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## Popular Culture as a Lens on Legal Professionalism

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# POPULAR CULTURE AS A LENS ON LEGAL PROFESSIONALISM

ALEXANDER SCHERR & HILLARY FARBER\*

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## I. INTRODUCTION

Why use art to teach lawyering?<sup>1</sup> Despite divergences in method and intention, the two disciplines overlap. If the prevalence of lawyers in movies,<sup>2</sup> television, literature, and even humor means anything, popular culture remains fascinated with lawyers. Our practices, our ethics, and our professional personae serve as a mine for image and narrative, a target for cultural critique, and a catalyst for expression. Not surprisingly, images of lawyers in cartoons, film, television, and literature offer unique opportunities to teach and explore professionalism. The proliferation of lawyer images in popular culture provides an array of material ranging from career choice to particular actions and behavior. This material elicits powerful responses about the morality, purpose, role, and identity of lawyers, in addition to traditional questions of legal ethics. The responses prompt students to reflect on career choice, professional persona in the legal world, and their development as human beings within a web of professional commitments.

This Article argues that the cultural images of lawyering provide opportunities for teaching professionalism that go well beyond the teaching of ethical rules using hypothetical facts. We contend that use of different media allows teachers to chart the broad middle ground between disciplinary minima and aspirational maxima—the map of realistic professional practice. This ground includes both rule- and conduct-based ideas of professionalism: careful role definition; responsible practice management; appropriate balance between public and private commitments; and concerns over manners, dress, and work ethic. The middle ground also includes less traditional content, discussion of which brings students to appreciate the subjective disciplines of lawyering. The subjective dimension includes the feel of lawyering for the practitioner: the psychic demands of an active, fully engaged practice. It also includes the subjective experience of the clients who use lawyers, as well as the complex interweaving of subjective and external factors in the situations in which lawyers are called to act.

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1. For purposes of this article, we use the following definition of lawyering: a process of decision-making, in collaboration with clients, that uses legal concepts, methods and institutions to resolve disputes or manage opportunities. See Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161, 219–23 (2002) (discussing and defining the components of lawyering process). We offer no comparable definition of art.

2. See Michael Asimow, *Bad Lawyers in the Movies*, 24 NOVA L. REV. 533 (2000) (compiling movies with lawyer-characters for nearly four decades and assessing their representation as good or bad); PAUL BERGMAN & MICHAEL ASIMOW, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES (1996) (collecting and critiquing movies about or containing lawyers); ANTHONY CHASE, MOVIES ON TRIAL: THE LEGAL SYSTEM ON THE SILVER SCREEN (2002) (discussing films according to legal genres defined by the author as doctrinal subject matters, including but not limited to constitutional law, criminal law, and tort law).

Using cultural representations of lawyers thus expands the notion of professionalism outside the bounds of the codified professional rules of conduct. One professor of ethics and professionalism refers to the examination of the varying layers of legal work as involving "macro" and "micro" contexts.<sup>3</sup> We accept this distinction, and extend it: the rules of ethics provide a micro context, around which popular media provide a macro context within which to appraise a different (and fuller) notion of professionalism.

What renders the use of media unique is its tendency to prompt immediate imaginative experience and assessment of the various dimensions of professionalism. Through a well-chosen excerpt, one can consider both what the rules of ethics require alongside discussions of the moral complexity, emotional content, or even spiritual challenge posed by the situation. From these conversations, students can emerge with their language and awareness enlarged to include a richer and more reflective vision of their own identities as lawyers.

Our argument proceeds in three phases. First, we review widespread notions of "professionalism," illustrating and explicating our notion of professionalism as occupying the middle ground between discipline and aspiration.<sup>4</sup> Second, we provide examples of teaching plans in which we have used different media, including examples of cartoons, movies, and short fiction as vehicles for teaching.<sup>5</sup> Finally, we appraise the common challenges and objections to using the arts for these purposes; while law students form our first and most immediate pool of critics, these objections may have also occurred to others who have used the arts in this way.<sup>6</sup>

We recognize that our approach builds on the enthusiastic use of fictional representation in many modern law school ethics classes. We do not criticize,<sup>7</sup> but rather seek to expand the range of what a teacher can do by using the arts in this way. We also hope to suggest the richness and power of conversations with students in which the traditional focus of classes on professionalism intersects with the more open-ended, expressive concerns of art.

## II. PROFESSIONALISM

Considering lawyers by looking at their artistic depiction offers unique opportunities to teach and explore professionalism. As we explain in our teaching examples,<sup>7</sup> these media allow exploration of both the internal and

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3. Carrie Menkel-Meadow, *Can They Do That? Legal Ethics in Popular Culture: Of Characters and Acts*, 48 UCLA L. REV. 1305, 1307 (2001). Menkel-Meadow defines the macro context as one involving career choice, client choice, and role in the legal institution, and the micro context as the particular choices and behaviors of the lawyer. *Id.*

4. See *infra* Section II.

5. See *infra* Section III.

6. See *infra* Section IV.

7. See *infra* Section III.

external aspects of law practice: the dynamics of role identification and career choice, the good (and bad) performance of standard lawyering tasks, the impact of formal rules of ethics on lawyering behavior, and the widespread cultural conceptions and stereotypes about what lawyers do and how they should act. Response to these media typically raises questions that go beyond what we traditionally think of as legal ethics. This section discusses the various notions of professionalism which we will discuss through teaching examples in Section III.

A formal definition of professionalism focuses on the application of textual rules to lawyering behavior; this is a rule-based notion of professionalism. Subsumed in this definition are the delineation of lawyer role and purpose, coupled with responsive law practice management skills. A somewhat broader and less formal notion of professionalism focuses on various aspects of lawyering conduct, including timeliness, good manners, appropriate appearance, and sustained application of one's best energy to the assigned task; this is a conduct-based notion. The sense of professionalism which we assert broadens these aspects to include other dimensions not easily taught through other methods. This inquiry assesses the moral and political dimensions of a lawyering situation by imagining, explaining, and assessing the subjective experience of both clients and lawyers, and developing the student's sense of self in relation to that imagined reality. Discussions of these topics seek to help students develop a more assured approach to both the external and the internal dimensions of law practice. Our sense of the utility of media as teaching tools rests in part on our belief that professionalism includes not only rule- or conduct-based assessments, but also on the exercise of the practitioner's imagination, maturity, and poise.

An excessively narrow teaching approach to professionalism examines conduct solely according to rules which, by their nature, impose a preexisting standard. In this approach, student consideration of conduct is often limited to asking, "Can he do this? Must she do that? What rule or canon applies, and how?" We accept and affirm the necessity of these questions; we agree that students should know and have practiced the methods for answering these questions, and should have been exposed to how ethics scholars might also handle them. Nevertheless, when these questions form the exclusive focus of teaching professionalism, the scope of professional reflection and learning diminishes.

Law schools currently offer a range of teaching formats in which teaching on professionalism can occur. These include large enrollment classes on legal ethics, seminars on the same topic, simulation classes addressing particular competencies, clinical classes in which discussions arise out of active practice, and even first year lawyering skills classes. A class need not focus exclusively, or even primarily, on professionalism for the topic to emerge. Even in doctrinal classes, teachers can and do introduce professionalism themes; this is a

hallmark of the "pervasive method" of exposure.<sup>8</sup> To be sure, behavioral or clinical classes offer unique opportunities for students to encounter the subjective realities which we stress in this article. Yet even there, the mandate of graded performance or the imperative of client service may restrict the in-depth assessment of professionalism which we recommend.

In our view, professional development rests as much on advances in the moral and emotional maturity of a practitioner as they do on the practitioner's conscious understanding of applicable rules of ethics.<sup>9</sup> Yet law schools face severe limits in attempting to foster full professional maturity in a young practitioner. The development of a mature sense of professionalism requires regular, repeated encounters with the intractable challenges and paradoxes of practice.<sup>10</sup> Fostering individual personal and moral development works best in a long-term relationship with more experienced mentors. By contrast, a three year course-oriented curriculum, whether consisting of large enrollment classes on legal doctrine or clinical classes involving short-term part-time work, provides no more than a bare introduction to the personal and professional growth a new lawyer will undergo.

Depictions of lawyer behavior in popular media offer a respite from these limits. They can serve as springboards from which to explore not only rules and conduct, but also subjective awareness and assurance. These media work well in a variety of teaching formats, from formal lecture to individual supervision (whether clinical or scholarly). Using media, a teacher can provide case studies which give rise to discussions about ethical rules and standards of conduct.<sup>11</sup> The depictions both provide the context and situate the action for lessons which might otherwise be taught in a hypothetical.

The use of media in teaching assumes the value of personal reflection as a method for developing professional identity. After seeing a cartoon, watching a film scene, or hearing a story read aloud, discussions with students can and do take a more personal tone. Through the artist's representation, teacher and student can more readily and thoroughly internalize the situation depicted in the image or scene.<sup>12</sup> The wealth of ethical problems and images of lawyers in

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8. See, e.g., DEBORAH RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (1994) (describing the pervasive method as one which integrates teaching on ethics into other class contexts, and presenting teaching materials on ethics for both substantive law and behavioral classes).

9. See Scherr, *supra* note 1, at 274-78 (discussing and identifying sources of the difficulties of producing fully developed practitioners in a three year academic program).

10. Bellow and Moulton write that to understand a lawyer's purpose, choices, and responsibility, one needs to consider the lawyer's relationship between self and society early and often in one's career. GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY 12 (1978).

11. See Menkel-Meadow, *supra* note 3.

12. Carrie Menkel-Meadow notes:

[T]he use of narrative expands the sight-lines of reality and imagination for legal and moral reasoning. Cases and stories allow us to see backward (historically, how this situation came to be), side-ways (how others in the

literature, film, and the graphic arts provides an immediate mirror against which students can react based on their own personal values and ideals. Carefully led, these reactions can transform into reflection, rooted in the experience of the character, which provides an open-ended sense of the moral choices inherent in the decision or action.<sup>13</sup>

Consider a preliminary example from the movie *The Sweet Hereafter*.<sup>14</sup> The movie chronicles a lawyer's efforts to pursue a tort claim for the survivors of children killed in a school bus accident. Early in the film, the lawyer goes to the home of a pair of grieving parents to ask that they retain him in a lawsuit against the "deep pockets" of the town or the bus manufacturer. After watching the film, students strongly disapprove of the lawyer's encouragement of vengeance and his energetic assertion that nothing is accidental. Most students see the lawyer as self-aggrandizing and self-interested. Students feel the lawyer's visit to the home during this time of grief is a deep intrusion into the family's privacy. Even minimal discussion of the clip renders these reactions palpable.<sup>15</sup>

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situation perceive it) and forward (the consequences and effects of what happened). Thus, cases and stories give us more information and more choices to consider than does the primary text of legal education—the "completed" appellate case. With a range of vision that is panoramic rather than snap-shotted, readers of (and participants in) stories and cases increase the possible readings and choices they make. We consider not only what has happened already but what might happen and how that future can be the product of our own choices, as well as external forces beyond our control. Reasoning about and making choices is what ethical lawyering is all about. So, a study of choice points more fully elaborated from multiple points of view and varied points in time necessarily must enhance the development of moral reasoning skills.

Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 *FORDHAM L. REV.* 787, 793 (2000).

13. *See id.* at 787–88.

14. *THE SWEET HEREAFTER* (Alliance Communications Corp. et al. 1997). We discuss this film, and the teaching questions it might prompt, in a later section. *See infra* text accompanying notes 34–35.

15. As another example, in the movie *PHILADELPHIA* (Tristar Pictures & Clinica Estetico Ltd. 1993), a defense lawyer (played by Mary Steenburgen) in a wrongful discharge case successfully informs the jury of the plaintiff's infidelity after the plaintiff (played by Tom Hanks) became aware that he had AIDS; the lawyer seeks an inference that the plaintiff was reckless and selfish toward his partner's health. Cross examination also drew the inference that the plaintiff was untruthful because at various points in his life he has concealed his homosexuality. The scene concludes with defense counsel saying under her breath to co-counsel, "I hate this case."

