Writing and Revising the Disciplines

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Writing Law

LARRY I. PALMER (Law)

WHEN I was a law student at Yale in the late 1960s, the phrase "legal fiction" was a term of disparagement. My professors used this term to describe those legal constructs or doctrines that judges manipulated in order to avoid explicit articulation of the social and economic consequences of their decisions. To label, for instance, some judicial prose about what a "reasonable man" would do a "legal fiction" certified that I had reached the pinnacle of analytical rigor I was being taught to apply to legal texts. In the discourse of the first-year law school classroom, "legal fiction" signified, at best, sloppy legal reasoning, and at worst, "bad law." I resisted this legal transformation of the meaning of fiction and its implicit method of interpreting legal texts. At a pragmatic level, I could not imagine ever using the term "legal fiction" in any legal text I might eventually write. Judges or other lawyers were unlikely to respond favorably to my text if I referred to terminology they treated as sacred as "legal fiction." I asked myself why I should bother adding "legal fiction" to the growing body of arcane lexicon the law was to me as a first-year law student.

The second form of my resistance to the legal fiction rhetoric came from my educational experience as an undergraduate. "Fiction" was not simply "pleasurable reading," but seminal for my own developing social and ethical discourse. I read numerous novels while at Harvard, and I was not a literature major. My fondness for fiction kept me clinging to the notion that novels, perhaps even poetry, plays, and short stories, provided critical social perspectives.

My professors must have known that their artful use of "legal fiction" was not a model for discourse in the practical world of lawyering, where people's money, hopes, and at times their liberty and very lives would de-

pend upon the prose I created. Yet I don't recall anyone ever explicitly stating what I sensed early on in my career as a law student: the way lawyers who are scholars—law professors—speak and write about law is different from the way lawyers who represent clients—professionals—speak and write about law.

I would have to find some term other than "fiction" to serve as a euphemism for "bad" when applied to law or legal reasoning. "Science" would not do, because "legal science" was somehow "good," at least among some of my professors.[1] Further, science had the patina of progress, usefulness, objectivity, and universality that the more idealistic among us longed for at the time.

I remain to this day skeptical of the style of legal writing and discourse epitomized by the rhetoric of "legal fiction." The coiners of the legal fiction terminology were, of course, legal realists. The terms of their discourse were in direct opposition to a more formalistic way of writing about law as a set of principles discernible in cases which had dominated legal scholarship in this country prior to the 1930s.[2] The realists' agenda sought to embed law in social and economic reality—an early form of "deconstructing" law. These scholars employed perspectives from other academic disciplines to critique legal doctrines. Philosophy and economics remain to this day the source of what legal scholars often call "theory," although anthropology, sociology, psychology, history, political science, and even literature[3] are also employed as allies in legal scholarship's attempt to find both intellectual rigor and social relevance.[4]

Even the supposedly more radical legal scholars of my own generation—those engaged in critical legal studies and critical race theory—are, from my perspective, heirs to the legal realism tradition. In writing for other legal scholars, the dominant mode of discourse in legal writing today shares in common with legal realists of an earlier generation an assumption that law, as interpreted by judges, plays a central role in resolving the social, ethical, and policy dilemmas their texts examine or display.

My own writing, mostly dealing with issues related to law and medicine,

1. For example, during my tenure at Yale, the late Myres McDougal, a great influence on legal education internationally, was collaborating with a political scientist, Harold Lasswell, on a project to transform the nature of legal education by talking about a new legal methodology. Some of the materials used in seminars were eventually published. See Harold D. Lasswell and Myres S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy* (New Haven, Conn.: New Haven Press, 1992).

2. Laura Kalman, *Legal Realism at Yale, 1920–1960* (Chapel Hill, N.C.: University of North Carolina Press, 1986).

3. See Jane B. Brown, "Law, Literature, and the Problems of Interdisciplinarity," *Yale Law Journal* 108 (1999): 1059–85.

4. See Donald A. Schön, *The Reflective Practioner: How Professionals Think in Action* (New York: Basic Books, 1983), 41–45.

often questions whether legal institutions are central to the social and ethical resolution of these issues for readers—some of whom are not judges, law professors, or lawyers. My readers bring their own experiences with birth, family, religion, and death to the texts I write. It might well be that they live in a world I can't imagine, but certainly they are trying to live in a world I can imagine for them.

