avuncular, but also unappealingly pompous and out-of-touch. His ethical style is preachy and abstract. He is prone to invoke categorical norms of rule or custom in ways that seem blind to the most pressingly relevant circumstances of the situation. In doing so, he strikes us as both emotionally and intellectually stunted. He has neither the passion nor the resourcefulness of his younger colleagues. He also seems a little gutless. We sense that his strongest commitments are not to the rules he cites, but to the old-money social circle he hangs with.

On the other hand, we have Douglas Brackman, McKenzie's shamelessly materialistic and rapacious colleague. Brackman does not appreciate the moral value or glamour of the litigators' cutting-edge cases. He focuses relentlessly on the bottom line. Ethics for him is merely a form of liability. The only norms he respects are those whose violation would be likely to injure the firm's pecuniary interests. Brackman is a figure of vulgarity, and eventually, farce. His manner is rude and abrupt; he is physically plain among a group of extraordinarily attractive people, and, in what seems the creators' ultimate expression of contempt, he turns out to be sexually impotent.

The *via media* between these two dark paths is the one taken by Michael Kuzak, Victor Sifuentes, Anne Kelsey, and Arnie Becker. They like the material good life, but they lead it with style. They have compro-

33. See Stephen Gillers, Taking *L.A. Law* More Seriously, 98 Yale L.J. 1607, 1608 (1989).

mised their highest ideals for their more mundane ambitions, but without denying or renouncing these ideals. They are still responsive to opportunities to serve the ideals in their practices. They understand ethics less in terms of compliance with rule and custom and more in terms of fidelity to the values that underlie rule and custom.

The ethical challenges of the L.A. lawyers are sometimes more complex than those of Grisham's heroes because their clients are less reliably virtuous. In the premiere episode, Kuzak tips the police that a client is violating parole by carrying a gun.[34] The tip enables the police to catch the client red-handed and forces him to bargain for leniency by offering to plead guilty and testify against his co-defendants in the rape prosecution in which Kuzak is defending bim. The client is a vicious ne'er-do-well (the son of one of the firm's business clients), and Kuzak seems to be motivated by a combination of personal resentment (the client had assaulted him with a gun) and compassion for the rape victim. Kuzak later offers his sympathy to the rape victim, and the episode closes with them in a platonic embrace.

In conventional professional responsibility terms, the story is over the top. The tip to the police was probably (though not clearly) a violation of ethics rules.[35] Continuing to represent the client without telling him about the tip was certainly a violation.[36] The story is vague on this and on Kuzak's motivation. But the show is evidently trying to create a situation in which justice and humanity require a departure from conventional role expectations, and to portray Kuzak as admirable for daring such a departure. Conventional role expectations are represented by an unattractive, snide lawyer for one of the client's co-defendants, who traumatizes the victim with aggressive cross-examination.

The theme recurs with greater clarity and sophistication in later episodes. In an especially interesting one, Anne Kelsey defends a water company in a tort suit on behalf of a child born deaf and blind.[37] Apparently, the birth defects were caused by contaminants in the well that supplied the water her mother drank during pregnancy. The client's CEO con-

34. See L.A. Law: Pilot (NBC television broadcast, Oct. 3, 1986).

35. See Model Code of Prof'l Responsibility DR 4-101 (1986) (stating that a lawyer may disclose otherwise confidential information in order to prevent criminal activity by the client). Under ABA Model Rule 1.6, she may disclose in order to prevent client criminal activity she reasonably believes is "likely to result in imminent death or substantial bodily harm." Model Rules of Prof'l Conduct R. 1.6 (1999). Kuzak's client was committing a crime by carrying a concealed weapon, and his armed assault on Kuzak might indicate a likelihood of subsequent harm. The main problem in analyzing the disclosure issue is that California has not enacted either of the relevant model rules, and its norms on confidentiality are exceptionally murky. See Fred C. Zacharias, Privilege and Confidentiality in California, 28 U.C. Davis L. Rev. 367, 372–73, 404–05 (1994).

36. See Model Rules of Prof'l Conduct R. 1.4 cmt. (1999) (describing a lawyer's duty to communicate important information to the client).

37. L.A. Law: Brackman Vasectomized (NBC television broadcast, Nov. 5, 1987) [hereinafter, L.A. Law: Brackman Vasectomized].

cedes at trial that certain chemicals occur in small amounts in the company's water, which might have seeped into the plaintiff's well, but insists that the amounts are within Environmental Protection Agency tolerances and that it is a "scientific impossibility" that they could have injured the plaintiff.[38] The plaintiff appears to have no evidence to the contrary. Then, on the verge of suffering dismissal, her lawyer receives a "smoking gun" memo from a whistle-blower. The memo indicates that the company's own research had shown that chemicals in the amounts that the company conceded were present created a high risk of serious and even fatal injury.

The client promptly settles with the plaintiff for two million dollars. As a condition of the settlement, the plaintiff and her lawyer promise to keep everything they know in confidence. When Kelsey confronts the CEO of the client company, he concedes that he had been fully aware of the research and that the company probably did cause the plaintiff's injuries. He acknowledges that further injuries are likely, but says, shamelessly, that it is more profitable for him to litigate and, if necessary, settle the claims that will be brought, than to remedy the problem. He brushes off her remonstrances and instructs her not to disclose the problem to the authorities.

