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## Moral Pluck: Legal Ethics in Popular Culture

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# STANFORD LAW SCHOOL

**Moral Pluck:  
Legal Ethics in Popular Culture**

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MORAL PLUCK:  
Legal Ethics in Popular Culture  
William H. Simon\*

*Favorable portrayals of lawyers in popular culture tend to adopt a distinctive ethical perspective. This perspective departs radically from the premises of the elite moralism exemplified by the official ethics of the American bar and the arguments of the proponents of President Clinton's impeachment. While elite 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 this work has 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 work deserves to be taken seriously as ethical discourse, and in particular, that it holds up well in comparison to elite moralism.*

- I. The Conformist Tradition in Elite Moralism
- II. The Legal Populism of John Grisham
- III. The You-Can-Have-It All Glamour Fantasy of L.A. Law
- IV. Role Bursting at the Seams in The Practice
- V. Lessons from Popular Culture
- VI. Conclusion

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In a speech to a South 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.<sup>1</sup> Starr's zeal in pursuing 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 has yet 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. Then, in the novel's final pages, a fascinating development, invariably ignored by its lawyer admirers, occurs. Finch and Heck Tate, the sheriff, agree to lie to the town by saying that Ewell died accidentally by falling on his knife.<sup>2</sup>

There is no question that the killing was justifiable. But the sheriff convinces Finch that the local court system, which has just sent the patently innocent Tom Robinson to his death, has not proven itself so reliable that it can 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.

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 intend to leave us with any doubt that he has done the right thing.

The sheriff in this scene exhibits a quality that I call Moral

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<sup>1</sup> David Kendall, "To Distort a Mockingbird," New York Times, June 3, 1998, sec. A, p. 25, col. 2.

<sup>2</sup> Harper Lee, To Kill a Mockingbird 272-76 (Warner Books paperback ed. 1982) [1960].

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Pluck.<sup>3</sup> 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'm going to try support and elaborate this claim with some illustrations from the three most prominent fictional portrayals of lawyers in recent years – the novels of John Grisham and the TV series L.A. Law and The Practice.

This ethical portrayal contrasts sharply with the premises of more established doctrines, in particular, the official ethics of the American bar. This ethics, 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 a commitment to 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.<sup>4</sup>

A study of legal ethics in popular culture has two possible payoffs for legal ethics. First, some of the positions of elite moralism, including the Bar's norms, are based on factual premises about popular morality. The elites justify their precepts partly in terms of their assumed effects on ordinary people. The evidence to be examined here suggests that these assumptions are mistaken. At least in some moods, popular morality is disposed to a style of

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<sup>3</sup> My title phrase was inspired by the title essay in Bernard Williams, Moral Luck 20-39 (1981). However, the argument here is largely different from Williams'. See note below.

<sup>4</sup> E.g., William Bennett, The Death of Outrage (1998); Sissela Bok, Lying: Moral Choice in Public and Professional Life (1978), and the rhetoric of the House Impeachment Managers cited below in note 43. For criticism, see William H. Simon, Virtuous Lying: A Critique of Quasi-Categorical Moralism, 12 Georgetown Journal of Legal Ethics 433 (1999).

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moral judgment considerably different from the one the elites attribute to it. Second, the portrayal of Moral Pluck is a substantive challenge to elite doctrine. The challenge is made, not through an explicit argument, but through dramatic representations of a type of moral 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 moral doctrine. While popular culture is Utopian about the possibilities of individual initiative, established doctrine is Utopian about the reliability of official institutions. Despite its limitations, popular culture scores some important points against established doctrine.

I begin by recalling the categorical and authoritarian themes of elite 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.

### I. The Conformist Tradition in Elite Moralism

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.<sup>5</sup> 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 any kind of perjury be condemned as a threat to the “rule of law.”

Professional responsibility doctrine is categorical in its in its

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<sup>5</sup> Immanuel Kant, “On a Supposed Right to Lie from Altruistic Motives,” in Ethics 180-81 (Peter Singer ed. 1994).