This segment evokes powerful responses from students, ranging from abhorrence to righteousness to cynical acceptance. With little prompting, students place themselves in the role of defense counsel and opine as to whether they would and could employ such a trial strategy. Discussion of these responses leads in a variety of directions: the effectiveness of the lawyer's trial strategy; the correlation between the strategy's perceived effectiveness and the students' moral repugnance; the discussion of the strategic flexibility inherent in the mandate of zealous representation; and the quite personal question of whether a given student would do the same, and why. Narrow discussion of the ethical obligation of zealousness helps; but discussing the strategic

One could address the scene solely by assessing whether the solicitation violates the corresponding rule of professional conduct. But the rules do not exhaust the range of reactions which suggest ethical minimums. The teacher can work off the immediate energy and antipathy in the students' responses. This immediacy opens a wide field for discussion: the subtle interplay of strategy and tactics, the depth and complexity of the lawyer-client negotiation, the legitimacy of a lawyer's motivation for pursuing a given case or a given career, and the moral and political impact that lawyers have on the decisions they shape. All these topics fall between the line where lawyers receive discipline and the line where lawyers satisfy the aspirations; in effect, the zone of the daily life and the actual experience of the practicing lawyer. Artistic media give teachers efficient, effective access to this zone, and focus on those aspects of professionalism most likely to confront students in their law practice.

### III. TEACHING EXAMPLES

More has been said about the concepts and philosophies of professionalism; we see our task here as providing concrete teaching examples of how to use different media. To this end, in this section we discuss three different media. First, we assess lawyer humor in the form of lawyer cartoons as a teaching vehicle. Next, we turn to film, both those which focus on lawyers and lawyering and those in which those concerns are incidental. Finally, we consider the use of written fiction in a discussion format. In so doing, we also introduce the question whether and how to use depictions that dwell on "extra-legal" concerns.<sup>16</sup>

#### A. Cartoons

The proverbial "a picture paints a thousand words" explains why cartoons provoke such rich and thoughtful discussion about lawyers and their roles and behaviors. Cartoons depict impressions and provide commentary on all aspects of our society, and lawyer cartoons are no exception. Cartoons about lawyers mirror how society evaluates lawyers and how lawyers assess themselves, and serve as one of our culture's principle means of critiquing the legal profession. Asking students to reflect on their own preconceptions about lawyers by deconstructing a cartoon is a simple device to generate an array of insightful responses. Cartoons offer quick graphic accessibility; their very humor and lightness disarm their audience. The viewer responds first to the aesthetic and second to the message the cartoon is communicating. Like fiction, the context

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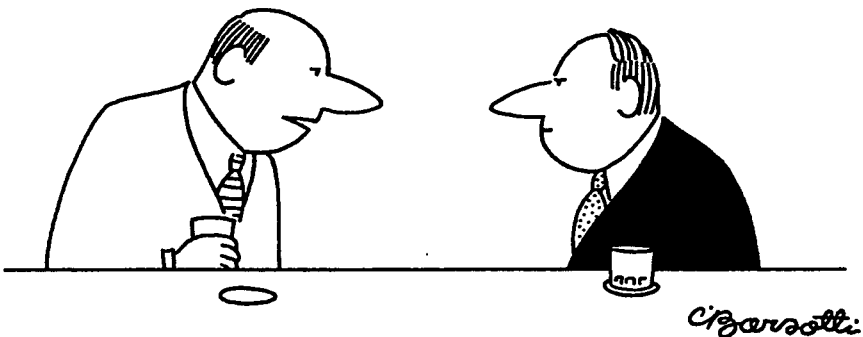
and moral dimensions of defense counsel's task, and their impact on the lawyer, offer greater chance for taking advantage of student reactions.

16. By "extra-legal," we refer to media in which the artist does not intend to describe or critique law, lawyers, or the legal process at all. *See* discussion *infra* accompanying notes 37–38.



grows out of the viewer's interpretation of the image.<sup>17</sup> Cartoons lend themselves to a wide range of interpretations because their meaning is so rich and complex. Responses range from subliminal to overt messages communicated by the cartoon.

When using cartoons as a teaching device, we project the cartoon on an overhead projector so students engage the image simultaneously. Allowing the student enough time to see and absorb the graphic, the first question asks: what message about lawyers does the cartoon convey? The ensuing discussion seeks to compile the beliefs about lawyers projected in the cartoon. The teacher can then ask how these viewpoints relate to students' own perceptions and beliefs of lawyers and lawyering behavior. The teacher can suggest that cartoons communicate some subset of society's view of lawyers. This in turn permits a challenge to students who disavow the accuracy or representativeness of the cartoon: if the cartoon is "false," then why, and for what purpose?<sup>18</sup> For example, consider this cartoon, which we refer to as "the passionate man" cartoon:



*"I consider myself a passionate man, but, of course, a lawyer first."*

©The New Yorker Collection 1980 Charles Barsotti from cartoonbank.com. All Rights Reserved.

After viewing the graphic, the teacher can ask: What is the distinction between "passionate man" and "lawyer"? Does the artist, or society at large, believe that passion and lawyering are mutually exclusive? Have the students had any experiences that have communicated this message? Does the law school curriculum contribute to this perception of lawyer behavior? To what extent do passion and lawyering intersect? Should they? Is it "professional" to feel or display emotion when engaged in lawyering activities or duties? Is it possible

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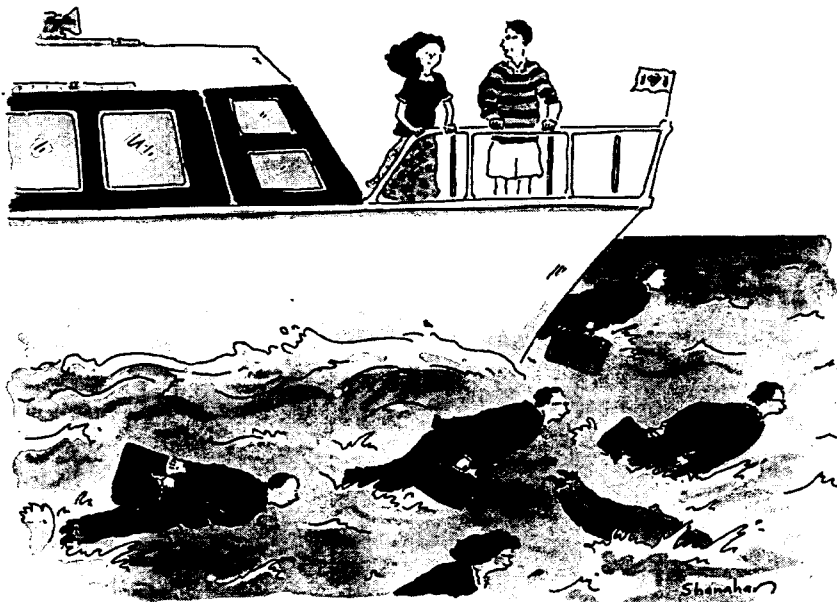
17. See *infra* Section III.C.

18. "Just as life imitates art, law imitates parody." Deborah L. Rhode, *Ethics in Counseling*, 30 PEPP. L. REV. 602, 612 (2003).

not to feel emotion?<sup>19</sup> Why or why not? Regardless of the specific questions one asks, the intention in using this cartoon is to make students question the relationship between human emotion and their role as lawyers.

This cartoon offers a second dimension that we believe merits more discussion than it usually receives. How can a lawyer integrate a healthy and balanced lifestyle with the professional responsibilities of a lawyer? Do professional obligations exist in opposition to personal health and balance, or does professionalism incorporate both? The teacher can ask students to consider the connection between choosing a career for which one feels a strong passion and living a life in which one experiences health and fulfillment. If professionalism includes a good work ethic, how does one maintain health so as to bring energy to work? At the very least, discussing this question can illustrate that good lawyering and good practice mean different things to different people.

The second cartoon personifies an archetypal belief about lawyers in our culture; we refer to this as “the shark cartoon”:



*“The ones just out of law school are especially frolicsome.”*

©The New Yorker Collection 1993 Danny Shanahan from cartoonbank.com. All Rights Reserved.

19. See MARTHA C. NUSSBAUM, *Narrative Emotions: Beckett's Genealogy of Love*, in *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* 286, 292 (1990) (discussing the view of the stoic philosopher Chrysippus on emotion); Martha C. Nussbaum, *The Stoics on the Extirpation of the Passions*, 20 *APEIRON* 129 (1987).

The teacher can prompt an interpretation of this cartoon as a commentary on lawyers and the values which law school or law practice instill. One might begin by acknowledging the societal perception of the lawyer as self-interested and avaricious—the genesis for the connotation that lawyers *are* sharks. If we assume the cartoonist intended that connotation, the teacher can then ask: Is there any doubt that we are supposed to think of these people swimming around with briefcases in their hands as sharks? What does that say about law school graduates? What does it suggest about society's perception of the motives of lawyers? What are the social costs if this cartoon accurately reflects the demeanor of most lawyers?

A teacher can also use this cartoon to explore the relationship between traditional law school training and self-interest: Does law school over-emphasize material gain at the expense of promoting public service, whether through career choice or pro bono? Does the law school curriculum minimize the role it can play in rectifying the delivery of legal services to the under-represented groups in our communities? Should law schools emphasize such service? Should law schools have a mandatory service program similar to the residency requirement for medical students, through which new law graduates would work for several years with populations historically deprived of access to legal services before being permitted to pursue a path of their own choosing? The cartoon and the joke permit students to reflect on their obligation, if any, to do pro bono work or assist in advancing access to justice. What are the personal rewards that can be attained through such a mission?<sup>20</sup>

A second, and just as plausible, interpretation sees the swimmers not as sharks, but as something else. Some students see the swimmers with briefcases as porpoises, dolphins, or some other fun-loving mammal. This view would suggest that recent law graduates are feistier and more energetic than lawyers who have been in the profession longer. Is this point as “funny” as the view of lawyers as sharks? Such a perspective is a considerably more optimistic view of lawyers, but it still raises concerns. If the cartoon is right, why do lawyers lose their energy and enthusiasm for the law and for their clients over time? Does law school encourage enthusiasm for legal doctrine and careers in the law? How might one reconcile the passionate man cartoon and the shark cartoon?

Both of these examples illustrate how cartoons can disarm an audience and lead to a self-reflective discussion of its import. Cartoons mean to evoke humor

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20. Whatever the teacher's personal opinions or answers to these questions, we suggest that they provide useful questions for discussion with students. Speaking personally, we recognize that these questions have different answers, and that our own commitment to one set of answers does not render those answers correct for all students. The teaching point here is not that the questions should force students to adopt the teacher's beliefs; to the contrary, the question is designed to introduce students to a dilemma that could well confront them in practice. To the extent that our opinions influence our teaching here, that influence emerges in the choice to submit these topics as worthy of discussion in the first place.

and through it convey awareness, critique, and even satire. Despite the fact that the audience is the butt of the joke, and perhaps because of it, the depiction makes them laugh. At the very least, this discussion can serve as a useful forum to discuss the phenomenon of lawyer jokes. But we would submit that its utility goes further. The effectiveness of the shark cartoon, as with other quick jokes, lies in the speed with which students acknowledge the subversive public perception of lawyers, and thus the immediacy with which the teacher can engage multiple layers of deconstruction.

### B. Film and Television

Film and television scenes of lawyers are perhaps the most common mediums used to talk about lawyer behavior. Segments from famous lawyer movies such as *Anatomy of a Murder*,<sup>21</sup> *Adam's Rib*,<sup>22</sup> *To Kill A Mockingbird*,<sup>23</sup> and television shows featuring lawyers, such as *L.A. Law*,<sup>24</sup> *The Practice*,<sup>25</sup> or *Law & Order*,<sup>26</sup> are commonly used as teaching devices in a host of contexts.<sup>27</sup> Imagery of lawyers provides countless opportunities to talk about role, purpose, identity, skill, strategy, behavior, and the interaction between some or all of these facets.

With film, we also move from single images to the world of narrative. Stories, real or fictional, provide a context that rules and case law often do not. Stories do not just report the events but also provide contextual information that may be useful to one's analysis, such as relationships between the parties, personal motivations, social status, the importance of this conflict in the actor's life, and sometimes even the origin of the dilemma.<sup>28</sup> As a result, the students

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21. *ANATOMY OF A MURDER* (Carlyle Productions & Columbia Pictures Corp. 1959). See *infra* text accompanying note 87.

22. *ADAM'S RIB* (Metro-Goldwyn-Mayer 1949) (exploring the comic potential in lawyers that are married to each other and become opponents in a high-profile criminal case; including a fine scene on initial client interviewing and opportunities to discuss the confidentiality and conflict of interest concerns arising between lawyers and their families and intimates).