As a writer, I attempt to find those receptors in my readers: I search for a way to construct a problem that persuades without preaching about the underlying ethical dilemmas I discuss. If my audience is other lawyers and judges, it must be critical without deconstructing law. Whether my audience is lawyers or non-lawyers, my texts often depart from the dominant mode of legal writing, legal realism, and its newer forms of critical legal studies, critical race theory, and what is sometimes called "outsider jurisprudence."[5]

My evolution as a writer begins with a description of how literary imagination—what we develop from reading good fiction—is important for the kinds of professional writing lawyers do. As an example, I describe the story of my professional representation of a criminal defendant before an appellate court. The kind of professional writing I had to employ on behalf of my client is very different from the way law professors write about law. To illustrate the difference, I will retell the story of my professional representation from the perspective of an imaginary critical race theorist.

Of course the issues of race are crucial in medicine, law, and all aspects of our culture, especially for an African American like myself, who came of age when racial segregation was legally enforced in the city where I grew up. So I must describe my method of confronting the issue of race in my own writing about law and medicine. This part of my evolution as a writer was nurtured, ironically, not by legal texts on race or great literature dealing with the issues of race, but by my encounter in the early 1980s with a seminal text on professionalism, Donald Schön's *The Reflective Practitioner: How Professionals Think in Action*. This book provided me with a theoretical framework for differentiating between writing about law as an academic discipline, writing law as a professional who serves clients, and writing about law for those educated in other disciplines.

To write about law for those without professional legal training, I discovered that I had to learn to teach non-professionals how to write about the intractable problems at the intersection of law and medicine. Finally, the process of teaching undergraduates to write about issues in law and medi-

5. One of the more gifted writers among those who are part of the "outsider jurisprudence" group is Patricia J. Williams. See her *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University Press, 1991).

cine converted me: I have become an essay writer about law rather than a writer of more traditional law review articles for other law professors.

Why Should Future Lawyers Read Novels?

I am often asked by undergraduates what was the most important thing that I did to prepare to become a lawyer, a very different question from what one *needs* to do these days to gain admission to law school. My response: I read all of Dostoyevsky's novels during the spring semester of 1966, my senior year in college.

Reading all of Dostoyevsky's novels gave me some insight into how another writer views the world morally, spiritually, and emotionally. It was the systematic reading of a great writer that prepared me for the many-layered manipulations of text that law is. To this day, my sense of satisfaction with my work as a lawyer comes when I have been able to listen to strangers as if they were novelists, telling me stories I must hear and help them interpret to others.

The last time I represented someone in an actual case, I had the most important professional "success" as a lawyer in my life. Back in 1976, I was asked by the clerk of the local court to undertake the representation of a man on appeal who had been convicted at trial of homicide. I was told that the lawyer representing the convicted man at trial had done a very fine job, but that he and other lawyers whom the clerk had approached had declined the appellate representation. While I knew the compensation for such court-appointed work was meager, I expressed surprise that no one would do it, and tried to decline because I was not a member of the bar in New York State, having been admitted only in California. The clerk assured me that the court would grant special permission for me to appear, so I accepted the assignment as my public duty.

Many disasters—this homicide, for instance—are learning experiences for future lawyers, so I hired a law student to help on the appeal. Writing the brief would be a learning experience for both of us. He would learn something about an actual appeal, and I would learn something about New York law and practice.

As soon as my research assistant and I began to work together, it was apparent that the novel reader in me, the lover of Dostoyevsky, would take over. The student immediately suggested that we should get in the car and drive to the state prison to interview the client, who was incarcerated without bail pending the appeal. I declined to follow the suggestion and said that we were both to read the thousand pages of trial transcript to understand what had actually happened at trial. The pragmatist in me told

my assistant that a trip to the state prison would take at least an entire afternoon, time which would be better spent understanding the trial, the story of what happened from the defendant's and the state's perspectives.

