

# Taking *L.A. Law* More Seriously

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The name tells the story. *L.A. Law*. One part "L.A.," one part "Law." And that is its strength and its risk. If it were only "L.A.," it would be flash without substance (a West Coast *Dallas*), probably gone by now. If it were only "Law," it would be something else entirely, a panel debate about the Constitution,<sup>1</sup> or *Scott on Trusts*, or *The Yale Law Journal*. What it would not be is on the cusp of a fourth year of weekly broadcast. What it would not be, what it has accomplished after a shaky start, is the closest a commercial television series has come to respectable presentation of issues of law and legal ethics. And, as every lawyer and law teacher knows, issues of law and legal ethics are issues about ideas. That makes *L.A. Law* a rare item: a dramatic television series partly about ideas. How has it survived? The answer lies in mindful acknowledgement of both halves of its name and the effort, often successful, to bring its "Law" as close to law as constraints of the medium will abide.

Convene a gaggle of lawyers and you will hear several varieties (and different intensities) of criticism of *L.A. Law*. The criticisms tend to focus on three aspects of the show: it makes lawyers' cases seem a good deal more significant than they are; it does not accurately recognize or describe the ethical issues lawyers face; it makes the work tasks of lawyers seem a great deal more exciting than they are.<sup>2</sup> In this essay, I take each count of this indictment in turn and explain why they are often either wrong or irrelevant and why, overall, *L.A. Law* has managed to be a beneficial influence on popular conceptions of law and legal ethics.

## I. COUNT ONE: *L.A. Law* MAKES LAWYERS' CASES SEEM A GOOD DEAL MORE SIGNIFICANT THAN THEY ARE

Let us start with a concession. *L.A. Law* inaccurately represents the kinds of legal issues lawyers routinely address, especially lawyers in pri-

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† Professor of Law, New York University School of Law. I planned to watch every *L.A. Law* program between the time I agreed to write this essay and its submission. But, often, my schedule did not permit me to be at a television set when the show aired. Therefore, I would like to thank Harold J. Schulman for his kindness in taping several months of programs, thereby permitting me to have a satisfactory "research base." I would also like to thank Matthew R. Carnevale, Jr., Esq., for providing me with critical footnote information about the first air dates of each of the *L.A. Law* shows discussed in this essay.

1. See, e.g., *The Constitution: That Delicate Balance*, (PBS television broadcast 1984).

2. Each of these criticisms surfaces in Machlowitz, *Lawyers on TV*, A.B.A.J. at 52 (Nov. 1, 1988); Orey, *Sex! Money! Glitz! In-House At L.A. Law*, AMERICAN LAWYER 32 (Dec. 1988).

vate practice. In *L.A. Law*'s world, cases come from today's headlines. Many are glamorous, controversial, or weighty, the kinds of cases large firm associates would die to have just one of, amidst the monotony of anti-trust depositions and research into the finer points of federal court venue. Here are some of the issues that have challenged *L.A. Law*'s lawyers over the years: the termination of life support for a young woman in a coma<sup>3</sup>; the duty of a psychiatrist to warn the intended victim of an apparently violent patient<sup>4</sup>; products liability<sup>5</sup>; toxic torts<sup>6</sup>; capital punishment<sup>7</sup>; date rape<sup>8</sup>; insider trading<sup>9</sup>; whether a "macho" food company that has hired an Olympic gold medal winner to promote its products can annul the contract when the young man decides to reveal his homosexuality<sup>10</sup>; and whether a pregnant terminally-ill woman should be forced to undergo a caesarian section<sup>11</sup>. Not once, so far as I am aware, has the show dwelt on, or even mentioned, the usual content of much law practice and legal scholarship—issues like the parole evidence rule, collateral estoppel, riparian water rights, or ancillary jurisdiction.

The simple explanation for this distortion is, of course, that to the extent the "Law" half of *L.A. Law* is able to remain part of the show, it has to earn its keep. That means it has to engage a lay audience. To be engaging, it has to be difficult, morally difficult, and that means it has to be about people and their responsibilities to each other: the responsibilities of lawyers to clients, partners, associates, and others; and the responsibilities of individuals to each other and of corporations (preferably large ones) to individuals. Actually, the "Law" in *L.A. Law* is law only accidentally. When done well, the "Law" part of the show is a series of moral questions that can be developed in a legal setting because, for better or worse, American society often presents moral questions that way. Absent an extreme situation, the holder in due course doctrine is just not going to be great entertainment, not even in L.A.

The subject of this essay is the influence of *L.A. Law* on the popular legal culture, which I take to mean how the public thinks about lawyers, their work, and the law itself. The public, as such, does not think anything about the holder in due course doctrine and is happy to leave its elaboration to experts. But the public does care, or can quickly be encouraged to care, about whether the state, through the person of a judge, ought to permit the parents of a comatose young woman to require the

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3. *L.A. Law* (NBC television broadcast, Jan. 12, 1989).

4. *Id.* (Oct. 22, 29, 1987).

5. *Id.*

6. *Id.* (Nov. 5, 1987).

7. *Id.* (Nov. 10, 1988).

8. *Id.* (Mar. 27, 1987).

9. *Id.* (Jan. 14, 21, (1988).

10. *Id.* (Feb. 23, 1989).

11. *Id.* (Mar. 3, 1988).

hospital to stop giving her food and water. The measure of *L.A. Law's* success, given its medium, is not whether its lawyers handle cases across the *corpus juris*. That is impossible. The measure of its success is *how* the show presents the legal questions that viewer interest and commercial reality (in other words, survival) require.