Kelsey returns later with a threat to go to the authorities. The threat and Kelsey's intimidating manner so cow the client that he promptly capitulates and signs a contract Kelsey puts in front of him promising to clean up the contamination. The show implies that either the continuing threat of disclosure or the contract will force the CEO to keep his promise. Kelsey has triumphed.

Analyzed dispassionately, Kelsey's triumph is not entirely plausible. The contract would surely be unenforceable judicially,[39] and the client's quick capitulation seems unwarranted both by his legal position and by his character. Nevertheless, Kelsey is so sympathetic, her dilemma so painful, and the client so repulsive, that we suspend disbelief and enjoy the "in your dreams" quality of the conclusion. Last minute reversals of fortune are common in fiction, but it is interesting to see the trope applied here to an ethical dilemma.

This episode features two negative ethical role models. First, there is the plaintiff's lawyer. Until he gets the "smoking gun" memo, he is stridently self-righteous, not only in court but in private conferences with Kelsey. He attacks her personally for defending a wealthy corporation that inflicts widespread injury on helpless children. After he agrees to the settlement, Kelsey challenges him about the propriety of the confidentiality condition and reminds him of his prior professions of commitment to the interests of victims generally. At this point, he becomes cynical and

38. Id.

39. See Restatement (Second) of Contracts § 73 (1981) (performance of legal duty not consideration); id. §§ 175–176 (contract voidable when assent induced by improper threat).

disclaims concern for anyone but his client. As much as the vulgar selfishness of Douglas Brackman, the strident self-righteousness of this plaintiff's lawyer is a quality incompatible with the have-it-all lawyering ideal of *L.A. Law*. Self-righteous people are suspect and unattractive. They never seem for real; rather, they appear dull and narrow.

But the most important theme is Moral Pluck. Lest we miss the point, the episode concludes with a discussion between Kelsey and the second negative role model—Leland McKenzie in his most flagrant Polonius mode. The water company CEO has complained furiously to McKenzie about Kelsey's shakedown, and he has just seen a resignation letter Kelsey sent the firm before she confronted the CEO:

> KELSEY: "Since my actions were in violation of the lawyer's code of ethics and probably illegal, I decided to resign from the firm to insulate you from liability."
>
> MCKENZIE: "I'm astonished. There are rules which govern the conduct of attorneys. Rules which you cannot disregard every time you decide you don't like the client."
>
> KELSEY: "I made a decision."
>
> MCKENZIE: "Dammit! There was no decision to be made! If all lawyers felt free to put themselves above the law, our legal system would be reduced to anarchy."
>
> KELSEY: "If you're looking for a lawyer who can turn off her conscience and just follow rules with blind deference, there's the letter [that is, her resignation]."
>
> MCKENZIE: "And if you're looking to be a lawyer who lets the law take a back seat to her personal sense of morality, maybe I have to accept it."
>
> KELSEY: "Leland, we could argue this all night, and the truth is, in the abstract I agree with you, but this wasn't the abstract. This was real people who were going to die. I don't know what was right, and I don't know what was wrong. All I know is I couldn't do it. Could you have done it, Leland?"[40]

McKenzie is silenced. He looks at her helplessly, tears her resignation letter in two, and walks out.

Kelsey's characterization of the situation is debatable. Perhaps in the most plausible real-world analogue, she would not have violated any rules by threatening disclosure. In most jurisdictions, if the client's actions were criminal and posed a risk of "imminent" bodily harm, disclosure would be warranted.[41] It is possible that the company's practices either of producing the contaminated water with knowledge of its toxicity or of concealing its research might be deemed criminal even if the contami-

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40. L.A. Law: Brackman Vasectomized, supra note 37.

41. See Model Rules of Prof'l Conduct R. 1.6(b)(1) (1999). As observed above, California has no clear authority on the matter. See Zacharias, supra note 35, at 404–05.

nants were within regulatory standards.[42] Moreover, unmentioned in the script, the client clearly committed both discovery abuse and perjury under circumstances that arguably *require* counsel to make disclosures to the court necessary to rectify matters.[43]

But this line of argument is pedantic. The show clearly wants us to believe that Kelsey violated the rules, and most members of the audience surely take that on stipulation. The point is that violating the rules is sometimes the right thing to do. Following the rules would have meant deference to an abstract (categorical) principle at the cost of concrete injustice.

McKenzie has two responses. The first is an appeal to social order: If everyone behaved like Kelsey, there would be anarchy. A response on the merits to this argument would be that Kelsey strengthened social order by stopping the client's dangerous conduct. If everyone felt free to dump deadly chemicals in the water supply, there would be anarchy. But the show deems it unnecessary to make any response to the "anarchy" argument: The argument is treated less as a serious position than as a symptom of McKenzie's fatuity. His argument postulates deference to constituted authority as a necessary response to the terrors of anarchy. However, it is a bedrock premise of entertainment of this sort that constituted authority is corrupt, inept, or both. Categorical deference to constituted authority is an expression of cowardice or, as in McKenzie's case, cluelessness.

McKenzie's second argument for categorical fidelity to his narrow conception of law is an appeal to role: Kelsey, as a lawyer, is obliged categorically to respect the law. In appealing to "conscience" and conceding McKenzie's characterization of her actions as based on her "personal sense of morality," Kelsey's response is jurisprudentially unsophisticated. She could have defended her actions as vindicating the substantive legal norms against the company's dangerous conduct, as violating one set of rules in order to vindicate a more important set. But her point is still powerful: If the moral scope of the lawyer role were as limited as McKenzie suggests, it would be intolerably constricting and degrading. No one of ambitious personal aspiration, and certainly no one needing to "have it all," would find the role worth taking.