23. *TO KILL A MOCKINGBIRD* (Brentwood Productions et al. 1962). See *infra* text accompanying note 89.

24. *L.A. Law* (NBC television broadcast, 1986–1994).

25. *The Practice* (ABC television broadcast, 1997–current).

26. *Law & Order* (NBC television broadcast, 1990–current).

27. See, e.g., Steven H. Goldberg, *Bringing The Practice to the Classroom: An Approach to the Professionalism Problem*, 50 J. LEGAL EDUC. 414 (2000) (discussing the development of a legal ethics curriculum that corresponds to the television series *The Practice*); Menkel-Meadow, *supra* note 3, at 1307.

28. By way of example, *THE CAINE MUTINY* (Columbia Pictures Corp. 1954) contains a series of excellent scenes involving client interviewing and counseling, as well as some classic trial scenes focused on effective direct and cross and closely-calibrated trial strategy. It would be possible to show only these scenes, out of context, and assess them narrowly for their value as skills training or even examples of evidentiary doctrine. Yet a prepared teacher should display the relatively short sequence which shows the typhoon and the transfer of command on the bridge during the height of the storm. That scene portrays with some delicacy the ambiguity of Captain

as audience engage the discussion on an emotional and intellectual level. Without narrative or imagery, law students can detach from the hypothetical and fail to assume the role of the lawyer despite the complexity and richness of the ethical dilemma. Narrative is such an important part of lawyering that it seems fitting to teach about professionalism through use of this medium.<sup>29</sup> By their very nature, stories encourage the audience to identify with the actors involved and to feel a personal stake or investment in reaching a particular resolution. When one feels a personal stake in an ethical or moral dilemma there is a natural tendency to desire a positive solution.

In this section, we provide examples in two different categories. We first discuss movies in which lawyers are protagonists and in which lawyering forms a substantial portion of the plot. Second, we discuss movies with "incidental lawyers," in which lawyers appear in supporting roles and the plot does not turn on lawyering.

### 1. *Films Focusing on Lawyers*

To begin our examples of films about lawyering, consider a scene from the film *Criminal Justice*.<sup>30</sup> In this scene a public defender visits his client at the jail to discuss a plea offer. It is the eve of trial and the prosecution has made a new offer. When the lawyer reveals the terms of the plea offer to his client, the defendant responds with an unrealistic counter-offer. The defendant quickly rejects any merit to the prosecution's case and continues to profess his

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Queeg's mental state, the difficult questions of loyalty facing both Executive Officer Marek and Ensign Keith, and indeed the inability of anyone on the bridge to say with certainty what would save the ship from disaster. The scene supports both the mutiny justification later offered in defense to the court-martial and an alternate "failure of loyalty" justification.

Showing this scene gives students a degree of "omniscience" which places all of the subsequent lawyering of the case, both by E.G. Marshall as the prosecutor and by José Ferrer as defense counsel, in sharper human relief. Even more compellingly, it can lead to showing what we submit is the dramatic climax of the movie, when defense counsel crashes the victory party of the *Caine*'s officers. During this scene, the lawyer angrily poses the "failure of loyalty" theory, places the court-martial in fuller, more compelling context, and lays passionate blame for the whole conflict on Lieutenant Kiefer (played wonderfully against avuncular type by Fred MacMurray). How does defense counsel see his role in this case? Why is he so wracked by his conscience over his cross-examination of Captain Queeg, whom, out of sympathy for the film's ostensible heroes, we might have come to detest? Is it appropriate for the lawyer to confront his clients as he does? Note that both Marek and Keith, through their actions, concede the lawyer's insight. Does that concession justify the shocking breach of "professionalism" involved in a rude, drunken, post hoc diatribe? Is this lawyer an exemplar of good lawyering, or bad? Is this an appropriate blending of passion, idealism, and skill?

29. See Scherr, *supra* note 1, at 203–04 (discussing scholarship on legal narrative); *id.* at 231–34 (assessing narrative and story-telling as a topic of lawyering).

30. *CRIMINAL JUSTICE* (HBO & Elysian Films 1990). In this film, a woman is robbed at knifepoint. At the police station she identifies the defendant (Forrest Whitaker) in a line-up. Despite the fact that the defendant maintains that he did not commit the crime, his family, friends, and legal counsel (played by Anthony LaPaglia) encourage him to plead guilty to a lesser crime to avoid a lengthy prison term.

innocence to his lawyer. Frustrated, the lawyer urges the client to accept the plea offer. The lawyer illustrates the disparities in time served under the proposed plea and the probable conviction as the difference between the defendant walking his child home from kindergarten and the defendant attending the child's high school graduation.

This scene captures the fear of a lawyer, committed to his client, who believes his client is making the wrong decision for the wrong reasons. Within the context of the lawyer-client relationship, a teacher might stress three topics in the ensuing discussion: client counseling, display of emotion by a lawyer, and a lawyer's judgment towards a client's decision.<sup>31</sup> In the ensuing discussion, a teacher could raise questions about how the lawyer's continued discussion of the plea offer may have affected his client. Does his persistence convey disbelief of the client? When, if ever, is it appropriate to display one's own emotions or viewpoint to a client? Does it depend on the situation or the client? Should a lawyer's feelings of compassion influence whether to display emotion?<sup>32</sup> Does the client's denial of the odds (or of the lawyer's assessment of the odds) permit the lawyer to continue to press the client to see the merits of the plea offer? The interaction between lawyer and client raises questions about how to behave when the lawyer disagrees with a client's choice.<sup>33</sup> It raises the issue of how much of the lawyer's own beliefs and values the lawyer can or should bring to the situation. Is a lawyer ever really totally objective? Does a lawyer's personal judgment and opinion overtly or covertly influence strategy and advice? What are the moral aspects of trying to prevent a client from proceeding with a course of action that counsel believes is against the client's best interest?

The scenario projected for students on the screen provides a fuller, richer dimension to the discussion than one typically offered by an ethical problem

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31. Much has been written by legal ethicists about counseling jurisprudence. There are primarily three schools of thought that have emerged in this area. *See* DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 282–84 (1991) (discussing the client-centered approach, which places a premium on client autonomy and advocates for lawyers to be neutral and non-judgmental); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 139–156 (1998) (discussing the contextual view of ethics); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 113–129 (1994) (discussing the collaborative approach, in which the decision-making process is a cooperative effort between lawyer and client, with the lawyer having a particular concern for ethical implications). *See also* Symposium, *Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591 (2003) (discussing the three most pervasive approaches to client counseling: the directive approach, the client-centered approach, and the collaborative approach); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987) (discussing attorney-client relationships).

32. If this discussion occurs in the same course as discussion of cartoons, a teacher might ask how to reconcile the passionless lawyer in the cartoon with the passionate lawyer of this segment.

33. One can explore this issue utilizing any of the three schools of thought relating to the lawyer's role in the counseling relationship. *See* Symposium, *supra* note 31, at 593.

posed in writing. By dramatizing the dilemma, the teacher gives students a context in which to offer an opinion. The teacher brings this human dimension to bear on students' opinions through the questions asked above, and does so with the emotions inherent in the scene still present. The scene (like any hypothetical) provides an occasion for rule assessment, but the drama in the scene conveys how concerns about professionalism arise where the text of the rules intersect with the fluid, pressing ambiguities of a given event.

Another excerpt from *The Sweet Hereafter* further illustrates approaches to movies on legal themes. In the movie, Mitchell Stephens, the lawyer protagonist played by Ian Holm, claims that by suing the most promising defendants for negligence, he is ensuring moral responsibility in our society.<sup>34</sup> Neither author Russell Banks nor director Atom Egoyan make any attempt to shade the self-interest and self-promotion of the lawyer so frequently portrayed in American popular culture.<sup>35</sup> But author, director, and actor go beyond the stereotype by depicting the lawyer as a complex person with multiple motivations, many of them characteristic of a hard-bitten activist litigator. Students find Stephens's self-aggrandizing comments humorous. Yet a teacher might ask whether the lawsuit is without any potential to provide a remedy beneficial to society as a whole. If successful, is it not plausible that the lawsuit may have the effect of preventing future harm? Is this not a means toward ensuring some kind of responsibility, moral or otherwise, in our society? If so, then why is the lawyer so ill-perceived? If lawyers do not talk to potential plaintiffs about pursuing a lawsuit, how else might people become informed of their legal options? If such conversations never occur, is there a risk that potential legal claims may go unrealized? What are the social costs, if any, in that instance? What, if any, biases and negative stereotypes of lawyers does one bring to their impression of Stephens in this scene? Does the negative stereotype of lawyer as "ambulance chaser" derive from such a scenario? Is the character of Stephens as one dimensional as an ambulance chaser? What are the complexities underlying the character? Are they idiosyncratic, or do they reflect tensions with the role of a plaintiff's lawyer, or even any lawyer?<sup>36</sup>

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34. Stephens says, "and now it's up to me to ensure moral responsibility in our society." *THE SWEET HEREAFTER* (Alliance Comm. Corp. et al. 1997).

35. Tony McAdams, *Blame and The Sweet Hereafter*, 24 *LEGAL STUD.* F. 599, 604 (2000).

36. *THE VERDICT* (20th Century Fox 1982) raises comparable themes by depicting an alcoholic lawyer, Frank Galvin (portrayed by Paul Newman) who struggles to find redemption during his prosecution of a compelling medical malpractice case. Here again, the film provides a series of fine set pieces on particular ethical and lawyering problems: the lawyer's attendance at the funerals of strangers in order to leave his business card; the rejection of a serious settlement offer without consulting with his clients; the preparation of a party-witness by a skilled large firm lawyer; the failure of a successful evidentiary objection to override the impact of powerful emotional testimony; and the ancient problem (which affects each side dramatically) of lawyers who ask questions during cross to which they do not already know the answers.

Yet the drama of the film lies in Galvin's efforts to reconstitute his life after a long decline into a meaningless practice and alcoholism. We are meant to like Galvin, or at least to sympathize with his cause; but his personal flaws not only permeate the plot generally, but also spread messily

## 2. "Incidental Lawyers"

Until now, we have used materials, whether cartoons or films, in which the artist uses lawyers as principal characters and lawyering activity as a focus of the plot. We would expect that this is the most regular use of media in teaching professionalism. Such movies present fewer difficulties in issue identification, provide more obvious links with specific class topics, and offer the opportunity of contrasting the artist's assumptions with those of the teacher and students.<sup>37</sup> However, the number of media that use lawyers as incidental characters may outnumber those in which an artist focuses on lawyers and lawyering.<sup>38</sup> The incidental use of lawyers as characters offers at least two possible opportunities for teaching professionalism: discussing how an artist uses a character's identity as a lawyer to affect the audience's response, and assessing how the character's lawyer identity affects (or should affect) his or her behavior in the plot.

It would be impossible to catalog all of the different effects that a character's status as a lawyer might have on an audience, and we will not try. But we can suggest that the range of characterizations arising out of the label "lawyer" has enormous potential richness, suggesting that the term "lawyer" has a complex cultural status. Michael Asimow has made an effort to track and describe images of lawyers.<sup>39</sup> He traces a period of transition in lawyer-archetypes from the lawyer-saint portrayed by Gregory Peck in *To Kill a Mockingbird* to the lawyer as the devil in *The Devil's Advocate*.<sup>40</sup> In virtually any fiction containing lawyer characters, a teacher can elicit a discussion of the

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into his performance as a lawyer. How did Galvin get to where he is? Where did it start? How could he have stopped it? An enterprising professor might ask, how prevalent is the use of alcohol in the student body? Is it a problem? Is the use of alcohol as a response to situational stress a practice that we should encourage, discourage, or simply ignore? Who can suggest an alternative to alcohol as a means of coping with stress? (We hasten to add that these teaching questions pose some serious risks, identified below, of stimulating unexpectedly powerful personal reactions from students. See discussion *infra* Section IV.B.).

Law students, particularly younger students, may not be prepared for an imaginative encounter with such deeply scarred and disturbing lawyers as Frankie Galvin or Mitchell Stephens. Deconstructing their scars, flaws, talents, and residual nobility may not be an exercise that a younger student wants to absorb. But we would submit that, entirely aside from ethical set pieces, the depth of character development in these movies provides multiple links to the deep personal challenges that all of our students will face as lawyers. At the very least, we think that presenting these characters to students, and suggesting something about their complexities, helps students to question both their own lawyer stereotypes and the easy assumption that it would never happen to them.

