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Nihilism Need Not Apply: Law and Literature in Barth's *The Floating Opera*

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NIHILISM NEED NOT APPLY: Law and Literature in Barth's *The Floating Opera**

Rob Atkinson†

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* JOHN BARTH, *THE FLOATING OPERA* (1956).

† Professor of Law, Florida State University. I am grateful to Stephanie Gamble and Mark Seidenfeld for their comments and encouragement, to Tracy Hill and Kristie Hatcher-Bolin for their diligent research assistance, and to the Florida State University for a summer research grant.

I considered too whether, in the real absence of absolutes, values less than absolute mightn't be regarded as in no way inferior and even be lived by. But that's another inquiry, and another story.

Todd Andrews, narrator, *The Floating Opera*¹

INTRODUCTION

John Barth summarizes the plot of his first novel as “an unsuccessful mass-murder/suicide attempt by a middle-aged small-town bachelor lawyer with prostate trouble and a hair-trigger heart condition.”² Whether the protagonist is a nihilist, as some have insisted,³ he is certainly no Atticus Finch. In any case, the novel has become a fixture in the law and literature canon, one suspects more because of its nihilistic tendencies than despite them. It is included in numerous bibliographies and syllabi on the subject,⁴ and two of the movement's central scholars, Richard Weisberg and Robin West, have commented on the novel extensively.⁵ Each uses *The Floating Opera* to support ambitious jurisprudential claims—claims that have profound implications for legal ethics. In this article I take issue with both their accounts. On the basis of a different interpretation of the novel, I offer a different assessment of the relationship between literature and legal ethics.

In Part I, I place our debate over *The Floating Opera* against the larger background of legal ethics and normative theory. In Part II, I critique Richard Weisberg's and Robin West's positions. In Part II.A, I argue that, contrary to Weisberg's view, Todd Andrews is not a good lawyer, at least by any good standard. Beyond that, I argue that the presentation of Todd's jurisprudence is best seen not as a commentary on the law, but as a window into his personality. In Part II.B, I take up Robin West's position that Todd is a bad person because he has embraced a flawed philosophy and jurisprudence. I argue that his nihilistic philosophy flows from his bad life, rather than the reverse; that his story reveals no transcendent values by which he might have been saved; and that neither his salvation nor his perdition is as fully within his control as she implies. Building on these

1. JOHN BARTH, *THE FLOATING OPERA* 251-52 (1956).

2. *Id.* at viii.

3. RICHARD WEISBERG, *POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE* 73 (1992) (“Critics generally peg him as a ‘nihilist.’”); ROBIN WEST, *NARRATIVE, AUTHORITY AND LAW* 97 (1993).

4. *E.g.*, Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 *TEX. L. REV.* 1929, 1962 (1991); Elizabeth Villiers Gemmette, *Law and Literature: Joining the Class Action*, 29 *VAL. U. L. REV.* 665, 690 (1995).

5. WEISBERG, *supra* note 3, at 73-81; WEST, *supra* note 3, at 151-76.

critiques, I offer in Part III my own reading of *The Floating Opera*. In part, mine is a commentary on a widely read and justly influential text in the law and literature canon. More ambitiously, it is a vehicle for demonstrating an alternative understanding of how literature can help us become both better lawyers and better people.

I. LITERATURE AND LEGAL ETHICS, OR HOW TO BE A GOOD PERSON AND A GOOD LAWYER

The central question of legal ethics is how to be a good person and a good lawyer.⁶ An impressive body of legal scholarship has answered that question with increasingly elegant analytic models. These models weigh lawyers' duties to clients against lawyers' frequently conflicting personal duties to third parties and society at large, striking the balance that best serves the shared values of both the legal system and ordinary morality.⁷ For all their elegance, however, none of these models is entirely satisfactory. The whole enterprise suffers three critical deficiencies, for each of which the law and literature movement offers a supplement.

A. *The Deficiencies of Systematic Legal Ethics*

1. Inattention to Ethical Foundations

In the first place, and most fundamentally, even the most elegant models beg a basic question: What is the good? By what ultimate moral standard is our professional and personal goodness to be measured? All contemporary models of legal ethics rest upon notions of goodness that are either imported from outside or assumed by the model to be generally shared, in each case without independent proof.⁸

6. See Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853, 854 n.2 (1992) (collecting citations for this proposition).

7. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS (1990); ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 137-48 (1980); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 4-7 (1998); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986).

8. Atkinson, *supra* note 6, at 888-89.

Lack of proof is not in itself a cause for concern. The assumption that certain basic values are widely shared, and that what legal ethics generally needs to do is balance these values, rather than build a foundation beneath them, is not inherently problematic. Theorists of legal ethics can plausibly argue that they have not only cleared their house of the more offensively self-serving professional rhetoric, but also made that house structurally sound. A morally safe domicile for practitioners that neighboring disciplines see as an intellectually respectable edifice is no mean achievement, even if its foundation doesn't rest on bedrock. Most, after all, do not. (Contrary to the received wisdom, sand is a wholly adequate substructure for the homes many of us inhabit—to say nothing of the houseboats at Sausalito.)

2. Inconsistent Ethical Conclusions

But there is a second problem with the models that casts into high relief this first problem of relative inattention to foundations. Systematic legal ethics suffers from an embarrassment of riches: In its heavenly city are several mansions, a multiplicity of principled homes for the good person who would be a good lawyer. Moreover, the main subdivisions are on opposite sides of the street, if not the tracks. Current theories of legal ethics strike very different balances between lawyers' duties to their clients and their duties to the public. On the one hand (and it tends to be the right hand), a much-beleaguered orthodoxy still insists that anything a lawyer does on behalf of a client within the letter of the law is morally defensible, if not positively virtuous.⁹ On the other hand, dissenters protest that lawyers must temper their zealous pursuit of client ends, technically lawful though those ends may be, by reference to the moral rights of others, including opposed parties, organic groups, and the public,¹⁰ and to the better natures of clients themselves.¹¹

This diversity of opinion would not be a problem if the occupants of the principal houses didn't call down plagues upon each other—but they do. Proponents of the two major models of legal ethics accuse each other of omitting or under-emphasizing essential values, seriously eroding the lawyer's proper social role. The orthodox insist on the primacy of protecting

9. Fried, *supra* note 7, at 1066, 1086-89; Pepper, *supra* note 7, at 634.

10. GOLDMAN, *supra* note 7, at 137-55; LUBAN, *supra* note 7; SIMON, *supra* note 7; Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 643-45 (1985); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 963-66 (1987).

11. THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 21-33 (1981).

individual rights and advancing individual autonomy;¹² dissenters invoke truth, the public interest, and the rights of the under-represented as countervailing concerns.¹³ This lead us back to the theorists' first, fundamental problem—the general failure to examine these theories' foundations.

There are several possible ways to resolve the impasse. We could await a reconciliation between the opposing parties, but if you've read their work, you won't be holding your breath. Their exchanges have made much clearer where they stand, and each side has shown parts of the other's position to be shaky, sometimes even untenable.¹⁴ Their essential differences have, however, become more rather than less entrenched. To resolve their conflict, it seems we will have to attend more to the fundamental values they purport to share but insist on ordering differently. In light of that inquiry, one system may prove right and the other, wrong; as a matter of logic, they cannot both be right (though they could both be wrong).

There is, however, another possibility, no less logical but rather more disturbing: There may simply be no ultimate right or wrong. An objectively right ordering of generally shared values may be impossible to build because these values rest ultimately on the valuers themselves. It has been suggested that systematic legal ethics can survive this possibility.¹⁵ But the suspicion lingers that the entire edifice of legal ethics, not to mention law itself, may crumble if it is not given a firmer basis or if loud lip service, at least, is not given to the notion that some such basis is really down there, discoverable if only we dig deep enough. Those who question the existence of such foundations are charged with nihilism, and the burden of proof placed upon them to show how the moral and legal world can subsist without the broad shoulders of a supportive titan.¹⁶ Without such a foundation, critics fear,

12. FREEDMAN, *supra* note 7; Fried, *supra* note 7, at 168-71; Pepper, *supra* note 7, at 617, 633-35.

13. GOLDMAN, *supra* note 7, at 117-35; LUBAN, *supra* note 7; SHAFFER, *supra* note 11, at 3-10; SIMON, *supra* note 7; Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1055-59 (1975); Rhode, *supra* note 10, at 629-31, 643-47.

14. Compare Frankel, *supra* note 13, at 1052-59, with Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1060-82 (1975); compare Fried, *supra* note 7, at 1087-89, with Edward A. Dauer & Arthur Allen Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573, 573-84 (1977) and Charles Fried, *Author's Reply*, 86 YALE L.J. 584, 584-87 (1977); compare Pepper, *supra* note 7, at 613-28, with David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 637-49, and Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 657, 662-67.

15. Atkinson, *supra* note 6, at 947-79.

16. *Id.* at 954-60.

normative discourse will degenerate into either “anything-goes” relativism or a “nothing-matters” nihilism.

3. Incomplete Ethical Psychology

As if this weren't enough, systematic legal ethics has a third problem. All the competing models of legal ethics leave another question unanswered. If, as they maintain, one can be a good person and a good lawyer (on widely shared, if not cosmically grounded, notions of what goodness is), then why do so many lawyers around us so obviously fail? With a multitude of moral refuges open to them, why do so many lawyers remain—or at least occasionally venture—where virtually everyone agrees is beyond the pale?

