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# LEGAL FICTIONS AND THE MORAL IMAGINATION: FEMALE FICTIONAL LAWYERS ENCOUNTER PROFESSIONAL RESPONSIBILITY

KATHRYN A. LEE & ELIZABETH MORGAN\*

In 1992, in his monthly column on professional ethics, Professor Monroe Freedman of Hofstra Law School, dared to criticize a fictional icon of lawyerly probity, Atticus Finch, Harper Lee's protagonist in *To Kill A Mockingbird*,<sup>1</sup> for accepting segregation and certain stereotypes of women.<sup>2</sup> The column ignited a friendly debate among law professors who assign the novel in their professional responsibility classes.<sup>3</sup> But even before Freedman's column, scholars had noted that "Finch has his ethical lapses."<sup>4</sup> Among these is Finch's breach of client confidentiality when he tells his children to pity their morphine-addicted neighbor, Mrs. Dubose.<sup>5</sup> Finch also goes along with the sheriff's lie that Bob Ewell died an accidental death rather than at the hands of Boo Radley.<sup>6</sup>

In contrast to Freedman, Notre Dame law professor, Thomas Shaffer,<sup>7</sup> thinks Finch, in his famous defense of a black man accused of raping a white woman, embodies all that is good about being an attorney.<sup>8</sup> Shaffer contrasts Finch with another literary lawyer, Robert Service, who appears in Louis Auchincloss', *Diary of a Yuppie*.<sup>9</sup> Service, an ambitious associate, suggests to a senior partner a legal strategy that the partner finds morally repugnant.<sup>10</sup> Unpersuaded

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1. HARPER LEE, *TO KILL A MOCKINGBIRD* (Warner Books ed., 1960).

2. Monroe Freedman, *Atticus Finch, Esq., R.I.P.*, *LEGAL TIMES*, Feb. 24, 1992.

3. See, e.g., DAVID MARGOLICK, *AT THE BAR: THE PASSIONS AND PECCADILLOES OF AMERICAN LAWYERS* 132 (1995) (documenting the phenomenon started by Freedman's articles).

4. See *id.* at 132.

5. See LEE, *supra* note 1, at 111 (cited in MARGOLICK, *supra* note 3, at 132).

6. See *id.* (cited in MARGOLICK, *supra* note 3, at 132).

7. Professor David Luban describes Shaffer as "the most unusual, and in many ways, the most interesting, contemporary writer on American legal ethics." David Luban, *The Legal Ethics of Radical Communitarianism*, 60 *TENN. L. REV.* 589 (1993).

8. See, e.g., Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 *U. PITT. L. REV.* 181, 188-89 (1981) (suggesting that Finch defined himself not by the limited ethical criteria of the profession itself, but by the values he taught his children); Thomas L. Shaffer, *On Living One Way in Town and Another Way at Home*, 31 *VAL. U. L. REV.* 879 (1997) (citing LEE, *supra* note 1, at 274) (suggesting that Finch, unlike so many real-life attorneys, has a coherent, integrated moral vision) [hereinafter, *On Living One Way*].

9. See *On Living One Way*, *supra* note 8, at 879 (citing LOUIS AUCHINCLOSS, *DIARY OF A YUPPIE* (1986)).

10. LOUIS AUCHINCLOSS, *DIARY OF A YUPPIE* 4-6 (1986) [hereinafter *DIARY*] cited in *On Living One Way*, *supra* note 8, at 879-80 (describing how Service learned that Mr. Lamb, a partner's golfing buddy and the head of a company that a corporate client wants to raid, gave Service's brother a job and then covered up the brother's thefts from company funds. Lamb covered the situation and reimbursed the company for his brother's salary and thefts. Service

that the strategy may be within the professional rules, the partner tells Service to go home and discuss the case with his wife who will likely be appalled by her husband's suggestion and make him see his error.<sup>11</sup> (It is interesting to note that the wife is the moral touchstone.)<sup>12</sup> Eventually, the partner simply orders Service not to use the proposed strategy.<sup>13</sup>

Although the reader may think the associate and partner had a discussion about legal ethics, Shaffer disputes that notion.<sup>14</sup> "Ethics," he writes, "is an intellectual activity in which the participants talk about morals and exercise in conversation the arts of insight and persuasion, without coercion. In ethics, the people involved hope to reach one another."<sup>15</sup> The partner did not engage the associate in ethical discourse, he merely resolved the conflict by exercising the power attached to his position as partner.<sup>16</sup> Regrettably, in Shaffer's view, Auchincloss's young associate appears willing to have one moral vision at work and another at home.<sup>17</sup>

A new breed of literary lawyer has joined Atticus Finch and Robert Service — the 'legal thriller' attorney. Publication of Scott Turow's *Presumed Innocent*<sup>18</sup> ignited this new literary genre,<sup>19</sup> followed by the more popular John Grisham novels, *The Firm*,<sup>20</sup> *The Pelican Brief*,<sup>21</sup> and *The Client*,<sup>22</sup> which sold 25 million copies in North America alone by 1994.<sup>23</sup> *Publisher Weekly* declared Grisham the bestselling author of the 1990s, having sold nearly 61 million

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wants to use this information to threaten a shareholder's derivative lawsuit. *Id.* at 880. Along with Finch and Service, Shaffer also uses William Faulkner's fictional attorney, Gavin Stevens, to ponder ethical issues. See Thomas L. Shaffer, *On Lying for a Client*, 1 J. INST. STUD. LEG. ETH. 155, 155-56.

11. DIARY, *supra* note 10, at 11, quoted in *On Living One Way*, *supra* note 8, at 880-81.

12. See, e.g., Carrie Menkel-Meadow, *The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft*, 31 McGEORGE L. REV. 1, 19 (1999).

13. See DIARY, *supra* note 10, at 11, cited in *On Living One Way*, *supra* note 8, at 881.

14. *On Living One Way*, *supra* note 8, at 881.

15. *Id.*

16. *Id.* at 881-82; see also DIARY, *supra* note 10, at 11.

17. *Id.* at 882 (citing LEE, *supra* note 1, at 267-75 (referring to Atticus Finch, who in refusing to lie to protect his son, states, "I can't live one way in town and another in my home.")).