Notwithstanding the rhetoric of personal morality, the show clearly portrays Kelsey as making, not just the best choice for her, but the best choice for a lawyer. It views her as a better lawyer than Leland McKenzie, and the latter comes close to conceding this as he retreats in silence. But by insisting on her action as a violation of the rules of confidentiality

42. Under the Clean Water Act, it is a crime to discharge "pollutants" into water sources except in accordance with a permit process entailing elaborate disclosure and reporting. 33 U.S.C. §§ 1311, 1314–1316, 1318, 1319(c) (1994).

43. See Model Rules of Prof'l Conduct R. 3.3 cmt. (1999); see also, e.g., Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1084 (1993) (ordering attorney sanctions for withholding a "smoking gun" document in discovery).

rather than a vindication of those against polluting water, it makes her action appear transgressive. We are expected to admire it all the more for this quality. She has not just respected the lawyer role, she has improved it through daring and initiative.

IV. ROLE BURSTING AT THE SEAMS IN *THE PRACTICE*

The setting of *The Practice* is less glamorous than *L.A. Law*—Boston instead of Los Angeles, criminal defense and personal injury cases instead of general civil litigation and business deals. Like the *L.A. Law* lawyers, but unlike Grisham's, these lawyers persevere in their commitment to lawyering careers, but their success is uneven.[44]

Tbeir world is scarier than that of *L.A. Law*. Scary in part because of recurring physical danger from clients and their associates and threats of ruinous sanctions from prosecutors, judges, and other state officials. Danger arises, not from a single, unified conspiracy of the sort Grisham portrays, but from more diffuse and idiosyncratic sources. In addition, the world is scary because of pervasive moral and psychological uncertainty aggravated by constant fissuring of role boundaries.

The aspirations of the *Practice* lawyers are more personal and romantic than those of the *L.A. Law* lawyers. Bobby Donnell and his colleagues have more than a genealogical kinship with the lawyers of *Ally McBeal*, the other series created by David Kelley, the producer and chief writer of *The Practice*. The *Ally McBeal* lawyers are preoccupied by Sisyphian quests for love and personal connection. The show treats their law practice as a vague background for their romantic strivings and entanglements.

The lawyers of *The Practice* share these personal goals and dispositions, but they take law more seriously. They want the satisfactions of skillful performance of an established social role and of the belief that their work contributes to the social good. But they endlessly confront technical and moral challenges to these goals. Wherever they turn, they find reasons to doubt that their clients are innocent or otherwise virtuous, or that their success in suppressing evidence or demonstrating reasonable doubt contributes to justice even in some indirect, long-run sense.

A distinctive feature of the moral world of *The Practice* is the way personal and professional realms engulf each other. The lawyers seem compelled to seek their personal needs in their work relationships, and the dangers and uncertainties of their work reach back to disrupt their personal lives.

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44. *The Practice* has been broadcast on ABC television since 1998. Its creator and chief writer-producer is David E. Kelley. Kelley was formerly a writer on *L.A. Law*, although as I suggest in the text, the moral tone of that of *The Practice* (and of Kelley's other, contemporaneous, show, *Ally McBeal*) is different from *L.A. Law*. See Caryn James, A Young Lawyer and Her Fantasies, N.Y. Times, Sept. 8, 1997, at C18 (discussing *Ally McBeal*).

We see this most visibly in friendship and dating relations. Throughout the series, at least one member of this firm of defense lawyers has been living with or dating one of the prosecutors who most frequently oppose them in court. Bobby Donnell used to date her; then Lindsay Dole roomed with her; then Ellenor Frutt replaced Lindsay. Lindsay moves out to live with Bobby, her law partner, and subsequently becomes engaged to him. The prosecutor is now being courted by a colleague in her office. Ellenor dates a client she has defended on a murder charge. Jimmy Berluti dates a judge before whom he often appears; he is tempted to end this relation when he encounters an old girlfriend who is now a client of the office. One of the firm's clients is sleeping with the police officer who is the chief prosecution witness against him. A majority of the firm's clients are personal friends of one or more of the lawyers.

This breaching of boundaries leads to both personal and professional chaos. It turns out that Ellenor's client really is a murderer: He almost kills Lindsay in the office. On a later date with Ellenor, he attacks her and is shot by her prosecutor roommate. At a rendezvous with his judicial lover in her office, Jimmy finds a document on her desk that leads him to suspect, wrongly, that she is responsible for a crime for which a client has been charged. He confides his suspicions to the police, who arrest the judge. After she exonerates herself, she comes to Jimmy's apartment to forgive him, is mistaken for an assailant, and again is confronted with the police.

Not surprisingly, confidences prove difficult to maintain in this environment. When he is dating Helen Gamble, the prosecutor, Bobby is in her apartment one evening and overhears her conversing with a colleague about a client of his. He relays the information to the client, with disastrous consequences. Later, when Helen is rooming with Lindsay, Bobby leaves a message for Lindsay on the answering machine, which Helen overhears, again with momentous consequences.