The systems themselves do not account for this kind of moral homelessness, for they are designed to address a very different question. The “how” in “how to be a good person and a good lawyer” is, for even the more subtle system-builders, a logical rather than a psychological “how.” Answering the basic question of legal ethics thus becomes a matter of showing how various conflicting moral demands on lawyers in their professional and personal capacities can be balanced *in principle*, if not in a grand architectonic moral scheme, at least in a well-calibrated moral scale. This, again, is no mean feat. But it leaves unanswered another, no less important, question: How is this possible *in practice*? Or (to return to the more negative form of the query): Why do so many fail?¹⁷ Socrates' assurances notwithstanding,¹⁸ knowing the good does not always seem sufficient to make us good.

B. Looking for Answers in Literature

The contemporary interest of legal scholars in literature can be seen as an effort to fill these three gaps, the need for a firmer moral foundation, a filter for competing systems of legal ethics, and a fuller moral psychology.¹⁹ I

17. Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of The Remains of the Day*, 105 YALE L.J. 177, 216-20 (1995).

18. PLATO, PROTGORAS, in THE DIALOGUES OF PLATO 123, 193-200 (B. Jowett trans., 1914); cf. ARISTOTLE, NICOMACHEAN ETHICS 6 (Martin Oswald trans., The Liberal Arts Press, Inc. 1962) (ethical knowledge is of no use to one whose desires and actions are not regulated by reason).

19. See WEISBERG, *supra* note 3, at 3-5; WEST *supra* note 3, at 1-10. This is by no means all that the law and literature movement is up to. See generally RICHARD A. POSNER, LAW AND LITERATURE (rev. & enlarged 1998) (presenting an overview of the law and literature movement's

believe, along with the law and literature movement generally, that literature can offer legal ethics help on each of these issues. But I also believe that literature cannot fix everything that is broken, at least not in the way some of its more prominent advocates promise. An analysis of *The Floating Opera* illustrates the opportunities and limitations of looking to literature at each of these three critical points.

On the issue of fundamental values, West and Weisberg purport to answer both those postmodernists who question the existence of absolute moral truths and those traditionalists who see in that challenge the threats of nihilism and relativism. Against the traditionalists, they argue that right normative answers are not to be found in current law or ordinary morality, because these sources are fundamentally tainted, particularly by sexism and racism. Against both traditionalists and the more morally skeptical among their postmodern allies, West and Weisberg insist that literature offers us a way of transcending the flawed values of liberal politics and capitalist economics by returning to a true understanding of human nature. From that understanding we can derive real—really real—values. Literature (to state their claim most starkly) will lead us to a pure human nature from which we can distill a natural law purged of liberal illusions and capitalist distortions.²⁰

I shall argue that, at least with regard to *The Floating Opera*, West and Weisberg have not proved their claim to find objective, absolute norms in literature. Beyond that, I shall argue that their particular analyses of the novel expose real problems in their entire effort to give law and ethics a new, natural foundation. But to reject their conclusion as to moral absolutes is not to embrace either nihilistic despair or namby-pamby relativism. Beyond my critique of West and Weisberg's ethical conclusions, I give an alternative account of how literature can help us fill the so-called postmodern normative gap.²¹ I suggest that we look to literature as a source not of rock-

various themes); Robin West, *The Literary Lawyer*, 27 PAC. L.J. 1187 (1996) (describing the current state of the law and literature movement and proposing a future agenda).

20. WEST, *supra* note 3, at 6-8; *id.* at 148, 172 (listing "real needs"); *id.* at 165, 172 (citing natural and animal self, respectively, as basis for critique of social and professional self); *see also* WEISBERG, *supra* note 3, at 41, 46-47; *id.* at 120 ("[W]hether we are reading Richard Wright's *Native Son* or William Faulkner's *Intruder in the Dust*, or for that matter Harper Lee's *To Kill a Mockingbird*[.] [w]hat is going on is a progressivism beyond labels, an attack on the virtues of male-dominated WASP institutions.").

21. It is in fact a much older gap, observed at least as early as DAVID HUME, A TREATISE OF HUMAN NATURE 469-70 (L.A. Selby-Bigge ed., 1964) (1888), and probably as early as Ockham. *See* FREDERICK A. OLAFSON, PRINCIPLES AND PERSONS: AN ETHICAL INTERPRETATION OF EXISTENTIALISM 19-33 (1967). It has an even more ancient solution, derivable from Plato's dialogues and perhaps from the Law and the Prophets. Atkinson, *supra* note 6, at 947-79.

solid moral absolutes, the kind West and Weisberg seek, but of contingent human values, the kind Todd wonders about at the end of his story.

I believe Todd's story helps teach us an equally important lesson. It shows us, if mostly by negative example, how we can shape these relative values into an ethos, a credo, by which we can live meaningful moral lives together. This is dialogue in the Socratic mode, transposed into a contemporary (or, if you prefer, postmodern) key. Though the dialogue within Todd's story fails, as it often did even between the Platonic Socrates and his interlocutors, we can save the process by picking it up, joining in, ourselves.²² Something very much like this happens, I will argue, as we attend to Todd's story.

With respect to legal ethics' embarrassment of riches—the incompatible answers its theoreticians have given to the basic question of how to be a good person and a good lawyer—one might hope that law and literature would give us a standard for separating the wheat from the tares. West and Weisberg clearly believe that it does. Curiously, however, they reach diametrically opposed conclusions in their analyses of *The Floating Opera*. Weisberg thinks the narrator and protagonist is a paradigmatically good lawyer;²³ West thinks him a perfectly awful person.²⁴ Beyond that, Weisberg at least implies that Todd's goodness as a lawyer warrants our ignoring his badness as a person; West, by contrast, explicitly argues that what makes Todd a bad lawyer also makes him a bad person. They are both partly right, but mostly for the wrong reasons and in ways that suggest the wisdom of an alternative approach.

Weisberg is right that Todd is a good lawyer. But he is a good lawyer only under what the novel holds up as a woefully inadequate conception of what a good lawyer is. Weisberg tries to ground Todd's approach in the old orthodoxy: whatever a lawyer does for a client within the law is morally justified because it advances systemic values, particularly individual rights and social justice. But Todd is not interested in moral justification for his legal practice, and the cases he describes have nothing to do with social justice. Contrary to Weisberg's reading, *The Floating Opera* does not implicitly commend the old orthodoxy as the way to be a good lawyer and a good person. Rather, it reduces that orthodoxy to absurdity or worse, at least as embodied in the person of Todd. Proving that system's absurdity in any absolute sense is not the novel's point; more generally, as we shall see,

22. In recommending this literal, back-to-roots radicalism, I am following a central suggestion of James Boyd White. James Boyd White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 870-71 (1983).

23. See *infra* Part II.A.

24. See *infra* Part II.B.

it is not clear how any novel could do that. The point is to show us that Todd's adoption of the orthodox position, as he understands it, is very problematic, and to press us to wonder *why* anyone would want to live that way, understanding it—rightly or wrongly—as he does.

West believes that Todd lives that way because he has made a grievous philosophical error. Todd maintains that there are no absolute moral values, though he suggests that a wholly satisfactory moral life may perhaps be lived according to less firmly grounded values. That he himself fails to live such a life is, according to West, proof not only that his theory is wrong in principle, but also that it is pernicious in practice. From his normative skepticism, she argues, only his nihilism can follow, suicidal and murderous as it is.

I shall argue that, as a matter of logic, this is simply not so. From the denial of an absolute, objective foundation for moral values, it does not follow that nothing has value; all that follows is that, if anything is to have value, we must find another foundation (which we already have: it is us.).

A careful reading of *The Floating Opera* reveals that Todd's nihilism is more the effect than the cause of his profoundly inadequate life, his inability to find meaning or value in anything. The source of his incipient nihilism is not logical, but psychological. His story suggests that, if we are to understand nihilism, we must examine the lives that produce it. We must, with reference to *The Floating Opera*, ask how Todd came to be the morally deficient person that he is. This is but a particular instance of the larger question: Why do so many very smart people—people who in some sense know better—turn out so badly?

For the most part, as we have seen, systematic legal ethics simply leaves this question to the side, perhaps as out of its purview, perhaps for another day. Or, perhaps, on the dubious assumption that, having had the light revealed to them, the virtuous will follow it and the vicious shy away. West, for her part, at least implicitly adopts this last view: in her interpretation, Todd had a brighter way open to him, but he freely chose the dark path of error, evil, and death.

A fuller appreciation of the novel requires a deeper moral psychology. The novel shows that the merely intellectual appropriation of moral (or, more properly, meta-ethical) truth is not a sufficient condition for a viable moral life. This is largely because, although a good moral life involves making appropriate moral choices, it more fundamentally involves pre-conditions that we cannot choose. Contrary to West's position, Todd does not actually reject loving and valuing; his upbringing and horrendous wartime experience seem rather to have rendered him incapable of caring.

As a result of accidents of his biography, he is virtually unable to form the deep affective bonds with others or the deep commitment to potential values that are at the root of anything we can properly call a meaningful moral life.

In raising this possibility, Todd's story radically challenges the notion of free will assumed not only in most models of legal ethics, but also in West's analysis of *The Floating Opera*. As we come to know Todd through his narration, he seems to be unable to chose to be other than as he is, incapable of a caring connection with his fellows. Paradoxically, however, we come away with the strong sense that he has connected with us, engaged us in his story, shown concern that we understand his life and, more particularly, his plight. We come to feel, furthermore, that, although he cannot quite help himself in his story, we could help him if we were in his story, knowing what we have learned about him along the way. He needs help, and our understanding of him, which transcends his understanding of himself, is part of the help he needs.