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proclivity for rules insensitive to the contingencies of particular situations. Such rules tend to require “mechanical” judgment or literalistic application.<sup>6</sup> They not infrequently mandate that the decisionmaker take actions that she correctly sees as unjust or contrary to important public values. Notoriously, for example, the confidentiality rules mandate that the lawyer keep secrets even in some situations where disclosure might save an innocent life and the client’s interests are trivial.<sup>7</sup>

Ethics is authoritarian when it conflates moral authority with the explicit commands or enactments of government institutions. For the impeachment prosecutors, it was sufficient that the President violated a judge’s order and the terms of a Congressional 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. (And 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 claims that the President had stayed within the literal terms of the order or the statute.)

The authoritarian tendency appears in professional responsibility doctrine in the tendency to define law and legal authority in terms of the state. The Model Rules distinguish legal authority from “moral, economic, social, and political factors” that, though sometimes important, must take a back seat.<sup>8</sup> Lawyers are obliged to press for their clients’ interests subject only to the constraints of formally enacted commands. At the same time,

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<sup>6</sup> 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. Geoffrey Hazard, Legal Ethics: Legal Rules and Professional Aspirations, 30 Cleveland State Law Review 571, 574 (1982).

<sup>7</sup> See Symposium: Executing the Wrong Person: The Professional’s Ethical Dilemma, 29 Loyola of Los Angeles Law Review 1543 (1996).

<sup>8</sup> Model Code EC 7-8.

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lawyers are obliged to respect any norm that qualifies as law under the test of formal enactment, even where 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".<sup>9</sup> They insist that the only appropriate response to unjust law is to petition institutions with formal legislative authority to enact revisions.<sup>10</sup>

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 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."<sup>11</sup>

In informal legal ethics discussions, a variety of rhetorical tropes are routinely deployed to sanction complex or 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, you find frequent disapproval of discretionary norms linked to concerns about "accountability."<sup>12</sup> Although it is not always clear to whom

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<sup>9</sup> Model Code EC 1-5.

<sup>10</sup> Model Code EC 8-2.

<sup>11</sup> Jamie Heller, Letter to the Editor, New York Times, December 16, 1994, p A38 (describing advice of lecturers in New York bar review course).

<sup>12</sup> E.g., Stephen McG. Bundy and Einer Elhauge, Knowledge About Legal Sanctions, 92 Michigan Law Review 261, 265-66, 313-16 (1993); David Wilkins, Legal Realism for Lawyers, 103 Harvard Law Review 468,511-13

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accountability is sought, it usually appears that control by the state is what the authors have in mind.

The moral premises of popular fictional portrayals of lawyering are 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.<sup>13</sup> These works tend to summon up situations in which general norms are at war with more powerful particularistic intuitions. The authoritarianism of elite moralism implies a consistently benign and reliable state. But popular culture reminds us that the state is often incompetent or corrupt and urges us to focus on some of 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 the world as dominated by vast criminal conspiracies. The conspiracies are identified with the mob, political terrorist organizations, or large multinational corporations. These conspiracies are operations of staggering power, integration, and efficiency. Agents of the government often play willing parts in them, but more often, they are simply too selfish, arrogant, or stupid to check them.

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. In the most familiar populist story line - - as exemplified in many Frank Capra films -- resistance occurs through spontaneously organized collective action. But Grisham's

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(1990).

<sup>13</sup> See Martha Nussbaum, Poetic Justice: The Literary Imagination and Public Life 7, 32 (1998).

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plots are closer to another familiar trope -- the lone, isolated hero (for example, High Noon, Dirty Harry).

Most of Grisham's novels are bildungsromans 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 the 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 in substantial part, through creative, transgressive moral entrepreneurialism on the part of individuals in crisis.

These crises arise when the hero becomes unwittingly involved with some overwhelming menace. The menace usually arises from an organized conspiracy. In a couple of stories there is also an independent, subsidiary menace from a single individual -- a violent spouse or boyfriend who terrorizes a client or friend. The scale of this latter menace is much smaller, but psychologically, it is portrayed as similar to the larger one -- overwhelming and inescapable.

It is premise of thrillers of this genre that the hero would be foolish to respond to the menace 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 menace. For the most part, the government is neither willing nor able to provide this protection. Its agents have been bought off, or are pursuing selfish political agendas without regard to the interests of the people they're supposed to be protecting, or are reckless and stupid. Even where officials are more able and committed (and a few are), they are at a tremendous disadvantage vis-a-vis the menace. They have to play by the rules, and the mob and its analogues do not. The mob can shoot people in the back, torture, and bribe, and the government generally can't.