37. This kind of excerpt may also minimize some of the relevance challenges that students might raise. See discussion *infra* Section IV.A.

38. See Asimow, *supra* note 2, at 562–82 (compiling movies with lawyer-characters for nearly four decades and assessing their representation as good or bad).

39. *Id.*

40. *Id.* at 569–82; *TO KILL A MOCKINGBIRD* (Brentwood Productions et al. 1962); *THE DEVIL'S ADVOCATE* (Warner Brothers et al. 1997).



lawyer-archetype (or lawyer-stereotype) by asking the class to consider the following: To what extent does the character's role depend on being on a lawyer? Does the character's personality and behavior express a stereotype about lawyers? Does the artist seem to rely on the audience's assumptions about lawyers in producing plot effects involving the lawyer character?

*Jurassic Park*<sup>41</sup> offers a light and usefully familiar example of this approach. Confronted with a list of "lawyer movies" that includes *Jurassic Park*, most students (and perhaps some readers of this article) wonder, "what lawyer?"<sup>42</sup> In no sense is *Jurassic Park* about law, lawyering, or legal professionalism. The lawyer character at best serves as a foil, first to the park owner's sense of vision, then to the scientists' ethical concerns, and finally to others' moral and physical courage when confronting the dangers of the park. Nowhere is the lawyer taken seriously. From his wobbly stance on the raft in the first scene, to the shift in his opinion on the park, to his physical cowardice and undignified death in an outhouse, Director Spielberg presents the lawyer as an object of ridicule and mild contempt—the lawyer as quibbling buffoon with no redeeming qualities. Teachers can highlight how, through Spielberg's humor and effective use of stereotype, students have absorbed an image of the lawyer as ineffective, greedy, cowardly, and ethically bankrupt.<sup>43</sup>

The second possible use of "incidental lawyers" involves questioning how a lawyer-character could or should have responded to the plot's events. This of course requires a summary of the plot that provides adequate context.<sup>44</sup> As an

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41. JURASSIC PARK (Universal Pictures & Amblin Entertainment 1993).

42. The puzzlement usually continues even after the student is reminded of the lawyer role in the plot, Donald Genarro, played by Martin Ferrero. Acting as the agent for John Hammond's (the park owner) investors in the dinosaur park, the lawyer appears in the very first scene, inspecting an amber mine. The lawyer next takes Hammond to task about the business feasibility of the park. He accompanies a team of scientists visiting the park as inspectors, but at first sight of the dinosaurs, his skepticism gives way to worshipful eagerness at the park's profit potential. Later, he opposes the scientists' ethical concerns; Hammond expresses surprise and dismay at having support only from the bloodthirsty lawyer. Finally, the lawyer accompanies the scientists and some children on an automated tour of the park. When automation fails and the tour group comes under attack from a "t-rex," the lawyer first abandons the children, then flees to a toilet. The t-rex finds him there, cowering on the toilet, and eats him. *Id.*

One of the authors tells students about his first time seeing the movie in a crowded theater; the crowd cheered enthusiastically at the lawyer's death. Whether this resulted from the character, or the fact that he is a lawyer, offers a useful point of discussion in class.

43. Compare this incidental use of the lawyer as a foil with the intentional representation of the lawyer in *THE SWEET HEREAFTER*. In the latter film, the director appears to intend the lawyer's ethical and moral lapses to serve as a major theme of the film, inviting the viewer's critical assessment. *Jurassic Park* invites no such critical thought and prompts none, at least if our students' unawareness of the lawyer character is any guide. Each example of characterization—Egoyan's implicit assertion that all lawyers are like *this* lawyer in *THE SWEET HEREAFTER*, and Spielberg's confident assumption that everyone will recognize and respond to his lawyer stereotype—has disturbing aspects for those committed to lawyering as a profession.

44. For this purpose, unless the teacher requires students to read or view the entire story, the teacher will need to summarize the plot, setting up the scene to be shown without advance disclosure of the points to be taught. These summaries repay the teacher's care. The teacher

example, few movies have the narrative complexity of Francis Ford Coppola's *Godfather* movies. *The Godfather: Part II*<sup>45</sup> intensifies this complexity by dividing the story line into parallel contrasting narratives. Brief summaries of the interwoven plot lines for this movie will of necessity vary depending on the scene chosen and the character explored. Here, we discuss a scene from the last third of the movie, after the movie has established most of the primary plot lines. The scene depicts an interaction between the family's lawyer, played by Robert Duvall, and the head of the family, played by Al Pacino.<sup>46</sup> The summary should stress those aspects most relevant to that relationship.<sup>47</sup>

After summarizing the plot, and showing the scene, the teacher could proceed to explore its dimensions through a series of questions such as the following: What has been decided in this conversation? Do the decisions relate solely to its explicit subject matter, the elimination of competition and the forestalling of government intervention? What other decisions have the principal characters reached?<sup>48</sup>

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cannot expect all students to have read the story or seen the movie and must provide enough detail to bring them to the interest in the story; at the same time, the teacher must satisfy those who have read or seen the entire work that the summary is at least accurate. Moreover, the teacher must consider how to cast the summary in terms that anticipate the teaching point.

45. *THE GODFATHER: PART II* (Paramount Pictures & The Coppola Co. 1974).

46. *Id.* Duvall plays the family's lawyer, Tom Hagen. Pacino plays the second godfather, Michael Corleone, head of the family business and successor to his father, Vito Corleone (played by Marlon Brando and Robert DeNiro). The scene selected for discussion occurs during the final, modern phase of the movie. It starts immediately after the death of Michael Corleone's mother and Michael's ostensible forgiveness of his brother, Fredo (played by John Cazale); it ends just before the deaths and estrangements which complete Michael's revenge against his enemies. The scene begins with Tom Hagen walking toward a house on the family's Tahoe estate.

47. One possible summary is as follows:

This movie is an immigrant's story, a family story. It tells of a man who escaped oppression in the old world to find fortune and success in the new. There, he discovered a special talent and founded his business on that talent. The business thrived, but had a series of complex, problematic ties with the era's political and legal institutions. Luckily, the family had adopted as a family member a bright young man who showed a special affinity for counseling and the details of managing the business. He became a lawyer, with the business as his sole client. His duties included negotiations for the business and its constituents, formal legitimization of the business's activities, interactions with governmental and political leaders, and advice on business initiatives and on coping with the competition.

Just before the scene we will see, the business had suffered a series of severe setbacks, resulting from betrayals by business partners, defections by key employees, and a foreign investment made valueless by a change of government. When the scene starts, the business appears likely to survive these setbacks, but management feels compelled to seek further security in an insecure world. This scene shows the counseling session in which lawyer and client consider the available options.

48. These questions invite a critique of the scene itself and have a number of possible answers. The explicit text of the scene involves decisions over whether and how to kill one of Corleone's former partners and present enemies. The scene also entails an exploration of goals and means, as Hagen expresses doubt about further killings. Corleone justifies them and asserts

Further, what kind of relationship does the lawyer have with his client in this scene? Is it client-centered? Some describe the relationship of lawyer and client as a negotiation, in which both lawyer and client bring separate sources of power and separate resources to the solution of an identified problem. Who has control in this relationship between lawyer and client? Would your answer be different for different kinds of lawyer-client relationships?<sup>49</sup>

The movie elsewhere makes clear that lawyer and client are brothers and friends; Hagen has become deeply involved not only in the family business, but also in Corleone's personal affairs. What risks does a lawyer run by working for his family? What benefits does the lawyer achieve by doing so? More broadly, are there well-defined limits on the extent of the intimacy between lawyer and client? How might these limits operate in other lawyer-client relationships?

Corleone confronts Hagen about his ongoing work with the family and about his willingness to do his client's work. Hagen responds, "I've always been loyal to you," which satisfies Corleone.<sup>50</sup> What kind of loyalty does Hagen assume? How does this relate to the loyalty mentioned in the ethical codes? How might Hagen have come to his understanding of the term loyalty?<sup>51</sup>

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the feasibility of murder in any circumstances by saying, "If history has taught us anything . . . it is that you can kill anyone." Finally, the scene represents an effort by Corleone to test Hagen's loyalty, in the face of information that Hagen might defect and dissent. This purpose justifies the scene's location in the movie: it comes at the end of a series of events in which Corleone sorts out his own family's loyalties and before the culminating series of murders.

49. See Scherr, *supra* note 1, at 270 ("The lawyer-client relationship entails a negotiation of extraordinary fluidity and depth."). These questions permit an exploration of the balance of power and influence between lawyers and clients generally. The "client-centered" question refers to the modern literature on client-centered lawyering, a model of the lawyer-client relationship in which the lawyer defers to the client's own judgments of value and resists the temptation to impose the lawyer's judgment on the client. *Id.* at 188-195 (assessing the client-centered model and its supporting literature). The other questions prompt reflection on how client-centeredness might vary from context to context; it permits the teacher to identify how lawyer-client negotiations might differ in transactional versus litigation problems or in-house versus outside counsel relationships involving commercial, familial, or criminal issues.

50. Hagen soon goes on to justify that confidence when he persuades a former client of Corleone's, now a potential witness against him, of the necessity and even the nobility of ending his own life.

51. These questions permit discussion of dimensions of loyalty going beyond formal ethical meanings, and also of the risks of conflicted interests and loss of independent judgment that can powerfully affect a lawyer in intimate, even familial, relationships with clients. A teacher could draw useful contrasts with those authors who advise that the lawyer take a "friendship" stance towards clients. See, e.g., SHAFFER & COCHRAN, *supra* note 31, at 40-54 (discussing the lawyer as "friend," and arguing that this stance permits the lawyer to integrate moral and value-based disagreement into conversations with clients). Intriguingly, the authors' explication of the "friendship" model uses advice in a family business as a teaching example. The same text compares this friendship stance favorably with the lawyer as "godfather," *id.* at 5-14 (discussing the lawyer dominant over client goals and means), lawyer as "hired gun," *id.* at 15-29 (discussing the lawyer completely subordinate to client preferences both on goals and means), and lawyer as "guru," *id.* at 30-39 (discussing a lawyer-technician assessing options dispassionately but without strong engagement). The contrasts between these labels and the scene from the movie can seem

The lawyer-client conversation centers on a series of proposed murders. Speaking formally, how would the ethical codes advise Hagen to act in this circumstance? Does the subject matter of the illegality make a difference? Consider different kinds of illegalities; for example, a technical violation of securities laws, as opposed to murder.<sup>52</sup>

What lawyer stereotype does Hagen's character represent? Arguably, Hagen offers a finely drawn picture of corporate counsel: responsible only to one client; entwined in a complex relationship involving professional advice and personal intimacy; and implicated in many of the most questionable business decisions. Is this fair as a stereotype of corporate counsel? Is this fair as a depiction of Hagen? To what extent or in what situations might the student be led to the abandonment of moral compass depicted in his behavior?

As with any discussion format, the exact sequence of questions and the depth of coverage on particular issues will depend on the teacher's own interests and the responsiveness of the class. But questions like these pursue a distinctive approach to the materials presented by the film excerpt, an approach which can involve students in a deeper assessment of professionalism. The approach assumes the reality of the situation presented in the film; rather than treating the scene as fictional, the student should answer the questions as if the events were real. If students suspend their disbelief and credit the scene with the force of reality, they can then step into quite personal discussions on professionalism issues.<sup>53</sup>

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a bit forced and over-the-top, but asking which of these categories fits Tom Hagen represents a useful way to explore the theories underlying the different models, and leads to sharp-edged speculation about how, exactly, Hagen might effectively raise moral concerns with Corleone.

52. Formal rules of ethics have a good deal to say about the lawyer's obligation not only not to assist but also to report a client's proposal to commit violence against another. *See, e.g., GA. RULES OF PROF'L CONDUCT R. 1.2(d)* (2003) (governing advice on and participation in client's proposed illegal conduct), *available at* <http://www.gabar.org/grpc12.asp>; *id.* at R. 1.6(b) (governing the obligation to disclose client plans where the lawyer believes it necessary to avoid harm resulting from client criminal conduct), *available at* <http://www.gabar.org/grpc16.asp>. The question about a securities violation raises the contrast between physical harm and economic violence and also permits a cross-reference to recent developments governing a lawyer's obligation to report securities laws violations, both under federal statute, 15 U.S.C. § 7245 (2002), enacted in Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745, 784 (2002), and under recent American Bar Association changes in its model rules, MODEL RULES OF PROF'L CONDUCT R. 1.6(b), *available at* [http://www.abanet.org/cpr/mrpc/red\\_rule1\\_6.pdf](http://www.abanet.org/cpr/mrpc/red_rule1_6.pdf) (rev. Aug. 12, 2003). The reference to securities law violations also permits discussions of Hagen's relationship with Corleone as an exaggerated example of the corporate counsel relationship.