In theological terms (in the theology of Western Christianity, the terms of the Augustinians against the Pelagians),²⁵ his will is in bondage, and he needs an infusion of grace to free him. In the absence of such grace, he is lost; in the absence of God in his story, and in our skeptical postmodern world, we must be the means of his grace, if he is to be saved.

Read this way—not merely as a chronicle of past events, but also as a dialogue between Todd the narrator and us his confidants²⁶—Todd's story gives us something the Platonic dialogues themselves lack. We get a deeper sense of how dialogue often fails, of why interlocutors frequently cannot connect in morally meaningful ways. Conversely, we also get a deeper sense of the conditions that make dialogue possible, the kind of character that sustained and significant dialogic encounter requires. As a participant in the story he tells us, Todd lacks that kind of character; that is not the least sense in which his life is almost death. But in telling his own story to us, he shows promise of just such character. In that sense he almost reaches, in his dialogue with us, a life that is worth living, by standards we share with him.

But this presents a final problem, itself critical to the question of how to be a good person and a good lawyer. To be capable of dialogue one must both trust and be trusted. Yet, even as Todd's story shows us he cannot trust, it also shows us that he is not entirely trustworthy. To the very end of Todd's story, we are left where much of modern (more properly,

25. Saint Augustine, *Grace and Free Will*, in 59 THE FATHERS OF THE CHURCH 250 (Robert P. Russell trans., Catholic Univ. of Am. Press 1968).

26. Which is close to the way James Boyd White suggests we read Platonic dialogues. White, *supra* note 22, at 870-71.

postmodern) literature leaves us: with the lingering suspicion that neither the protagonist nor the author has been entirely straight with us. We come to suspect that they have not really taken us into Todd's story, but rather have fabricated his story to take us in. *The Floating Opera* has much to tell us about that risk, too, and how we—in our own dialogue with each other—can transcend it.

II. THE SEARCH FOR TRANSCENDENT VALUES IN *THE FLOATING OPERA*

In this part, I critique Weisberg's and West's efforts to find transcendent values in *The Floating Opera*. In Part III, I offer my own alternative account of how lawyers can find value in the novel.

A. Richard Weisberg's Analysis: Todd Andrews as a Good Lawyer

According to Weisberg's analysis, Andrews is not, as many literary critics have maintained, either a nihilist or an existentialist. Rather, he lacks "any overriding system of thought or action"; he is, instead, the embodiment of the lawyerly virtues of inductive reasoning and pragmatic empiricism.²⁷

Like that first true literary lawyer (Hamlet, who is mentioned frequently in the novel), Todd moves slowly and thoroughly through an experience, rejecting received generalizations in favor of empirical learning. Yet the refusal to follow absolutes leads (as it did in Hamlet) to a purely inductive approach to reality (reasoning from facts to generalizations) which is neither nihilistic nor even "existentialist": it is simply lawyer like.²⁸

This, Weisberg goes on to explain, is the genius of the Anglo-American common law: "Hamlet epitomizes the careful, empirical, inductive method of English and American law."²⁹

This is a striking claim, in two equally striking ways, one descriptive and the other normative. First, as a descriptive matter, it equates Todd's personality with Hamlet's;³⁰ on this point there can be little dispute. Still as a descriptive matter, but much more open to question, Weisberg identifies their hyper-caution with the essence of the common law.³¹ Second, and as a prescriptive matter, Weisberg takes these shared features—"inductive

27. WEISBERG, *supra* note 3, at 73-75.

28. *Id.* at 75.

29. *Id.* at 76.

30. *Id.* at 75-78.

31. *Id.* at 75.

reasoning, relative values,” as he subtitles his treatment of *The Floating Opera*—to be positive virtues. It is on account of these features that Todd can rightly describe himself as an “excellent lawyer,”³² someone who shares with Hamlet “his lawyerlike capacity to elevate mere proceduralism to the level of nobility and verbal art.”³³ In the case of the lawyer, however, this is not, at least in the first instance, art for art’s sake; it is, rather, “the power to work from a confused set of facts *toward* an ordered (post-hoc) generalization favorable to his client.”³⁴

Though the identification of Todd with Hamlet cannot be gainsaid, the elevation of Hamlet to the epitome of Anglo-American lawyerly virtue should give us pause. Furthermore, the location of this virtue in purely process values—and process values aimed mainly at the advancement of private rather than public ends, client rather societal goals—warrants further analysis. One might be forgiven for thinking that at least equally significant is the common law’s substance: most saliently, its commitment not just to preserve individual freedom, but to advance human dignity as well; not merely to limit government, but also to make government responsible to the governed.

Not surprisingly, therefore, Weisberg is eager to link procedure with substance:

These [Anglo-American] lawyers’ penchant for procedure masks their commitment to deeper values inaccessible to others [F]ew other professions would take uncompensated delight in vehemently exercising their craft for a principle. American lawyers, while manipulative and secretive, also follow this model into rigorous defenses of the United States Constitution. The very procedures that sometimes place criminals back on the streets derive from what Todd might call the “values less than absolute” of that fundamental text. People finally realize that those values deserve safeguarding, and that lawyers perform a noble function in so doing.³⁵

Todd’s mode of lawyering, as Weisberg rightly implies in this passage, resembles a widely-held lawyerly ideal. This ideal is what I have identified as the orthodox position, what scholars refer to more frequently as neutral partisanship and what others, less flatteringly, call the hired gun.³⁶

32. *Id.* at 76.

33. *Id.* at 77.

34. *Id.* at 76.

35. *Id.* at 80.

36. SIMON, *supra* note 7, at 7; CHARLES W. WOLFROM, MODERN LEGAL ETHICS § 10.3.1 (1986); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*,

According to this model, anything a lawyer does for a client within the letter of the law is morally acceptable, if not quite affirmatively virtuous. And this moral acceptability is independent both of the lawyer's motive for rendering the assistance and of any harm the assistance wreaks upon innocent third parties or the public at large. Thus, according to one of the earlier and more famous articulations of this model:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, . . . is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.³⁷

Questions about these latter aspects have always bedeviled proponents of neutral partisanship. Why should we absolve lawyers from moral fault, much less congratulate them for civic virtue, when they help clients harm others within the letter of the law, irrespective of both the spirit of the law and the demands of ordinary morality, particularly when they are paid handsomely for their efforts? As Weisberg himself points out, "aggrieved plaintiffs rail against rich corporate or individual defendants who can pay their lawyers to concoct endless procedural delays."³⁸

None of the defenses legal scholars have given for neutral partisanship is particularly convincing, though some of the less compelling still enjoy wide currency.³⁹ Without rehearsing those defenses and their critiques in detail, it is important to note that Weisberg himself interposes one of the least persuasive on Todd's behalf. The passage quoted above closely parallels a widely shared, and deeply flawed, defense of neutral partisanship, the adversarial system excuse.⁴⁰ The version Weisberg invokes rests heavily upon a critical premise, a notion deeply ensconced in our Constitution and widely accepted in our political culture: individual human beings deserve extensive protections, procedural and substantive, against the state, with its

1978 WIS. L. REV. 29, 34-38, 42 (1978) [hereinafter *Ideology of Advocacy*]; cf. *supra* note 9 and accompanying text.

37. Speech of Mr. Brougham in *The Trial of Queen Caroline*, 2 CAUSES CÉLÈBRES 1, 3 (Frederick D. Linn & Co. 1884) (1821). On this speech's place in the iconography of neutral partisanship, see LUBAN, *supra* note 7, at 54-55, 63, 84.

38. WEISBERG, *supra* note 3, at 80.

39. SIMON, *supra* note 7, at 26-76 (reciting and critiquing arguments in favor of neutral partisanship).

40. In calling this an "excuse" rather than a "defense," I am following DAVID LUBAN, *The Adversary System Excuse*, in *THE GOOD LAWYER* 83 (D. Luban ed., 1983). See LUBAN, *supra* note 7, at 50-103; SIMON, *supra* note 7, at 62-68 (setting out and critiquing the adversarial system defense).

vast power and ultimate penalties, including loss of liberty and even life. From this premise follows the criminal defense paradigm: to the end of protecting individual criminal defendants, actual and potential, from abuses of the state's awesome power, their lawyers must be allowed to engage in tactics that, in other contexts, would offend our ordinary moral sensibilities.⁴¹ Stated most briefly, criminal defense lawyers must be permitted, morally as well as legally, to make the false look true, and the true, false.⁴²

As Weisberg insists, most of us accept this state of affairs as part of the price of a system of ordered liberty.⁴³ But it is critical to see that, although this is a very persuasive defense of neutral partisan lawyering, it is, in its own terms, very narrow: it applies only to criminal defense work and analogous cases, in which Leviathan looms over an individual human being who, without a zealous legal champion, would be alone and at risk of absolute loss.⁴⁴

Weisberg, like traditional defenders of neutral partisanship, extrapolates from criminal defense work to all litigation, and, beyond that, to all legal representation. On this view, the underdog, David-versus-Goliath ethics of criminal defense counsel is equally available to lawyers when the tables are turned. Thus counsel for huge multinational corporations are morally justified in using no-holds-barred tactics when opposing individual consumers, employees, or share-holders. Union-busters, exporters of dangerous and domestically illegal substances, and artful dodgers of consumer protection laws are all thus wrapped in the mantle of Clarence Darrow and Daniel Webster.⁴⁵

Ordinary citizens are to be forgiven for their disquiet at this slight of hand,⁴⁶ and legal scholars are to be congratulated for questioning the method by which the base metal of advancing ordinary evil gets transmuted into the gold of preserving Constitutional values.⁴⁷ Weisberg, as we have seen,

41. LUBAN, *supra* note 7, at 58-66.

42. Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 SW. L.J. 1135, 1136 (1988).