Reading this transcript with empathy for what my client said, and objectively as to what others said, I could immediately see how the stories conflicted. My professional role was to search the cases and statutes of New York to determine how I could "give voice" to my client's story through a series of legal arguments about how juries should be charged about self-defense in homicide cases. In addition, by reading the transcript with literary empathy, I was convinced that despite a long previous record of imprisonments, my client was a very intelligent and literate individual. Letter writing would be my mode of communication—and my client would first be introduced to me as a writer.

I wrote a letter informing him of my appointment and how I planned to proceed in his case. My law student assistant, ever hopeful of meeting a real live client, expressed doubts that the prisoner would respond to my epistle from Ithaca. The lover of Dostoyevsky, the novel reader, won the bet: I received a very cogent letter from my client thanking me and agreeing with my overall strategy. As we worked on writing the brief, I gave in at one point to my research assistant's need to at least get out of the law library.

In order to write the "statement of facts" for our brief, I realized that we needed to leave the literary world of trial transcripts and judicial opinions and enter the world that existed at the time of the homicide in November 1971. We visited the courthouse and looked at some photographs, including a picture of the deceased, who had been shot at close range with a 38-caliber pistol—a terrifyingly gruesome experience—that the appellate court judges would have before them in addition to my brief. We also walked to an area of the city near Cornell, called Collegetown, the scene of the homicide. I was searching for a way to organize what would only be a two-page written description of the facts in a manner most likely to lead the judges towards my argument, and yet not misrepresent anything that was in the transcript.

As I viewed the photographs and walked down the street, I went over my client's story in my mind *and* in my imagination: during the afternoon of that November day, he had been drinking and injecting heroin at a bar; around 5 P.M., he called his girlfriend, a Cornell student, to meet him at a certain location in Collegetown; on his way there, my client encountered a man who accosted him with a gun. My client, fearful for his life, pulled out his 38-caliber pistol and shot the man. Almost immediately after the shooting, my client's girlfriend arrived in a taxi, and they left Ithaca, not to be found again until over three years later. The victim of the shooting was dead. I also remembered reading that the only eyewit-

ness to the shooting was some distance away, not close enough to hear the conversation or to clearly recognize the two men.

As we walked back toward the law school on that sunny June day in 1976, I suddenly remembered that at 5 P.M. in November the sun is starting to set. I thought about the fact that the eyewitness was viewing the scene from a distance at twilight, a time of day when vision is impaired by shadows and rapidly changing light. In a moment of inspiration, the metaphor of my client's story came to me: romance at twilight interrupted by an assailant whom he killed in self-defense. I turned to my research assistant and shouted "Romance at twilight!" He looked puzzled. I explained that this would be the theme for our factual statement and saw him become as excited as I was about how the "facts" could be put together in a way that would allow our brief to have *passion*—a point of view—and yet be objective about the facts so that the judges might at least listen to our arguments.

So the brief began: "At twilight on November 12, 1971, the defendant had arranged to meet his girlfriend at the Sunoco gas station in a portion of the city of Ithaca called Collegetown, when he was accosted by the deceased, who was armed with a gun. . . ." The brief went on to argue that the manner in which the judge charged the jury about the interrelationship of the various homicide statutes was illegal because it deprived the jury of a fair opportunity to consider my client's claim of self-defense. I filed the brief in the appellate court and sent my client a copy. I lost the case in the appellate court and failed to receive a hearing in the highest court of appeals in New York.

Since I lost the case, why do I call it my greatest professional success? Writing this brief was a professional success in terms of service to a client. After the court's decision, I wrote my client, expressed my regret about the outcome, sent him a copy of the decision, and explained his remaining options regarding the federal courts through a process he could start on his own called a Writ of Habeas Corpus. I did not hear from him for some time, but at Christmastime 1977, a few months after my first son was born, I received a card from him, from the prison where he was then serving six to ten years. In the card he thanked me for my services on his behalf and wished me a Merry Christmas. I thought of the irony of the situation—I was about to spend my first Christmas as a father, and a man who was still in prison despite my efforts was sending me holiday greetings. His written words, the only way I really knew my client, had touched me as my written words must have touched something good and very human within him.