53. *See* Samuel Taylor Coleridge, *Biographia Literaria*, in *ENGLISH LITERATURE: THE ROMANTIC PERIOD* 258, 259 (Albert Granberry Reed ed., 1929) (discussing how literary texts permit the reader "to transfer from [his or her] inward nature a human interest and a semblance of truth sufficient to procure for these shadows of imagination that willing suspension of disbelief for the moment, which constitutes poetic faith."). Of course, a student may not be willing to suspend their disbelief and might express skepticism that the film bears any relationship to reality. *See infra* text accompanying notes 76-77 (describing teaching methods to cope with student rejection of the "reality" of the lawyering depicted in film).

This teaching approach can also tease apart the complexities in the lawyer-client relationship, using traditional concepts which may have been covered earlier in the course, including the ethical challenges of loyalty and confidentiality, the dilemmas associated with a client's illegal behavior, the proper balance of lawyer and client influence in counseling and problem-solving, and the dividing line between engagement and detachment from a client's concerns as expressed in the intimacy a lawyer might form with a client. All of these elements are present in the clip from *The Godfather: Part II*, although not by design.<sup>54</sup> Rather, the film presents a human situation that involves a lawyer in a situation of disturbing moral and emotional complexity. In doing so, the approach stresses the situational and relational forces that so often dominate the practices of active professionals, albeit in an apparently incidental way.

### C. *Written Narratives*

Written fiction offers communicative advantages that differ from those of other media. To be sure, those differences may make written fiction more difficult to use. Writing does not have the immediacy or (necessarily) the easy absorption of a cartoon; nor does it occur in a darkened room with the almost coercive aesthetic focus of film. While many, if not a majority, of law students use visual media as entertainment, we suspect that far fewer students read fiction and fewer still do so critically and analytically. If true, this intuition suggests that law students may approach written fiction without the tools of critical assessment and social critique that they may have developed for film. It also suggests that the teacher will have to adjust the teaching method to highlight the distinctive communicative features of written fiction.

The advantages of written fiction include the special openness of language as a medium for representing reality and the special imaginative effort which reading fiction requires of its readers.<sup>55</sup> What language lacks in coercive focus

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54. As with *JURASSIC PARK*, it would be hard to describe any of the *GODFATHER* movies as concerning lawyers or specific legal issues. To the extent they have any concern with law, it is to use the law as part of a social, cultural, and political depiction and critique; the films do not attempt to portray the mechanics of the law or legal process. The bankruptcy of legal institutions forms the background for parallel illegalities and mirrors institutions of the family's world.

The character of Tom Hagen serves important plot functions in the first two movies of the trilogy, but only rarely do the films rest the character's significance on his professional role. See *THE GODFATHER* (Paramount Pictures 1972) (depicting negotiations between Hagen and a Hollywood film producer, in which Hagen pursues an interest-based bargaining strategy which ends in shocking physical violence); *THE GODFATHER: PART II* (Paramount Pictures & The Coppola Co. 1974) (depicting Hagen's representation of Corleone before congressional committees). The irrelevance of Hagen *qua* lawyer serves to advance the films' critique of legally legitimate institutions confronted with the corruption of the human spirit.

55. See, e.g., SVEN BIRKERTS, *States of Reading*, in *READINGS* 101 (1999). Birkerts posits that "[r]eading is a change of state." *Id.* at 102. "When readers are fully absorbed in a book and the ulterior world it presents, their awareness of solid reality is supplanted by awareness of what

(as compared to film), it more than makes up for in its power to stimulate the reader's imagination. Unlike images, words depend on the imagination of the reader as a necessary complement. The reader translates the language into mental states that may vary not only from the author's, but also from any other reader's. Moreover, the physical reality of language is far more restrained than film, as it relies on comprehension through a single sense (sight, or for spoken fiction, sound) and depends on the listener's mental translation for its impact.<sup>56</sup> Written fiction thus has a particular intimacy as representation; while the author can structure and guide, the reader or listener must collaborate in the author's creation of realities which, when complete, exist primarily in the reader's imagination.<sup>57</sup> Indeed, this special intimacy may have particular value for lawyers and law students, whose primary medium for communication is verbal.

This intimacy creates some practical difficulties. One standard teaching method requires students to read the text outside of class and come to the classroom ready to discuss it. However appropriate for a literature class, we have strong concerns about its utility for law students. First, the disparity in style and content between traditional law assignments and fiction can create a barrier. While students may welcome fiction as a relief from casebooks, they may, as a result, fail to assess the fiction with comparable rigor and care. Moreover, the immediacy of student response is lessened if students read the fiction at different times prior to class. Thus, to obtain the maximum impact, we suggest reading a key excerpt from the story aloud during class.

One example of this approach uses an excerpt from a Raymond Carver short story, *A Small, Good Thing*.<sup>58</sup> Too long to read aloud in one class sitting, the story describes an auto accident which injures a young boy, a week or so before his birthday. The boy's mother has ordered a cake from a baker, but forgets about the cake after the accident. The author describes the course of the boy's treatment through an omniscient narrator whose point of view shifts

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the imagination is experiencing." *Id.* at 105. Birkerts identifies a diminishing of this experience of reading in modern culture and attributes it to a range of sources: a loss of belief in the power of art; the production of fewer works of artistic strength; a climate of rapid shifts in attention and a resulting rise in "distractedness"; and the influence of electronic and, specifically, visual media. *Id.* at 108–110. See also Coleridge, *supra* note 53, at 259 (describing the "suspension of disbelief" as the reader's willing connection of inner experience with the author's "shadows of imagination").

56. This may understate the role that viewers play in translating the multi-media impact of film or audio into meaning—an engagement which produces just as intimate an impact as fiction. Moreover, it may also understate the sensuousness of skilled writing, which communicates as much through the texture of words, tone of voice, and audible rhythm as through the content of meaning. Still, it seems fair to suggest that written texts have different communicative qualities than film.

57. See BIRKERTS, *supra* note 55, at 107–08 ("Reading . . . is not simply an inscribing of the author's personal subjectivity upon a reader's receptivity. Rather it is a collaborative bringing forth of an entire world.").

58. RAYMOND CARVER, *A Small, Good Thing*, WHERE I'M CALLING FROM 280 (The Atlantic Monthly Press 1988).

between mother and father, and whose focus carefully documents small, painful shifts in the moods and hopes of the two main characters. Eventually, the boy dies, but both before and after he does, the baker starts to make calls to the parents' home phone about the completed but unpaid-for cake. The calls become increasingly angry, even abusive. The boy's mother, in particular, gets increasingly angry and enraged at what she feels to be the baker's insensitivity and brutality. At last, on returning from the hospital, their boy dead, and hearing yet another call, the parents decide to drive to the baker's business late at night to confront him. Reading aloud begins as the parents arrive at the baker's shop.<sup>59</sup>

In the ensuing scene, the woman confronts the baker angrily, but with a calmness that deepens and intensifies with her anger. The baker at first seeks to avoid them ("I'm busy now, I have work to do"), but eventually exchanges sharp, sarcastic accusations with the woman that further anger her. In her rage, she notices how ugly he is ("[h]is eyes were small, mean-looking . . . nearly lost in the bristly flesh around his cheeks"). The baker taps a rolling pin in his hand and warns the husband, "Careful, careful." Then the woman announces, "My son's dead," in a speech which releases her rage, fills her with nausea, and ends with her weeping, "It isn't fair." The husband too accuses the baker, "Shame on you . . . shame."<sup>60</sup>

With this, the baker changes. He seats them at a table in his kitchen. The mother tells him she wanted to kill him. The baker sits with them and apologizes: "Let me say how sorry I am . . . God alone knows how sorry."<sup>61</sup> He describes how he has lost the feel of how to be a human being, how he has forgotten how to act, how he has no children: "I'm not an evil man, I don't think. Not evil, like you said on the phone."<sup>62</sup> He gives them coffee and freshly baked hot rolls, with words that provide the story's title: "[E]ating is a small, good thing in a time like this."<sup>63</sup> The couple welcomes the food. The baker tells them about his life:

They nodded when the baker began to speak of loneliness, and of the sense of doubt and limitation that had come to him in his middle years. He told them what it was like to be childless all these years. To repeat the days with the ovens endlessly full and endlessly empty . . . . He had a necessary trade. He was a baker. He was glad he wasn't a florist. It was better to be feeding people.<sup>64</sup>

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59. *Id.* at 298–99 (text starting at "They drove around behind the bakery and parked."). The next two paragraphs summarize the events of the scene.

60. *Id.* at 299–300.

61. *Id.* at 300.

62. *Id.*

63. *Id.* at 301.

64. CARVER, *supra* note 58, at 301.

The baker serves them “‘heavy bread, but rich.’ . . . It had the taste of molasses and coarse grains.” The couple stays through the night and “did not think of leaving.”<sup>65</sup>

After reading the text aloud, Carver’s language and skill in narrative organization usually leave students with emotions and reactions which are both palpable and complex. Indeed, the described confrontation itself presents a scene of such simplicity and familiarity that it proves hard for most students to resist a response of some depth.<sup>66</sup> The teacher can start to ask questions, at first simple but then of increasing point and focus:

What has happened in this excerpt? What human experiences does this excerpt describe?<sup>67</sup>

Is this good writing? Why? Characterize the prose style. What does it rely on? Is there anything distinctive about it?<sup>68</sup>

What has been resolved in the excerpt? What conflicts existed between the characters and on what scale were they resolved? Is it a fair description of the resolution to say “the parties to the potential small claims court action over the cake order reached a settlement of their contract claims?”<sup>69</sup>

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65. *Id.*

66. See also discussion *infra* notes 68–74 (assessing the use of fiction without any lawyer characters or explicit legal themes).

67. This question invites students to use their own language to describe the reactions they had to the story. The resolutions in the excerpt are particularly complex and involve spiritual and emotional dimensions that far outweigh the practical or legal problems solved. Students sometimes find themselves struggling with language to describe these dimensions. The critical teaching task lies in pushing the students towards a greater awareness of the emotion in the room in that instant and of the difficulty of finding their own language to discuss it.

68. Such a question usually serves two functions. First, it offers a small escape from the discomfort of the first question, by providing a discussion one step removed from the effects which Carver’s prose produces. In effect, the question permits students to hold Carver’s prose at arm’s length and thus to achieve a little distance from the feelings the prose evokes. Second, it permits some discussion of Carver’s artistic approaches, especially his choice of focus and his habits of moving narrative along. The teacher can stress the skill with which Carver uses transitions in emotional and psychic states as the moving points in his narrative rather than external events or even conversational speech. From this, if the class is responsive, the teacher might also make some initial points about legal persuasion as artistry. See Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459 (2001).

69. It seems clear that the baker and the parents have resolved their dispute but for reasons associated with apology, forgiveness, and healing that have their unexpected source in idiosyncrasies of the baker’s character, coupled with the special emotional openness of the grieving parents. As a result, the teacher can propose that legal disputes are often resolved (or transactions arranged) as a result of non-legal influences, and discuss what role lawyers might play in the handling of those influences. See Scherr, *supra* note 1, at 229–53 (identifying various non-legal topics of lawyering); *id.* at 253–61 (discussing the relationship of law to the other topics



If more than legal issues have been resolved, what are those other issues? Identify other dimensions of the resolution: emotional, spiritual, social and class, gender, familial, or spousal. Could lawyers be agents of the broader resolutions reached between these human beings? Why or why not? Should they?<sup>70</sup>

How conscious should a lawyer try to be of these subjective influences? Elicit the practical reasons, as well as the aspirational ones: Does it ease legal work, or expand its possibilities, for a lawyer to have a good awareness of and vocabulary about the inner life of clients? Does it permit the dodging of hidden obstacles? If a given dispute (or a given transaction) reveals strong subjective influences, should a lawyer try to speak to them at all? Does a lawyer's awareness of subjectivity require that he or she talk about it?<sup>71</sup>

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of lawyering).