And of course, the government, unlike the mob, can

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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 can't act effectively in the absence of proof, and 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 personal injury victim.<sup>14</sup> Gray Grantham, a reporter in The Pelican Brief, spies to discover the identity of a telephone source after promising not to do so.<sup>15</sup> Sometimes the violations are major felonies: Baylor and Mitch Deere of The Firm both commit homicides. Deere'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.<sup>16</sup>

Grisham clearly intends us to accept these actions as morally justified. When he makes the bedside solicitation, Baylor is on the verge of destitution (having been screwed by a prestigious corporate firm that welched on an agreement to employ him) 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 some books, Grisham delivers his moral lesson explicitly

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<sup>14</sup> John Grisham, The Rainmaker 182-88 (1995) [paper].

<sup>15</sup> John Grisham, The Pelican Brief

<sup>16</sup> John Grisham, The Firm 412-13 (1991); The Rainmaker 568-84.

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in the form of dialog. For example, 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.” 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.<sup>17</sup>

Grantham does play 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.’

‘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.’”<sup>18</sup>

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<sup>17</sup> Pelican Brief 129.

<sup>18</sup> Id. at 230.

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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 of the source does no harm to him 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."<sup>19</sup>

In The Chamber, a young lawyer and a law professor organize a bunch of students to make repeatedly 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 trying to do to Sam?'

'Execute him.'

'... it'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.'<sup>20</sup>

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, but one that

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<sup>19</sup> 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. The Client 349-50 (1993).

<sup>20</sup> The Chamber 429 ( ).

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does no harm here and probably benefits the victim.<sup>21</sup>

“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.”

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.” Not only is solicitation the only way he can make a living, it’s in the interest of at least the clients they solicit. They plan to do a good job for their clients, and if they refrained from soliciting, someone else would get them who might be less loyal to them.<sup>22</sup>

### 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.<sup>23</sup> Grisham portrays elite law firms as dens of iniquity and treachery. The McKenzie Brackman firm of L.A. Law

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<sup>21</sup> ABA Model Rules 7.3(a).

<sup>22</sup> The Rainmaker 187-88. The Moral Pluck themes remain prominent in Grisham’s more recent novels. In The Street Lawyer (1998) the hero steals a client file from his law firm and breaches confidentiality norms in order to expose wrongful conduct that has caused the death of a homeless family. In The Testament (1999), the hero lies to the court the he has authority to represent the legatee of a large fortune, in order to prevent the estate from being devoured by a group of ne’er-do-well relatives and their bottom-feeding counsel. The Runaway Jury (1996) and The Partner (1997) are revenge fantasies in which the heroes pull off massive, flagrantly criminal (but nonviolent) scams against wrongdoers who have previously victimized them.

<sup>23</sup> L.A. Law was broadcast on NBC from 1986 to 1994. Its creator and chief producer was Stephen Bochco.

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is not exempt from these qualities, but it is, above all, glamorous. In many respects, the series resembles the wish- fulfillment fantasies of novelists like Judith Krantz. Subject to preliminary and episodic struggles, the heroes enjoy in abundance wealth, stylish consumption, good looks, sex, and above all, exciting work. (Family and friends, the summum bonum of an older popular genre represented by the films of Frank Capra, 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. They're mostly in court litigating issues like a hospital's right to terminate life supports, or a psychiatrist's duty to warn about a dangerous patient, or the grey areas of insider trading liability.<sup>24</sup> 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 means, not avoiding unsavory conduct and associations, but actively and ingeniously confronting difficult issues -- showing Moral Pluck.

The show's ethical commitments are incarnated in its central thirtysomething 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

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<sup>24</sup> See Stephen Gillers, Taking L.A. Law More Seriously, 98 Yale Law Journal 1607, 1607-12 (1989).

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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 established old-money, old-fart social structure he hangs with.

On the other hand, we have Douglas Brackman, McKenzie's shamelessly materialistic and rapacious colleague. Brackman doesn't appreciate the moral or glamour value of the cutting edge cases the litigators work on. 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 in 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've compromised their highest ideals for their more mundane ambitions, but they haven't denied or renounced 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 turns in a client to the police for violating parole by carrying a gun. 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 him. 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 has assaulted him with a gun) and sympathy for the rape victim. Kuzak proceeds to offer his sympathy to the rape victim, and the episode closes with

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them in a Platonic embrace.<sup>25</sup>

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.<sup>26</sup> Continuing to represent the client without telling him about the tip was certainly a violation.<sup>27</sup> The story is vague on this and on Kuzak's motivation. But it 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, Kelsey defends a water company in a tort suit on behalf of a child born deaf and blind.<sup>28</sup> Apparently, the defects were caused by contaminants in the well that supplied the water her mother drank during pregnancy. The client's CEO concedes 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

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<sup>25</sup> L.A. Law (NBC television broadcast, Oct. 3, 1986).