On *The Practice*, the demands of moral self-assertion often burst the constraints of conventional role norms. This occurs in two recent scenes involving suppression motions that seem likely, if granted, to free guilty defendants. In one, the judge acknowledges from the bench that the motion is valid but then denies it, saying that she refuses to be responsible for the consequences that would ensue. Let the appeals court do the dirty work, she says. In another, Bobby argues the grounds of the motion and then, visibly out of control, denounces his client in open court as a morally disgusting person.

Bobby has a reputation as a hot-head, and frequently defies judges in court. But the issue with him seems less a matter of emotional self-control than a refusal to surrender his values to the demands of role. His outbursts and role transgressions always seems to arise from plausible moral judgments, and they sometimes exhibit that combination of moral and tactical acuity I call Moral Pluck.

Consider a scenario involving infanticide.[45] Bobby is called to the home of a friend on what appears to be a life-and-death matter. He asks his partner Eugene Young to accompany him. Eugene is a foil for Bobby. Although privately tormented, he is in public the most polished and self-assured of the lawyers, and the one with the most conventionally professional orientation. Bobby wants him to serve as a check on his own impulsiveness.

The friend/client lives in an upper middle-class suburban home with his wife and teenage daughter. He has just discovered that his daughter, whom he had no idea was pregnant, gave birth during the night in her bedroom, and that the newborn son has died. Initially, it appears that the baby was smothered accidentally when the daughter tried to hide it under some towels. Then, it emerges that the wife deliberately smothered the baby when she discovered the situation.

Two issues of professional responsibility are developed in exchanges between Bobby and Eugene. Eugene immediately frames the first issue as legal ethics doctrine prescribes—as a question of how to stay on the right side of the line that separates legal advice from assisting client illegality.[46] The lawyer can and should tell the client what the law requires or prohibits, and what penalties it prescribes for violations of its commands. But the lawyer risks liability if he discusses more informal contingencies in a way that encourages the clients to compound their illegal conduct. The father wants to know whether he should call the authorities, what he should say to them, and what he should do with the body. His main interest is not what the law requires, but what course of action will be best for his family. Bobby wants to talk about this openly, but Eugene cautions him to restrict himself narrowly to legal advice.

When it appears that the wife may be responsible, Eugene raises the other issue—the conflict-of-interest. The wife and their daughter have potentially conflicting interests. Either of them facing indictment or conviction might find it in her interest to implicate the other. If the evidence implicates one more strongly, the other has less to lose and more to gain individually from calling the police. In these circumstances, the rules forbid representation of both parties unless the lawyer can determine that joint representation will not adversely affect anyone's interest. Of course, in the circumstances, one cannot determine anything reliably. Eugene argues—correctly under the rules—that the default option should be separate representation for wife and daughter.[47]

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45. See The Practice: A Day in the Life (ABC television broadcast, Jan. 10, 1999).

46. See Stephen L. Pepper, Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering, 104 Yale L.J. 1545, 1587–88 (1995).

47. See Model Rules of Prof'l Conduct R. 1.7(a)(1) (1999) (providing that joint representation can be undertaken only when the lawyer "reasonably believes" that neither client's interests "will be adversely affected"). No such determination is necessary for separate representation, making it the default option when a lawyer is uncertain. The presumption of separate representation is even stronger in the Model Code. Under DR 5-

Bobby will have none of this. He will not look at the family as separate individuals with conflicting interests. He will not try to slice out the narrow, safely legal dimension of the situation and restrict himself to it. He insists on taking on the whole situation. He wants to deal with the clients as a family, and he wants to help them all. The husband is inclined to try to bury the baby in the hope of concealing his death, and Bobby is willing to risk liability by discussing this as a serious option. But he is also shaken with horror at the death of the baby and angry at the callousness of his two adult clients.

Ultimately, Bobby decides that the baby must have a religious burial. He will not permit the family to bury him in secret. They must leave it at a church, where someone will take care of him. He names a particular church, a Catholic one, with which he has an association; we're never told what, if any religious association, the family might have. Bobby tells his friend to leave the baby at the back door of the church at a designated time. He will make sure that it is promptly recovered without the friend being observed. If they fail to do this, he tells them emphatically, he will report them to the police. In the last scene, we see the friend outside the church following Bobby's instructions, as Bobby looks on from his car.

It would be difficult to think of a response to the situation that would more flout established professional responsibility norms than Bobby's. He violates his duties to both the public, by actively assisting in the concealment of a birth and a homicide, and the clients, by ignoring their conflicting interests and by coercing them through the threat of an improper breach of confidence.[48] Yet we are supposed to sympathize and even admire him for it, and most of us probably do.

This is easiest with respect to his disregard of conflict-of-interest norms. These norms do not fit family situations comfortably. They require that the lawyer treat family members as potentially hostile individuals rather than as an affective community. In one sense, this scenario illustrates the concerns on which the rules are based. The wife has given some indication of willingness to let her daughter take the blame for a

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105, joint representation can proceed only where it is "obvious" that there will be no adverse impact. See Model Code of Prof'l Responsibility DR 5-105 (1986).