18. SCOTT TUROW, *PRESUMED INNOCENT* (1987).

19. See Adrienne Dell, *Murder They Wrote*, 80 A.B.A. J. 46 (Jun. 1994).

20. JOHN GRISHAM, *THE FIRM* (1991).

21. JOHN GRISHAM, *THE PELICAN BRIEF* (1992).

22. JOHN GRISHAM, *THE CLIENT* (1993).

23. See Dell, *supra* note 19 at 46-47.

copies between 1990 and 1999.<sup>24</sup> In 2002, the best-selling hardcover book was Grisham's, *The Summons*,<sup>25</sup> selling 2.6 million copies.<sup>26</sup>

Americans have an apparent insatiable appetite for legal thrillers. Some have suggested that living in a litigious society may explain the popularity.<sup>27</sup> The irony is that we love the legal thriller and hate attorneys.<sup>28</sup> While those on the beach with the latest Grisham novel may not identify the exact source of the sentiment, they would most likely agree with Shakespeare's famous statement in *Henry the Sixth*,<sup>29</sup> "The first thing we do, let's kill all the lawyers," and would be amused that law schools require students to take a course in legal ethics.<sup>30</sup>

If the legal profession is perceived as unscrupulous and greedy, one has to ask, does the legal thriller reflect and reinforce this perspective or does it engage the reader in a wider consideration of legal ethics? This article examines this 'new breed' of novel, focusing particularly on issues of legal ethics. The scope is limited to thrillers with female attorney protagonists created by female authors who have attended law school and, in most cases, have practiced law. There are several reasons for this limited scope. The first is simply a practical one — the number of legal thrillers grows daily and one could be reading forever. Even this list does not include all legal thrillers with the given criteria. Second, selecting only authors who have attended law school, whether or not the author practiced law, also allows one to assume that they have some knowledge of professional responsibility issues.

24. See CNN, *Grisham Ranks as Top-selling Author of Decade* (Dec. 31 1999), at <http://www.cnn.com/1999/books/news/12.31/1990.sellers>.

25. JOHN GRISHAM, *THE SUMMONS* (2002).

26. See Daisy Maryles, *Bestsellers of 2002: The Big Didn't Get Bigger* (Mar. 24, 2003), available at <http://publishersweekly.reviewnews.com/index.asp?layout=articles&articleID=CA286525&display=searchresults&stt=001&text=john+grisham>.

27. See Bill Haltom, *Make a Million Bucks With This Tried & True Formula For Novel Writing*, 32 TENN. B. J. 37 (Jul. 1996).

28. See *id.* ("while everyone claims to hate lawyers, the blockbuster movie hits and the highest rated TV shows are a; about mean ruthless lawyers." *Id.*); See, e.g., David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 37 (1995) (stating both "lawyers and the general public seem terribly unhappy about the state of the profession").

29. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc.2.

30. SOL LINOWITZ W. MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 120-21 (1994) (stating that with many lawyers being investigated and convicted as a result of the Watergate scandal, the ABA mandated a required professional responsibility course); see also Peter K. Rofes, *Ethics and the Law School: Confusion Persists*, 8 GEO. J. LEGAL ETHICS 981 (1995).

In addition, examining female fictional lawyers raises a question posed by some feminist legal scholars, namely whether female lawyers approach lawyering differently than men, and, in particular, whether female lawyers approach ethical issues differently.<sup>31</sup> Legal scholar Carrie Menkel-Meadow has suggested that gender differences might affect lawyering and ethical decision-making.<sup>32</sup> Others are skeptical of making too much of gender differences.<sup>33</sup> Professor Naomi Cahn writes that "the question is not whether women speak in a different voice, but how different voices can change how we practice law."<sup>34</sup> We suggest that different voices are what the novel is all about.

A threshold question is why legal thrillers deserve any serious examination. After all, they do not pretend to be great literature. As Judge Richard Posner asserts, those who write popular fiction do not intend to educate, but instead take their readers' prejudices as given.<sup>35</sup> On the other hand, Professor Lawrence Friedman has urged legal scholars to pay attention to popular culture, elaborating on the idea of a popular legal culture defined as books, songs, movies, plays and TV shows about lawyers intended for the general population.<sup>36</sup> To examine popular culture is important, he suggests, because law is a dependent variable; law and legal systems are not autonomous, free-standing entities.<sup>37</sup> They are shaped by external forces, and it behooves legal scholars to examine those forces.<sup>38</sup> Though recognizing

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31. See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) (initiating the discussion of gender and lawyering by suggesting moral reasoning differed among boys and girls, the latter having what would later come to be described as an 'ethic of care'). Gilligan's study was criticized for proposing too essentialist a view of gender. See Stephen Ellmann, *The Ethic of Care As An Ethic for Lawyers*, 81 GEO. L. J. 2665, 2665 (1993) (stating that despite general criticism, the ethic of care suggests an attractive alternative to the traditional neutral partisan model of legal professionalism). But cf., Menkel-Meadow, *supra* note 12, at 19 (referring to the wife of the young associate in *Diary of a Yuppie* as "a good Gilliganite," to describe the wife's concern with the ethics of relationships).

32. Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 639 (1994) [hereinafter *Culture Clash*].

33. See Deborah L. Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39, 42-43 (1994) (noting that most empirical studies of moral development demonstrate that there are not significant gender differences; see also *Culture Clash*, *supra* note 32, at 640 (revising Menkel-Meadow's view by suggesting that there may be more differences in legal behavior among individuals of the same gender, rather than across gender)).

34. Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L. J. 1039, 1061 (1992).

35. Richard A. Posner, *The Depiction of Law in the Bonfire of the Vanities*, 98 YALE L.J. 1653 (1989) (finding Tom Wolfe's novel, *Bonfire of the Vanities*, disappointing in its "jurisprudential significance." *Id.* at 1655).

36. Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1579-80 (1989).

37. See *id.* at 1580.

38. See *id.*

that accuracy would not necessarily be characteristic of portrayals of law in popular culture, particularly in the media, Friedman maintains that the study of popular legal culture is valuable in order to understand law in our society, especially as culture reflects social norms.<sup>39</sup> Changes in society result in shifts both in law and popular culture; Freidman notes “[a]rt, sub-art, and law move in parallel directions — more or less.”<sup>40</sup> For example, nudged by the women’s movement, television began to depict women in roles outside the home and no longer relegated them to simply romantic roles.<sup>41</sup>

As for lawyers, their depiction in television programs and popular novels “tell us something about views of law and lawyers prevalent among members of the general public.”<sup>42</sup> Popular works may reinforce familiar values, especially because “of their broad and uncomplicated presentations.”<sup>43</sup> Popular fiction may also tell us the topics and plots with which the general public is most comfortable.<sup>44</sup>

Over and above other forms of popular culture, we claim that popular fiction has the power to engage the public in acts of the moral imagination simply because of the way a novel works. In a modest little book entitled *Poetic Justice: The Literary Imagination and Public Life*,<sup>45</sup> Martha Nussbaum, ethicist at the University of Chicago School of Law, relates our need for moral imagination to the form of the modern novel. While working on a quality of life assessment project at the World Institute for Development Economics Research in Helsinki, Nussbaum and global economist, Amartya Sen used Charles Dickens’ *Hard Times*<sup>46</sup> to critique standard economic paradigms of assessment, exposing the paradigm’s reductionism and failure to address human complexity.<sup>47</sup> Nussbaum argues that one of the best ways to keep economics, or the law (one of Dickens’ favorite topics to problematize), from becoming a ‘dismal science’ is for students of economics and the law to seek a more complicated and philosophically adequate set of foundations through reading novels!<sup>48</sup>

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39. *Id.* at 1589.

40. *Id.*

41. *Id.* at 1590.

42. *Id.* at 1598. The public seems to group lawyers in two groups: those who defend the weak and those who are shysters. *Id.* at 1599.