As a client, he wanted a human being to hear his story, and treat it with integrity within the peculiar written constructs of law—those things we call appellate cases and statutes. Unlawful homicide is divided into three constructs in New York: "murder," "manslaughter," and "criminally negli-

gent homicide." Our theory was that "self-defense" should have the same meaning under all three rubrics of New York law, rather than two or three distinct theories of how a homicide might become "justifiable" homicide and therefore not unlawful. My client knew that not all stories fit within the legal structure, but he acknowledged my human efforts that went into researching and writing the brief. More important, he gave me some insights into true professionalism.

Professionalism is about hearing the other person at his or her deepest level and translating those broken dreams, hopes, thoughts, and value systems into a position within the existing institutional structure. I had "won" despite the appellate court decision because I had been faithful to my client's interests, values, and imagined world without violating my own standards of honesty, service, and reverence for human life. Again, when we act from that deep sense of what I call literary empathy, I believe we gain deeper knowledge about the meaning of being human in ways of which we are often unaware.

It is worth noting here that in some sense, all fiction is the same: it gives us resemblances, new ways of looking at things, that help us in that process of constantly remaking ourselves into the larger constructs of another's imagination. The best fiction gives us this, whether it is poetry or prose. I refer to Dostoyevsky because he is the writer who truly gave me the world. The late Dorothy West, a Harlem Renaissance author who died in 1998, was quoted as saying about her first encounter with Dostoyevsky at fourteen years of age, "I think I had read up to page 50. And all of a sudden I jumped up, and I walked up and down the floor of my room with tears in my eyes, and I said, 'this is genius; this is genius!' "

It is out of this encounter with the genius of fiction that I have developed my own sense of professionalism. As a lawyer—a person who must serve the interests of others who are strangers while maintaining one's own sense of values—my professional challenge is to have what I would call both professional empathy and professional distance.

Critical Race Theory and the Case

Let me now retell the facts of my representation from what I imagine is a "critical race theory"[6] perspective. What I omitted from the first version of

6. Legal scholars who identify themselves as critical race theorists often advocate race-conscious solutions in law and are skeptical of liberalism's claims of objectivity and neutrality. Critical race theory is not without its critics; see Randall Kennedy, *Race, Crime, and the Law* (New York: Pantheon Books, 1997).

the story was that the defendant, his girlfriend, and the deceased were all black or African American; that the defendant had grown up in Harlem and had spent over ten of his then twenty-seven years in prison; that the defendant and the deceased were both drug dealers from Harlem. To the critical race theorist, these are crucial facts which perhaps I should have explored in my text, especially since I had a hunch my own race was probably a factor in the clerk's decision when I was asked to take on the appeal.

Even though I recall being conscious of all of the possible racial implications of this case, I resisted exploring those issues for two reasons centered in my own sense of professionalism. First, the client himself never raised any of these issues in his own trial testimony or in any subsequent communications with me. I felt my obligation was to be client-centered in creating the text—his legal story. In other words, when writing for this client, I had a professional obligation to write the most convincing "story" he and his trial lawyer had constructed in the trial court.

Second, I assumed the appellate court would know of the racial background of the defendant and the victim from the context of the transcript or from some of the photographs introduced into the record at trial. I thus knew that race was a "subtext," and chose to cast my arguments in terms of narrow provisions of the statutes or general language in the United States Constitution about "due process of law."

In the institutional context in which I was operating as a professional, I left race out of my arguments because I thought it gave my client the best chance at liberty, or the least amount of time in prison. I am somewhat more cynical about the nature of racism than my colleagues who call themselves "critical race theorists." I do not believe that appellate court judges in upstate New York, or anywhere for that matter, would be sympathetic to claims about race unless they had clear backing in precedent. To this day, it is very difficult to make racial claims in the course of criminal adjudication, even in death penalty cases in which the American Bar Association has acknowledged apparent racial disparity in the infliction of the death penalty on convicted prisoners.

Of course, I must admit that my imaginary critical race theorist might point out that I never gave my client an effective opportunity to choose to make race an issue in the case. In 1971, the year of the homicide, when my client was in Ithaca, there were no African Americans or blacks on Cornell Law School's faculty. My client couldn't know I was black unless I interjected that fact in my letters, since I never saw this man. Our communication was always through letters. None of my published writing at the time had dealt explicitly with the issues of race. So even if he had managed to find any of my published work, he would probably have assumed I was Caucasian, with little interest in legal analysis of racial justice.