Here the challenges are several. The first challenge is motivational. Many viewers may not have given the particular legal question much thought. The people responsible for *L.A. Law* have to *show* that the issue is important by placing it in a story that is dramatically engaging. At some level, the viewer must think: "I care what happens to these people. What happens to them in some way depends on a legal rule. That makes the legal rule important, and I have to try to understand it."

The second challenge, which then follows, is educational. Without being "preachy", the show must reveal why the issue is hard. What are the opposing arguments? The show must do this within a dramatic context. It cannot trot out a lecturer on the pros and cons of euthanasia. Furthermore, it must attempt to do what lawyers do all the time — extrapolate from the immediate case to the general rule and back to other cases. But it must do even *that* through dialogue and courtroom interrogation.

Yes, if the psychiatrist had warned the threatened victim of the violent patient, she might be alive today. But what will happen if we force doctors to do that by freely awarding damages to the victim's estate (as plaintiff requests)? Some doctors will stop treating violent patients. Others will warn the victim even though they reasonably believe that the patient does not mean it. The warning will probably mark the end of the therapeutic relationship. That in turn means patients inclined toward violence will not get treated. Now, what should the legal rule be? In any event, should we award damages to the bereaved parents of the victim in this very case? These questions (or ones like them) could be debated in the torts, legal ethics, or civil procedure classes of any American law school. Writing them into a dramatic television series is demanding in a different way.<sup>12</sup>

The show's third challenge — to my mind the most difficult, but one it seems to appreciate — is to maintain a proper respect for ambiguity. Be-

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12. See *supra* note 4. This story had a twist. Kelsey assumed the defense of a psychiatrist in a civil action. The parents of one of the psychiatrist's group therapy patients sued because he had not warned their murdered daughter that another patient in the group had told the defendant that he intended to kill her. The apparent killer had already confessed and been convicted. The first half of the story thus assumes the guilt of the convicted patient and focuses on the doctor's duty to warn. Kelsey then learns that the convicted patient is innocent and that his delusional confession was instigated by the psychiatrist, who was the real killer. This discovery enables exploration of Kelsey's ethical dilemma. Should she reveal her client's confession, and thereby violate what may well be a duty of confidentiality? Or should she say nothing and let an innocent person remain in jail and a guilty one remain free? The dilemma is resolved, if not solved, when a terminally-ill, retired prosecutor, whom Kelsey has asked for guidance, decides to violate *his* confidentiality obligation and reveal the psychiatrist's confession. The effect of this "story within a story" is to have Kelsey argue in favor of the psychiatrist's duty of confidentiality in the first part of the story, only to be confronted with her own duty of confidentiality in the second part, when the psychiatrist tells her he did it.

cause *L.A. Law* often addresses cutting-edge legal issues—issues that are controversial precisely because they are unresolved and provoke strong feelings on both sides—the story cannot blithely choose one position or another. It cannot make hard issues look easy; loose ends have to remain loose.

Consider the episode concerning the comatose young woman whose parents have petitioned the court to order the hospital to withdraw food and water.<sup>13</sup> The woman had been comatose for two years. She displayed no cognitive function. She required no extraordinary life support system, only a tube to provide food and water. She had virtually no prospect of recovery. She could live forty years this way or she could die tomorrow. The hospital hired McKenzie, Brackman, Chaney & Kuzak<sup>14</sup> to resist her parents' petition. At the beginning of the story, a firm lawyer expresses the opinion that the parents are right, an opinion probably shared by many viewers, at least in the abstract. McKenzie responds by emphasizing the firm's responsibility to the client hospital.

Victor Sifuentes, the firm lawyer reluctantly handling the matter, persuades the judge to deny the petition. The judge announces that he had initially been inclined to grant it, but he changed his mind after seeing the patient (we saw her too), hearing a description of the pain caused by death from dehydration (which the doctors could not swear the patient would not suffer), and hearing that the doctor who testified to the patient's insensate condition nevertheless stopped to hold her hand and talk and sing to her as he made his rounds.

The parents obviously love their daughter, believe (probably correctly) that she would not want to live in her current condition, and have been financially ruined by her treatment. After they lose, an anguished and angry father follows Sifuentes from the courtroom, shouting that while the lawyer would now simply move to his next case, he and his wife would have to suffer the consequences of Sifuentes' victory for the rest of their lives. As elevator doors close between them, Sifuentes is visibly anguished. He has to reconcile the dissonance between his responsibility to achieve the client's goal and his personal doubts about the wisdom of that goal.

The creative challenge to *L.A. Law* is how to have a *result* for cases raising hard issues without pretending to have the *solution* to the dilemmas they pose. The world of popular entertainment and the world of law each requires a result. A story must have an ending of sorts; a court proceeding must have a judgment. Yet due regard for the ambiguity and complexity of issues like these makes it imperative that the show not pretend to have solved them in less than an hour. In the episode of the comatose

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13. See *supra* note 3.

14. "McKenzie, Brackman" is the name of the law firm at the center of the show.

patient, as in many others, *L.A. Law* has managed to honor this multiple assignment.