43. Carol Sanger, *Seasoned to the Use*, 87 MICH. L. REV. 1338, 1343 (1989).

44. *See id.*

45. MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND THE PUBLIC LIFE* 1-4 (1995)

46. CHARLES DICKENS, *HARD TIMES* (Dingle Foot, ed., Oxford U. Press 1987) (1854)

47. *See* NUSSBAUM, *supra* note 45, at xv-xvi, 3-4.

48. *See id.* at 11-12.

She argues that it is an essential component of any ethical stance that theoreticians enter imaginatively into the lives of the 'subjects' under consideration and that they do so in such a way that they experience emotions about this participation.<sup>49</sup> For example, in our study, the 'subjects' would include lawyers as well as their clients. Novel reading provides a significant "rehearsal" for such engagement.<sup>50</sup> Moreover, the novel allows readers to engage in a form of ethical reasoning that is context specific without being solipsistic. As symbolic representation, or reflection, of reality, the novel contains both concrete action and abstract idea, multiple motives and unitary arrangement of detail. Ultimately the novel brings experience, emotion, and analysis/interpretation into a single complex rendering. What one encounters here is full of play and multifaceted significance, and he/she can, in fact, stand back far enough to take in the richness, without being overwhelmed by detail.<sup>51</sup>

Nussbaum does not suggest that novels replace political documents, and legal and economic analyses, but rather that political, legal and economic treatises would be perfectly consistent with their goals if the view of human beings underlying them was that supplied by novels.<sup>52</sup> As ethical philosopher Gayatri Spivak points out, ethics is not a matter of knowledge, it's a call to relationship.<sup>53</sup> Novels exploring the complicated relationship between lawyers and clients, between lawyers and judges, and between lawyers and readers' accumulated perceptions of lawyers may well be an arena where the ethics of practitioners of the law are actively examined and tested.

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49. *Id.* at xvi.

50. *See id.*

51. *See id.* at 43.

52. *Id.* at 44 ("Government cannot investigate the life story of every citizen in the way that a novel does with its characters; it can, however, know that each citizen has a complex history of this sort." *Id.*).

53. *See* Gayatri Chakravorty Spivak, *Righting Wrongs*, in *HUMAN RIGHTS, HUMAN WRONGS* 180 (Nicholas Owen, ed., 2003) ("ethics are a problem of relation before they are a task of knowledge" *Id.*).

Such a view of the novel welcomes its enriching "heterglossia,"<sup>54</sup> its multiple voices, both social and psychic. In his theory of literary "heteroglossia," the Russian literary critic Mikhail Bakhtin claims that of all literary genres, the novel resists monologism and keeps alive the multiple discourses of a given society in its breadth and complexity.<sup>55</sup> Bakhtin's theory assumes all persons are internally dialogic, no groups in society are voiceless, for even if they are illiterate, their nuanced speech can be heard and reproduced, and all culture centers around multiplicity of conflict.<sup>56</sup> The novel is thus, by its very nature, "an anti-authoritarian, democratizing art form," simultaneously teasing out and ultimately trumping singularity of thought and separate from didactic discourse.<sup>57</sup>

In his 1981 introduction to Bakhtin's *The Dialogic Imagination*, Michael Holquist says that Bakhtin "loves novels because he is a baggy monster,"<sup>58</sup> which is Bakhtin's way of indicating that the novel itself is a "baggy monster" of a genre. Bakhtin celebrates the novel — its eclectic, folkloric, multivoiced, multiclassed, disruptive and overfull nature. He describes the novel as uncanonic and plastic, a hybrid genre that forms itself out of bits and pieces of other genres, "ever questing, ever examining itself and subjecting its established forms to review."<sup>59</sup> Thus, he sees it as the perfect genre for a changing, emerging world such as our own, "the leading hero in the drama of literary development in our time precisely

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54. See Michael Holquist, *Glossary to MIKHAIL BAKHTIN, THE DIALOGIC IMAGINATION: FOUR ESSAYS BY MM BAKHTIN* 428 (Univ. of Texas Press Slavic Series, No. 1) (Caryl Emerson & Michael Holquist, trans., Michael Holquist, ed., 1981) (describing heterglossia as:

The base condition governing the operation of meaning in any utterance. It is which insures the primacy of context over text. At any time, in any given place, there will be a set of conditions — social, historical, meteorological, physiological — that will insure that a word uttered in that place and at that time will have a meaning different than it would have under any other conditions; all utterances are heteroglot in that they are functions of a matrix of forces practically impossible to recoup, and therefore impossible to resolve. Heteroglossia is as close a conceptualization as is possible of that locus where centripetal and centrifugal forces collide; as such, it is that which a systematic linguistics must always suppress).

*Id.*

55. See MIKHAIL BAKHTIN, *THE DIALOGIC IMAGINATION: FOUR ESSAYS BY MM BAKHTIN* 411 (Univ. of Texas Press Slavic Series, No. 1) (Caryl Emerson & Michael Holquist, trans., Michael Holquist, ed., 1981); see also ROBERT YOUNG, *TORN HALVES: POLITICAL CONFLICT IN LITERARY AND CULTURAL THEORY* 56 (1996).

56. See BAKHTIN, *supra* note 55.

57. *Id.*

58. Michael Holquist, *Introduction to BAKHTIN*, *supra* note 55, at xviii.

59. BAKHTIN, *supra* note 54, at 39.



because it best of all reflects the tendencies of a new world still in the making."<sup>60</sup>

If the plot of the novel begins with decentered verbal interest, the ideological world being reflected is inevitably somewhat unsettled and unsettling. If all points of view are heard, and this is what holds the reader's interest, there is no unitary social consciousness to be received. Characters and readers alike are in the position of discovering their own ideological horizons within the "contingent"<sup>61</sup> and "illusory."<sup>62</sup> Thus, legal discourses within the work of fiction, canonized or popular, may well merge the worlds of delineated legal ethics and complicated situational thinking, toward the end of an exercise of the moral imagination.

The problem seems to come when readers forget that they are engaging in interpretive play — their own and the authors' — and read novels as empirical knowledge sources. Should readers assume that they are receiving facts rather than engaging events, the result could be misinformation, confirmation of cynicism and abdication of moral reasoning. One hopes for a more 'active' reading public; we shall assume one.

This article examines eleven books by seven authors, depicting seven fictional lawyers. Authors Gini Hartzmark, Lia Matera, Barbara Parker and Carolyn Wheat have created female attorneys who appear in several books, allowing for more character development than occurs in most mystery novels.<sup>63</sup> All three authors are law school graduates, and two have practiced, Parker as a prosecutor with a state attorney's office and Wheat as a Legal Aid attorney in Brooklyn. Lisa Scottoline, a University of Pennsylvania law school graduate and former Philadelphia lawyer, has also written several legal thrillers.<sup>64</sup> Two current prosecutors of sex crimes are also authors: Linda Fairstein and Christina McGuire.<sup>65</sup>

The selected novels raise several issues involving professional ethics. Those issues include: conflict of interest, the meaning of zealous advocacy, the practice of law as a business, and the ethical

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60. *Id.* at 7.

61. *Id.* at 365.