My point in recasting the facts is that some critical race theorists[7] give the impression that issues about race are important to arguments made by an African American like myself. What is often obscured about critical race legal scholarship is the problem of audience. Critical race theorists, like most academicians, write for other critical race theorists. I doubt if any of them, if presented with the facts of the case I described, would have made race an issue in the brief filed on behalf of the client. Or they would not have done so at the time. As I ponder these things nearly two decades later, it certainly occurs to me that a different person from myself, at that time, might have said something other than "Romance at twilight!" And of course another kind of imaginative empathy—another kind of metaphor—might or might not have led to a different outcome.

Law as a Discipline and a Profession

Race is a very powerful institutional influence in American life, politics, and art, and it must be confronted by writers. Given my own commitment to fiction as a form of moral discourse, it may come as no surprise that the appropriate vehicle for me to write about race was not a legal brief, but a work of fiction, the play *Miss Evers' Boys*.

A chance encounter with David Feldshuh in the summer of 1989 led me to one of the most exciting collaborations of my professional life. At the time, David was finishing the final draft of his prizing-winning play, *Miss Evers' Boys*, which is based on his reading about an actual event, the Tuskegee Study of Untreated Syphilis in the Negro Male. I was writing an article dealing with the work of Jay Katz, a psychiatrist and a member of the original government panel to review the ethical and policy consequences of the study in 1973. When David asked me to read and comment on a draft of his play, he would eventually provide me with a vehicle for writing about the intersection of race, social and economic justice, law, and professional ethics. As it happened, the experience was also multiracial and multidisciplinary: in addition to being a playwright, David, who is Caucasian, is also an emergency room physician.

After the national acclaim of David's play, he, along with several others, worked with me to bring a production of his play to Cornell in August 1991 and to produce an educational video based on *Miss Evers' Boys* and a study guide to accompany the video, *Susceptible to Kindness: Miss Evers' Boys and the Tuskegee Syphilis Study*. Although I was the "executive producer" of

7. See Stephen L. Carter, *The Dissent of the Governed: A Meditation on Law, Religion, and Loyalty* (Cambridge, Mass.: Harvard University Press, 1998), 68–69.

this entire project, the most exciting part of the project was writing the study guide.

Daniel Booth, a filmmaker at Cornell's Media Services, created a visual text from the many hours of video of the play and various interviews with experts from many fields. I then had to create an accompanying written text that would help a group leader frame questions for discussion of the many complex issues addressed in the final forty-two-minute video. Clearly, a two-hundred-page academic tome would not do. I realized that the text was intended to help a person turn directly to Booth's film, and saw my own piece as ephemeral. In effect, I was writing a pedagogical piece,[8] not a definitive statement about race, professional ethics, or health care delivery.

My writing task allowed me to raise questions about race and professional ethics and provide Booth with a metaphor for his visual text. In the study guide, I ask: "Does David Feldshuh present a sympathetic and realistic vision of the moral dilemma of a black public health nurse in the rural South of the 1930s?" And, "Can you describe a situation in which you have been susceptible to someone else's 'kindness'?"

Of course, the educational video was different from the two-hour prizewinning HBO film, *Miss Evers' Boys*. Some of the critics of the play and the HBO movie confused the historical reality of what happened during the Tuskegee Study with the characters David created to develop a moral dialogue with the audience. But—and I say this modestly—these critics were not following the study guide. They were fusing metaphor to reality.

My ability to use my professional knowledge to create a written text that resonated with both the historical reality of the Tuskegee Study and Booth's visual text was aided by my reading the work of the late Donald A. Schön nearly a decade earlier. His *The Reflective Practitioner: How Professionals Think in Action* demonstrates how important the construction of problems is to the work professionals in various disciplines do, and the tenuous relationship of the academic researcher to the work of the professions. In working with a video that students and teachers from all levels of education might use, I had to become mired in what Schön calls the "mess" of practice. My previously articulated theories of how law and medicine (and in the case of the Tuskegee Study, public health) ought to work were only the background knowledge that I brought to the task of writing about a visual text, a kind of reality very different from the legal cases and statutes I most often encounter and interpret. In Schön's words,

8. See Larry I. Palmer, "Research with Human Subjects as a Paradigm for Teaching," *Law, Medicine, and Health Care* 16 (1988): 183–89.