43. LUBAN, *supra* note 7, at 58-59. At its most extreme, which calls essentially for making the false look true and the true, false, on behalf of criminal defendants known by their lawyers to be guilty, the criminal defense paradigm has been seriously and cogently questioned. SIMON, *supra* note 7, at 170-94; Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 125-29, 152-53 (1987).

44. LUBAN, *supra* note 7, at 59-66.

45. E.g., Abe Krash, *Professional Responsibility to Clients and the Public Interest: Is There a Conflict?*, 55 CHI. B. REC. 31, 31-33 (spec. centennial issue 1974).

46. SIMON, *supra* note 7, at 93-95.

47. Murray L. Schwartz has traced this process in detail, effectively criticizing each move beyond the criminal defense paradigm. Murray L. Schwartz, *The Professionalism and*

acknowledges lay people's disquiet, but he makes no effort to address scholarly critiques. If the moral and legal virtue of advancing evil but legal ends by equivalent means is to be defended, it will have to be by a better means than the alchemy Weisberg offers.

Moreover, even if neutral partisanship were an adequate definition of good lawyering in all contexts, civil as well as criminal, it would not logically follow that all who adopt that model are necessarily good people, as Weisberg implies as to Todd. The reason for the possible disjunction between good lawyer and good person is that motive matters in our assessment of personal character even if, as neutral partisans insist, it can be disregarded in assessing professional competence. Those who adopt the neutral partisanship model may, irrespective of their motives, be good, even excellent lawyers, functionally defined. As to a lawyer's success in defending individual liberties, for example, motive may well be at most a marginal matter. If all that counts toward professional excellence is success at defending or advancing client interests, why one undertakes the task will be irrelevant, as it explicitly is for proponents of neutral partisanship.⁴⁸

But assessments of lawyers' personal characters, as opposed to their professional proficiency, need not ignore motives. If lawyers lack proper motives—or, as in the case of Todd, manifest and even admit the most dubious of motives—it does not strain our ordinary moral sensibilities to call them bad, or even evil, people. We credit, and even honor, soldiers who do their duty, even when that duty involves killing,⁴⁹ even the incidental killing of innocent non-combatants.⁵⁰ But we cringe at soldiers who are sadists,

Accountability of Lawyers, 66 CAL. L. REV. 669, 690-95 (1978) (arguing that the adversarial system justification does not apply to non-litigation contexts); Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543 (1983) (arguing that the criminal defense paradigm does not apply to civil litigants); see also LUBAN, *supra* note 40, and LUBAN, *supra* note 7, at 59-66.

48. [I]t has been my purpose to explicate the less obvious point that there is a vocation and satisfaction even in helping Shylock obtain his pound of flesh or in bringing about the acquittal of a guilty man. . . . What I affirm, therefore, is the moral liberty of a lawyer to make his life out of what personal scraps and shards of motivation his inclination and character suggest: idealism, greed, curiosity, love of luxury, love of travel, a need for adventure or repose; only so long as these lead him to give wise and faithful counsel.

Fried, *supra* note 7, at 1088-89.

49. *Id.* at 1084 ("If he [the soldier] is a citizen of a just state, where foreign policy decisions are made in a democratic way, he may well believe that it is not up to him to question whether the war he fights is a just war.")

50. LUBAN, *supra* note 7, at 162 (applying just war principle of "double effect" to lawyer-client relationship).

who notch the stocks of their rifles in macabre commemoration of each kill.⁵¹ And lawyers, outside the atypical case of appointed criminal counsel, are not draftees, but volunteers. It is the irreducible relevance of motive to the assessment of character that gives resonance to Thomas à Becket's final lament: "The last temptation is the greatest treason: To do the right deed for the wrong reason."⁵²

Weisberg himself implicitly recognizes the importance of motive, for he asserts that lawyers "take uncompensated delight in vehemently exercising their craft for a principle."⁵³ This assertion of lawyerly devotion to principle plays to our deep, and deeply understandable, feeling that lawyers who undertake even the most noble work should be motivated by the principles that justify and imbue that work with its nobility. Weisberg gives us, however, no evidence that lawyers are typically motivated by commitment to principle. What's worse, his exemplar, Todd, is evidence of precisely the reverse. Todd asserts quite baldly that he selects cases not to vindicate principle, but principally to amuse himself. The cases he describes to us and the role he plays in them amply attest the truth of his assertion.

Todd professes indifference to whether his clients win or lose,⁵⁴ and he is quite ready to deprive them of their legally vindicated rights for purely personal reasons, or even whims. He seriously contemplates destroying the evidence that would win a will contest for his friend Harrison Mack, Jr., having taken it upon himself to determine whether Harrison and his wife are worthy of the money.⁵⁵ He delights in teasing them with the prospects of their winning,⁵⁶ and it will not do to say that he tantalizes to educate. Both critics⁵⁷ and proponents⁵⁸ of neutral partisanship note that it does not allow for such paternalism. Thus Todd manifests not only the indifference toward third-party and public harm that infects the neutral partisan's neutrality; he also lacks the zealous commitment to vindicating client rights that allegedly redeems its partisanship.

51. ERICH MARIA REMARQUE, *ALL QUIET ON THE WESTERN FRONT* (1929) (describing common soldiers' disgust at marksman).

52. T.S. ELIOT, *MURDER IN THE CATHEDRAL* 44 (1935); see also Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 604 (1991) ("Integrity depends on the reasons which determine the legal actor's actions.").

53. WEISBERG, *supra* note 3, at 80.

54. BARTH, *supra* note 1, at 85.

55. *Id.* at 145-46, 214-16.

56. *Id.* at 98-99, 206.

57. Simon, *Ideology of Advocacy*, *supra* note 36, at 52-59 (arguing that, on its own premises, neutral partisanship forecloses lawyer insight into clients' subjective, as opposed to imputed, ends).

58. See generally Pepper, *supra* note 7, at 629-33 (supporting the moral justification for the amoral role of a lawyer).

And there is a further problem with painting Todd as the poster-boy of neutral partisanship. Todd not only abjures commitment to the deep values on which neutral partisanship is theoretically grounded; he is also quite skeptical of the legitimacy of that grounding. He explicitly doubts that adversarial efforts—his own or others’—vindicate legal rights. Here again, we do not have merely his own assertion; we have the cases themselves. Weisberg’s emphasis on process asserts that lawyering vindicates substantive—even Constitutional—values, that lawyerly means produce civically acceptable ends. In this, Weisberg is again echoing defenders of the neutral partisanship model of legal ethics. But, contrary to Weisberg’s analysis,⁵⁹ the two cases that Todd describes in detail to us suggest that neutral partisanship, at least as he cultivates it, bears very different fruit.

The first, *Morton v. Butler*, is merely a grudge match, a petty proxy-war between two disgruntled local grandees. The named parties are rival heads of the local Democratic party. Col. Henry Morton, the packer of Morton’s Marvelous Tomatoes, runs the party’s conservative wing; William T. Butler, an investment banker, heads the New-Deal wing.⁶⁰ Out for Sunday drives with their respective families, each in his own Cadillac, they suffer a minor collision. No one is seriously hurt in what Todd calls “a trifling automobile accident,”⁶¹ and Todd is under no illusions about who is at fault: “both drivers executed poor turns simultaneously.”⁶² They exchange jokes at the scene of the accident; the following day Butler sends Mrs. Morgan a spray of flowers and Morgan sends Butler a quart of whiskey, each having tacitly resolved that “among responsible gentlemen such private affairs didn’t go to court.”⁶³

Todd is convinced that the matter would—and should—have ended there. But nearly two years later President Roosevelt slights Morton—perhaps inadvertently—by inviting only his New-Dealish rival Butler to a special stop-over of the presidential yacht, out for a cruise on Chesapeake Bay.⁶⁴ Shortly after this perceived snub, Todd’s “old friend and poker partner,” Charley Parks, whose office is next door to Todd’s, files suit for Col. Morton.⁶⁵

59. WEISBERG, *supra* note 3, at 80.

60. BARTH, *supra* note 1, at 174.

61. *Id.* at 74.

62. *Id.* at 174.

63. *Id.* at 175.

64. *Id.*

65. *Id.* at 74, 176.

Butler retains Todd for the defense, and the lawyers drag the case out for several years, enjoying what both recognize as a game.⁶⁶ After admitting—or boasting—as much, Todd regales the reader with three and a half pages of their tortuous procedural wranglings.⁶⁷ These reach all the way up to the Maryland Supreme Court, but the case never comes to trial on the merits.⁶⁸ Col. Morton settles in exchange for two safe slots for his retainers on the Democratic ticket in the next election, slots for which Butler says he had no candidates of his own anyway.⁶⁹ The case ends precisely as it would have ended—indeed, had already ended—without recourse to litigation: Col. Morton sends Butler a bottle of whiskey; Butler sends Mrs. Morton another bunch of flowers.⁷⁰ Except there is this final flourish: Todd and Charley mockingly toast each other with the Colonel's Park & Tilford.⁷¹

Unlike Todd, Weisberg takes the suit quite seriously. In his view, cases like this vindicate basic legal and ethical values: “Procedural jousts, Todd teaches us in *Morton v. Butler*, can finally produce substantive ends, even if these sometimes relate only to the lawyer’s own sense of personal accomplishment.”⁷² Beyond that, Weisberg cites Todd’s pages of admitted “procedural minutiae”⁷³ as the paradigmatic parallel between modern law and modern fiction. In just these passages, according to Weisberg, “we are faced . . . with the question of why the most attuned contemporary fiction writers of their day employ such legalistic detail.”⁷⁴ After rhetorically raising and rejecting several answers, Weisberg settles on this explanation: reciting the stuff of Todd Andrews’ practice responds “to the modern-day fiction-reader’s craving for the soothing language of form and procedure.”⁷⁵ On this view, it is precisely Todd’s indifference to the substantive outcome of *Morton v. Butler* that makes him “the champion of a contemporary worldview that recognizes both the futility of absolutes and the potential of procedures.”⁷⁶ There is, of course, an alternative that Weisberg does not raise: Todd’s cases are a *reductio ad absurdum* of a proceduralist view of law, even as his life is a parody of absolute moral disinterest, of being “enthusiastic about nothing.”