62. *Id.*

63. See GINI HARTZMARK, *BITTER BUSINESS* (1995); GINI HARTZMARK, *PRINCIPAL DEFENSE* (1992); LIA MATERA, *A RADICAL DEPARTURE* (Ballantine Books ed., 1991) (1988); LIA MATERA, *WHERE LAWYERS FEAR TO TREAD* (Ballantine Books ed., 1991) (1971); BARBARA PARKER, *SUSPICION OF GUILT* (1996); BARBARA PARKER, *SUSPICION OF INNOCENCE* (1994); CAROLYN WHEAT, *FRESH KILLS* (Berkley Prime Crime ed., 1996) (1995); CAROLYN WHEAT, *WHERE NOBODY DIES* (Berkley Prime Crime ed., 1996) (1986).

64. See, e.g., LISA SCOTTOLINE, *LEGAL TENDER* (1996).

65. See LINDA FAIRSTEIN, *FINAL JEOPARDY* (Pocket Books ed., 1997) (1996); CHRISTINA MCGUIRE, *UNTIL PROVEN GUILTY* (Pocket Books ed., 1995) (1993).

dilemmas of cause lawyering. This article examines specific sections of the Model Rules of Professional Responsibility.<sup>66</sup>

Often these novels, like the general public, hold lawyers in low regard. Author Gini Hartzmark's characters refer to lawyers as "stickup artists" and "shakedown artists."<sup>67</sup> Lisa Scottoline's protagonist, Bennie Rosato, a partner in a nine-attorney Philadelphia boutique law firm, shares this view. When a friend remarks that he is the best bankruptcy lawyer, Rosato snaps, "Because you're morally bankrupt?"<sup>68</sup> Christina McGuire's fictional attorney, Assistant District Attorney, Kathryn Mackay "said a little prayer that she would never let her integrity and idealism be blunted by the imperfections of the system. Too many attorneys did."<sup>69</sup> Barbara Parker has a law school friend of corporate attorney Gail Connor remark that he did not belong in law school because "[t]hey're so good at turning out moral ciphers."<sup>70</sup>

#### · CLIENT CONFIDENTIALITY

Apart from these comments regarding the general ethical state of the profession, these authors introduce readers to ethical dilemmas attorneys face as a result of the professional rules under which they work. They do so by introducing multiple points of view, by engaging the reader's dialogic imagination. For example, while no author specifically refers to Model Rule 1.6 on confidentiality,<sup>71</sup> the reader is made aware that attorneys must keep client secrets confidential except in certain very limited situations. But sometimes keeping secrets appears to be more in the firm's interest than the client's — protection against a malpractice suit, in other words, self-interest, and not altruism, may undergird confidentiality concerns.

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66. The history of the official legal ethics codes, including the Model Rules of Professional Responsibility, began with the 1836 publication of David Hoffman's *Rules of Professional Deportment* and the 1854 lectures of Judge George Sharswood of Pennsylvania. Luban & Millemann, *supra* note 28, at 42-44 (citing David Hoffman, *Rules of Professional Deportment Resolution* 50, in 2 A COURSE OF LEGAL STUDY 775 (1836)). In 1908, the American Bar Association ("ABA") published its first Canons of Professional Ethics in response to a speech by President Theodore Roosevelt, criticizing the bar for opposing his Progressive legislation. See Luban & Millemann, *supra* note 28, at 44. The first authoritative code published by the ABA came out in 1969, and the Model Rules were adopted in 1983. See *id.* Not all have welcomed these developments. Luban and Millemann believe the ethics codes "have become increasingly legalistic and less ethical." *Id.* at 41.

67. HARTZMARK, BITTER BUSINESS, *supra* note 63, at 248, 253.

68. SCOTTOLINE, *supra* note 64, at 23.

69. MCGUIRE, *supra* note 65, at 19.

70. PARKER, SUSPICION BY GUILT, *supra* note 63, at 19.

71. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.6 (2002).

Professor Stephen Gillers argues that the confidentiality rules, "to the extent that they impose duties on lawyers that substantive law does not, benefit the profession."<sup>72</sup> A partner in associate Katherine Millholland's firm would not discuss a hostile takeover with her in the cab. "No one wanted the firm's secrets peddled by some market savvy, cabdriver with sharp hearing."<sup>73</sup> Even more blunt is the firm's attitude towards talking with the press. If an associate talked with the press, "partners would have your tongue cut out and nailed to your office door."<sup>74</sup>

Millholland, however, is aware of the rule about confidentiality at a different level as well. A client/friend asks her if a family business for which she is counsel would want to unload a division he would be interested in buying.<sup>75</sup> Discussing the affairs of one client with another, however, makes her uncomfortable.<sup>76</sup>

Lisa Scottoline's attorney, Bennie Rosato, receives information from a client that suggests that the life of someone else might be in danger, not from her client but from someone close to the client. Before calling a detective to alert him to that fact, she checks the rules on confidentiality. "I could tell the cops what I knew, but I couldn't tell an associate, friend or the intended victim."<sup>77</sup> It is interesting to note that under Model Rule 1.6(b), a lawyer has no affirmative duty to alert anyone regarding prospective criminal conduct that is likely to result in imminent death or substantial bodily harm; the lawyer has only discretion to breach a confidence

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72. Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L. J. 243, 256 (1985). Gillers takes exception that a lawyer may only reveal a confidence if bodily harm or death is imminent, but cannot breach a confidence if a client has done a serious injustice to someone. He points out that a lawyer may breach a confidence if the lawyer's professional or financial interests are involved. *Id.* Prior to 1983, the disciplinary rule allowed an attorney to reveal personal and financial crime. Critics of the more narrow exception under the Model Rules suggested in 1983 that it represented the economic interests of powerful firms in the ABA. NATHAN M. CRYSTAL, AN INTRODUCTION TO PROFESSIONAL RESPONSIBILITY 181-82 (1998).

73. HARTZMARK, PRINCIPAL DEFENSE, *supra* note 63, at 6.

74. *Id.* at 31.

75. *Id.*

76. *Id.*, at 240.

77. SCOTTOLINE, *supra* note 64, at 73.

in that situation.<sup>78</sup> The rule does not say to whom the lawyer should report such information.<sup>79</sup>

Assistant District Attorney Alexandra Cooper created by Linda Fairstein, reflects the notion that confidentiality may cut several ways. As the chief of the Sex Crimes Prosecution Unit in Manhattan, Cooper works closely with domestic abuse victims. To help them feel safe in telling their stories, she assures them that their accounts will be kept confidential.<sup>80</sup> In the process of investigating a murder, however, she seeks understanding and shows a psychologist-friend confidential letters that are part of the investigation.<sup>81</sup> Even in doing so, Cooper knows she should not show them to anyone because she is violating the victim's confidence.<sup>82</sup>

### CONFLICTS OF INTEREST

The ethical issue that appears most frequently in these legal thrillers concerns conflicts of interest. Model Rule 1.7<sup>83</sup> works to ensure that a client has a lawyer's loyalty in advocating his/her interests.<sup>84</sup> Several novels mention the running a conflicts check. Bennie Rosato's firm has its "New Matter Reports," a monthly listing of new cases to alert partners to possible conflicts of interest.<sup>85</sup> Rosato's partner (and future murder victim) accuses her of not performing a conflicts check, pointing out that the animal rights protester she represents in a police brutality case demonstrated

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78. Rule 1.6(b) of the Model Rules states:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to secure legal advice about the lawyer's compliance with these Rules;
- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (4) to comply with other law or a court order.