48. By burying the body in secret, the clients would probably be committing a crime. See Mass. Gen. Laws ch. 272, § 22 (1992) (stating that it is a crime for a parent to conceal the death of a child born out of wedlock); Mass. Gen. Laws ch. 274, § 4 (1992) (describing a crime of giving aid to a felon "with intent that he shall avoid or escape . . . punishment"); see also Mass. Gen. Laws ch. 46, §§ 6, 8 (1992) (defining as a civil wrong when a "parent" or "householder" fails to report birth or death). However, in most states, including Massachusetts, disclosure would still be prohibited. Model Rule 1.6 permits disclosure only to prevent (future) harm imminently threatening death or substantial bodily injury. See Model Rules of Prof'l Conduct R. 1.6 (1999). Massachusetts and other states have broadened the rule to include other harms, but all involve future injury to sentient individuals. Stephen Gillers & Roy D. Simon, Regulation of Lawyers: Statutes and Standards 2001, at 71–75 (2001). Only in the few states that retain DR 4-101 of the Model Code of Professional Responsibility is disclosure permitted to prevent criminal acts of any kind.

murder she appears to have committed. Yet, even in this relatively compelling situation, we sense that Bobby is right to resist Eugene's, and the profession's, perspective.

The basic problem is this: Where individual interests potentially conflict, the Bar portrays separate representation as a device for maximizing informed choice on the part of clients. In fact, however, separate representation does not simply protect interests, it constitutes them. The choice between joint and separate representation influences people's sense of their interests, and it may affect the range of options open to them. Separate counsel is more likely to lead the daughter to take a view of her interests that precludes collaboration with her parents. And once additional outsiders become involved in the situation, the practical possibility of concealing the tragedy will diminish.

So Bobby ignores his duty under the rules to insist on separate representation. He fails even to warn them about the dangers of joint consultation. He still sees them as a family, despite what has happened. Their common interests dominate their separate ones, and he refuses to impede their ability to act together.

He does, however, force them to deliver the baby's corpse to the church. Some people will find this more difficult to justify than the other transgressive interventions we have considered. In the other cases, the actors disregarded the priority afforded to the relevant competing values by Conformist Moralism, but the values to which they appealed were clearly *public* values. Here Bobby seems to be influenced fundamentally by his private religious commitments. To the extent that he uses his power to vindicate his private beliefs, he seems more vulnerable to the charge of illegitimate coercion than the actors in the other scenarios. Yet his actions may seem morally appealing even to those who do not share his religious beliefs. Bobby feels he should not report the crime. This sentiment seems based on a personal and professional confidentiality commitment. Perhaps it is also based on a sense of the futility and crudeness of criminal punishment in cases like this one. The wrongdoer is not dangerous; there is little likelihood of recidivism. Her punishment might serve the purpose of deterring future crimes by others, but deterrent effects are highly speculative. The one undeniable potential role for the criminal process would be public affirmation of the value of the life of the infant and condemnation of the murder. But the criminal process is riven with demagogic posturing and bureaucratic rigidity that compromises its ability to perform such functions. The cynicism of lawyers and the media and the inflexible harshness of the rules make it a poor vehicle for moral expression.

So the Catholic burial may seem an appealing substitute. It affords ceremonial affirmation of the value of life in a context that is less public but also less profane than the criminal trial. I imagine many nonreligious people might agree. At times of great tragedy, such people sometimes wish they were religious. Even people who do not identify with the ritual

as a whole may appreciate its insistence on the infinite worth of every individual and the sense of loss from this death. The point is not that Bobby imposes his private religious convictions; rather, it is that the church ceremony seems to be the best available way to serve a public need at a time when the official processes seem inadequate and when confidentiality values weigh against invoking them. Bobby draws on the Catholic ceremony in order to reconcile these competing values. Viewed in this way, his actions exemplify the transgressive resourcefulness of Moral Pluck.

V. Lessons from Popular Culture

This material from popular culture has two potential contributions to ethics: first as a source of evidence about popular moral thinking, and second as a substantive contribution to ethical understanding.

Collectively, these works have achieved an enormous audience in a highly competitive cultural marketplace. Of course, large as it is, this audience embraces only a minority of society. Yet, few self-consciously ethical pronouncements have had greater currency. And while enjoying these works is not tantamount to embracing their moral premises, the works seem to depend strongly on the imaginative identification of the audience with their heroes. Such identification seems to imply at least openness to the moral assumptions on wbich their portrayal as attractive people depends. The most one could claim from this material is that it suggests that Moral Pluck is *one* form of popular morality. Doubtless there are others, including the Conformist perspective.[49] And perhaps it is better to describe the success of these works as based on openness to, rather than adherence to, their common moral perspective. It may be that the underlying attitude is more ambivalence toward, rather than rejection of, Conformist Moralism.

Even this modest claim would support an important objection to the factual premises of the Conformist perspective. For Conformist Moralism sometimes justifies its categorical and authoritarian disposition by characterizing popular moral understanding as uniformly categorical and authoritarian. In this view, it is because ordinary people think in categorical and authoritarian terms that public ethical pronouncements need to be expressed in such terms.

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49. A classic survey study found a moral perspective resembling the Conformist one associated with the "working" class and a perspective resembling Moral Pluck associated with the "middle" class. Melvin L. Kohn, Class and Conformity: A Study in Values 165–88 (2d ed. 1977). It is possible that recent popular portrayals of lawyers reflect the views of the same middle class constituency Kohn studied. However, it also seems possible that the moral vision implied in these popular works appeals to many who would not have explicitly supported it in response to survey questions. The works discussed here might appeal to people who describe themselves as conformist because the works express repressed longings about which the subjects are not fully aware or articulate.