70. These questions continue the development of students' vocabulary for the discussion of subjective realities, *see supra* notes 17, 67 and *infra* notes 71, 72. But it also begins a more structured process of identifying various categories of subjective realities. In articulating these influences as distinct from each other, the teacher can suggest that not only can these subjective realities be described, they can be discussed, assessed, and weighed; in short, they constitute a form of awareness that permits weighing and balancing, together with other less subjective influences in the situation. *See Scherr, supra* note 1, at 237-38:

Emotions in this view are not just an unreliable tool with which to change otherwise reliably cognitive judgments. . . . [Rather,] awareness and appraisal of emotion forms a natural activity of practical judgment. . . .

Lawyering thus does not just use emotion as a means to manipulate reason, or fear emotion as a distortion of rules, cordon[ing] and sanitizing it. . . . Rather, emotional and conceptual reasoning contain "different sorts of theories or views about life" . . . . Talk about emotion, or at least alertness to emotion as a defining element of decisions, thus constitutes a key topic of practical judgment.

The closing question in the text above seeks to integrate the richer content of "practical judgment" into the professional practice of lawyering.

71. This question continues the discussion of subjectivity as a component of lawyering by encouraging students to consider how useful it would be for a lawyer to develop competence in these concerns. The text suggests a question which stresses that a lawyer's awareness of subjectivity can help accommodate unexpressed but nonetheless powerful points of conflict, such as differences in value or belief which can create sharp conflicts and which can in turn obscure commonalities of interest that might lead to settlement. A teacher has other points of practical commentary, including the usefulness of emotion expressed or perceived by a client as a source of understanding of the client's goals or interests; or alternately, the value of accurate assessments of mood and reaction in assessing how a jury or a judge understand a dispute and might decide between competing views of the dispute.

The text also suggests a distinction between the lawyer's awareness of subjective realities and a decision to introduce those realities as an explicit topic of conversation. This in turn can start a discussion of different methods of integrating awareness of subjective realities into practice challenges. If a lawyer chooses to speak explicitly to client emotion, what impact might that have

Does professionalism require alertness to more than just the legal dimensions of a problem? For that matter, does competent lawyering require that same alertness? Is it an appropriate role for the lawyer to include conversation or other interactions with clients about these realities?<sup>72</sup>

How does the baker talk about his role and his chosen trade? What is his attitude towards his work? Would you aspire to such an attitude as a lawyer? If not, would you expect lawyers or bakers to be at greater risk of developing such an attitude? What is it about law practice that leads you to answer this way?<sup>73</sup>

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on the conversation? If a lawyer reserves explicit discussion, but continues to see the strength of the subjective influences, what other approaches does a lawyer have for dealing with those influences?

72. This discussion makes explicit the ethical dimensions of a lawyer handling the subjective dimensions of legal problem-solving. The rules of ethics have a series of rules which help to structure this handling, including the obligation to exercise independent judgment, coupled with the permission to address factors other than the law:

In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation. Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.

GA. RULES OF PROF'L CONDUCT R. 2.1 cmt. 2 (2003), *available at* <http://www.gabar.org/grpc21.asp>.

At the same time, the rules recognize that other professionals may have special expertise in at least some of these realities. The lawyer might raise the concerns but ultimately refer the client to the experts:

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation.

*Id.* at cmt. 4.

Further, a lawyer may have to develop a special awareness of those subjective realities which have such distorting power that they disable the client from effective decision-making. *Id.* at R. 1.14, *available at* <http://www.gabar.org/grpc114.asp> ("Client under a Disability").

73. These questions raise useful issues standing alone, but a teacher might develop two further lines of questioning from this:

(1) If you do *not* aspire to this attitude, how can you prevent it from developing? What realities of a baker's trade led to this attitude? Would such realities confront lawyers? What would it take to resist the influence of repetition and of routine distancing from customers or clients? These questions push students to think ahead to their futures and to consider the problems of repetitive practice and of persistent professional distancing of clients as factors in fostering cynicism and moral insensitivity.

This sequence pursues a few basic goals. First, it starts with the students' immediate reactions to the aesthetic and subjective effects of the media. Rather than starting with legal issues or with lawyering, the sequence establishes the non-legal context as primary. Second, the sequence moves from context to legal issues, rather than the other way around. It exposes students to an imagined reality that extends beyond what they might typically see as legally relevant, and thus, prompts reflection on how lawyers might act where non-legal influences form the center of the dispute. Finally, instead of exploring rules or discussing specific legal categories, the sequence posits that professionalism concerns arise at the intersection of lawyering with the fuller dimensions of a given problem.

To some extent, the effectiveness of this sequence of questions depends on a distinctive feature of the Carver excerpt. Earlier we discussed media that directly address lawyers and legal ethics (lawyer cartoons and lawyer jokes),<sup>74</sup> that use lawyering and legal process as a source of plot or character interaction (*The Sweet Hereafter*),<sup>75</sup> or that present lawyer characters without any particular stress on law, lawyering, or legal process (*Jurassic Park* and *The Godfather II*).<sup>76</sup> By contrast, the Carver excerpt has no explicit concern with legal themes and has no lawyers as characters. While it focuses on a human situation with potential legal dimensions, those legal dimensions are at best secondary or even irrelevant to the characters, the narrative, and the author's expressive intent.

The use of purely non-legal fictions has benefits and risks for the teacher. The benefits rest primarily on the separation of law students from familiar law teaching and legal contexts, including the focused, conceptual content of casebooks, class discussion, or student scholarship, and the problem-oriented demands of clinical or simulation practice. In fostering the student's imagination of situations "outside" the law, the teacher can renew a students' appreciation of legal fundamentals. The Carver excerpt presents an arguably standard contract dispute: a contracted service (baking) with a failure to perform that results in loss to the baker. Yet the intensity of the baker's rage and the responsive fury and grief of the parents, particularly the mother, seem out of proportion to what a law student might expect from a simple contract dispute. To what extent might the law recognize these outsized reactions? How might the balanced messages of contract law, which honor "foreseeable expectations," affect the intensity of this conflict? These questions can refresh a student's sense of grievances and policies that underlie legal doctrines.

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(2) We sometimes categorize law practice as a profession, and baking as a trade. Accepting the distinction for a moment, what is "professional" about being a lawyer? Is it only the lack of physical labor? These questions ask students to compare lawyering to the trades and to consider what might justify the term "professional" as attached to lawyers.

74. See discussion *supra* Section III.A.

75. See discussion *supra* Section III.B.1.

76. See discussion *supra* Section III.B.2.

We discuss some of the general risks of using media in teaching professionalism in a later section.<sup>77</sup> Two more specific risks of using “extra-legal” fictions as teaching tools relate primarily to a given student’s sense of relevance.<sup>78</sup> Absent a clearly stated and reinforced message about the purposes of the exercise, a student can be forgiven for asking why, in law school, he or she has shifted over to the study of literature. To some degree, a teacher can moderate this risk both by careful structuring the syllabus and linking the messages of the exercise to other class themes, discussions, or materials.<sup>79</sup>

The teacher can also moderate the relevance risk in the selection of fictions. The Carver story, while its ultimate concerns lie elsewhere, does describe interactions that the teacher can cast in terms of legal disputing.<sup>80</sup> More to the point, the excerpt presents a specific human situation (the transformation of an ostensibly trivial conflict into an occasion for compassion, reconciliation, and emotional healing) which uses specific fictional methods (Carver’s narrative technique of focusing on changes in psychic and emotional states). These can be translated into concrete questions both about lawyering and about professionalism, as described above. Thus, in selecting extra-legal fictions, a teacher should take care to assess how both extra-legal content and the author’s specific narrative methods relate to the professionalism themes she might want to develop.

Written fiction as a medium presents one final aspect worth discussing here. Written fiction uses language as its tool for expression, and as already noted, so do lawyers, courts, and the legal academy. Yet the nature of the two usages varies both in intention and in method. We accept that written fiction seeks to recreate understandings that are not primarily conceptual in nature. We assume that written fictions rely on language with potentially intense auditory richness as well as complex, evocative layers of meaning. By contrast, legal

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77. See discussion *infra* Section IV.

78. The concerns addressed here relate not only to written fictions, but also to filmed narratives involving completely extra-legal themes. We have not attempted to use such materials in our own teaching or in this article. A teacher could use such materials to explore themes of professionalism as here, or use written fictions which more specifically address law, legal process, or lawyers as characters.

79. For example, Professor Scherr originally used the Carver excerpt as part of a clinical seminar entitled “Fictions for Facts: Using Fiction to Assess Approaches to Legal Fact Investigation.” The class read a series of short stories to develop perspectives on the development and creation of factual stories by lawyers, both in litigation and in transactional work. The Carver excerpt appeared as part of a phase dealing with the development of the psychic, emotional, and relational aspects of disputing. The class, following the use of the excerpt, focused on the role that such realities, once understood, might play in assessing the possibilities for negotiated or other non-litigated solutions.

80. The whole story describes a series of events which have specific legal dimensions: the hit-and-run which injured the boy; the question of medical malpractice in the boy’s treatment; the baker’s contract claim; and perhaps the parent’s claims against the baker for consumer harassment or intentional infliction of emotional distress. It would be plausible to deconstruct the story into its component legal claims and appraise those claims using the methods of legal problem-solving. We suggest, however, that doing so eliminates much of the force of using media in the first place.

prose predominantly develops conceptual material to the exclusion of other content and uses language which constrains inference to precisely focused meanings; perhaps by reason of this precision, legal prose does not rely on, and may even distrust, rich sensory effects.<sup>81</sup> Thus, to use fiction for the purposes described here entails the use of expressive prose in a teaching context where analytical prose predominates.

For students whose recent training stresses precise, structured, and explicit analysis, the inferential and expressive freedom of written fiction can be disorienting. Indeed, students sometimes assume that written fiction is less challenging, less legitimate, and less worthy of careful assessment. Some students may have so successfully transformed themselves into legal writers that expressive prose no longer communicates anything, much less the depth that a teacher might wish. To some extent, reading aloud can counteract this lack of response. But teachers using written fiction should be careful not to assume that their own enthusiasm and responsiveness to fiction will carry over to their students. They should come ready to address the special features and rigors of fiction using the explicit assessments common in law school, conscious that, as when explaining why a joke is funny, something important may be lost in translation.

#### IV. CHALLENGES

In discussing particular media, we have identified a number of teaching concerns and risks specific to a particular medium. In this section, we describe more general concerns with using media to teach professionalism. These concerns include some of the more common objections raised by students: "but it isn't real lawyering"; "it's just a story"; or "it's not about lawyering at all." Other risks focus on students' over-receptiveness to the medium: unexpected interpretations of the material; acceptance of a fictional picture as accurate; or unexpectedly personal responses to strongly moving material. Finally, differences exist in how to use media in different class formats, including large class, seminar, and clinical settings.

##### *A. Challenges Arising from Student Objections*

Using media to teach professionalism can produce uniquely visceral reactions to the images students see or to the stories they hear. In reaction to this response, students often claim that film and fiction are "make believe," reflect the artist's desire for impact and effect, and are not an accurate assessment of lawyering. The reaction is rooted in truth; the scenarios are

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81. Modern legal scholarship on narrative tends to counteract these assumptions, at least as to scholarship which relies on narrative to develop scholarly argument.

fiction, however thoroughly modeled on real life.<sup>82</sup> We have already asserted that the fictional, visual, or narrative form of these materials enhances its teaching value. Yet students' suspicions can render full discussion problematic. To the extent that the cry of "fictional" represents a rejection of the teaching method, a teacher risks losing some portion of the class entirely by discussing a clip that students do not believe is real.