*L.A. Law* differs from most other modern entertainments that use law and lawyers to tell a story. I include here those on television and in films, books, and plays. *Perry Mason*<sup>15</sup> is often cited as embodying the genre, but I think in this regard *Perry Mason* is representative. It could as well be *The Defenders*,<sup>16</sup> *The Verdict*,<sup>17</sup> *Jagged Edge*,<sup>18</sup> or *Presumed Innocent*.<sup>19</sup> The difference is that most other entertainments based in law are mysteries whose solutions will be discovered by lawyers rather than police officers, Miss Marple, or some other variety of modern detective. For these mysteries, dramatic tension comes not over what the law should be, but over what happened and whether the lawyer will be able to prove it happened. Murder is wrong and should be a crime, naturally; but who is the murderer?<sup>20</sup>

*L.A. Law* has some of this, but a good deal else. Its law is very much the law of the familiar law school hypothetical, usually from torts, criminal law, contracts, and other first year courses. And of course that kind of law is not about facts (what happened?); it is about ideas (what should society do about it?). To be sure, *L.A. Law* is about more than ideas, not least of all glamour, money, sex, and fashion. But on network television, let's face it, you can't expect the dramatic presentation of ideas, at least not consistently, without a large helping of spice.

Granted the ideas in *L.A. Law* are not developed with the nuance and subtlety we expect to find in law journals or judicial opinions. But we have no right to ask that. We must test the show's claims by the same standards we apply to the treatment of law in other popular mediums—for example, newspapers, film, or magazines. So tested, I think it measures up quite well.

Let me put this another way: in *L.A. Law*, law is a character or, more precisely, legal issues are characters. *L.A. Law* takes the ideas behind legal issue, adds a cup of sugar, and gets "roughly fourteen million view-

15. *Perry Mason* (CBS television broadcasts, aired Sept. 21, 1957 through Jan. 27, 1964).

16. *The Defenders* (CBS television broadcasts, aired Sept. 16, 1961 through Sept. 9, 1965).

17. *The Verdict* (1982).

18. *Jagged Edge* (1986).

19. S. TUROW, *PRESUMED INNOCENT* (1987).

20. Shows like *People's Court* (CBS television broadcasts, first airing Sept. 16, 1987), and *Superior Court* (CBS television broadcasts, first airing Sept. 15, 1986), present yet another variety of legal entertainment. *People's Court* finds real litigants in a Los Angeles small claims court who agree to dismiss their court actions, tell their story on *People's Court* instead, and abide by the decision of a retired judge. *Superior Court*, by contrast, does use actors and a script dramatized from real litigations. In both shows, the disputes are self-contained. Neither show relies on dramatic continuity from program to program or on character development. They simply present the application of legal rules in a court setting. Such suspense as they have is over the verdict. These and other law-based programs, employing assorted formats and diverse in their verisimilitude, are described in Machlowitz, *supra* note 2, at 52-53.

ers"<sup>21</sup> to swallow its recipe every week. No legal institution can claim that kind of influence on the public's conception of law and lawyers. Influence alone, however, gets no applause; the influence must be constructive.

In producing their shows, the people behind *L.A. Law* have generally treated legal ideas with respect, and even if they do not fret over their many shades of gray (the road to certain death), they at least acknowledge and try to convey something of the ideas' ambiguity, import, and difficulty. Next to that effort and achievement, what difference does it make if McKenzie, Brackman lawyers consistently ignore the rules of evidence or if they make speeches to witnesses when they should be asking questions? What difference does it make that no firm its size (or probably any size for that matter) could or would have the kind of practice it enjoys?

## II. COUNT TWO: *L.A. Law* DOES NOT ACCURATELY RECOGNIZE OR DESCRIBE THE ETHICAL ISSUES LAWYERS FACE

If the fact that *L.A. Law* exaggerates the caseloads of lawyers — makes them more momentous than in truth they are—is not a fair criticism, what about the show's treatment of ethical issues? These are a major and quite a natural, indeed an irresistible, part of *L.A. Law*'s dramatic inventory. How do the ethics of *L.A. Law* measure up?

Early signs were disturbing. The first show missed obvious ethical lapses while presenting proper conduct as problematic. Without blinking, the pilot showed lawyers talking to an opposing client without opposing counsel present;<sup>22</sup> and it had Michael Kuzak proceeding to represent a client after he gave the police information (the client was armed and dangerous) they needed to arrest him.<sup>23</sup> Then the same show fretted over the fact that Kuzak had provided this information to the police in the first place, although no ethical rule protects information about future violent crimes.<sup>24</sup>

Matters have improved. Today, an informal group of teachers of legal ethics, I among them, periodically meet to discuss how to teach the course. Inevitably, our discussions include scenes from *L.A. Law*.

My favorite episode (also from the first show as it happens) is one in which Arnie Becker, the firm's sometime shallow (but always adept) divorce lawyer, meets with Lydia, a woman nearing forty who has decided to accept her husband's settlement offer. Lydia has come to Arnie because

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21. Orey, *supra* note 2, at 34.

22. See MODEL RULES OF PROFESSIONAL CONDUCT, Rules 4.3 and 4.4 (1983). The first show aired on Sept. 15, 1986 (NBC television broadcast).

23. Kuzak would have been a likely "necessary witness" at trial. See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.7(a) (1983). In any event, Kuzak's instrumental role in the client's arrest was not revealed to the client, as it should have been before Kuzak presumed to continue the representation. If it had been revealed, it is doubtful that a client would have retained trust and confidence in counsel sufficient to sustain the relationship.