For example, the Model Code of Professional Responsibility defends its categorical injunction of obedience to positive law by saying: "Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession."[50] This implies both that elite conduct has a disproportionate influence on popular belief and that ordinary people perceive that conduct through categorical moral grids. Lawyers might be able to perceive the difference between indefensible and defensible ("minor") violations, but the lay public cannot.[51]

These premises also fueled some of the most impassioned rhetoric of the Congressional impeachment proponents. They repeatedly asserted that the effect of the President's example was not simply to legitimate or encourage perjury about consensual sex or immaterial sex, but rather to legitimate perjury in general, with the consequence that the "rule of law" was jeopardized.[52] When these proponents noticed that most people were not buying their condemnation of the President, they were inclined to speculate that the public was becoming dangerously indifferent to moral issues. They saw public disagreement as arising from a moral "relativism."[53] Richard Posner interprets public sympathy for the President as arising from a "popular morality" preoccupied with nonmoral personal attractiveness. The public, he suggests, cynically winks at the moral failings of people they find attractive.[54]

But the works considered here suggest a different hypothesis. The moral orientation of these works is neither cynical nor indifferent to principle. It just does not share the categorical, authoritarian premises of elite moralism. If these works are any guide, the public is less susceptible to elite influence than the elites like to think. It is less troubled by defiance of authority because it has much lower expectations of authority.[55]

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50. Model Code of Prof'l Responsibility EC 1-5 (1986).

51. Or, to take another example, the bar's conventional argument against recognizing exceptions to its categorical duty of confidentiality in extreme cases, such as where disclosure is needed to remedy client fraud, is that sucb exceptions would indiscriminately undermine client willingness to confide in their lawyers. E.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 341 (1975). Again, the premise is that distinctions that are apparent to lawyers, here between confidences that should and should not be protected, would be incomprehensible to lay people.

52. See supra note 7.

53. See, e.g., 145 Cong. Rec. S1466 (daily ed. Feb. 12, 1999) (statement of Sen. Hutchison) (suggesting that the tendency to excuse President's lying or law-breaking arises from "moral relativism"); 144 Cong. Rec. H11862 (daily ed. Dec. 18, 1998) (statement of Rep. Oxley) ("We have seen a lot of bright lines blurred in our society in recent years. Moral relativism abounds.").

54. Richard A. Posner, An Affair of State: The Investigation, Impeachment, and Trial of President Clinton 92–93 (1999). Posner says that "popular justice," which he defines as the "ideas of justice that are held by the average person untrained in law," tends "to degenerate into popularity contests." Id. at 42.

55. Of course, I have described only one strand of popular culture. If you turn from favorable portrayals of lawyering to favorable portrayals of the police, you see a different attitude toward government authority. Even here, however, the attitude is mixed. The

And it tends not to see ethical norms and issues categorically. It is more willing to see formally enacted norms as qualified by more informal norms and more inclined to see all norms as presumptions that can be rebutted in situations where competing values of greater weight are at stake.

In this light, popular indifference to the President's perjury may simply reflect a tendency to interpret it more contextually—as illegal lies to preserve the privacy of consensual sex, rather than illegal lies period. Public opinion may be more sensitive to the competing value of privacy, notwithstanding its weaker formalization than the perjury norm. Recall that the last time the public disappointed the conservative moralists—in the defeat of Robert Bork's nomination to the Supreme Court—privacy values seemed part of the explanation.[56] And popular attitudes may also be more sensitive to the arguable abuse of discretion on the part of Judge Wright in allowing coercive inquiry into consensual sex without adequate justification; on the part of Kenneth Starr for his reckless, costly, and prurient pursuit of the matter; and of the House leadership for its instant worldwide publication of Starr's report in all its pornographic detail.

These entertainments usefully remind us that there is a moral orientation with broad popular appeal that is neither categorical and authoritarian on the one hand, nor relativistic on the other. They raise doubts about the view that has influenced both the Bar and the Congressional leadership that moral precepts framed in categorical and authoritarian terms are most likely to be compatible with ordinary moral thinking. For the appeal of these works seems to depend on a capacity for contextual judgment and a principled skepticism toward authority.

The second potential contribution of these works is substantive. They offer an ethical perspective that competes with Conformist Moralism as a source of moral guidance. The tone of this perspective is Emersonian. It is an ethic of self-assertion that encourages us to think of morality as an occasion for creativity. By contrast, the tone of Conformist Moralism is Puritanical and Kantian. It is an ethic of self-restraint that emphasizes the need to curb our more aggressive and destructive impulses through deference to external authority. Moral Pluck insists that ethics is not simply a matter of duties to society, but rather of character and personal integrity. While philosophers have argued for this perspec-

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virtuous police officer often has to work against her superiors and the larger governmental structure, which are rarely as virtuous as she, and this often requires her to violate promulgated norms in order to vindicate more fundamental, but less formal, ones. The TV series *Law & Order*, and the *Dirty Harry* and *Lethal Weapon* movies exemplify this perspective.

56. See Michael Pertschuk & Wendy Schaetzel, The People Rising: The Campaign Against the Bork Nomination 132–33 (1989) (pointing out that focus groups suggested some popular opposition to nomination was based on Bork's hostility to privacy rights).

tive abstractly,[57] popular culture teaches it by urging us to identify imaginatively with an attractive figure and then confronting us with the damage to the character's commitments and self-conception that deference to authority sometimes would require.