66. *Id.*

67. *Id.* at 176-79.

68. *Id.* at 178-79.

69. *Id.* at 180.

70. *Id.*

71. *Id.* at 181.

72. WEISBERG, *supra* note 3, at 80.

73. *Id.* at 79.

74. *Id.* at 78-79.

75. *Id.* at 79.

76. *Id.*

The other case Todd describes is even more comically absurd, reducing law below farce to scatology.⁷⁷ As Todd sarcastically remarks, "It was an edifying spectacle."⁷⁸ *Mack v. Mack* is a dispute between Todd's friend and client, Harrison Mack, Jr., and the latter's mother over the will of Harrison Mack, Sr.⁷⁹ "Will" here clearly embraces not just a testamentary instrument, but also a puerile arbitrariness. All his life Mack, Sr., had used his various testaments—seventeen in all—to exert his will over his son, his wife, and everyone else with whom he had even the most casual contact.⁸⁰

As in the *Morton v. Butler* case, Todd had no sense that substantive justice lay on either side, and litigated the case principally as a game. Mack's mental state didn't differ much at the time he executed the rival wills, one in late 1933 and the other in early 1934;⁸¹ there was more than enough in the estate to support each claimant comfortably; and the trial promised to be a thoroughly unseemly intra-family squabble. This is Todd's own assessment:

All the pressure was for out-of-court settlement on a fifty-fifty basis, but both Harrison and his mother—who had never especially liked each other—refused, on the advice of their attorneys. Froebel [Mrs. Mack's lawyer] thought he could win, and wanted the money; I thought I could win, and wanted to see.⁸²

In short, the substantive justice of the case is at best obscure, and is of no concern to either the litigants or their lawyers. "In any world but ours," Todd says at the outset, "the case of the Mack estate would be fantastic."⁸³

Nor is the role of the judiciary as Todd depicts it any more encouraging than the antics of the parties and their lawyers. Todd's experience convinces him of what critics of neutral partisanship ever since Socrates himself have feared: that eloquence deployed without regard to the merits of the case at hand will produce results of the same kind.⁸⁴ In arguing that Harrison's anti-Franco contributions triggered his disinheritance under a will clause forbidding Communist sympathy, Todd's opponent concludes with this

77. Richard W. Noland, *John Barth and the Novel of Comic Nihilism*, in JOSEPH J. WALDMEIR, *CRITICAL ESSAYS ON JOHN BARTH* 14, 21 (James Nagel ed., 1980) ("The entire legal procedure, in fact, is parodied in *The Floating Opera* in a lawsuit worthy of a place in *Bleak House* . . .").

78. BARTH, *supra* note 1, at 89.

79. *Id.* at 88.

80. *Id.* at 86-87.

81. *Id.* at 88.

82. *Id.* at 91.

83. *Id.* at 85.

84. PLATO, *GORGIAS* 38-41 (Walter Hamilton trans., Penguin Books Ltd. 1960).

flourish: “Young Mr. Mack, like too many of our idle aristocrats, is, I fear, a blue blood with a Red heart.”⁸⁵ Todd laments, “How could mere justice cope with poetry? Men, I think, are ever attracted to the *bon mot* rather than the *mot juste*, and judges, no less than other men, are often moved by considerations more aesthetic than judicial.”⁸⁶

Weisberg argues at great length—indeed, it is the second major thesis of his *Poethics*—that right judicial decisions must be rendered in appropriately lofty prose, prose approaching, if not attaining, the status of poetry, if they are ultimately to carry the weight of legal authority.⁸⁷ He unfortunately fails to note that such flourishes are often precisely what makes the weaker argument appear the stronger. Quite ironically, even Todd’s own client found the opposing counsel’s argument compelling until Todd carefully unpacked its compounded logical lapses.⁸⁸

The *Mack* case also illustrates a deeper problem: not only are judges, like the rest of us, susceptible to clever rhetoric; they, too, are most likely to be swayed in the direction of their prior political leanings. Todd knew the presiding judge to be “famously conservative . . . [t]hough by no means a fascist himself,” a man who “epitomized the unthinking antagonism of his class toward anything pinker than the blue end of the spectrum.”⁸⁹ Accordingly, the “blue blood with a Red heart” trope “struck him square in the prejudices, and found a welcome there.”⁹⁰ Nor, Todd would have us understand, was the trial judge unusually susceptible in this regard; quite the contrary. Todd wins the next round, in the intermediate appellate court, through a crafty assessment of the political leanings of the incumbent justices and a clever tactical move.⁹¹ He delays the case for six months until one of the court’s Republican judges can be defeated in his bid for re-election and replaced by “a chronic if somewhat fuzzy liberal—a man after Harrison’s own heart.”⁹²

85. BARTH, *supra* note 1, at 94.

86. *Id.* at 94-95. There is a nice irony here. Todd uses “mot juste” as if it meant “word of justice” instead of “precise word.” In effect, he himself thus not merely chooses “le bon mot” over “le mot juste”; he perverts the latter into the former. In Socratic terms, he makes the weaker argument appear the stronger by invoking its greater aesthetic appeal. And, of course, Todd’s position strikingly parallels Plato’s own fears about the corrupting effect of poetry’s emotional appeal. PLATO, *THE REPUBLIC OF PLATO*, Book X 333-336 (Francis Macdonald Cornford trans., Oxford University Press 1960) (1945).

87. WEISBERG, *supra* note 3, at 5-35.

88. BARTH, *supra* note 1, at 96.

89. *Id.* at 95.

90. *Id.* at 94.

91. *Id.* at 97.

92. *Id.* at 102.

The ultimate irony, and the deepest insult to the integrity of law, lies in the means by which Todd effected the delay he deemed necessary to win the case. One critical aspect of Mack Sr.'s character is that, "especially in his last years, he was obsessively jealous of the products of his mind and body, and permitted none to be destroyed."⁹³ These twin obsessions were closely intertwined; in their interplay lies both the cause and the resolution of the case. In the advanced stages of his decline, Mack Sr. "allowed nothing of his creation—including hair- and nail-clippings, urine, feces, and wills—to be thrown away."⁹⁴ Beyond that, he made his mental products—his wills—the ultimate guardian of his physical by-products. The will that left everything to his wife included a bequest of one hundred twenty-nine pickle jars of excrement; should she fail to preserve the jars (or ever taste sparkling burgundy), all the Mack estate was forfeited in favor of Mack, Jr.⁹⁵

As we have seen, Froebel's anti-Red rhetoric prevails in the trial court, poisoning the widow's pickle-jar will to win on appeal, given the preponderance of conservative judges on the bench. Casting about for a means of delay until the arrival of a more liberal appellate judge tips the balance in his client's favor, Todd remembers the defeasing feces clause.⁹⁶ The reminder comes from a most unlaywerly source: his secretary, to her extreme mortification, "most undaintily—oh, most indecorously,—broke wind, virtually in my coffee."⁹⁷ Here we have Todd's sense of the ultimate source of lawyerly inspiration: not quasi-divine flatus, but embarrassed flatulence.

Thus reminded, Todd stoops even lower than his opponent's sophistry. He sneaks up to the Mack estate, bribes an old acquaintance on the household staff, and discovers, with her assistance, that the widow has ordered the pickle jars' contents be used to fertilize zinnias.⁹⁸ Had she not given the order, Todd was ready to bribe the gardener.⁹⁹ As Todd concludes his account of the will contest, the principal pre-occupation of his chapter entitled "The Law," "My friend Harrison Mack is three million dollars the richer for it."

93. *Id.* at 86.

94. *Id.* at 87.

95. *Id.* at 91.

96. *Id.* at 103-04.

97. *Id.* at 103.

98. *Id.* at 104-07.

99. *Id.* at 105. In this respect, Todd passes beyond the pale of neutral partisanship, confined as it is to the outer limits of the law, and enters the nether world of what David Luban has called "Low Realism," which "is simply an elaboration of the tautology 'You can get away with what you can get away with.'" Luban, *supra* note 14, at 647.

All of this, of course, bespeaks a radically reductionist jurisprudence, strongly reminiscent of some of the late Realists and strikingly prescient of much of the Critical Legal Studies movement. If Todd is even remotely right about the cases he describes to us, Weisberg is profoundly wrong in his paean to process values. On the evidence Todd Andrews presents, the clash of neutral partisan lawyers in the adversarial process does not generally produce justice; rather, as critics aver, the clash seems usually a waste and often an opportunity for the wealthier to have their way.¹⁰⁰

The emphasis on waste—literal, visceral waste—could not be clearer; the association of legal process and outcome with defecation and feces could not be closer. Law and excrement are reduced to virtual identity: intestinal gas inspires Todd's ultimately successful legal maneuver,¹⁰¹ and the success of that maneuver depends on law's own equation of the lowest matter, feces, with the most fungible of property, money.