24. See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6(b)(1) (1983).

her original lawyer, Julia, had qualms about the settlement and urged Lydia to talk to Arnie about it. Lydia tells Arnie she does not want a fight. "I just don't want it to get into an ugly, pitched battle with name calling and recriminations," she insists.<sup>25</sup>

On the very morning of the day he meets Lydia, a gun-carrying former client threatened Arnie because he had not stopped her from accepting a settlement she now realized was too low. In the interim, the former client had learned that her husband had "another woman" and that they were living up in Bel Air while Arnie's former client was living out in Van Nuys. With the memory of that assault still painfully present and based on his years of experience as a divorce lawyer, Arnie tells Lydia that her husband surely has another woman. He urges Lydia to be more aggressive in protecting her economic interests. Lydia does not believe there is another woman or doesn't want to believe it—"My husband and I are not statistics," she declares, "we're individuals." Arnie responds: "For your husband, divorce is a fiscal inconvenience. But for you, this can be the most important financial decision that you'll ever make in your life."

At the conclusion of their meeting, Lydia is wavering. Citing "friendship to Julia" and "admiration for your principles," Arnie offers to review the proposed settlement agreement and tell Lydia his conclusions over lunch at a fancy restaurant the following Thursday. Meanwhile, without Lydia's knowledge, Arnie has his private detective surveil the husband. She succeeds in getting several eight by ten glossy photographs of Lydia's husband and the inevitable other woman in very compromising positions, all of which are meticulously described.

Arnie takes the glossies to the fancy lunch, where Lydia informs him that she has decided to accept the settlement offer. "In the long run, there are more important things than money," she insists. Tapping the envelope containing the glossies, Arnie muses that he will just put the "investigation" of her "husband's affairs, financial, otherwise," on hold. Predictably curious, Lydia asks if it will obligate her financially to look in the envelope. "In no way," Arnie assures, but then in a rare burst of compassion, he warns Lydia that "it may be painful." Of course she looks, then quickly escapes to the lady's room to give up her lunch, as nonchalant Arnie had previously told the investigator she would. Arnie summons the waiter for dessert.

In the next scene, a retributive Lydia, in a sit-down with her husband and counsel, can hardly contain her anger as she hurls insults and her pocketbook across the conference table. Arnie uses other, financial, information the investigator obtained to force the husband to increase his offer considerably. The not-so-veiled threat is that otherwise the information

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25. *L.A. Law* (NBC television broadcast, Sept. 15, 1986).

will get the husband into trouble with the law ("lots of cash transactions"). The extortion issue is not addressed.<sup>26</sup>

Afterwards, Arnie is pleased with himself ("we really socked it to them"), but Lydia is crying uncontrollably. She tells Arnie: "I think what you did was despicable. I'll never be able to look at him again with any kind of respect or affection." For Arnie, she says, it was "all so easy. . . . Just sock it to him and get the money. I lost my life, my children lost a family. And there's no amount of money that would compensate for that." Arnie asks Lydia if she wants to return the money. She does not. Having thereby proved his point to his own satisfaction, Arnie predicts that in two weeks Lydia will be recommending him to a friend. In two months, she will be inviting him to dinner. (Earlier, Arnie mentioned how Lydia would "look great in or *out* of a bikini.")<sup>27</sup>

Client autonomy is an ethical issue.<sup>28</sup> It is the analogue in law to informed consent in medicine.<sup>29</sup> It is difficult to define and harder to teach. The episode I have just described (and my summary does not do it justice) is nearly perfect in presenting the autonomy issue in equipoise. Without his client's permission, Arnie Becker used an investigator to obtain a legally irrelevant but inflammatory fact—opposing counsel points out that in California the husband's affair has no bearing on the grant of a divorce or support obligations. Arnie then used that fact to get his client angry enough to fight for a larger settlement, employing weapons that would inevitably destroy the modicum of civility the couple still enjoyed and which Lydia had declared at the outset she wanted to retain.

Did Arnie exceed his authority when he connived to override his client's stated wishes in order to secure the money he truly (perhaps correctly) believed she would later regret not having? Should he have requested Lydia's authorization before hiring a detective to follow her husband? Did he give insufficient respect to Lydia's declaration that "there are more important things than money?" Did Arnie manipulate Lydia? Or did he save her? Whichever he did, did he act properly?

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26. See N.Y. PENAL LAW § 155.05(e)(iv), (vii) (McKinney's 1988). The program often misses other ethical issues as well. On several occasions it has allowed improper *ex parte* communications between judges and counsel. This may be for dramatic effect, but both interests—accuracy and dramatic effect—can be satisfied by having the opposing lawyer consent. The show is also too casual about the propriety of sexual relations between a lawyer and his or her client. These relationships are especially troublesome in matrimonial cases. See Dubin, *Sex and the Divorce Lawyer: Is the Client Off Limits?*, 1 GEO. J. LEGAL ETHICS 585 (1988).

27. I recently used this segment at a faculty luncheon at New York University Law School to demonstrate how *L.A. Law* treated ethical issues. In the ensuing discussion, the question arose whether it was proper for a male divorce lawyer to be complimentary about the attractiveness of a female divorce client in order to give her confidence and make her feel better about herself. The faculty discussion ended before a consensus developed for or against the conduct.

28. *Jones v. Barnes*, 463 U.S. 745, 754 (1983) (Blackmun, J., concurring). See also Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454.

29. See, e.g., *Cleckner v. Dale*, 719 S.W.2d 535 (Tenn. App. 1986) (drawing analogy).

I have discussed this episode before audiences of lawyers, law students and laypersons. People react strongly to it. But each audience has been sharply divided, which proves the point. *L.A. Law* has taken a hard, ambiguous ethical problem and portrayed it in a serious, dramatic way without making it seem self-evident and without pretending to have solved it. Writing a dramatically powerful scene illustrating dilemmas posed by the attorney-client privilege should not be too difficult. But client autonomy is a nebulous, cerebral concept. The Lydia episode successfully presents that concept in an immediate and engaging way without succumbing to false obviousness.