MODEL RULES OF PROF'L RESPONSIBILITY R. 1.6(b) (2002).

79. *See id.*

80. FAIRSTEIN, *supra* note 65, at 43.

81. *Id.* at 268-69.

82. *Id.*

83. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.7 (2002).

84. Gillers, *supra* note 72, at 252. Gillers writes, "The Rules reflect the view that some conflicts may be so intense that it is reasonable to expect a lawyer consciously to ignore a client's goals, or actually to work to impede them. This is a peril the Rules do not let the clients run." *Id.* at 252-53.

85. SCOTTOLINE, *supra* note 64, at 162.

at a plant owned by another of the firm's clients.<sup>86</sup> Rosato points out that her case is against the police, not the company, hence there is no conflict.<sup>87</sup> However, in the partner's eyes, it is a public relations nightmare.<sup>88</sup> When attorney Gail Connor takes a case involving a possible forged will, a partner asks her if she has done a conflicts check to see if the firm represents a beneficiary who might not receive any gift should the will be declared a fraud.<sup>89</sup>

Gail Connor has one of the more interesting conversations about conflicts of interest and legal ethics in general. Her clients are suing the builder of their house who in turns wants to purchase land from Connor's cousin. The builder is being stubborn in the lawsuit against him, and a partner in Connor's firm suggests that the two transactions be connected.<sup>90</sup> In other words, the sale of the land could be facilitated if the builder showed some willingness to settle the lawsuit against him. The partner says that as long as Connor's cousin is fully informed about the situation, connecting the two might be worth considering.<sup>91</sup> Connor recognizes that doing so is "clearly against the rules" and says that she would not be comfortable connecting the two transactions. The attorney on the other side could raise questions about legal ethics; however, the partner tells her there are ways to be subtle. "Ethics can't be viewed narrowly," he says.<sup>92</sup> "You have to remember that you are right. Your clients are difficult, granted, but they are in the right. That's the basis of legal ethics, knowing that what you do is right."<sup>93</sup> He adds, "We can't resort to abstractions to make the decisions for us."<sup>94</sup> Despite her misgivings, Connor does as the partner suggests.<sup>95</sup>

Beside raising conflicts of interest questions, this situation also triggers questions about the responsibilities of lawyers under Rules 5.1 and 5.2. Under Rule 5.1, a partner is to try to ensure that a subordinate attorney is professionally responsible.<sup>96</sup> Rule 5.2 does not absolve a subordinate if she acts at the behest of another; however, 5.2(b) says that the subordinate lawyer does not violate the rules if she "acts in accordance with a supervisory lawyer's

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86. *Id.* at 41-42.

87. *Id.*

88. *Id.* at 41-42.

89. PARKER, SUSPICION OF GUILT, *supra* note 63, at 87.

90. PARKER, SUSPICION OF INNOCENCE, *supra* note 63, at 95-96.

91. *Id.* at 95

92. *Id.* at 96.

93. *Id.*

94. *Id.*

95. *Id.* at 95-96. Professor Shaffer would likely say that this was not a conversation about legal ethics at all. See *supra* text accompanying notes 7-17.

96. See MODEL RULES OF PROF'L RESPONSIBILITY R. 5.1 (2002).

reasonable resolution of an arguable question of professional duty.”<sup>97</sup> Though concerned, Connor would appear to be protected should her partner’s directive be questioned.

While most scenarios refer to conflicts of interest in a narrow sense, some authors raise the issue in a broader context. Associate Katherine Millholland tells her firm’s partners that should she find that the killer is a client’s brother, she won’t hide the fact, not even for a corporate client.<sup>98</sup> A partner replies, “We are honorable people, Kate, we serve the client, but also serve the law.”<sup>99</sup> Millholland’s retorts, “Spare me the bullshit.”<sup>100</sup>

District Attorney Kathryn Mackay offers a defendant’s attorney a plea bargain to which the attorney says he will not agree to a deal without talking to his client.<sup>101</sup> The case is a homicide case, and the defense attorney has never tried a murder. It is plain to Mackay that “copping a plea wouldn’t get him any headlines,”<sup>102</sup> and headlines would help his career. Mackay wonders, “How could a responsible attorney put his own interests before those of his client?”<sup>103</sup>

Even the protagonists are not immune from considering their career interests. Gail Connor wonders if she took a case because she believed in the client’s ideals or because winning meant becoming a partner.<sup>104</sup> She fears that winning could ruin some people who did not deserve such a fate. Her boyfriend, a criminal defense attorney, reminds her that her duty is to her client and her client alone. His “linear” system<sup>105</sup> of ethics is male, she tells him, possessing no subtlety. He asks her if she really wants subtlety, and she replies, “No.”<sup>106</sup>

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97. MODEL RULES OF PROF’L RESPONSIBILITY R. 5.2(b)(2002)

98. HARTZMARK, *PRINCIPAL DEFENSE*, *supra* note 63, at 106-09

99. *Id.* at 108.

100. *Id.* Millholland appears to doubt that the partners take seriously the first statement in the Preamble to the Model Rules: “A lawyer is a representative of clients, an officer of the legal system and a public citizen having a special responsibility for the quality of justice.” *Preamble to MODEL RULES OF PROF’L RESPONSIBILITY* (2002).

101. MCGUIRE, *supra* note 65, at 123.

102. *Id.*

103. *Id.* at 125. The fictional attorneys who face the fewest ethical temptations among the examined attorneys are the two prosecutors created by two practicing district attorneys. One wonders if having a vested interest in protecting the integrity of the system prompts an author to create less complex ethical workplace.

104. PARKER, *SUSPICION OF GUILT*, *supra* note 63, at 140.

105. *Id.*

106. *Id.*

## CAUSE LAWYERING

Cause lawyering presents another issue withing conflicts of interest. A general definition of cause lawyering is using legal skills to further a vision of the good society.<sup>107</sup>

A situation may arise in which the interests of cause and client conflict. Lia Matera's protagonist, attorney Willa Jansson, works for a San Francisco firm that has gained a left-wing reputation for defending "[y]uppies, draft resisters and Black Panthers."<sup>108</sup> Though sympathetic with the firm's political leanings, Jansson questions a partner's trial technique which "favored political grandstanding over stick-to-the-point argument, which is fine if your client appreciates guerrilla theater and likes prison food."<sup>109</sup> Yet, in the first paragraph of another narrative, Jansson makes clear that even the most "privileged" legal arena involves its players in violent conflict: "Law schools don't have football teams, they have law reviews. Law reviews may look like large paperbacks, but they are arenas. Legal scholars maul each other in polite footnotes, students scrimmage and connive for editorial positions, and the intellectual bloodlust of law professors is appeased, rah rah."<sup>110</sup>

This novel reminds us that since legal justice is never pure, demythologizing the power hierarchies that grant its validity may be a way of letting equity have a voice. If interests are always in conflict, the silenced point of view may, by its very exclusion, make the most 'just' claims for articulation.