As if to underscore these connections, Todd follows his long chapter on the law with a very short chapter entitled "An instructive, if sophisticated, observation."¹⁰² The latter chapter is a commentary on how "[n]ature, coincidence, can be a heavy-handed symbolizer."¹⁰³ The ostensible object of this reflection is Todd's observing two dogs copulating in the wake of a funeral procession, a "clumsy 'life-in-the-face-of-death' scenario, so obvious that it was embarrassing."¹⁰⁴ After listing and bemoaning a host of such "ponderous, ready-made symbols,"¹⁰⁵ Barth has Todd address the reader directly in the chapter's penultimate sentence: "So, reader, should you ever find yourself writing about the world, take care not to nibble at the many tempting symbols she sets squarely in your path, or you'll be baited into saying things you don't really mean, and offending the people you want most to entertain."¹⁰⁶ Though Todd never mentions his immediately preceding

100. As Todd said of another case involving Colonel Morton, "[t]he evidence was all in favor of the shipping company, . . . but the Colonel had never lost a litigation before, and so he determined to spend his way to justice." BARTH, *supra* note 1, at 187. In the will case itself, Todd's opponent eliminates one other claimant by threatening embarrassing revelations about her to the press, *id.* at 89, and another, whom Todd believed "had the strongest case," by outmaneuvering her lawyer, who was also "her boy friend, a lad fresh out of law school, none too bright," *id.* at 90.

101. CHARLES B. HARRIS, *PASSIONATE VIRTUOUSITY: THE FICTION OF JOHN BARTH 19* (1983) (drawing a further parallel, between Mack Sr.'s, madness and Todd's legal method generally).

102. BARTH, *supra* note 1, at 109.

103. *Id.*

104. *Id.*

105. *Id.* at 110.

106. *Id.* at 111.

scatological account of law, its juxtaposition with this chapter can hardly have been coincidental.

But, of course, we must be careful here, even as Todd warns us: all we have is Todd's account, our own prejudices and predilections, and the very crafty way that Todd Andrews presents his evidence to confirm or alter our position. What we want—what we both lack and desire—is a genuine jurisprudence, an effort to get at the truth of what the law is. At the very beginning of his chapter entitled “The Law,” Todd raises all the great jurisprudential questions, only to dismiss them:

That will-o'-the-wisp, the law: where shall I begin to speak of it? Is the law the legal rules, or their interpretations by judges, or by juries? Is it the precedent or the present fact? The norm or the practice? I think I'm not interested in what the law is.¹⁰⁷

What interests Todd, he goes on to tell us, is what the law can be made to do.¹⁰⁸ He compares his practicing law with a child's placing obstacles before a toy tractor;¹⁰⁹ law is, for him, essentially a plaything to be manipulated for his amusement. Yet we must, here as elsewhere, be as attentive to what he does as to what he says he is doing. To be sure, he enjoys the labyrinthine processes of law, rather as others enjoy chess. But he also uses these processes to torment his clients, especially the Macks, with evident delight if under the pretext of education. We might well suspect that he is doing something analogous with us, that he is giving us a plausible but tendentious account of law as part of his plan to persuade us that nothing ultimately matters, that all is morally meaningless. We shall explore that possibility in detail later.¹¹⁰

What is important to see here is how far Todd Andrews' view of law, as both stated and acted upon, diverges from what Weisberg would have us believe both about law and about Todd's attitude toward law. Todd's cynicism about the law may well be wrong; indeed, his stated cynicism about the law may be a deeply cynical design to distract us from the very real good that the law can do. But Todd's legal cynicism, in theory as well as in practice, can scarcely be cited in support of the traditional neutral partisan defense of the lawyer's amoral role in the representation of private clients. Taken on its face, Todd's position, contrary to Weisberg, is not a vindication of neutral partisanship, but a refutation by way of *reductio ad absurdum*, or *reductio ad nauseam*.

107. *Id.* at 84.

108. *Id.*

109. *Id.*

110. See *infra* Part II.B.

In that connection, a final observation about the relation between Todd's position and neutral partisanship is in order. As Weisberg quite rightly points out, neutral partisans, along with Todd, tend to delight in the law as a craft. They, like him, seem to treat the practice of law as an aesthetic exercise requiring, at its higher levels, extraordinary virtuosity. Weisberg sees this as an adjunct to the functional, societal good that neutral partisan lawyers accomplish. In addition to assisting indirectly in the production of social justice, a production in which they are but a part, excellent lawyers also, and much more directly, enjoy the delights of craft:

To the twin satisfactions of mastering a procedural environment and standing for the last discernible (if still relative) values, the lawyer can add the quiet reward of an artistic job well done. Procedural jousts, Todd teaches us in *Morton v. Butler*, can finally produce substantive ends, even if these sometimes relate only to the lawyer's own sense of personal accomplishment. But often, the procedural morass of cases such as the two Todd garrulously describes throughout *The Floating Opera* does redound to the client's (and society's) substantive benefit.¹¹¹

This has the ring of special pleading, of making a virtue of necessity, or of the near despair that perceived necessity thrusts upon us.

For Todd—and, we have good reason to believe, for many real lawyers—the relationship between craft pleasure and social justice is quite different. For his part, Todd is quite clearly indifferent to justice: “I don't know what you mean, sir, when you speak of justice.”¹¹² For many real lawyers, delight in craft seems a substitute for meaningful participation in the production of justice. Contrary to Weisberg's assertion, they do not experience the two as inevitable correlates; instead, they turn to craft when they despair of justice. Robert Gordon found evidence of this in his study of elite New York lawyers at the turn of the twentieth century.¹¹³ In precisely this era the neutral partisanship model of lawyering began to replace earlier models more insistent upon the lawyer's direct role in doing justice. According to Gordon, a common recourse for lawyers disturbed by the divorce of their work from substantive justice was to retreat into craft values. There they could take uncomfortable refuge in technique as they saw the

111. WEISBERG, *supra* note 3, at 80.

112. BARTH, *supra* note 1, at 84.

113. Robert Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York Lawyers, 1870-1970*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* (G. Gawalt ed., 1984).

public harm their work on behalf of the wealthy wrought.¹¹⁴ This theme is still sounded in paeans to neutral partisanship, usually in wistful notes near the conclusion.¹¹⁵

Contrary to what Weisberg asserts, Todd's briefs are not high art, analogous to the work of novelists; they are, as Todd himself gives us to understand how he experiences them, pathetic diversions, like a proficiency at tiddle-winks or building match-stick Taj Mahals.¹¹⁶ In this, Todd reminds us of another fictional lawyer, Tolstoy's Ivan Ilyich. Professionally, Ivan Ilyich valued, "above all, his own recognition of the skill with which he handled cases";¹¹⁷ privately, the "one pleasure which, like a bright candle, outshone all the others in his life: . . . was . . . a game of whist . . . a clever, serious game."¹¹⁸

Like lawyers' practical proceduralism, Weisberg's own theoretical proceduralism has a distinct *faux de mieux* flavor. The best is, of course, notoriously the enemy of the good; in practice, as elegant theories have shown, sometimes the second-best is as good as it gets. We do well to wonder, with Todd at the very end of his story, "whether, in the real absence of absolutes, values less than absolute mightn't be regarded as in no way inferior and even be lived by."¹¹⁹ But Todd's own life up to that point offers little positive insight into how that might be done, and it is fair to say that Weisberg himself has promised better than either he or Todd delivers. If we are to fill the ethical void left by the postmodern critique of law and ethics, as Weisberg sets out to do in the book of which his analysis of *The Floating Opera* is a part,¹²⁰ we will have to do more than hold up Todd's tired neutral partisanship as our model.¹²¹

114. *Id.*; see also Richard Schickel, *The Floating Opera*, CRITIQUE 60-61 (1963) (disparaging Todd's practice of law as a retreat into technical excellence, paralleling his pointless boat-building, and suggesting that law itself has seriously fallen from its preeminent place in liberal democracy).

115. Fried, *supra* note 7, at 1088 ("[I]t has been my purpose to explicate the less obvious point that there is a vocation and satisfaction even in helping Shylock obtain his pound of flesh or in bringing about the acquittal of a guilty man.").

116. Noland, *supra* note 77, at 21 (practicing law "for Todd is a kind of elaborate game").

117. LEO TOLSTOY, *THE DEATH OF IVAN ILYICH* 60 (Lynn Solotaroff trans., Bantam Books 1981) (1886).

118. *Id.* at 70.

119. BARTH, *supra* note 1, at 252.

120. WEISBERG, *supra* note 3, at 3-5 ("Filling the Void").

121. Robert Weisberg, *Reading Poethics*, 15 CARDOZO L. REV. 1103, 1118 (1994) (reviewing Richard Weisberg's *Poethics*, "Underlying Weisberg's vision of the lawyer as ethical figure is a strange blend of serious Nietzscheanism and superficial civic and ethical homilies. . . . Weisberg's awkward fluctuation between the positive, the negative, and the ambivalent portrait of legal rhetoricians leaves a very thin and unsatisfying result."); see also Thomas Morawetz, *Ethics and Style: The Lessons of Literature for Law*, 45 STAN. L. REV. 497, 511 (1993) ("Weisberg's

B. *Robin West's Analysis: Todd Andrews as a Bad Person*

Weisberg believes that Todd's professional life can save his personal life, and he implies that this way of salvation is assured to all. As we saw in the last section, this is not the case, at least not the case the novel puts forward. Now we must be wary of the opposite error. From Todd's colossal failure as a person, we must be careful not to infer the inevitable failure of other lawyers who are in some respects like him, who even agree with him in his deep moral skepticism. This is Robin West's position. She believes it is Todd's inadequate jurisprudence that does him in and endangers the rest of us. I believe that what does him in lies deeper, and is the source of the appeal of his jurisprudence to him and, perhaps, to many another.