<sup>26</sup> Under ABA Model Code DR 4-101, a lawyer may disclose otherwise confidential information in order to prevent criminal activity by the client, and under ABA Model Rule 1.6, she may disclose in order to prevent client criminal activity "likely to result in imminent death or substantial bodily harm." 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 Zacharias, Privilege and Confidentiality in California, 28 U.C. Davis Law Review 367 (1995).

<sup>27</sup> See, for example, ABA Model Rule 1.4 on a lawyer's duty to communicate important information to the client.

<sup>28</sup> L.A. Law (NBC television broadcast, Nov. 5, 1987).

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Environmental Protection Agency tolerances and that it is a “scientific impossibility” that they could have injured the plaintiff. The plaintiff appears to have no evidence to the contrary. Then, on the verge of suffering dismissal, her lawyer receives from a whistleblower a “smoking gun” memo indicating 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 \$2 million. 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 has 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 the 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, and the client’s quick capitulation seems unwarranted both by his legal position and by his character. But 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’s interesting and perhaps novel to see this trope applied here (as in other episodes of the series) to an ethical dilemma.

This episode features two negative ethical role models. First, there’s the plaintiff’s lawyer. Until he gets the smoking gun, he is stridently self-righteous, not only in court but in private

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conferences with Kelsey. He attacks her personally for defending a wealthy corporation that is inflicting 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 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, and they seem 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's 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, my 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

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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?

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

We could take issue with Kelsey's characterization of the situation. Perhaps in the most plausible real-world analogue, she wouldn't have violated any rules in threatening disclosure. In most jurisdictions, if the client's actions were criminal and posed a risk of "imminent" bodily harm, disclosure would be warranted.<sup>29</sup> It's 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 contaminants were within regulatory standards.<sup>30</sup> Moreover, although the script ignores it, the client has clearly committed both discovery abuse and perjury under circumstances that arguably require counsel to make disclosures to the court necessary to rectify matters.<sup>31</sup>

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 violation of the rules is sometimes the right thing to do. Kelsey says she believes in the rules "in the abstract" but that this "wasn't the abstract. It was real people." The rules express a valid principle, but their formulation is insensitive to critical contingencies of her situation. McKenzie responds that the rules

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<sup>29</sup> ABA Model Rules 1.6(b)(1); ABA Model Code 4-101, but, as observed above, California has no clear authority on the matter. See Zacharias, cited in note 38.

<sup>30</sup> 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. See 33 U.S.C. 1311, 1318, 1319(c).

<sup>31</sup> Model Rules 3.3(a)(4); Washington State Physicians Insurance Exchange v. Fisons, 122 Wash. 2d 299, 858 P.2d 1054 (1993).

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are “law” and entitled to respect by virtue of that status. He suggests two reasons for this notion of obligation.

One 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 one. 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 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.

McKenzie’s second argument for categorical fidelity to his narrow conception of “law” is an appeal to social order: If everyone behaved like Kelsey, we’d have “anarchy.” A response on the merits to this argument would be that Kelsey enhanced social order by stopping the client’s dangerous conduct: If everyone felt free to dump deadly chemicals in the water supply, we’d have anarchy. But the show deems it unnecessary to make any response to the “anarchy” argument. McKenzie’s posture is a familiar trope in popular culture, and we immediately take it, not as a serious position, but as a signal of the speaker’s fatuity. The posture opposes to the terrors of anarchy deference to constituted authority, but it is a bedrock premise of entertainment of this sort that

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constituted authority is corrupt or inept or both. Categorical deference to constituted authority is an expression of cowardice or, as in McKenzie's case, cluelessness.

### III. Role Bursting at the Seams in The Practice

The setting of The Practice is less glamorous than L.A. Law – Boston instead of L.A.; 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 and find them generally satisfying, but their success is more uneven.<sup>32</sup>

This world is scarier than 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

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<sup>32</sup> The Practice has been broadcast on ABC 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 The Practice (and of Kelley's other, contemporaneous show, Ally McBeal) is quite different from L.A. Law.