Much about legal ethics is inherently compelling. The reason is apparent. Lawyers are often required to behave in ways we would condemn if the same people were not acting as lawyers. Often, loyalty to clients requires lawyers to tolerate injustice to others, even to perpetrate it. How do lawyers handle that dissonance? How can it be proper—even laudable—to do for others what it would be wrong to do for yourself or a friend?<sup>30</sup>

Anne Kelsey, for example, knows her client committed a murder for which an innocent person is in prison,<sup>31</sup> but she knows this as a result of what is plausibly a privileged communication. The client confessed to her in order to stop her from trying to establish the incarcerated man's innocence because that effort could direct suspicion back toward the client. What should Kelsey do?

In another episode,<sup>32</sup> Kelsey is defending a corporate client that has been sued for injuries because its plant has allegedly poisoned the well water of a nearby trailer park. The plaintiff, a resident of the trailer park during her pregnancy, gave birth to a child who was completely deaf and blind in one eye.<sup>33</sup> The trial was over the issue of causation: Did Kelsey's client, the Washington Pure Water Company, cause the contamination?

The plaintiff's proof is weak until her lawyer uncovers a secret internal memo establishing causation. The lawyer uses the memo to pry a two million dollar settlement from Kelsey's client in exchange for a sealed record and a secrecy agreement. Kelsey asks the lawyer whether he feels he has responsibility toward people still living in the trailer park and drink-

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30. The literature here is extensive. See David Luban's study in D. LUBAN, *LAWYERS AND JUSTICE* 104-147 (1988). Charles Fried's classic defense of adversary justice can be found in Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060 (1976). See also Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 *AM. B. FOUND. RES. J.* 613; Gillers, *Can a Good Lawyer Be a Bad Person?*, 84 *MICH. L. REV.* 1011 (1986). For a broad view of the questions, see Marvin E. Frankel's engaging book-length essay. M. FRANKEL, *PARTISAN JUSTICE* (1980).

31. This is the second part of the story described *supra* note 12.

32. *L.A. Law* (NBC television broadcast, Nov. 5, 1987).

33. It is not entirely clear whether the mother of the infant is the actual plaintiff, nor does it matter for purposes of the story.

ing the water. No, he replies, his only responsibility is to his client, whose settlement is conditioned on secrecy. Is he right?

Kelsey is then further dismayed to learn that her client refuses to reveal the contamination or clean it up. It would be cheaper, explains the perfectly cool, cost-benefit minded CEO, to settle any claims that may arise, just as car makers prefer to settle products liability claims rather than make a safer but more costly car. Again, Kelsey's knowledge is confidential. What can she do?<sup>34</sup>

Kuzak represents a man named Sears who is accused of leaving the scene of an accident.<sup>35</sup> The car belongs to Sears' aunt, whom Kuzak calls as a witness to explain how others may have gained access to it. In the middle of her highly credible testimony and to Kuzak's surprise, the aunt volunteers that she and Sears were at the beach when the accident occurred. Kuzak knows she is lying at the request of her nephew. He asks to speak with the judge in chambers, where he moves to withdraw. The judge denies the motion after a discussion that might have enlightened the Supreme Court's reasoning in *Nix v. Whiteside*.<sup>36</sup>

*Judge:* What's to prevent him [the defendant] from playing the same time and money wasting game with his next lawyer and the one after that? No, Mr. Kuzak, withdrawing is not the answer to your dilemma. The answer is to let the system work. You do your job, let

34. What Kelsey did do was probably more extreme than what she had to do. She resigned from her firm and then threatened to reveal her client's conduct. The CEO threatened to sue, but Kelsey was able to persuade him that her resignation would free the firm from vicarious liability. The CEO finally yielded and agreed to clean up the contamination in exchange for Kelsey's silence. It is doubtful that revelation would have been unethical in any event. Model Rule 1.6(b)(1) permits revelation of a client's confidence "to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (b)(1) (1983). Although California has not adopted the Model Rules, the same exception appears to apply there. See Los Angeles County Bar Ass'n Opinion [L.A. Opinion] 386 (1981) ("disclosure of a future crime . . . is authorized only if it is needed to prevent immediate and serious injury"); L.A. Opinion 436 (1985) (adopting standard in Model Rule 1.6(b)(1)). Permission to reveal, then, would turn on whether it would be a federal or state crime to fail to clean up the deadly contamination of which the company was aware.

35. *L.A. Law* (NBC television broadcast, Jan. 8, 1987).

36. 475 U.S. 157 (1986). Implementation of *Nix* will not be as simple as might first appear. Justice Stevens recognized as much when he began his opinion, concurring in the judgment:

Justice Holmes taught us that a word is but the skin of a living thought. A "fact" may also have a life of its own. From the perspective of an appellate judge, after a case has been tried and the evidence has been sifted by another judge, the particular fact may be as clear and certain as a piece of crystal or a small diamond. The trial lawyer, however, must often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel.

*Id.* at 190 (Stevens, J., concurring in the judgment).

The conjunction of *Nix* and Model Rule 3.3 means that the lawyer must determine whether he or she has "knowledge" of perjury. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983). If the lawyer's answer is "yes," the trial judge may have to decide if the lawyer is right. On the dilemma of the lawyer, see Judge Altamari's decision in *Doe v. Federal Grievance Committee*, 847 F.2d 57 (2d Cir. 1988). On the dilemma of the trial judge, see *United States v. Long*, 857 F.2d 436 (8th Cir. 1988). See also ABA Formal Op. 87-353 (construing Model Rule 3.3 in light of *Nix*).

the D.A. do her job, and the jury will do their job of sorting out the truth, the falsity, of the testimony.