Robin West's basic assessment of Todd Andrews diametrically opposes Weisberg's. In her view, "Todd Andrews . . . is no hero; in fact, he constitutes a form of evil."¹²² The novel is no vindication of proper lawyerly values, as Weisberg claims; it is, instead, "a stinging indictment" of wrong-headed jurisprudence.¹²³ The form of professionalism its protagonist embodies is not protective of basic constitutional norms, as it is for Weisberg, but rather highly corrosive of even more fundamentally grounded values.¹²⁴

Over against Weisberg, West is quite right to insist that Todd is a seriously flawed human being with a grossly inadequate professional orientation.¹²⁵ But she is much less convincing in her account of why Todd is as he is, about the sources of his personal and professional problems, and what is to be done about them. On these issues, West makes three basic points. First, she maintains that Todd's very bad moral life flows from what she takes to be very wrong philosophical premises.¹²⁶ Second, she maintains that the necessary remedy is a different set of premises, those of moral naturalism.¹²⁷ Third, and less explicitly, she maintains that moral life is mostly a matter of reason and volition, of knowingly and freely choosing

arguments are breathtakingly ambitious. . . . It is yet unclear what it would take to prove these claims, let alone determine whether Weisberg actually does so.").

122. WEST, *supra* note 3, at 97.

123. *Id.* at 151. The particular jurisprudential error she identifies in it, what she calls "subjective interpretivism," shares, as we shall see, a basic premise of what I call metaethical skepticism: the denial of any absolute values outside human will. *Id.*

124. See Lynne Henderson, *Authoritarianism and the Rule of the Law*, 66 IND. L.J. 379, 409 (1991) ("West uses *The Floating Opera* to argue that subjective interpretation—the denial that there is any real basis for moral criticism of law or of adjudication—creates the nihilism of power and no way in which to combat it.").

125. WEST, *supra* note 3, at 97, 172.

126. *Id.* at 163-65.

127. *Id.* at 165-73.

right or wrong courses of action.¹²⁸ Todd's problem, she implies, is that he chooses the wrong way and rejects the right.

On each of these points, I shall try to show, the textual evidence points in a rather different direction. Closer attention to the text, and to the kind of text it is, not only answers West's questions differently; it also raises very different questions. We must remember that we are not reading an allegory or a *conte philosophique*, much less a philosophical treatise, but a novel. What the narrator of Toni Morrison's *The Bluest Eye* says at the outset of that novel is worth bearing in mind here: "But since *why* is difficult to handle, one must take refuge in *how*."¹²⁹ One of the more curious things *The Floating Opera* shows us is why "why" is so difficult to handle.

1. The Problem: Theoretical Error

According to West, "[t]he novel reveals Andrews's suicidal and murderous urges as attempts to come to grips with the logical derivatives" of his philosophical premises, in particular, his "nihilistic theory of value."¹³⁰ "Andrews's adamant denial of the existence of objective value," in her interpretation, "leads him to contemplate suicide."¹³¹ From the premise that nothing has inherent value, Todd logically deduces the worthlessness of his own particular life, and decides to kill himself as a corollary.

West is at pains to establish this link because her analysis of *The Floating Opera* is part of a larger project, in which she tries to demonstrate the danger of metaethical skepticism. Metaethical skepticism rejects, or seriously doubts, that ethical norms have objective foundations independent of those who adhere to them. On this view, people may and do value many things, but they do not find value inherent in the valued things. Quite the reverse: people supply value to things by their very valuing of them. Value is not, ultimately, something we discover in the world; it is something we create.

West insists that denying objective, inherent value out there in the things themselves invariably leads to political apathy or conservatism.¹³² Todd's life is, for her, evidence for the proposition that metaethical skepticism is

128. *Id.* at 172-73.

129. TONI MORRISON, *THE BLUEST EYE* 3 (1970).

130. WEST, *supra* note 3, at 151.

131. *Id.* at 158.

132. *Id.* at 95-96; cf. Robin West, *Relativism, Objectivity, and Law*, 99 *YALE L.J.* 1473, 1496-97 (1990) (reviewing BARBARA HERRNSTEIN SMITH, *CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY* (1988) (arguing "[n]on-quietistic but relativistic theories of value are certainly possible," but giving only examples that are inconsistent with metaethical skepticism)).

morally and politically stultifying, inevitably producing nihilism or relativism.¹³³ This erroneous belief, widely held in the fields of philosophy and jurisprudence,¹³⁴ is an unfortunate transplant into law and literature. It needs as careful a correction here as it has received elsewhere.¹³⁵

To supply that corrective, we must attend carefully to what Todd tells us in his story. In the first sentence of *The Floating Opera*, Todd describes “the task at hand” as “the explanation of a day in 1937 when I changed my mind.”¹³⁶ That change of mind was his decision not to commit suicide. In his final chapter, he summarizes:

That’s about what it amounted to, this change of mind in 1937: a simple matter of carrying out my premises completely to their conclusions. For the sake of convention I’d like to end the show with an emotional flourish, but though the progress of my reasoning from 1919 to 1937 was in many ways turbulent, it was of the essence of my conclusion that no emotion was necessarily involved in it.¹³⁷

On its face, this statement seems to support West’s interpretation of the relationship between Todd’s life and his theorizing. But on further examination, that analysis does not hold up even here, and it is very much at odds with the novel as a whole.¹³⁸

The quoted passage itself implies that Todd’s reasoning from skeptical premises led him not to suicide, but beyond it. Indeed, after his life has taken another turn—after his half-hearted suicide attempt has failed—Todd corrects an error in his earlier logic, the very error West insists upon. When the *Floating Opera* fails to explode, Todd toys with the idea of attempting to blow it up again, only to have a new thought occur to him: “On the other hand, why bother?”¹³⁹ Reflecting on the matter later in his hotel room, he

133. WEST, *supra* note 3, at 97 (“[T]he dangers of subjective interpretivism are dramatized by the exploits of the protagonist Todd Andrews in John Barth’s legal novel *The Floating Opera*.”); *id.* at 159 (arguing that Todd’s theories, like the parallel views of the legal and literary theorist Stanley Fish, involve “an acquiescent and even celebratory attitude toward the professions that generate dominant values”).

134. Atkinson, *supra* note 6, at 955-60.

135. Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984) (arguing that law can rest on a metaethically skeptical foundation); Atkinson, *supra* note 6, (arguing that legal ethics can be reconstructed on a metaethically skeptical foundation).

136. BARTH, *supra* note 1, at 1.

137. *Id.* at 251.

138. WEISBERG, *supra* note 3, at 76 (“‘I tend, I’m afraid’ . . . ‘to attribute to abstract ideas a life-or-death significance.’ As a philosophical imperative taken to explain his half-hearted decision to commit suicide, this statement . . . is, indeed, contradicted throughout the novel by everything else Todd says and does.”(quoting BARTH, *supra* note 1, at 16)) .

139. BARTH, *supra* note 1, at 246-47.

adds to his final proposition, "There's no final reason for living," the parenthetical "(or for suicide)."¹⁴⁰ On the novel's penultimate page, he elaborates: "To realize that nothing makes any final difference is overwhelming; but if one goes no farther and becomes a saint, a cynic, or a suicide on principle, one hasn't reasoned completely. The truth is that nothing makes any difference, including that truth. Hamlet's question is, absolutely, meaningless."¹⁴¹

That, for metaethical skeptics, is the heart of the human condition. There is no dispositive, logically conclusive answer, discoverable out there in the world and binding on us, to even the most fundamental moral question: to be or not to be. That is what Todd means by saying the question is absolutely meaningless. But from that truth (assuming for the moment that it is a truth), no particular absolute moral imperatives follow, precisely because that metaethical truth entails the denial of absolute moral imperatives in general. From the denial of objective value, nihilism does not logically follow; as a normative matter, nothing logically follows.¹⁴² Metaethical skepticism clears the ethical field of a certain kind of supposed value, but it does not cancel the enterprise of valuing, much less of living. Indeed, by its own terms, it cannot.

This (thankfully!) is the other side of the skeptical coin. Values do not become logically impossible; if they are to exist, they simply must be given a foundation in something other than the valued things in themselves or anything else external to the one who values them. But that foundation is ready to hand: we ourselves. We cannot logically deduce the answer to Hamlet's question: we simply have to decide. We certainly don't have to decide in a vacuum—we have all of humankind's hopes and dreams before us. All we have lost, if metaethical skeptics are right, is a foundation of natural imperatives.

Todd comes to this possibility on his final page, when he wonders "whether, in the real absence of absolutes, values less than absolute mightn't be regarded as in no way inferior and even be lived by."¹⁴³ Why Todd does not follow up that possibility is a very important theme of the book, as we shall see. The point here is that the logic of Todd's metaethical skepticism, once he fully works it out, does not lead him to suicide.

Nor is Todd's metaethical skepticism the psychological, as opposed to the logical, source of his suicide attempt; quite the contrary. By Todd's own

140. *Id.* at 250.