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satisfactions of skillful performance of an established social role and belief that it 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.

The most 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.

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 used to date her; then Lindsay roomed with her; then Ellenor replaced her. 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 is dating a judge before whom he often appears; he is tempted to end this relation when he encounters an old girl friend who is now a client of the office. One of the firm's clients turns out to be 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; then on a date with Ellenor, he attacks her and is shot by her prosecutor roommate. At a tryst 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, and to have sex with him, and is mistaken for an assailant and

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again confronted with the police.

Not surprisingly, confidences prove difficult to maintain in this environment. When he's 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 disastrous consequences.

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 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 is the most extreme of the characters in this respect. He has a reputation as a hot-head, and he 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 seem to arise from plausible moral judgments, and they sometimes exhibit that combination moral and tactical acuity I've called Moral Pluck.

Consider a scenario involving infanticide.<sup>33</sup> 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. He is 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

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<sup>33</sup> "A Day in the Life" (ABC television broadcast, January 10, 1999).

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home with his wife and teenage daughter. He has just discovered the his daughter, whom he had no idea was pregnant, gave birth during the night in her bedroom, and the baby 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 mother 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 issue as legal ethics doctrine suggests it should be framed – as staying on the right side of the line that separates legal advice from assisting client illegality. The lawyer can and should tell the client what the law requires and 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, if anything, he should do with the body. His main interest is not what the law requires, but what course of action is likely to lead to the best result for his family. Bobby wants to talk about this openly, but Eugene cautions him to restrict himself to narrowly legal advice.

When it first appears that the mother may be responsible, Eugene raises the conflict-of-interest issue. The mother and 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 is confident that joint representation will not adversely affect anyone's interest.<sup>34</sup> Of course, in the circumstances, one can't be confident of anything. Eugene plausibly suggests that the default option should be separate representation for daughter and mother.

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<sup>34</sup> Model Rule 1.7.

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Bobby won't have any 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. The husband is inclined to try to bury the baby in the hope of concealing its 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 callousness of at least his two adult clients.

Ultimately, Bobby decides that the baby must have a religious burial. He will not permit the family to bury the baby in secret. They must leave it at a church, where it will be taken care of. 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 following Bobby's instructions outside the church, 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 murder, and the clients, by ignoring their conflicting interests and by coercing them through the threat of an improper breach of confidence.<sup>35</sup> Yet we are supposed to sympathize and even admire him for it, and most of us probably do.

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<sup>35</sup> By burying the body in secret, the clients would probably be committing a crime. However, in most states, including Massachusetts, disclosure would still be prohibited. Model Rule 1.6 permits disclosure only to prevent (future) harm threatening death or substantial bodily injury. Massachusetts and other states have broadened the rule to include other harms, but all involve future injury to specific, living individuals. Only in the few states that retain DR 4-101 of the Model Code of Professional Conduct is disclosure permitted to prevent criminal acts of any kind.

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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 norms are premised. The mother has given some indication of a willingness to let the daughter take the blame for a murder she appears to have committed. Yet, even in this relatively compelling situation, we sense that Bobby is right to resist the 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 the clients. In fact, however, separate representation doesn't 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 refuses to default to separate representation. He sees these people as still a family, despite what's 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 corpse to the church. Some people will find this move 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 elite 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

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illegitimate coercion than the actors in the other scenarios.<sup>36</sup>

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. The wrongdoer is not dangerous; there's 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 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 makes it a poor vehicle of 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. I imagine many nonreligious people might agree. (At times of great tragedy, such people sometimes wish they were religious.) Even if we don't identify with many of the themes of the ritual, we may identify with some and appreciate the effort to take them seriously in this context. The point is not that Bobby imposes his private religious convictions. The point 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 this way, his actions

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<sup>36</sup> It's possible that Bobby knows that the family is Catholic and believes that he is forcing them to respect their own convictions. However, the scenario is silent on this point. The coercion charge might be blunted if this were true, but it would not lose its force. In the perhaps dominant view, religious duties are voluntarily undertaken, and it is not the role of co-religionists to enforce them against each other.

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exemplify the 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, second as a substantive contribution to ethical understanding.