*Kuzak:* That's a comforting homily, your Honor. But you know as well as I that Sears will be acquitted. That sweet little old lady had the jury eating out of the palm of her hand. . . .

*Judge:* Witnesses lie on the stand every day, Mr. Kuzak. You want to debate the ethical conundrum, we'll have dinner after this thing is over. In the meantime, let's just do our jobs.

Kuzak returns to court, tries to resume questioning, cannot, refuses to continue, and is jailed for contempt. The judge tells the defendant to get a new lawyer and return for a new trial. Who was right?

In other episodes, Abby, a former McKenzie, Brackman associate, now out on her own, urges a client to accept a low settlement.<sup>37</sup> She needs the contingency fee it will produce to pay her office bills. A black lawyer uses allegations of racism in an effort to deflect the jury's attention from facts that will prove that his client committed murder.<sup>38</sup> A dwarf representing the plaintiff in a product liability case encourages the jurors to snicker at his own deformity in order to cause them to feel ashamed and, therefore, more willing to award damages to a child deformed when his pajamas caught fire.<sup>39</sup>

The morally ambiguous universe in which lawyers live delights script writers, as well it should. And it fascinates the public. Here is where education can be especially beneficial. Ethical issues in law are not abstract. They can, of course, be abstracted, restated at increasingly higher levels of generality until, finally, they become mush. When that happens, opposite answers can both sound right because neither tells you much or even commits you to anything specific. To some extent, especially in the academy, this sort of generalizing is appropriate and inevitable. Still, we would do well to remember William Carlos Williams' admonition that there are "no ideas but in things."<sup>40</sup> In the end, every ethical rule must be tested against real stories. Rules of science will not survive if the experiments that prove them cannot be duplicated. Rules of ethics will not survive if, when played out in real cases, they persistently lead to resolutions we cannot accept.

We are frequently ambivalent about how lawyers should behave in a particular circumstance. One reason for this may be that we are still mak-

37. *L.A. Law* (NBC television broadcast, January 19, 1989).

38. *Id.*

39. *L.A. Law* (NBC television broadcast, Oct. 22, 29, (1987).

40. W. C. WILLIAMS, *Paterson*, in *SELECTED POEMS* 262 (C. Tomlinson ed. 1985). The stanza reads:

—Say it, no ideas but in things—nothing but the blank faces of the houses and cylindrical trees bent, forked by preconception and accident—  
split, furrowed, creased, mottled,  
stained—  
secret—into the body of the light!

ing up our minds about a matter. Another is that an answer we have purported to accept suddenly does not sit well when unpredictable consequences are confronted or as our assumptions about the world begin to change. *L.A. Law* tries to capture these morally ambivalent professional dilemmas as few other popular entertainments have. As with the trendy legal issues it generously heaps on McKenzie, Brackman's docket, *L.A. Law's* ethical riddles are about ideas. How should people behave? When can lawyers behave differently because they are lawyers? What will happen if they do? What will happen if they do not? What do, can, or should lawyers have to do with justice? How much do lawyers owe a client?

As with the legal issues, with lapses caused by oversight or demands of the medium, *L.A. Law* makes an earnest effort to pose these questions in a serious way, a way that is calculated to leave the viewer not wholly satisfied. By that I mean that the script does not put everything neatly in its place, with nothing left to do but watch the eleven o'clock news and switch off the light. As with the legal issues, the immediate ethical problems are answered because they must be, but the larger conflicts they signify linger unresolved.

### III. COUNT THREE: *L.A. Law* MAKES THE WORK TASKS OF LAWYERS SEEM A GOOD DEAL MORE EXCITING THAN THEY ARE

I now move to the final criticism: *L.A. Law* presents a distorted picture of the work lives of lawyers. Agreed. The show does not show a lawyer drafting a complaint or a contract for the seventeenth time, or "Shepardizing" cases, or in the third day of a week of depositions over antitrust violations in the pet food industry. It does not reveal how monotonous and repetitive a lawyer's work can be.

*L.A. Law* subtracts eighty to ninety-nine percent of lawyers' real work lives (the exact amount depends on the particular practice) and emphasizes the remainder. It compresses and distills. It exaggerates and conceals. In doing these things, of course, *L.A. Law* does exactly what lawyers themselves try to do for quite different ends. *L.A. Law* and lawyers practice the same arts on different stages. *L.A. Law* does it on television. Lawyers perform in opening statements and summations, in the "facts" sections of their briefs, in oral argument, in negotiations, and in tales they tell, or put in books, about their great victories and unjust defeats.

*L.A. Law* tells stories about people who tell stories. Yes, those people also perform a great deal of other tasks, tasks that they know would bore any listener, even their best friends. *L.A. Law* chooses to omit those tasks from its stories. So do they.

In telling its stories, *L.A. Law* makes the lawyer-storyteller a character instead of an author, but a character whose role in the story in which he or she appears may include telling a story about the story itself. In the

show, as in life, these stories are told to judges, juries, partners, adversaries, and clients. But unlike life, *L.A. Law* has an "outer" audience, the viewer, who knows the show is not real. The real lawyer's audience, by contrast, is encouraged to believe that the lawyer's story *is* real, whether it is or not, while an opposing lawyer may be telling an opposite story about the same reality. *L.A. Law* uses the actor's and the storyteller's arts to entertain, not to fool, people. Lawyers, meanwhile, sometimes (and legitimately) use the same arts to make the false appear true or the true false, at least momentarily, if doing so will help them win.<sup>41</sup> As Shakespeare wrote in *The Merchant of Venice*: "In law, what plea so tainted and corrupt/But being season'd with a gracious voice/Obscures the show of evil?"<sup>42</sup> And as long as we're piling on ironies, the authorization we afford lawyers to "Obscur[e] the show of evil" itself becomes a fit subject for *L.A. Law's* exploration of the profession's ethics.