I could not rely upon "technical rationality" to solve my writing problem, but had to reflect upon the reality that the filmmaker had created through his imaginative juxtaposition of excerpts from the play with expert commentary.

Although Schön did not write much explicitly about law in his book, his theory of the kind of professional knowledge individuals like Booth use to create coherence for the viewer has much to offer law professors. As a law professor, I must constantly distinguish between the textual skills that students will use as lawyers and the critical analytical skills they have to acquire in law school. Despite popular images, lawyers spend most of their professional lives reading and creating texts from reading and interpreting other texts, and from what other people say and do. Schön's work helps me resolve the conflict between my role as a teacher of professionals and my role as writer. His book converted me from writing law review articles to writing essays about law. My first book on law and medicine, *Law, Medicine, and Social Justice,*[9] is an essay for the non-lawyer concerned about the role of law in resolving the problems of modern medicine.

Teaching Writing as Professional Practice

My commitment to the essay as my preferred mode of legal writing solidified when I taught an upper-division writing course to undergraduates in the Biology and Society Program at Cornell from the mid-1980s to the mid-1990s. Discovering a way to teach non-professionals to write critically about law led to a form of self-discovery: the teaching of writing is part of my vocation, at least at this point in my evolution as a professor, a scholar, and a teacher. In the course of this teaching, I found myself using fiction as a way of teaching students how to carefully formulate problems in law and medicine. Yet I am not a part of the "law and literature" crowd who write law review articles about the relationship between law and literature.

The problem I faced in my undergraduate seminar on law and medicine in the spring of 1992 was how to design a set of questions around a legal case in which a trial judge had authorized physicians to perform a Caesarean section on a comatose woman suffering from terminal cancer during the twenty-sixth week of her pregnancy. The physicians were attempting to save the fetus, which was delivered alive, but died shortly thereafter. Although the undergraduates in the seminar had not yet been

9. Larry I. Palmer, *Law, Medicine and Social Justice* (Louisville, Ky.: Westminster/John Knox Press, 1989).

officially professionalized in the discourse of either law or medicine, I knew from previous seminar discussions that they were well versed in media-generated slogans about "fetal rights," "choice," "rights to life," "women's rights," "men's rights," etc. As I read their short papers in preparation for class discussion, I realized that in order to get beyond their simplistic ideas of "rights," I needed to reach beyond the facts of the case to something in their collective human experience that just might turn the class into a conversation about their divergent ethical perspectives on the issues presented by the case.

The students knew that *The Brothers Karamazov* was my favorite novel, but I decided to tell the students the story of *The Little Fur Family*, by the well-known children's author, Margaret Wise Brown. I began relaying this story of a little furry creature who says good-bye to his father in the morning, goes out into the world to find his own biological connections to his little fur grandfather and the earth in the form of fish, insects, a little tiny fur animal, and a brilliant sunset. As darkness comes the little fur child returns home to his little fur family and his fur father is there. After eating his supper, his father takes him off to bed and both parents sing him a song. In effect, *The Little Fur Family* is a story about a child's view of family wholeness. I asked them to consider their own image of family as compared to the image of family in the children's story before asking them a question about the consequences of legal institutions deciding that a fetus might have a "family."

We moved well beyond competing, simplistic "right" versus "right" as we went through the process of thinking about the complexities of ethical perspectives. My evidence that the students moved beyond slogans about "rights" is their writing. These students had to produce group projects that required them to work and write collaboratively with students with whom they disagreed. And my own response to one of the finer group papers said, in part:

> Your paper is a wonderful combination of your own ideas, the questions raised in our classes, and good writing. . . . Having listened and debated with each of you in class, I am very impressed that with your strong views, you have learned how to maintain your intellectual integrity and yet produce an excellent group-written project.

Through shared imaginative experiences, we were able to grant validity to one another's perspectives.