The two concerns are related because the normative pronouncements of elite moralism are partly based on empirical assumptions about popular moral thinking. Elite moralism sometimes explains its affinity for categorical and authoritarian injunction as necessary to popular moral understanding. 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.

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 tend to lessen public confidence in the legal profession.<sup>37</sup>

We can see the implications 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 they lay public could not.

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<sup>37</sup> EC 1-5.

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These premises drove some of the most impassioned rhetoric of the House Impeachment Managers. They repeatedly described the exemplary influence of the President's conduct as to legitimate or encourage, not perjury about consensual sex or immaterial sex, but perjury in general, with the consequence that the "rule of law" was placed in jeopardy.<sup>38</sup>

When the House Impeachment Managers noticed that the masses 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."<sup>39</sup> Richard Posner interprets the public sympathy for the President as arising from a "popular morality" preoccupied with nonmoral personal attractiveness. The public cynically winks at the moral failings of people they find attractive, he suggests.<sup>40</sup>

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<sup>38</sup> E.g., "Linking the People's Trust in the President to the World's Trust in America," New York Times, January 17, 1999, at A31 (Remarks of Rep. Henry Hyde at the Impeachment Trial: "The issue is whether the President has violated the rule of law..."); "The Four Elements of Perjury," New York Times, Jan. 16, 1999, at A13 (Remarks of Rep. Steve Chabot: "...if 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..."); "An Attack on What Has Been Characterized as the 'So What?' Defense", New York Times, Jan. 17, 1999, at 29 (Remarks of Rep. Stephen Buyer: "If indeed the President is successful in trying to make everyone believe that this case is only about an illicit affair, what will the message be in this hallowed body to those who've in the past been passionate advocates of our civil rights laws, whether it be by race, gender, religion, disability?"). For a more considered and cautious assessment, see Richard Posner, An Affair of State: The Investigation, Impeachment, and Trial of President Clinton 153-59 (1999).

<sup>39</sup> Cite

<sup>40</sup> 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 92 (1999).

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But the works we're considering suggest a different hypothesis. The moral orientation of these works is neither cynical nor indifferent to principle. It just doesn't 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. 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. The appeal of these works depends on the audience's ability and disposition to judge contextually rather than categorically.<sup>41</sup>

In this light, popular indifference to the President's perjury may reflect a simply a tendency to interpret it more narrowly – as illegal lies to preserve the privacy of consensual sex, rather than illegal lies period. Public opinion may 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 an important part of the explanation.) And it may 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.

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<sup>41</sup> 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 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.

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The second potential contribution of these works is substantive. They give us an ethical perspective that competes with elite 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 ethics as an occasion for creativity. By contrast, the tone of elite moralism is Puritanical and Kantian. It is an ethic of self-constraint 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 of character and personal integrity. While philosophers have argued for perspective abstractly,<sup>42</sup> 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. In a more mundane realm, 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." The problem is that the EPA doesn't 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 elite moralism is deficient for ignoring them. If you had to choose between elite and popular

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<sup>42</sup> E.g., Bernard Williams, "A Critique of Utilitarian Ethics," in Utilitarianism: For and Against 77, 108-18 (1977); Alasdair MacIntyre, After Virtue 204-25 (2d ed. 1984).

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moralism, you might do well to choose the popular one. The official one implies an absurdly naive and complacent attitude toward constituted authority and a hostility toward contextual judgment that is incompatible with ethical autonomy. Its view of the good lawyer is unattractive in its passivity and unreflective deference. These are the lessons that popular culture has for professional responsibility doctrine.

Nevertheless, the type of popular works we are considering have undeniable limitations as a form of ethical reflection. It is a familiar complaint 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 we don't on reflection 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 we've considered are vastly 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.<sup>43</sup> 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

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<sup>43</sup> Thus, to use Patrick Ewing and Susan Silbey's terms, I'd put these works in an intermediate category between "subversive stories", which distance us from conventional understandings of established social structures, and "hegemonic tales", which reinforce such understandings. The Moral Pluck literature satisfies Ewing and Silbey's central criterion of subversiveness: These works "emplot the connection between the particular and the general". They do so by emphasizing the connection between transgressive self-assertion and institutional failure. However, their portrayal of both self-assertion and institutional failure is one-dimensional. See Patrick Ewick and Susan Silbey, "Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative," 29 *Law and Society Review* 197, 218-19 (1995).