If we are going to discuss which profession — law or acting — most exploits the skill and substance of the other, lawyers have a lot more to answer for. To help make their professional performances more effective, lawyers take courses in trial advocacy. There, they are videotaped and critiqued, just like actors, in an effort to make them more persuasive and apparently sincere.<sup>43</sup> Lawyers have even started taking acting lessons, to enable them to achieve in real settings and for different purposes the same credibility that *L.A. Law's* actors try to achieve on the screen.<sup>44</sup>

So if lawyers strive to be actors to better put across their versions of a particular reality, is it fair to criticize actors who pretend to be lawyers on

41. See, e.g., Schwartz, *On Making the True Look False and The False Look True*, 41 Sw. L.J. 1135 (1988). See also the debate between Professor Harry I. Subin and John B. Mitchell in the following articles: Mitchell, *The Ethics of the Criminal Defense Attorney - New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980); Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987); Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission"*, 1 GEO. J. LEGAL ETHICS 339 (1987); Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 GEO. J. LEGAL ETHICS 689 (1988).

42. W. SHAKESPEARE, *The Merchant of Venice*, Act III, scene ii.

43. Ordovery, *Law Firm Training Programs: Avoiding Trial and Error*, 5 LITIGATION 16-18 (summer 1979); Schachter, *Drama in Court: Lawyers Learn There's a Method in the Way to Act in Front of a Jury*, L.A. Times, May 7, 1987, § 2, at 1, col. 2.

44. *They're Playing Up to the Jury: Lawyers Are Turning to Actors to Polish Their Court Performances*, TIME, Aug. 1, 1988, at 70 *Lights, Camera . . . Objection!* A.B.A.J., Mar. 1, 1987, at 29; Smart, *Taking a Cue from the Stage*, Washington Post, June 3, 1986 at C5.

Robert C. Post has recognized the relationship between the work of lawyers and actors in an engrossing article that draws on the writings of sociologist Erving Goffman. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379, 386-89 (1987). Pursuing a performance metaphor, Milner S. Ball has suggested a new way of looking at truth in litigation. "[I]t is not to be ascertained; it is to be performed, created, achieved, generated, done, practiced." A lawyer's job is "to perform as a member of an ensemble comprising counsel, judge, and jury. That is, the attorney both produces a play for her client and acts in the larger play of the case as a whole, played to the audience of the public." Ball, *Wrong Experiment, Wrong Result: An Appreciatively Critical Response to Schwartz*, 1983 AM. B. FOUND. RES. J. 565, 570.

Actors, meanwhile, do not appear to be going to law school to learn how to play lawyers.

the ground that the actor-lawyers, in an effort to entertain, make the real lawyers' jobs more exciting than they are? I do not think so. I doubt it misleads people about the true nature of lawyers' work or into choosing a legal career. Students able to compete for places in American law schools know that television is not life. In any event, if we think law school applicants misapprehend how routine and dull law practice may sometimes be, which indeed they might, *L.A. Law* notwithstanding, we can insert a warning on the front pages of law school catalogues, in red ink, ten point type, and italics.<sup>45</sup>

A related ground for criticism of *L.A. Law* is more amusing. Lawyers kibitz, not least of all about the performances of other lawyers. Perhaps some of the criticisms of how *L.A. Law*'s lawyers tell their stories (i.e. practice law) are the critics' way of saying that they would have told the story differently if, like the actress in Woody Allen's *The Purple Rose of Cairo*,<sup>46</sup> they could only enter *L.A. Law*'s courtroom and take over. No doubt, given restrictions of the medium, most of the stories *L.A. Law*'s lawyers tell would be told differently (certainly at greater length) in a real courtroom. But look now, we are talking about disputes over craft. Lawyers who choose to critique the show on grounds of legal craft are making a significant concession, aren't they? To kibitz is to respect, no matter how grudgingly.<sup>47</sup>

#### IV. *L.A. Law*'s LAW, LAWYER'S JUSTICE

In research (as it were) for this essay, I watched many hours of *L.A. Law*. The shows were uneven internally and from week to week. Some were heavy with adolescent humor and crude stereotypes. Others were admirable, occasionally masterful, in their depiction of legal and ethical issues. Lean and subtle, they could inspire class discussion. How can we account for this discrepancy?

One explanation must be the difficulty in maintaining peak performance across the many episodes produced each season. That is to be expected. Other professionals, including lawyers, also vary in the quality of

45. Such a warning is framed in Gillers, *Great Expectations: Conceptions of Lawyers at the Angle of Entry*, 33 J. LEGAL EDUC. 662 (1983). Recent evidence of professional dissatisfaction among lawyers suggests that a warning might be appropriate. See Margolick, *At the Bar*, N.Y. Times, Feb. 10, 1989, at B7, col.1.