## OTHER ETHICAL CONFLICTS

Other issues related to the rules of professional responsibility come up in the novels, though not to the degree that confidentiality and conflicts of interest do. For example, a public defender meets with the judge without the prosecution present, a situation, District Attorney Mackay points out, "forbidden by the Rules of Professional Conduct,"<sup>111</sup> specifically Rule 3.5. The public defender gets away

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107. Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: an Introduction*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 3 (Austin Sarat & Stuart Scheingold, eds., 1998).

108. MATERA, A RADICAL DEPARTURE, *supra* note 63, at 1.

109. *Id.* at 3.

110. *Id.* at 1.

111. MCGUIRE, *supra* note 65, at 168 (citing MODEL RULES OF PROF'L CONDUCT R. 3.5 (2002)). The relevant portion of Rule 3.5 states:

with the violation because the judge is egotistical and thinks that he will not be influenced by the public defender.<sup>112</sup> Mackay warns a new assistant district attorney that public defenders typically flout the rules, particularly their duty of candor with the court.<sup>113</sup>

Another issue that arises in these novels is unethical billing.<sup>114</sup> Attorney Millholland is required to smooth the ruffled feathers of a partner, and, as she is doing so, realizes that clients will be billed for the time she spent placating the partner.<sup>115</sup> In Lisa Scottoline's *Legal Tender*, attorneys overbill for reimbursements and pad some pretrial time.<sup>116</sup>

Other acts of deceit in addition to over-billing include outright lying. Attorney Bennie Rosato tells one lie after another as she tries to avoid arrest for a murder.<sup>117</sup> Attorney Kate Millholland perjures herself for her boyfriend-client, telling the police that she didn't see him hit a corporate raider at a party when in fact she did.<sup>118</sup> Despite the apparent ease with which she lied, she later says, "[F]or a

A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order.

*Id.* *Ex parte* communications have several risks: lawyers may tell a judge facts that otherwise might have been inadmissible under the rules of evidence; also, with no one else present, there is no opportunity for cross-examination. CRYSTAL, *supra* note 72, at 248-49. This is one of the very few instances where an author actually identifies the specific ethical rules by name.

112. MCGUIRE, *supra* note 65, at 168.

113. *Id.* at 173 (citing MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002)).

114. The only Model Rule that directly addresses legal fees is Rule 1.5(a) which simply states that "fees shall be reasonable," and sets out factors to determine reasonableness. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2002).

115. HARTZMARK, BITTER BUSINESS, *supra* note 63, at 273. In the 1970s, time-based billing became the primary method of computing compensation for law firms. Opportunities for fraud are rife as there is no practical way to verify the accuracy of time sheets. William G. Ross, *The Ethics of Hourly Billing by Attorneys*, in PROFESSIONAL RESPONSIBILITY ANTHOLOGY 181 (Thomas B. Metzloff, ed., 1994). Issues surrounding the ethics of billing reappeared in the public eye in the indictment of Webster Hubbell. During a tape-recorded phone conversation while he was in prison, his wife asked, "You didn't actually do that, did you, mark up time for the client, did you?" He replied, "Yes, I did. So does every lawyer in the country." *Excerpts from the Tapes of Webster Hubbell's Prison Phone Conversations*, N. Y. TIMES, May 2, 1998, at A9. In the same issue, Boston University law professor, Susan P. Koniak expressed dismay at the number of lawyers who overbill. See Susan P. Koniak, *When Did Overbilling Become a Habit?* N.Y. TIMES, May 2, 1998, at A15. She suggests that lawyers overbill because they can get away with it. *Id.* Also, there is pressure to accumulate billable hours. *Id.* Professor Koniak expresses her particular worry — the excuse that 'everybody is doing it.' *Id.* "It is a theme that dominates our public and private morality, at every level, not just in law firms." *Id.*

116. SCOTTOLINE, *supra* note 64, at 196-97.

117. See generally *id.*

118. HARTZMARK, PRINCIPAL DEFENSE, *supra* note 63, at 32-33.



lawyer I was a rather poor liar."<sup>119</sup> Gail Connor pretends she is not an attorney in order to induce a witness to give her information. At the moment she does, she wonders "[if it is] against the Florida Bar Code of Ethics."<sup>120</sup>

Besides lying, Bennie Rosato breaks the law, violating Rule 8.4, the prohibition against misconduct.<sup>121</sup> On the run from the police who suspect her of murdering her law partner, she breaks into law offices, pretends to be an attorney in a firm, and steals files.<sup>122</sup> At one point, she says, "I almost found myself believing my own scam."<sup>123</sup> Attorney Kate Millholland smokes dope,<sup>124</sup> as does Lia Matera's Willa Jansson.<sup>125</sup> Rosato tells a lawyer-friend who uses heroin that the bar association has a service for attorneys with drug problems.<sup>126</sup>

In *Suspicion of Guilt*, not only does a well-known attorney help forge a will, but another lawyer, running for a judgeship, bribes a notary.<sup>127</sup> The attorneys who know about the misconduct have an affirmative duty to report it under Rule 8.3(a),<sup>128</sup> but they ignore it. When the attorney running for the judgeship withdraws from the race, Gail Connor decides not to report her.<sup>129</sup> When clients, not

119. *Id.* at 117.

120. PARKER, *SUSPICION OF GUILT*, *supra* note 63, at 193.

121.

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

MODEL RULES OF PROF'L CONDUCT R. 8.4 (2002).

122. SCOTTOLINE, *supra* note 64, at 233-44.

123. *Id.* at 392.

124. HARTZMARK, *PRINCIPAL DEFENSE*, *supra* note 63, at 38.

125. MATERA, *A RADICAL DEPARTURE*, *supra* note 63, at 21. Comment 2 to Rule 8.4 notes that not all offenses may affect one's fitness to practice law. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 2 (2002). "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." *Id.*

126. SCOTTOLINE, *supra* note 64, at 204.

127. PARKER, *SUSPICION OF GUILT*, *supra* note 63, at 71-72.

128. MODEL RULES OF PROF'L CONDUCT R. 8.3 (2002) (regarding lawyers' duties to report professional misconduct).

129. PARKER, *SUSPICION OF GUILT*, *supra* note 63, at 318. Filing of complaints is rare because of disincentives to do so. There are no tangible rewards, and one may invite retaliation. As a result, clients file most complaints, a questionable situation, given client

lawyers, did file complaints with the state bar about the attorney who forged a will, the Florida Bar permitted him to "quietly settle with each [client]."<sup>130</sup> "How would it look, a former Florida Bar president, disciplined for ethical violations?" asks a fellow attorney.<sup>131</sup> While he was not disciplined, the Bar did require him to go to a clinic for his alcoholism.<sup>132</sup>

The criminal conduct of law students and attorneys sinks to new depths in Matera's *Where Lawyers Fear to Tread*. A law review staff member commits blackmail and murder, and a well-known couple, both attorneys, also commits murder.<sup>133</sup> Two female attorneys commit murder in Scottoline's thriller.<sup>134</sup>