In our experience, the teacher can make good use of these objections, extending and deepening the messages the teacher can deliver about professionalism. To the immediate objection of "fakery," a teacher can ask, "In what ways does the film diverge from reality?" In the ensuing discussion, the teacher can prompt students towards greater specificity: "Exactly why would a lawyer never ask those questions?"; "What rule of evidence or procedure does that ruling violate?"; "What ethical rule does this violate?"; and "Why would *no* lawyer ever engage in that behavior?"<sup>83</sup> During the ensuing discussion, students invariably make assertions of their own about how lawyering really works. The teacher can then ask students to trace the sources of those assertions to their past experiences and to assess the extent to which assumptions about "how it really is" might not apply in every situation. This probing about what students believe to be realistic is not meant necessarily to justify the medium's depiction as "acceptably real." Instead, it seeks to move students to become more aware of their own assumptions about the realities of lawyering, to trace them to their sources, and to assess whether alternative assumptions also exist. It also prompts a more accurate assessment of "good lawyering," and a more

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82. A similar response can occur even when using nonfictional representations of lawyering. While students are constrained from crying "make believe," they can still allege that the nonfiction account distorts the realities of lawyering and reflects agendas of the film-maker or narrator. An excellent example of this arises in the use of material from *A Civil Action*. Originally a nonfiction book, JONATHAN HARR, *A CIVIL ACTION* (Random House 1995), it later became a feature length film with John Travolta and Robert Duvall. *A CIVIL ACTION* (Paramount Pictures et al. 1998). Still later, the same events became the subject of a short documentary, produced by anthropologists at the University of Washington. *LESSONS FROM WOBURN: THE UNTOLD STORIES* (Films For Justice 1999). Students required to read the book have no difficulty distinguishing the events it describes from the fictionalized themes of the feature film. Similarly, students routinely express suspicion of the documentary, spending at least some portion of each discussion critiquing the biases it expresses (usually identified as pro-plaintiff).

Perhaps most intriguingly, students discussing only the book frequently refer to it as "the novel;" when its status as nonfiction is brought to their attention, the usage often continues unabated.

83. These kinds of specifying questions lead to the conversations discussed next, but they also have a separate value, strongly related to professionalism. In posing them, the teacher forces the student to think carefully and critically about lawyering behavior and to discuss the advantages and disadvantages of those behaviors in an analytical format. This can foster in students the sense that a given lawyering behavior reflects choices about how to act in a given situation; regularly exercised, that sense of behavioral choice fosters a reflectiveness about lawyering action that we see as a valuable component of professionalism. To be sure, in these exercises the student develops that reflectiveness in response to fictional characters and events; yet once exercised, the habit of behavioral self-consciousness can take root and flourish, especially if reinforced through clinical supervision.

careful and collaborative critique of how “bad lawyering” falls short of that standard.

A different teaching approach to claims of fictional falsity starts with the teacher acknowledging the apparent falseness, while asking students to make explicit the assumptions on which the artist might have based the depiction. Questions here might include: “Conceding inaccuracy, what impression does the artist intend to create?”; and “Does it lessen the medium’s impact to know that the situation it describes does not match reality?” These questions in turn lead to a variety of topics of direct relevance to professionalism. First, students can be brought to describe explicitly what cultural myth or stereotype about lawyers the particular excerpt has used. Once expressed, teacher and student alike can speculate as to the source of the stereotype, its net accuracy (i.e., the kernel of truth in the stereotype, shorn of the elements of caricature), or the reasons for its continued vitality. Second, students can be moved to identify how differently they now react to fictions involving lawyers. This topic leads quite naturally to open assessment of the impact of their legal training on their understanding not only of fiction but also of the public perception of and reaction to lawyers and lawyering.

Despite these efforts, some students will persist in rejecting the claims of visual or narrative representation as a useful tool in assessing law, legal process, or lawyering. (This reaction is especially likely and acute where the medium presents a situation with no obvious connection to legal topics.<sup>84</sup>) For these students, more conceptual discussions of the role of narrative and of visual imagery in persuasive practice can help create a link of relevance, whether as advocates in a forum or as negotiators. Asking whether the particular clip or excerpt represents an effective use of the particular medium can lead to practical discussions of the differences in approach to oral or visual presentation, with direct relevance to particular lawyering competencies which that student expects to perform in the future.<sup>85</sup>

Beyond this, a teacher can bring students who distrust fiction to assess the claims of lawyering as an effort to find the truth. The skepticism with which students approach fiction can be used to explore the accuracy of fact-finding at trial or the role of deception in legal negotiations. Both disciplinary rules and aspirational maximums have a special concern for candor, truth telling, and the

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84. See discussion *supra* notes 68–73 (addressing the use of written fiction presenting completely extra-legal topics).

85. See, e.g., Foley & Robbins, *supra* note 68, at 461 (describing the three “building blocks of all stories—character, conflict, and resolution—and two essential techniques [of] storytelling—organization and point-of-view,” and discussing how to teach students to write effective factual sections). The methods of effective storytelling, and the respective use of oral and visual media as narrative media, also have potential relevance to counseling, negotiation, trial advocacy, and any other lawyering competency in which the lawyer engages in conduct intended to persuade another.

avoidance of unwarranted deception.<sup>86</sup> A teacher can link a student's aversion to fictional falsity with the concerns of these rules and exhortations. In doing so, a teacher can help students consider how to apply that same skepticism to the fluid flow of information in law practice.

Finally, students may have difficulty imagining their way into the depicted scene, even if they accept its premises, its artistic messages, or its relevance to lawyering. To some extent, the teacher can anticipate this reaction by using scenes with a reliable impact on students; we have each learned not to use scenes or excerpts that fail to engage students. Where even a reliable scene fails to catch hold of a class, the teacher can still retrieve some portion, and sometimes all, of the intended message through the use of standard narrative explication: describing (or asking students to describe) the flow of the depicted scene; discussing both surface and submerged messages; identifying key points of transition or decision in the scene and discussing alternative paths that the scene might have taken; or replaying or rereading portions of the text or film as illustrations of particular points.<sup>87</sup>

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86. See, e.g., GA. RULES OF PROF. CONDUCT R. 4.1 (2003), available at <http://www.gabar.org/grpc41.asp> ("Truthfulness in Statements to Others"); *id.* at R. 3.3(a)(4), available at <http://www.gabar.org/grpc33.asp> ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false."); *id.* at R. 3.1, available at <http://www.gabar.org/grpc31.asp> (barring the filing of claims which lack support in fact); *id.* at R. 3.4, available at <http://www.gabar.org/grpc34.asp> (barring the coaching of witnesses and the falsification of evidence).

At the same time, it is a widely accepted assumption that lawyers as advocates and negotiators tell stories in an effort to persuade decision makers to act in their favor, stories which necessarily edit the facts into a distorted picture. "By its very nature, storytelling distorts facts. By placing the facts within the context of a narrative with a unifying theme, a specific genre, and persuasive images, all fashioned for a particular audience, a storyteller seeks to convey a particular meaning to that audience." STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION AND PERSUASIVE FACT ANALYSIS* 169–70 (2003). For a useful discussion of the ethics of storytelling in trial settings, see Steven Lubet, *The Trial as a Persuasive Story*, 14 AM. J. TRIAL ADVOC. 77, 81–86 (1990).

87. We have provided one example of this in some of the questions asked about the Carver excerpt. See discussion *supra* text at notes 67–73 (questions focused on Carver's narrative devices and language). With films, a teacher can usefully discuss the framing and editing of individual shots in a short scene. For example, one popular lawyering scene appears early in *ANATOMY OF A MURDER* (Carlyle Productions & Columbia Pictures Corp. 1959), where Jimmy Stewart in the lawyer role interviews and advises Ben Gazzara, the defendant in a murder case. One approach to this scene focuses on the extent to which Stewart's character persuades Gazzara into a plea of insanity, as an illustration of ethical strictures against witness coaching. Yet it is possible to track the director Otto Preminger's framing, camera angles, and cutting between images in this scene as a vehicle for discussing the flow of power and control between lawyer and client. A prepared teacher can illustrate with great precision the physical behaviors and verbal devices through which Stewart's character first deflects then absorbs Gazzara's hostility and isolation in a persuasively natural illustration of a lawyer's exertion of control over client choice and a potentially disturbing portrait of lawyer and client as collaborators in a false plea.

We concede that it remains possible to develop these themes without the focus on the filmmaker's or the author's technique, but where a class fails to connect with a scene, critique of the artistry can provide an unexpected path towards reconnecting students with previously invisible



### *B. Challenges from Student (Over-)Acceptance*

Student acceptance of the use of media poses risks which match, and sometimes exceed, those which arise from student rejection of the media. Perhaps the most common version of these risks occurs when students enthusiastically form impressions which diverge from those intended by the teacher. We already described one instance of this in our discussion of legal cartoons.<sup>88</sup> Humor seems especially susceptible to variance in interpretation, but these variations exist with both written fiction and video. Where it occurs, the teacher could acknowledge the difference, but explain or explore his or her view as the primary one. However, to do so would miss opportunities for useful discussion and could counteract the very open-endedness of the exercise itself. Here again, the teacher's comfort in acknowledging the disparity between his or her view and the students' views, and the teacher's ease in subjecting the planned interpretation to student critique can spell the difference between a flat exercise and a useful discussion. Indeed, the disparity may well be susceptible to reverting back to an overall discussion of professional issues, not only in a given class but also in future class discussions of the same material. Finally, the teacher's willingness to accept competing interpretations can set a model for collaborative analysis that has direct relevance to professional practice.

Another challenge of using media results from student familiarity, especially with popular films or television shows. While some students may have limited knowledge, others may have both the ability and the willingness to recite every line from a favorite movie or television episode. This intense familiarity can serve a useful teaching function, as calling on such students and asking them for accurate and thorough summaries of the surrounding plot can be helpful. Intense familiarity also brings risks; their knowledge of the excerpt may render them powerless to assess the segment in isolation. While we have discussed ways to integrate understanding of the full narrative in which the excerpt appears, a teacher may want to use a particular clip out of context. A particular segment may not accurately represent the film or a given character and may in fact distort the story as presented in class. If the excerpt provides a concise illustration of an aspect of professionalism one seeks to teach, the teacher is justified in taking it out of context. We suggest that the teacher accommodate this risk by preparing in advance to address the disparity or distortion embodied in an excerpt. If a student cries foul at a scene's distortion of a favorite character or plot line, the teacher can acknowledge the variance but use the critique to stress the points that the excerpt might illustrate when more narrowly considered.

In the previous section, we discussed student rejection of a particular depiction of lawyering as inaccurate or unrealistic. Yet, use of compelling

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features of the scene.

88. See discussion *supra* Section III.A.

media risks student acceptance of some lawyering as not only accurate, but also as the preferred or only way to perform the depicted task. The problem seems especially acute with sympathetic, heroic, or simply fascinating lawyer-protagonists, where the power of the character or the momentum of a given narrative may overcome the student's (or even the teacher's) critical judgment. The risk of over-acceptance of questionable practices applies equally to true lawyer heroes,<sup>89</sup> intriguing lawyer villains,<sup>90</sup> or lawyers whose personal redemption centers the plot.<sup>91</sup> At a minimum, a teacher needs to approach the display with a willingness to seek a critique of the lawyering from students or to suggest a critique if no students offer it. Over time, a teacher who uses a particular clip can discover and counteract the most common over-identifications.

Finally, persuasive media can engender psychological distress in some students, for whom particular scenes or stories may prompt strong personal reactions. This can be especially true for narratives of personal violence or family dysfunction, such as domestic abuse,<sup>92</sup> rape,<sup>93</sup> or parental neglect and abuse.<sup>94</sup> Similar reactions can occur where the excerpt offends strongly held values of a given student, whether political, religious, racial, or social. Expressive media do not necessarily share the apparent value-neutrality or

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89. See, e.g., *TO KILL A MOCKINGBIRD* (Brentwood Productions et al. 1962) (depicting the character of Atticus Finch, played by Gregory Peck). The character of Atticus Finch has been described as an archetype of the lawyer as saint. See Asimow, *supra* note 2, at 574 (explaining that in the 1960's, "some inspiring films like *To Kill a Mockingbird* or *Inherit the Wind* came close to nominating lawyers for sainthood"). Yet his lawyering in the movie is remarkable for its informality, its occasional woodenness, its political and social conservatism, and its spillover into the lives of his children. None of these constitute bad lawyering, but their specificity to time and place and their potential inappropriateness and ineffectiveness in other legal cultures may well get lost in the film's relentless (and justifiable) stress on his idealism and his emotional connection with his children and his community.

90. See, e.g., *A CIVIL ACTION* (Paramount Pictures et al. 1998) (depicting the character of Jerome Facher, played by Robert Duvall). The Facher character (as portrayed in the film) offers some subtly seductive messages about negotiation. For example, in a scene in the courtroom hallway while awaiting a verdict, he describes himself and Jan Schlichtman (played by John Travolta) as kings, able to settle disputes on any terms they view as acceptable.

91. See, e.g., *THE VERDICT* (20th Century Fox 1982) (depicting the character of Frank Galvin, played by Paul Newman). By the end of trial, Galvin's recovery from alcohol and surprising success in prosecuting a malpractice case run such risks of identification that some students see his persistent failures in lawyering more as a function of actions by his opponent, Edward Concannon (played by James Mason) than of Galvin's own errors.