At the same time, these works insist that we take account of situations in which norms of authority are in tension with substantive justice. They remind us incessantly of the widespread ineptitude and corruption of official institutions. At one extreme—in the darker Grisham novels—these institutions are integral parts of a vast criminal conspiracy. At a more mundane level, the problem is simply limited information. Kelsey says to the water company executive, "If the EPA had this information, they'd shut you down in a second."[58] The problem is that the EPA does not have the information. The works also remind us of the limitations of categorical norms that arise from their unresponsiveness to vital dimensions of some morally urgent situations. The confidentiality norm is the most prominent example. Many of these works try to demonstrate that the Bar's established norms are potentially incompatible with morally plausible responses to situations with high stakes. These are important lessons, and Conformist Moralism is deficient for ignoring them. Its view of the good lawyer is unattractive in its passivity and complacency.

Nevertheless, the type of popular works we are considering have undeniable limitations as a form of ethical reflection. One familiar complaint is that popular culture oversimplifies. Instead of promoting reflection, it gratifies unconscious desires for self-assertion by abstracting away the most important moral and strategic difficulties of real world ethical dilemmas. Some of us get visceral satisfaction watching Clint Eastwood or Sylvester Stallone blow away bad guys unconstrained by due process or physical limitations, but on reflection we do not regard their characters as role models. These fantasies grossly understate the dangers of transgressive self-assertion and underestimate the importance of institutional authority.

The works considered here are more self-conscious and thoughtful about ethics than the typical Hollywood "action" movie. Still, it has to be conceded that, as ethical discourse, they are unambitious. To begin with, the dilemmas they portray tend to take a Manichean form with implausible frequency. The works mislead by suggesting that, in the situations where lawyers perceive a tension between the dictates of established authority and their conceptions of substantive justice, defiance of authority would usually meet with the approval of most ordinary people (at least if they knew the facts). In fact, popular moral values are strongly divided across a broad range of situations. There are many situations in which many people would find unattractive the substantive values lawyers would

57. See Alasdair MacIntyre, After Virtue 204–25 (2d ed., Univ. of Notre Dame Press 1984) (1981); Bernard Williams, A Critique of Utilitarianism, *in* Utilitarianism: For and Against 77, 108–18 (1973).

58. L.A. Law: Brackman Vasectomized, supra note 37.

assert in good faith defiance of constituted authority: Racists and fascists are rarely portrayed in the movies or on television as self-consciously principled, but no doubt some of them are. Moreover, if passivity and unreflective deference are unattractive, moralistic self-assertion can be so too. Lionel Trilling's complaint—that the "liberal imagination" tends to ignore that "the moral passions are even more willful and imperious and impatient than the self-seeking passions"—is pertinent to the works discussed here.[59]

The attitude expressed in these works toward institutions is also fanciful. The problem is not that they exaggerate the ineptitude and corruption of official institutions, though they probably do. More importantly, they portray Moral Pluck exclusively as an individual matter. The protagonists accomplish their heroic feats by themselves, or with the informal help of a few close friends. And their own transgressive initiatives leave no institutional traces. They do not contribute to new, more satisfactory institutions or alter the basic contours of established ones.

Kelsey emphasizes her solitude by resigning from the firm after confronting the CEO. She does not even attempt to persuade McKenzie that she did the right thing, much less try to enlist the firm in her effort; she simply offers to leave. In Grisham's novels, the hero's achievements rarely become public. The downfall of the villain is presented to the public as the work of established institutions, and the official ineptitude or corruption that required the hero's Moral Pluck is covered up.[60] This trope reinforces the crude populist premise that we are surrounded by corrupt powers that determine our fate, but that we cannot see or influence. The hero redeems himself morally, helps some people, perhaps even averts a catastrophe, but he never changes the system. Thus, a deep pessimism about the larger society co-exists with a romantic view of individual initiative.

This hostility to institutions is a further objection to Moral Pluck as an ethical ideal. For one thing, Moral Pluck seems implausible as a practical matter. As the solitary exploits of Clint Eastwood and Sylvester Stallone seem physically implausible, those of the prodigies of Moral Pluck seem to depend on unlikely assumptions about the capacity of even extraordinary individuals to manipulate people and institutions. On reflection these exploits do not inspire emulation: We plausibly doubt our ability to accomplish them by ourselves.

Moreover, the life of these heroes seems unattractively lonely. The *L.A. Law* lawyers are exceptions; everything nearly always works out for them, and as we have noted, friendship and solidarity do not seem important to them. However, despite their amazing successes, Grisham heroes rarely achieve satisfying careers, especially as lawyers. They have a ten-

59. Lionel Trilling, Manners, Morals, and the Novel, *in* The Liberal Imagination 205, 221 (1976).

60. See Grisham, The Brethren, supra note 18, at 341–66; Grisham, The Firm, supra note 18, at 420.

dency to leave the profession. The heroes of *The Firm* and *The Partner* drop out of society entirely for lives of luxurious seclusion.[61] Rudy Baylor of *The Rainmaker* gives up law to become a high school teacher.[62] The lawyers of *The Practice* are luckier in this respect. There is more solidarity among the lawyers of the Donnell firm than there is in McKenzie Brackman or any Grisham firm. But solidarity does not seem to extend beyond the firm. The firm is under constant siege from frightening outside forces—prosecutors, judges, and even their own clients.