While one would have to do a thorough comparison with male fictional attorneys before drawing any firm conclusions about ethics and gender, these fictional attorneys tend to support the view that *there may be as much variation among individuals of the same gender as between genders*. Prosecutor Linda Fairstein's protagonist, Assistant District Attorney Alexandra Cooper, lapses only once when she shows confidential letters to a psychiatrist who, she hopes, might help in the investigation.<sup>135</sup> In contrast, Lisa Scottoline's fictional legal world is peopled with female attorneys whose scruples have all but disappeared.<sup>136</sup> In *Where Lawyers Fear to Tread*, Lia Matera gives us the full panoply of female figures in the law: Susan Green, the meticulous, high achiever; Willa Jansson, the liberal sleuth; Mary West, the lawyer-slut who specializes in seducing first year students; Professor Miles, the stuffed-shirt law professor who spends a lifetime agonizing over footnotes; and Jane Day (Lady Jane) who makes the mistake of trying to mix politics and justice.<sup>137</sup> Green and Miles are murder victims; and Day a perpetrator (suggesting that perhaps law is, after all, more reputable than politics).

Likewise, gender does not automatically suggest different styles of lawyering in these novels. These fictional female attorneys are just as comfortable as males with zealous advocacy and its attendant metaphors of combat, though sometimes a worried note

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dependence on attorneys. David B. Wilkins, *Who Should Regulate Lawyers?*, in *PROFESSIONAL RESPONSIBILITY ANTHOLOGY* 233-34 (Thomas B. Metzloff, ed., 1994).

130. PARKER, *SUSPICION OF GUILT*, *supra* note 63, at 215.

131. *Id.* at 216.

132. *Id.* at 216.

133. MATERA, *WHERE LAWYERS FEAR TO TREAD*, *supra* note 63, at 201-03.

134. SCOTTOLINE, *supra* note 64, at 278-80.

135. FAIRSTEIN, *supra* note 65, at 268-69.

136. *See generally* SCOTTOLINE, *supra* note 64.

137. *See generally* MATERA, *WHERE LAWYERS FEAR TO TREAD*, *supra* note 63.

does creep in as some evaluate their roles. Attorney Kate Millholland is prepared for "deadly combat"<sup>138</sup> in her job as a mergers and acquisitions attorney and boasts,

I am a deal lawyer . . . Someone you call in to orchestrate a complex transaction or craft the terms of a tricky acquisition . . . I'm the person you call in when you need your lawyer to play hardball with their lawyer, not when you need your client's hand held.<sup>139</sup>

But in a meeting she notices that everyone but her is male and notes that "mergers and acquisitions is still the locker room of the profession. On the few occasions I allowed myself to think about it, I wondered what that said about me."<sup>140</sup> District Attorney Kathryn Mackay discusses her attitude to her job and what it requires of her if she is to do it well. "I can't be a Pollyanna while I'm trying a homicide . . . When I'm in court, it's like . . . like I'm a soldier and it's a war. The only difference is I use words instead of guns."<sup>141</sup> She goes to autopsies voluntarily because it helps her do her job better. "Seeing the victim made the crime somehow more real, more painful. A sense of reality and pain were crucial to good prosecution."<sup>142</sup>

Cass Jameson, the protagonist of Carolyn Wheat's novels, describes herself as "a born defense lawyer."<sup>143</sup> "It's a reflex, not a choice. Start bad-mouthing Attila the Hun, and I'll probably come up with a defense."<sup>144</sup> Although Jameson describes herself this way, she wrestles with ethical dilemmas and her role as an attorney in ways that make her the most complex and, for these writers, the most appealing, character of the seven. She is a fitting protagonist with which to conclude. She may be a born defense lawyer, but that does not prevent her from struggling with representing a mother in a child custody dispute whom she dislikes.<sup>145</sup> The mother's selfishness is hurting her own child, and Jameson spends "half the night" to convince the mother not to be a "ball buster."<sup>146</sup>

Professor David Luban might suggest that Jameson is choosing the "*professionalism of presumption*."<sup>147</sup> That is, rather than deferring

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138. HARTZMARK, *PRINCIPAL DEFENSE*, *supra* note 63, at 42.

139. HARTZMARK, *BITTER BUSINESS*, *supra* note 63, at 11-12.

140. HARTZMARK, *PRINCIPAL DEFENSE*, *supra* note 63, at 1.

141. MCGUIRE, *supra* note 65, at 52.

142. *Id.* at 185.

143. WHEAT, *WHERE NOBODY DIES*, *supra* note 63, at 14.

144. *Id.*

145. *Id.* at 1-10.

146. *Id.* at 2.

147. David Luban, *W.M. Keck Foundation Forum on the Teaching of Legal Ethics: Stevens's Professionalism and Ours*, 38 WM. & MARY L. REV. 297, 306 (1996) [hereinafter, *Luban*,

to the client, the typical professional posture of lawyers, that Luban terms the "professionalism of deference,"<sup>148</sup> Jameson is trying "to correct a client's bad moral judgment."<sup>149</sup> Luban writes, "As lawyers, we must appreciate that when professional morality commands us to do something revolting to the nonprofessional conscience, the default assumption should be that the nonprofessional conscience has it right and that professional morality is too clever for its own good."<sup>150</sup>

Not only does Jameson present an atypical view of professionalism, but she also questions the suitability of the "winner-take-all adversary system" for Family Court disputes.<sup>151</sup> In a decision that does lend some support to the idea that lawyering might be done differently by women, Jameson seeks out a social worker with whom she sets up an alternative dispute resolution service.<sup>152</sup>

Doing what she thinks is right as a lawyer and as a person does have costs. Representing a woman charged with endangering her children's welfare, Jameson wins the right for the woman to keep her children, having convinced the judge that with counseling and parenting lessons the mother could become a good parent.<sup>153</sup> She even commissions her own social work study.<sup>154</sup>

When asked how she could represent this woman and persons like her, Jameson replies, "By understanding them. By seeing them as people, not monsters, no matter what they've done. By finding the whole story, the one that appears between the lines of the official records. By listening instead of talking."<sup>155</sup> Here Jameson's view of her role suggests a style of lawyering that Professor Minna Kotkin has termed "the advocacy of protection,"<sup>156</sup> an advocacy style "in which the lawyer focuses on an empathetic understanding of a

*Stevens's Professionalism and Ours*]. Luban's analysis is based on the novel by Kazuo Ishiguro, *Remains of the Day*, set in the time period during the two world wars. Stevens is an English head butler whose employer asks him to fire two maids for being Jewish. See generally Kazuo Ishiguro, *Remains of the Day* (1989). Luban describes this novel as "the finest story about professionalism I know" and suggests that the word, "lawyer," can be substituted for "butler." Luban, *Stevens's Professionalism and Ours*, *supra* note 147, at 297.

148. Luban, *Stevens's Professionalism and Ours*, *supra* note 147, at 304.

149. *Id.* at 306.

150. *Id.* at 315.