92. See, e.g., *SLEEPING WITH THE ENEMY* (20th Century Fox 1991) (depicting a wealthy couple in which the husband, played by Patrick Bergin, is a deeply violent abuser and stalker of his wife, played by Julia Roberts).

93. See, e.g., *THE ACCUSED* (Paramount Pictures 1988) (depicting a violent rape in a working class bar and the legal system's hostility to the victim (played by Jodie Foster) who wanted the female prosecutor (played by Kelly McGillis) to pursue not only the perpetrator but also the bystanders).

94. See, e.g., *KAYE GIBBONS, ELLEN FOSTER* (1998) (depicting the progress of a girl in her early teens through foster care and state protective services).

carefully distanced handling of beliefs or suffering which characterizes many (if not most) classroom legal materials. Instead, they characteristically seek expressive force, taking students by surprise and prompting powerful reactions. At the very best, these reactions interfere with a student's ability to absorb messages about professionalism. At worst, the films can restimulate trauma or prompt unwanted personal disclosure, posing the risk of active psychological harm to a student.

These latter risks may persuade teachers to avoid use of materials which might prompt such responses. In this Article we have primarily discussed examples which in our experience do not prompt such strong reactions. Use of jokes and humor,<sup>95</sup> use of artificial or archaic fictions (written or visual), and use of media created in cultures widely different from today's promote a distancing of the medium from the student and ease these risks. The size and teaching format of the class can also influence the teacher's choice. Deeply moving materials presented in large lectures may have a different impact (and require different levels of engagement) than the same materials presented in a small seminar with a practice of active participation by all students, or in a clinical seminar where student and teacher have a more direct personal relationship through clinical supervision. When using such potentially affecting materials, the teacher will want to take special care to assess and prepare exactly which points to discuss when using the excerpt. A teacher who has a habit of using media without advance notice (so as to maximize its power to surprise and unsettle students) should consider altering this practice to include not only notice, but even structured discussion of the issue in advance of its unstructured presentation.

Care taken to incorporate the messages of deeply affecting media in a well-considered classroom context can limit the risks and maximize the benefits from the display. Moreover, we suggest that the potentially powerful impact of these excerpts contributes something vital to the teaching of legal professionalism. Lawyers encounter situations of conflict and opportunity throughout their careers. Lawyers often handle client problems only when financial, emotional, or ideological aspects have reached a certain level of intensity. The ability to recognize and to accommodate these strong psychological, value-laden responses (sometimes described as "toughness") is one of the more lauded abilities of an assured legal practitioner. At the least, it seems unwise to lead our students to believe that, throughout their active careers, they can avoid encountering and working with human emotions and motivations. Instead, we agree with the proposition that the mental ability to handle the psychological, emotional, and intuitive elements of common legal

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95. Jokes, of course, can also wound, stimulate psychological distress, and offer deep offense. *See generally* TED COHEN, JOKES: PHILOSOPHICAL THOUGHTS ON JOKING MATTERS (1999).

situations reflects a central component of effective professional practice.<sup>96</sup> Carefully used examples of fictions which both prompt and provide perspective on these emotional dimensions thus serve as exercises in the development of practical judgment in all its dimensions, creating occasions in which students can develop the moral and mental balance to absorb and consider the powerful subjective realities which permeate lawyering.

### *C. Challenges Arising from Class Format*

So far in this Article, we have presented exercises or discussed uses of media without regard to classroom context. To be sure, many of our classroom examples assume an interactive discussion format, with open-ended questions prompting both student response and non-linear development of the planned lesson. Yet these examples primarily reflect our particular styles. This paper contends that law teachers can use media to teach professionalism in most of the prevailing law teaching formats. An exhaustive review of how to use media for teaching professionalism in all possible teaching formats far exceeds the planned scope of this discussion. However, we can make some initial suggestions. Four different elements of class design affect the use of media for teaching professionalism: class size, course topic, stated course competencies, and teacher-student interaction.

Class size matters, and not only for the practical limits it imposes on open-ended discussion. The larger the class, the more diffuse the impact of the medium itself, whether the spoken word or the moving image. Moreover, the larger the class, the less likely the intimacy of smaller groups and the greater the potential diversity of opinion and reaction to the media's impact, including the risk of complete student non-engagement. Further, a relationship exists between class size and course topic. Large classes tend to focus more on the coverage of large bodies of closely linked conceptual material, whether doctrinal or ethical. These aspects of class size suggest that using media in large classes would involve the use of shorter excerpts tailored to more specific purposes, essentially stressing the content of the scene (rather than its expressive impact) as an illustration of focused points. In contrast, if a larger class also has smaller sections or if the class is a seminar, it becomes more realistic to have longer excerpts handled through open-ended discussion that are more heavily reliant on the expressive impact of the medium to prompt discussion of less conceptual, more subjective dimensions of the topic.

The topical focus of the class also matters. In classes or for teachers focused purely on intellectual or scholarly content, it seems less likely that the

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96. See generally MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* (1990) (collecting essays discussing the impact of literature in teaching emotion as a component of good judgment); MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* (2001) (arguing that the intelligent assessment of emotion constitutes a central dimension of ethical judgments).

teacher would use media as a source of discussion about professionalism.<sup>97</sup> Even where the dominant focus of such a class rests on doctrine or policy, teachers concerned with the practical dimensions of the topic will find filmed or written narratives useful as the focus of class discussion in much the same way as described here. Where the course primarily teaches practice competencies (as in a clinic or a simulation class), media can raise questions about how the excerpt represents the lawyer's performance, as well as introduce usefully complex depictions of the underlying problems to which performance is directed. In these classes, a well-chosen story or film can represent a practice situation in sufficient depth and with sufficient immediacy to provide a controllable vehicle for critical reflection, in ways that separate performance of the competencies under teacher supervision often cannot.

Special considerations apply where the class explicitly focuses on ethics and professionalism. Mandatory in many schools, and sometimes required as a precondition to bar entry, these classes often have an implicit, strongly felt purpose of preparing students for the relevant ethics examination. As a result, teachers of these classes may feel some obligation to teach ethics in a rule-based format, with a special view towards the hypothetical format of the Multistate Professional Responsibility Exam. At the same time, teachers of these classes can also feel a demand to go beyond pure rule-based approaches and to teach ethical recognition and complex understandings of professionalism that stress more than simple application of rules to well-structured hypotheticals. We offer the unsurprising proposition that teachers will find in the use of narrative forms and of lawyer humor an invaluable set of tools for meeting these disparate goals. However, it is also worth noting that ethics and professionalism classes often have large enrollments; class size may affect the extent to which a teacher can use narrative or humor for more than purely illustrative or exemplary purposes.

The teacher's choice of which course competencies to teach may also affect the ways in which he or she might use media. We suspect that, in classes which train careful reading of legal texts, analysis, and explicit intellectual argument, the use of media would be limited to illustrations of the topics on which the course focuses. Indeed, little need exists to use media to teach the mechanics or practice of the analytical and scholarly competencies, as the classroom setting itself, coupled with out-of-class preparation, constitutes the primary locale for the exercise of these skills. A teacher of such topics may feel little need for fictional depictions of what already occurs regularly in class.

However, where the scope of the course competencies goes beyond the practice of academic study and argument, the scope for using media expands.

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97. We do not mean to suggest that teachers of this sort of class might not find the various media we have discussed useful as illustrations of their chosen doctrinal, philosophical, or policy concerns. Indeed, we suspect that teachers often find room to use different narrative media to make their points. However, the focus of this paper rests on the use of media to teach professionalism.

The clearest example of such classes includes clinical classes, in which students develop complex competencies exercised in law practices which directly serve client concerns. In these classes, narratives can introduce the practice context, offer examples of the designated competencies in action, and convey something of the subjective weight and heft of action in the presence of real client concerns. Similarly, simulation classes which teach particular sets of competencies (trial advocacy or pre-trial practice, and interviewing, counseling, and negotiation) will also benefit from the use of narratives. Especially in pure simulations where students work with teacher-drafted fact patterns, film or written depictions of the relevant competencies bridge the fiction of the simulation with the reality of practice and permit group critique of the fiction in ways which model effective critiquing of class performance.

Finally, we suggest that the nature of the interaction between teacher and student has an impact on the use of media in the classroom. Where the teacher elects a pure lecture format, it is obvious that narratives serve solely as illustrations. Subordinated to the lecture, the full impact of the selected medium depends on the teacher's ability to structure the lecture to accommodate its force while maintaining the momentum and focus of the lecture itself. Where the teacher uses a discussion format, whether strictly one-on-one and socratic or oriented to broader group discussion, room exists to develop the students' responses more directly, and students can be prompted to explore more fully the expressive content of the excerpt. Classes with a more open-ended discussion format, including scholarly and clinical seminars, allow even more room for the use of media, especially since seminars rely more heavily on personal contact between teacher and student. Finally, classes in which the teacher engages in direct critique and supervision of student performance and professional development (including both simulation classes and clinics) offer even further opportunities for the integration of media into teaching. The use of media in the class component benefits from the greater intimacy inherent in individual supervision; the supervision in turn can benefit from using the stories portrayed in media both as a point of reference and as a source of contrast.

This review of the impact of course format on the use of media does not exhaust all of the possible ways to integrate media into the classroom. Moreover, we stress that the differences between how media might function in different class formats form gradations of degree and focus, not categorical divisions. Based solely on the discussion above, we might conclude that the richest use of media for professionalism would occur in smaller classes, with a strong focus on practice themes and a commitment to training complex competencies, where the teacher creates a more intimate, discussion-oriented relationship with students. Yet we are both aware of large classes with strongly conceptual content and lecture approaches in which media serves a vital role in teaching professionalism. We conclude that the teacher's own assessment of the excerpt and the teacher's ability to work within the given format form the principal determinants of success in the use of media for these purposes.

## V. CONCLUSION

Art provides a nearly infinite resource for teaching and examining legal professionalism. Popular culture will continue to depict and critique one of its favorite preoccupations: the lawyer. Using art to explore professionalism offers a rich mine of meaning from which to encourage exploration and self-reflection. The key to success rests in a teacher's willingness to fuse the expressive concerns of art with the practical considerations of professionalism.

In this Article we have offered an expansive notion of professionalism. In our view, lawyers in practice confront daily challenges that require judgments that fall between what the disciplinary minimums and aspirational maximums address. As law teachers, we see an opportunity to prepare students for these moments of decisive action, so they can assess and act with self assurance and poise. These opportunities occur not only in professional responsibility courses, but also in doctrinal classes, clinical settings, and first year lawyering skills classes. Each format permits assessment and discussion of lawyering from subjective, moral, and emotional perspectives. The memory of these discussions and the exercise of imagination and empathy which they foster ground students in a firm and functional understanding of their challenges as professionals.

Art permits and indeed encourages ready access to the imaginative and subjective dimensions of practice. Media provides not only a lens, but also a mirror in which to consider the behavior of lawyers. When we watch movies, see cartoons, and read literature, we often see ourselves or someone we know in the story.<sup>98</sup> Stories present us with predicaments and resolutions, "good" and "bad" characters, and opportunities to evaluate, reflect, and learn. Vivid images of lawyer conduct and of legal personae permit a deeper student identification with the feel of being a lawyer, increasing their engagement and learning.

As in all teaching, challenges exist. We have sought to identify the most common ones and provide workable solutions to minimize, if not overcome, them. The key to effective use of media lies in the teacher's ability to adapt the messages and effects of given media to the teacher's chosen themes and preferred teaching style. The good news is that both art and life provide an endless supply of material from which to choose. Given highly publicized scandals such as Worldcom and Enron, and the prominence of lawyers in those scandals, one would have to go out of their way to avoid stories about lawyers and ethical problems. We can expect creative artists to continue to use our flaws (and our power) as a subject for expression and cultural assessment.<sup>99</sup> Law teachers, too, can see their role as creative. We can foster the development of lawyers whose thoughts and actions will prompt different fictions, ones that

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98. Perhaps we are more fully engaged in the illustration because we fear we could be confronted with the same situation.

99. See, e.g., *Law & Order* (NBC Television Broadcast, 1990–present) (advertising for the program stresses that stories are "ripped from the headlines").

are more ethical, more assured, and more attuned to the fullest notion of professionalism.