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their conceptions of substantive justice, the decision in favor of justice would usually be supported by the broader lay culture. 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 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, so can moralistic self-assertion be. Lionel Trilling's complaint that the "liberal imagination" tends to ignore that "the moral passions are even more willful and impatient and imperious than the self-seeking passions" is pertinent to the works we've looked at.<sup>44</sup>

The attitude expressed in these works toward institutions is also fanciful. The problem is not so much 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 don't contribute to new, more satisfactory institutions or alter the basic contours of established ones.

Kelsey emphasizes her solitude by resigning from the firm before confronting the CEO. She doesn't even try 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 achievement never becomes public. The downfall of the villain is typically presented to the public as the work of established institutions, and the official ineptitude and corruption that required the hero's Moral Pluck is covered up. The hero often acquiesces in the cover-up as part of the price of extricating

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<sup>44</sup> The Liberal Imagination 214 (Anchor ed. 1953).

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himself or his friends or clients from their difficulties. This trope reinforces the crude populist premise that we are surrounded by a corrupt power that determines 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 much. Thus, a deep pessimism about the larger society co-exists with the 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 seems 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 don't inspire emulation. We plausibly doubt our ability to accomplish them by ourselves.

Moreover, even if we could, the life of these heroes may strike us as unattractively lonely. The L.A. Law lawyers are exceptions; everything nearly always works out for them, and as we've noted, friendship and solidarity don't seem important to them. However, despite their amazing successes, Grisham heroes rarely achieve satisfying careers, especially as lawyers. They have a tendency to leave the profession. The heroes of The Firm and The Partner drop out of society entirely for lives of luxurious seclusion. Rudy Baylor of The Rainmaker gives up law to become a high school teacher. 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 the solidarity doesn't seem to extend beyond the firm. The firm is under constant siege from hostile outside forces.

Nevertheless, there are moments, especially on The Practice, when these limitations are overcome, or at least acknowledged. Consider a recent episode involving Jimmy Berluti.<sup>45</sup> Jimmy occupies the opposite pole of the spectrum of

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<sup>45</sup> "Boston Confidential," (ABC television broadcast, Oct. 3, 1999).

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moral orientations from Eugene Young. He is the least polished and most ingenuous of the lawyers. He is often 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 of taking a fall to protect his son, who actually committed the crime. He refuses to permit Jimmy to confront the son. Jimmy decides to do so anyway and tries to persuade a friend – Judge Roberta Kittleson – to help him do so. Roberta refuses on the ground that Jimmy would be violating the rules of client loyalty and confidentiality. (The breach of role boundaries that such participation would involve for a judge is so much a routine feature of the series that it is not even mentioned here.) Jimmy goes ahead alone, and the confrontation is a disaster – the son commits suicide. Roberta tries to console him, telling him that at least he tried to do the right thing, while she feels bad that she remained passive. Jimmy replies that at least she has the consolation of knowing she followed the rules. But he took a course of action that could only be vindicated by success, and having failed, he feels bereft.

The argument is an implicit response to the charge of naivete and over-simplification in two respects. First, it acknowledges that independent, transgressive judgment is risky and can work out badly. Second, it reminds us that virtue cannot be measured solely in terms of consequential success. Jimmy's self-criticism doesn't entirely persuade us. Despite his expression of regret and inconsolability, we admire his good intentions and willingness to take risks.<sup>46</sup> On the other hand, there's nothing glib

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<sup>46</sup> This episode makes salient the differences between the types of cases that Bernard Williams focused on in his essay "Moral Luck", cited in note 4, and those with which I'm concerned here. Williams draws attention to cases in which the moral validity of the decisions 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,

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or smug about the conclusion. The show doesn't seek to resolve more than partly the anxiety and uncertainty we feel about Jimmy's decision.

### VI. 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 usefully 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.

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even *ex ante*. (His examples are the Gauguin abandoning his family to become a painter in the South Seas – a successful and therefore right decision – and Anna Karenina abandoning her family to live with Count Vronsky – an unsuccessful and therefore wrong decision.) But Jimmy's decision is different. His intentions do not embrace any project of personal development. He is seeking to vindicate an enduring commitment to substantive justice. Of course, if he was reckless in appraising the probable consequences, that bears on our assessment of his initial decision. But the bad consequence only raises the question; it doesn't establish recklessness. And even if he was reckless, we might plausibly regard his good intentions as mitigating.