151. WHEAT, *WHERE NOBODY DIES*, *supra* note 63, at 97.

152. *Id.* at 213-14.

153. WHEAT, *FRESH KILLS*, *supra* note 63, at 10.

154. *Id.*

155. *Id.*

156. Minna J. Kotkin, *Professionalism, Gender and the Public Interest: The Advocacy of Protection*, 8 ST. THOMAS L. REV. 157, 171 (1995). Despite the criticism of Carol Gilligan's work, Kotkin points out that "relational" feminist theory, for which Gilligan's work is foundational, resonates with many female attorneys. *Id.* at 159.

client's powerlessness in the litigation process and a deep connection with the client's goals."<sup>157</sup>

In the end, the lawyer who chooses to protect her client from possible abuses in the litigation process cannot ultimately protect the client from herself or those around her. Two months after the decision by the court to return the children to their mother, the mother brutally kills them. Jameson thinks that "if a less conscientious lawyer had represented Rojean, those kids would be alive. In a foster home, but alive."<sup>158</sup>

Jameson faces another ethical dilemma when a client disappears with the baby she had promised to put up for adoption. Twice Jameson comments that she took the adoption case to "atone" for the dead children killed by her mother.<sup>159</sup> When Wheat has her protagonist use that word, the reader enters a different moral world than is depicted in the other novels, for this word is usually used in religious contexts, both Jewish and Christian, to refer to acts done to purify oneself from sin.<sup>160</sup>

Jameson wonders if she should turn her client in. She thinks, "My mind reviewed hastily the obligations of a lawyer regarding future crimes. . . . This was no time for an ethics opinion. There was a baby's life at stake. Just dial the phone [of the police] and worry about the ethics later."<sup>161</sup>

This statement is a fitting one with which to draw some conclusions about fictional lawyers and professional responsibility issues. The statement is troubling because it suggests that there is the right thing to do and then there is the professionally responsible thing to do. Yet the situation itself begs the question of whether a bifurcated view of ethics makes sense in either law or ordinary life. Perhaps the public accepts Jameson's statement, not because people believe that many lawyers lack a moral compass, but because they recognize that the situation requires a highly complex ethics which no book of rules can provide. In any event, one is left with Professor Luban's problematizing comment on the Model Rules that they "invite lawyers to turn the Socratic question, 'How

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157. *Id.* at 171.

158. WHEAT, *FRESH KILLS*, *supra* note 63, at 10.

159. *Id.* at 8, 229.

160. Ben Zion Wacholder, *Day of Atonement*, in *THE OXFORD COMPANION TO THE BIBLE* 156 (Bruce M. Metzger & Michael D. Coogan, eds., 1993). In the Jewish faith, the Day of Atonement is Yom Kippur, the most solemn festival. "On this day God passes judgment on past deeds of every individual and decrees who shall live and who shall die during the ensuing year." *Id.*

161. WHEAT, *FRESH KILLS*, *supra* note 43, at 99.

should we live?' into the legalistic question, 'Is this legally permissible?' and act accordingly."<sup>162</sup>

Perhaps the public is also drawn to Wheat's protagonist because she acknowledges that her life as an embodied woman has the power to affect and complicate her life as an attorney. For while no hard and fast gender differences appear in the professional deliberations of fictional attorneys, some differences seem to appear in the strategies of male and female lawyer-novelists.

The protagonists in several of John Grisham's novels "have no concern about the degeneration of professionalism."<sup>163</sup> Justice is the product of deceit, and "[h]is characters have the mentality of 'I practice therefore I am corrupt' no matter how minor their role in the story."<sup>164</sup> Professor Carol Sanger notes that while most of the male attorneys in Scott Turow's first novel are unscrupulous, the main male protagonist has some decent qualities, but the female attorney-victim is completely unscrupulous.<sup>165</sup> In short, characterization tends to serve plot and the solution of the "mystery" drives both plot and character. The reader is handed an intriguing criminal conundrum and races avidly to its solution, almost indifferent to the personal lives of the discoverers. In Turow's *Presumed Innocent*, it is almost irrelevant that the protagonist's wife somehow found a justification to kill his lover; it's the cleverness of her plan that counts. He can still sleep with her occasionally at the end — such intellect deserves tolerance and miraculously escapes pathology.

In thrillers written by female lawyers, however, the solution of the 'mystery' may appear secondary to the solution of the protagonist's inner quandaries over vocation (if and how to practice), relationship to community, and professionally enforced autonomy. The political is inevitably personal in many of these works and the plot exploratory of both realms. Lia Matera's *The Smart Money* is a case in point.<sup>166</sup> Laura leaves a high profile law firm in San Francisco to return to her small town of origin, seeking vengeance on her ex-husband and justice for the unsolved slaying of her former lover (who interestingly enough was once married to her ex-husband's present wife). But the slaying is never conclusively solved. As her sidekick private detective reminds her, "Gleason

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162. Luban & Millemann, *supra* note 28, at 57.

163. Robert A. Creo, *An Essay on Professionalism: The Portrayal of Lawyers in Popular Fiction*, available at <http://www.rcreo.com/pg14.cfm> (last accessed Apr. 15, 2004).

164. *Id.*

165. Sanger, *supra* note 43, at 1350.

166. LIA MATERA, *THE SMART MONEY* (1991).

murdered Lennart Strindberg, but we'll never prove it, Laura! That's the god-damned system for you!"<sup>167</sup> She heads back to San Francisco to take on an important case, her war-damaged cousin/lover in tow. She's found direction and 'family' for now, but one suspects that she and Hal (as well as her future professional identity) are a whole other story waiting to be told. The book jacket confirms our suspicions.

There is no female Atticus Finch among these seven fictional attorneys. That may say as much about the moral struggles any woman entering the legal 'fraternity' has to face as anything else. And this, in turn, reflects on the struggle of female novelists to be taken seriously. Can these contemporary writers afford the 'nostalgia' of innocence vs. evil plots? Can they be 'idealists' without being perceived as soft minded — lacking in the necessary competitiveness to 'make it' in the publishing world or in contemporary court? Yet in that these lawyer/novelists (hazarding both arenas) present characters who are ethically complex and who are often deeply unsettled by the dilemmas presented to them, they may illustrate an important aspect of female 'logic' and storytelling — that which can allow for digression and nonlinear development. As Margaret Doody contends in *The True Story of the Novel*, perhaps all truly fascinating novel characters are always somewhat "feminine" in that they honor internal emotions and, from a position of private desire, question civic virtue.<sup>168</sup>

Since transgression of social rule is what often drives the novel plot, according to Doody, and since women are often second class citizens in their professions, it stands to reason that their issues of freedom and restraint would govern much fictional discourse. It falls to the female writer, then to make this dissident element work to the advantage of women in the audience. Thus, these popular novels — legal thrillers written by female lawyers about their peers and clients — may, by the very diversity of ethical reasoning(s) employed, do just that, and offer hope for the kind of social renovation that an (inter)active moral imagination can evoke.

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167. *Id.* at 182.

168. MARGARET ANNE DOODY, *THE TRUE STORY OF THE NOVEL* 266 (1996).