It might be that my students were amused by my invoking *The Little Fur Family* as well as *The Brothers Karamazov*; it might be that there was something pleasantly jarring for them in the apparent dichotomy of their pro-

fessor's literary preferences. From a psychiatrist's point of view, this is either very simple or very complex. But in the end, this was one of the best classes I have ever taught—one in which my questions led to various responses, where students listened and disagreed, and where they built new questions from mine—a class in which I could feel my own deep love of teaching.

I cannot "prove" that my use of the literary image of family from *The Little Fur Family* was the sole reason for the seminar's success. I do have some evidence that the students were moved by my telling them the story. When the class met one night at my house for dinner and discussion several weeks later, before we began to get down to work, the students asked me to read aloud *The Little Fur Family*. A strange request from a group of 20–21-year-olds? Not if one considers that *perhaps* this children's book helped them to think more deeply about issues, to hear arguments they had never heard before, to respect individuals with whom they had violently disagreed, and to feel a gratefulness for what the human mind can do. I granted their request.

My challenge as a teacher in this seminar was to help the students understand each other's feelings—empathy—but yet have enough distance to criticize each other's ideas. In my view, the dilemma for modern people beyond the classroom is how all the psychologizing in which we engage can move us from "information" to "knowledge" about our fellow human beings and ourselves.

What Is Law?

Legal scholars today are engaged in acrimonious debate about how their knowledge should be conveyed. The new legal realists, almost all of whom employ some discipline other than law in their writing, are dominant, particularly among those law professors who write books for the general audience. Yet the realists' opponents have not faded from the scene. Within the legal academy and among some judges, the formalists of various types seek to find the boundary of the law within legal cases, statutes, and the Constitution. The formalists' most prominent ally is Harvard Law School educated United States Supreme Court Justice Antonin Scalia, and his "new textualist" colleagues on the federal bench. Justice Scalia, formerly Professor Scalia at the University of Chicago, expresses his ideas in books as well as in his opinions. His recent book, *A Matter of Interpretation*,[10] will

10. Antonin Scalia, *A Matter of Interpretation* (Princeton, N.J.: Princeton University Press, 1997).

surely play a crucial role in the debate, if nothing else as the foil for many of the new realists. Underneath this debate lies the question: what is law?

When I began to write for non-lawyers, as I did in my first book, that task forced me to articulate my own view of law, despite all the controversy raging about the nature of law in legal writing. My writing treats law as a basic social institution. It—along with other basic institutions such as medicine, the family, religion, and even the market—provides individuals in a given society with assumptions about how everyday life is organized socially and morally. These "rules of the game" constrain individual behaviors[11] and generate ideologies.[12] The impact of any particular institution varies for each individual. Viewing law as an institution raises the interesting question of whether law is a more powerful institutional force than, say, people's conceptions of "families" in determining whether reproductive technology should be used.

This institutionalist perspective on law is not generally shared by other legal scholars, particularly those who write about law and medicine or "bioethics." Most scholars writing today about topics such as assisted suicide, cloning, or reproductive technology start with the assumption that our conflicts about these topics should be resolved through a theory of "rights." These rights can be derived by applying moral theory to constitutional analysis and thus ultimately decided by judges of the United States Supreme Court. The most widely known scholar of this type of writing is Ronald Dworkin. Dworkin's brief in the United States Supreme Court case dealing with physician-assisted suicide was deemed interesting to the general reading public—enough to be published in the *New York Review of Books*.[13] Why? Is a "theory of rights" more or less a "legal fiction" than other briefs? Assuredly not. But Dworkin keeps focused on the subject of "rights" in such a way that his construction of the problem as one of "rights" becomes equal to the facts of life and death themselves for many readers.

It is easy to miss that Dworkin's seductive metaphor of "rights" had almost no effect upon the judges who decided the case. Rather, the brief written by the lawyers from the American Medical Association had a tremendous influence on the Justices because their manner of constructing the problem fit within the institutional context of both law and medi-

11. Douglas C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990), 3.

12. Janet L. Dolgin, *Defining the Family: Law, Technology, and Reproduction in an Uneasy Age* (New York: New York University Press, 1997), 225 n. 1.