Nevertheless, there are moments, especially on *The Practice*, when these works achieve a more complex perspective that acknowledges the difficulties and dangers of Moral Pluck and provides a more cautious and subtle defense of it. Consider a recent episode involving Jimmy Berluti.[63] Jimmy occupies the opposite pole of the spectrum of moral orientations from Eugene Young. He is the least polished and most ingenuous of the lawyers. He is often visibly uncomfortable in role and sometimes recklessly inclined to assert his personal commitments at the expense of professional decorum.

In this episode, Jimmy's client, a murder defendant, insists on taking a fall to protect his son, who actually committed the crime. After he is convicted and Jimmy discovers the truth, the client refuses to permit Jimmy to confront the son. Jimmy decides to do so anyway despite Eugene's impassioned protest that doing so would be an egregious breach of confidentiality. Jimmy remains resolute, and, in another argument with Eugene after confronting the son, says, "If I violated some precious lawyer rule, tough!"[64]

But the confrontation with the son ultimately proves disastrous—the son commits suicide. Jimmy is devastated. He has caused a death and (apparently) eliminated the last possibility of vindicating his client. In a final scene, his friend Judge Roberta Kittleson tries to console him. She speaks of the futility of hindsight second-guessing, and then they have this exchange:

> ROBERTA: "I've put killers back out on the street only to have them kill again. You can only be true to yourself, and trust that."
>
> JIMMY: "No. You can only be true to the rules. You put killers back on the street because the rules of law told you to. The rules here, they said, 'Honor privilege.' 1 broke the rules, and now a kid is dead, and my client . . . I don't have any system to cling to."
>
> ROBERTA: "You saw a terrible situation. You tried to improve it. Cling to that."[65]

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61. See Grisham, The Firm, supra note 18, at 417–19; Grisham, The Partner, supra note 18, at 353–66.

62. Grisham, The Rainmaker, supra note 18, at 598.

63. See The Practice: Boston Confidential (ABC television broadcast, Oct. 3, 1999).

64. Id.

65. Id.

This scene is in striking contrast to the "in your dreams" conclusion of Anne Kelsey's confrontation with Leland McKenzie over her betrayal of the polluting water company. While McKenzie's appeal to "the rules" in that scene seemed fatuous, the "rules" are accorded great deference here. Yet, even in this disastrous denouement, Jimmy remains sympathetic and even admirable. Roberta excuses him and expresses respect for him. In the preceding scene, so does Eugene. Jimmy's self-condemnation does not seem meant to be entirely convincing. He seems to have been reckless in appraising the risks to the son, but his good intentions and willingness to take risks are still attractive.

There seem to be two lessons here. One is that Moral Pluck can work out badly. Another is that its value does not depend entirely on things working out well. Moral Pluck is partly a matter of personal integrity. Even when the consequences are so bad that, in hindsight, the decision seems wrong, the actor's fidelity to substantive justice is mitigating and, in a qualified way, admirable. Although we would not want Jimmy to make the same decision in similar circumstances in the future, we would not want him to abandon his general willingness to take moral risks either.[66]

While the works we have examined are rightly faulted for ethical simplification, this episode suggests that the genre has a potential for more complex portrayals that it has only rarely explored so far.[67]

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66. And he does not. In a later episode, Jimmy succeeds in freeing his wrongly convicted client through a transgression so outrageous it upsets even Bobby. He strikes a deal with a sleazy D.A. to plead another client to a charge of which he probably could not be convicted (but of which he is plainly guilty) in return for the D.A.'s acquiescence in Jimmy's motion to re-open the first client's case. The Practice: Race Ipsa Loquitor (ABC television broadcast, Feb. 20, 2000).

67. This episode makes salient the differences between the types of cases that Bernard Williams focused on in his essay "Moral Luck," supra note 4, and those with which I am concerned here. Williams draws attention to a particular category of cases in which the moral validity of a decision depends on the success of the project it involves. His premise is not consequentialist. He is concerned with decisions that are grounded substantially in character. But the decisions involve projects that promise personal growth on the part of the decisionmaker. When the projects fail, and the growth does not occur, it is difficult for the decisionmaker, looking back, to see the decision as right, even ex ante. His examples are Gauguin abandoning his family to become a painter in the South Seas and Anna Karenina abandoning her family to live with Count Vronsky. The first is a successful, and therefore right, decision, not just because Gauguin produces great paintings, but because he becomes a stronger, more independent person in the course of his success. Anna's decision is wrong in part because she does not change. She remains dependent on her son's love, and thus cannot achieve the happiness with Vronsky that might have justified her decision to leave.

Jimmy's bad luck has a more limited moral significance. His intentions do not embrace any project of personal development; he is seeking to vindicate an enduring commitment to substantive justice. The bad outcome leads him to regret this particular decision and probably to condemn it as reckless, but, ultimately, it does not lead him to regard his general strategy as a moral risk-taker, as a practitioner of Moral Pluck, as a failure. The episode is a reminder of the costs and dangers of the strategy, but it does not show that it is not the right course for Jimmy in the long run.

CONCLUSION

Moral Pluck—a combination of transgression and resourcefulness in the service of virtue—is a pervasive theme in some of the most prominent favorable portrayals of lawyering in recent popular culture. As ethical discourse, these works suffer from a preoccupation with extreme situations, a tendency to oversimplify the dangers and difficulties of independent ethical decisionmaking, and an unreflective suspicion of institutions. Nevertheless, as social data, the works are useful in indicating how different popular moral understanding may be from established professional norms. And in their insistence on the limitations of categorical norms and constituted authority, they are a valid corrective to biases of professional responsibility doctrine.