46. Released 1985.

47. In one final way *L.A. Law* has been decidedly unrealistic. With a nearly subversive zeal, the writers and producers have populated the show's legal terrain with a rainbow coalition of characters. Women, blacks, Latinos, Asian-Americans, and individuals of various sexual orientation are shown as lawyers, judges and other persons of achievement. Most notable, perhaps, is the creation of Grace Van Owen, the no-nonsense assistant district attorney whose spunk and courtroom demeanor would make a real life adversary weep. The firm has hired a retarded messenger. And recently it employed an older woman associate, whose presence challenges popular assumptions about age with the same visual bluntness that other characters challenge assumptions about gender, sexual orientation, and race. The inhabitants of *L.A. Law* are demographically improbable—for law in L.A. and elsewhere—which is what makes them so valuable on prime time television.

their work. But this cannot be the sole explanation. The quality span has been too broad, while the cast, the writers, and the producers have remained largely intact.

A second explanation offers a further similarity between legal work and television, as well as a perspective from which to judge the quality of *L.A. Law*'s influence on popular conceptions of lawyers and their work.

Like the halves of its name, *L.A. Law* seems in internal struggle between Hollywood's strong impulse toward cheap and easy entertainment — caricature, slapstick, stock situations, and "happily-ever-after" endings — and the ambition of the show's producers and writers to transcend this constricting culture. But culture is a powerful force, as another ambitious writer and performer in popular theatre confessed four centuries ago. "[M]y nature is subdued/To what it works in, like the dyer's hand," Shakespeare wrote. He was excusing the "public means" by which he was forced to make his living ("fortune . . . did not better for my life provide") and for the "public manners" a life of acting "breeds."<sup>48</sup>

Lawyers are also constrained by the centripetal force of the institutions that house them. Many students come to law anticipating some role, however modest, in fostering the ideals of the justice system they expect to join. But as they soon learn, justice and the practice of law are different things. A lawyer's skills are purchased by or for a client whose lawful goals may be unjust. Furthermore, the lawyer's work environment may be as constricting for its inhabitants as the culture of television is for creative artists. New lawyers discover that market forces and the traditions of practice, not their private hopes and visions, govern the course and content of their work.

The fact that strong institutional cultures dominate work in both law and television should make lawyers better critics of *L.A. Law* or, indeed, any popular entertainment about law and lawyers. Lawyers need only recall their own reactions to periodic public skepticism about the bar.

Lawyers are often criticized for perceived defects in the system of justice. It is easy to understand why. Daily and cumulatively, they appear as the single most important influence on that system and, accordingly, the public may take them to account when the system visibly misfires. At such times, and with perfect sincerity, a lawyer's nonlawyer friends may ask, "But what about justice?" And with equal sincerity, a lawyer may re-

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48. W. SHAKESPEARE, *Sonnet 111*, SHAKESPEARE'S SONNETS 96 (S. Booth ed. 1977). *Sonnet 110* anticipates this theme. It begins:

Alas 'tis true, I have gone here and there,  
And made myself a motley to the view,  
Gored mine own thoughts, sold cheap what is most dear  
Made old offences of affections new.

Most true it is, that I have looked on truth  
Askance and strangely.

*Id.* at 95.

spond, "Basically, that's not our job. Justice is incidental, though not irrelevant, to what we get paid to do, which is represent clients." It is not clear whether the parties to such conversations ever manage to understand each other.

Similarly, *L.A. Law*, broadcast to millions, may be seen as the single most important influence on the popular conception of lawyers' work and ethics. Accordingly, it may be criticized when it seems to distort what it pretends to describe. At such times, and with perfect sincerity, lawyers may ask, "What about accuracy?" And with equal sincerity, the response may be, "Basically, that's not our job. Accuracy is incidental, though not irrelevant, to what we get paid to do, which is entertain viewers." This exchange is also destined to suffer serious communication failure.

Both parties to these conversations make a point. Lawyers are charged to serve their clients and might wish to disclaim further obligations. Yet the public and lawyers must refuse to let a narrow agency view of the professional role deny a broader accountability. Justice also has claims on a lawyer's loyalty, although we may hotly debate its scope. At the least, however, we have a right to expect that lawyers, given their prominence and authority, will take and demonstrate responsibility to improve the institutions in which they work. We must recognize, however, that lawyers, unlike their critics (including academic lawyers), are "in" the culture "on" which we want them to act, a position that can make that additional assignment difficult. Nevertheless, we have a right to expect both an earnest effort and results, not smugness and self-protection.

Similarly, *L.A. Law* must entertain. It might seek to hold its large audience with television's traditional formulas and try to disclaim further obligation. Yet, again, the public, and from all that appears, the writers and producers of the program, must refuse to let this narrow view deny a broader accountability. We have a right to expect that overall, the show will advance, rather than decrease or leave unchanged, the public's comprehension of legal issues and lawyers' work. Again, we must recognize that the writers and producers of *L.A. Law*, unlike their critics, are "in" the culture "on" which we want them to act and that this position makes the additional assignment difficult. Nevertheless, as with lawyers, we have a right to expect an earnest effort and results.

In this essay, I have suggested that we have so far seen both effort and result. In fact, it is because we have seen them that *L.A. Law* has won significant professional notice. *Perry Mason* was singularly less informative about law and lawyers' work. Indeed, it was misleading, a joke, beneath serious criticism, and it got none. By contrast, we criticize *L.A. Law* because we take it more seriously and we do that because it takes itself more seriously. Our criticism must, however, give due regard to the fact that the program, like the bar, must work on its environment from inside.

Like a person who has been through several disappointing romances,

we are suspicious of a new suitor that presumes to tell our story. We want it to work. But we do not want to be taken for granted. Yet playing hard to get carries the risk of being ignored. I think it is time to meet McKenzie, Brackman half way. At neither their place nor ours, mind you. Not yet, maybe not ever. But after a three year courtship, we know these people well enough to be encouraged.