13. "Assisted Suicide: What the Court Really Said," *The New York Review of Books* 44 (March 27, 1997): 41–47.

cine.[14] The AMA brief was built around the metaphor of "access to health care, autonomy, and the relief of pain." Dworkin's "theory of rights" and his metaphors of "constitutional principles of liberty for courts and legislatures" seem far removed from the practical issues of deciding the case before the Justices.

When we think about what metaphors mean for us, we must think about *misrepresenting* as well as *representing*: Do creators of prose, fiction, or nonfiction, lie? All the time. They lie when they tell us what passes for the truth about their own lives—witness the appalling number of memoirs on "bestseller" lists. Do lawyers lie? Do clients lie to their lawyers? All the time.

But there are some overriding truths to the metaphors created by good fiction that help us understand law as a very human and fragile enterprise. The connections that individuals feel for one another are best explained to me by the sense of connectedness portrayed in *The Little Fur Family*. Its vision of wholeness is not some ideal of what families ought to be, but rather for me an antidote to the fragility of connections best symbolized by the brothers of many marriages and sexual liaisons in *The Brothers Karamazov*. The lawyer's role as text writer for individuals is not to assume that the individual is either like the child of the Fur Family or one of the children of the father Karamazov. The lawyer must meet the client as a stranger with a story to tell, before offering an interpretation.

When we examine writing by legal scholars, I suggest that the subject of their texts—judicial opinions—could benefit from a heavy dose of "literary imagination." Imagine for a moment if legal scholars thought of Justices Rehnquist and Scalia as writers invoking metaphors to frame and resolve cases rather than as proponents or defenders of liberty. Although these two Justices often agree, when they disagree we might discover their different conceptions of law and the institutional role of the United States Supreme Court if we paid attention to those metaphors in their writing. For instance, Justice Scalia and Justice Rehnquist have different approaches to the problem of abortion although they often vote for the same result.[15] In a 1989 case, Rehnquist avoided overruling *Roe v. Wade* by framing the question as whether state legislatures can prefer childbirth over abortion. Scalia chastised his colleague in a separate opinion for failing to overrule *Roe* by framing the question as a kind of "deconstruction"

14. Larry I. Palmer, "Institutional Analysis and Physicians' Rights after *Vacco v. Quill*," *Cornell Journal of Law and Public Policy* 7 (1998): 415–30, 420–21.

15. See Larry I. Palmer, *Endings and Beginnings: Law, Medicine, and Society in Assisted Life and Death* (Westport, Conn.: Praeger Publishers, 2000).

of what he called "the mansion of constitutionalized abortion law, constructed overnight in *Roe v. Wade*."[16]

The importance of literary imagination[17] to the work of the professional lawyer cannot be overstated. The task of the lawyer, at least in the ethically complex areas in which I write, is to have both professional empathy and professional distance. It is essential to be able to feel compassion for a person or organization and to give that compassion shape within a legal institutional context. At the same time, in creating a text, the lawyer must step back and restore himself or herself to the role of reader and see the world from another perspective. To me this is the essence of "thinking" and acting like a lawyer and thus exercising professionalism.

When Richard Nixon's lawyer during the Watergate matter, James St. Clair, was asked what he thought of the fact that then-President Nixon had lied to him about the so-called Watergate tapes, his reply intrigued me. St. Clair said something like: "Clients are free to tell me whatever they please. I was hired to be his lawyer and have no comment about the truthfulness of what he told me." St. Clair in effect took Nixon's story and followed it to its tragic political end without public rancor. I suspect that Nixon's lawyer had overcome the ambiguity of client lies by treating his clients as if they were novelists telling him stories to be legally reconstructed. Lawyers often find themselves working in the twilight.

So I read and reread Dostoevsky, among other novelists, as part of my own evolution as a writer. Until I understood the importance of the frames we bring to problems in law, I—like a first-year law student—did more imitating of a rhetorical style than negotiating the writing tasks necessary for different occasions. As I learned the value of metaphor, I understood the value of reading fiction—in my case, sometimes rereading and recreating myself through literary imagination. The whole business of creating and recreating, it seems to me, is what we keep coming back to as we live our lives as well as pursue our professions. In the end, they are one and the same.

16. *Webster v. Reproductive Services* 492 U.S. 490, 537 (1989).

17. Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston: Beacon Press, 1995).