141. *Id.* at 251.

142. Atkinson, *supra* note 6, at 881-86.

143. BARTH, *supra* note 1, at 252.

account, well borne out by the events he relates, the relationship between his skeptical premise and his contemplated suicide was precisely the reverse of what West postulates. In tracing the source of his radical (but admittedly unoriginal) insight that “*nothing is valuable in itself*,”¹⁴⁴ Todd gives this account:

I am not a philosopher, except after the fact; but I am a mean rationalizer, and once the world has forced me into a new position, I can philosophize (or rationalize) like two Kants, like seven Philadelphia lawyers. Beginning with my new conclusions, I can work out first-rate premises.

On this morning, for example, I had opened my eyes with the knowledge that I would this day destroy myself . . . ; here the day was but half spent, and already premises were springing to my mind, to justify on philosophical grounds what had been a purely personal decision. The argument was staggering. Enough now to establish this first premise: nothing is intrinsically valuable.¹⁴⁵

Thus, according to Todd, he did not deduce the logical necessity of suicide from the premise that nothing is inherently valuable. Rather, he adopted that premise to rationalize his prior decision to kill himself.

And this, he tells us more generally, was the pattern of his intellectual life as a whole: “I know for certain that all the major mind changes in my life have been the result not of deliberate, creative thinking on my part, but rather of pure accidents—events outside myself impinging forcibly upon my attention—which I afterwards rationalized into new masks.”¹⁴⁶

With particular reference to his suicide deduction—completed, it bears repeating, only on the evening of the day he awoke already resolved to kill himself—here is what he said: “I called these ideas rationalizings, and so they were: the *post facto* justification, on logical grounds, of what had been

144. *Id.* at 171.

145. *Id.*

146. *Id.* at 22. *But see id.* at 44 (“But I am not a thinker, nor have I ever been. My thinking is always after the fact, the effect of my circumstances, never the other way round.”); *see also* Noland, *supra* note 77, at 26 (arguing that Barth “suggests the extent to which psychological need determines ideas and beliefs,” though faulting him for not “prob[ing] deeply”); Maria José Somerlate Barbosa, *Life as an Opera: Dom Casmurro and The Floating Opera*, in 29 COMP. LIT. STUD. 223, 231 (1992) (“Todd’s indifference toward everything (including his suicide) is merely another mask he is wearing.”).

Todd ironically insists that the only dictum he affirms from Marx is that “quantitative changes suddenly become qualitative changes.” BARTH, *supra* note 1, at 170; *see also id.* at 16. Yet in accounting for his moral skepticism, he demonstrates another, more immediately relevant, Marxist premise, namely, that all ideological positions are the product of material conditions.

an entirely personal, unlogical resolve. Such, you remember, had been the case with all my major mind-changes. My masks were first assumed, then justified.”¹⁴⁷

The purpose of each of his masks, Todd realizes at last, was to shield him from authentically facing the imminence of his death from his serious and incurable heart condition—as he put it, “to hide my heart from my mind, and my mind from my heart.”¹⁴⁸ The course of his adult life, as he comes to see it, is a succession of these masks. He assumed the first mask, that of a rake, upon learning at the end of his military service about his heart condition. He assumed the second, that of an ascetic “saint,” upon being murderously attacked as a graduate student by a former girlfriend, and the last, that of a cynic, when, as a young lawyer in the early Depression years, he discovered that his father had hanged himself in the cellar of their home.¹⁴⁹

In each case, he insists, the change of mask was involuntary and post hoc: “For when one mask no longer served its purpose of disguise, another had perforce to take its place at once”;¹⁵⁰ “[i]t was my heart that had made my masks, not my will.”¹⁵¹ So, too, with the stripping off of the last, cynical mask. It fell before a black despair brought on, so far as he tells us and so far as we can discern from the evidence he gives us, by his increasingly frequent impotence with his mistress, a symptom of chronic prostatitis, and by his mistress’s notice of his clubbed fingers, themselves a symptom and thus reminder of his heart condition.¹⁵²

By the penultimate page, when Todd tells us his decision not to kill himself was “a simple matter of carrying out my premises completely to their conclusions,”¹⁵³ we know better. We are in a position to see that this statement is at variance not only with Todd’s own prior statements about the relationship of his thought to his action, but also with what he has shown us about them. Contrary to his assertion here that “no emotion was necessarily involved,”¹⁵⁴ we know precisely the opposite to be true, for he himself has shown us that emotion was necessarily involved in each change of his mind from 1919 to 1937.

We shall have to examine those emotions, and their sources, in some detail below. But, contrary to West’s claim, there is no evidence that his

147. BARTH, *supra* note 1, at 223.

148. *Id.*

149. *Id.* at 223-24.

150. *Id.* at 223.

151. *Id.* at 226.

152. *Id.* 224-26.

153. *Id.* at 251.

154. *Id.*

moral skepticism deprived his life of meaning and led him to embrace cynicism and attempt suicide. At various points throughout the novel, Todd insists that his reasoning was invariably post hoc, from lived experience to rationalized premises and gerry-rigged justifications. And at various points he gives us ample evidence that this is indeed the case. At the end, his reasoning from thoroughly skeptical premises leads him not, as West would have us believe, to the threshold of murder and suicide, but beyond them. And beyond them, as we shall see, lies the theoretical prospect of creating a meaningful life out of non-absolute values, toward which Todd tantalizingly suggests taking a tentative step.

The paradox he leaves us with at the end is that his emotionally turbulent life has rendered him virtually incapable of emotional intensity, or of action at all. For the source of that apathy, and the oddly belated insistence that his ethical conclusion had nothing to do with his emotions, we shall have to look, not at his ideology, but at his biography. Before we turn to that, however, we must examine West's second claim, that Todd's life shows moral naturalism to be the only alternative to cynical despair.

2. The Prescription: Ethical Naturalism

As West quite rightly points out, Todd's final theoretical position is deeply disturbing: If "*Nothing has intrinsic value*" and "*The reasons for which people attribute value to things are always ultimately irrational,*" "*There is, therefore, no ultimate 'reason' for valuing anything.*"¹⁵⁵ This is the essence of metaethical skepticism, and it is sobering stuff.

If these propositions are true, West believes, there is no logically dispositive answer to Todd's eerily amoral musings, "Why not blow up the Floating Opera? . . . On the other hand, why bother?"¹⁵⁶ West thinks that there is such an answer, because Todd's premises are wrong. Human life and other things really do have inherent value, according to West. By direct reference to "[t]he natural self and its needs,"¹⁵⁷ we can not only answer Todd's musings, but also derive objectively true answers to moral questions generally. These propositions, of course, place West squarely—and self-consciously¹⁵⁸—in the natural law tradition. She affirms, with that tradition,

155. *Id.* at 223.

156. *Id.* at 246-47; see also WEST, *supra* note 3, at 165.

157. WEST, *supra* note 3, at 165.

158. Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817, 818-20 (1986) (defending liberalism's rule-of-law commitments on the alternative foundation of Freud's "naturalistic" jurisprudence); see also ROBIN WEST, *CARING FOR JUSTICE* 279-80 (1997).

the existence of real moral norms, independent of our wills and accessible to our thought. By reference to these norms, we can objectively measure human actions and laws—indeed, all of human culture and human history.

That is an ancient and honorable tradition, anciently and honorably disputed. Within the scope of this paper, I cannot hope even to survey the debate between natural law and its critics, much less to advance the critique myself. My purpose is more limited, and more defensive: to show that West's analysis of *The Floating Opera* does not succeed in its more ambitious goal of deriving natural law norms from this particular novel.

It is important to emphasize here at the outset the ambitiousness of her aim and the relative modesty of mine. The cases for and against natural law both have strong and weak forms. The strong form of the natural law claim is that natural norms definitely exist; strong arguments for natural norms purport to have proved their existence. Correspondingly, strong arguments against natural norms purport to have disproved them, to have demonstrated that they do not, or cannot, exist. On the other hand, weak natural law arguments hold only that there may be natural norms, not that there are, or must be; weak skeptical arguments, on the other hand, hold only that such norms have not been proved, either generally or in a particular case, not that such a proof is in principle impossible.

Against this background, we can better understand how my and West's positions engage. She maintains a strong natural law position: Natural norms exist and, beyond that, they can be shown to exist in *The Floating Opera*. I interpose a weak skeptical critique: I have yet to see a convincing case for natural norms and, more to the point, I do not believe West has demonstrated that they exist in *The Floating Opera* or that their reality can be inferred from it.

All this would, I admit, be rather off-puttingly removed from the realm of legal ethics if my position and West's did not engage at another, related point. We are both concerned with the relationship between natural norms and meaningful human existence, individual and social. West takes the position that, without natural norms, human life can have no meaning. Without acknowledging our fealty to such norms, we are doomed to despair and nihilism, unable to resist tyranny and oppression. In particular, West believes that the life of Todd Andrews illustrates, even proves, this link. Here again, her natural law position is a strong one: Without natural norms, life is meaningless, as shown by Todd's life.

On this point, my skepticism is different, and stronger. To doubt that human life is necessarily meaningless without natural norms is to begin to believe that life can have meaning without them. "Without them" need not

mean in the face of their confirmed absence; it can also mean in the face of deep doubts of their existence, the very kind of doubts Todd harbored. Elaboration of that faith will have to await Part III. As Todd himself realized, it is an inquiry that takes us beyond his story.

In this section, then, I do not mean to take on the momentous task of refuting moral naturalism. That would involve the notoriously difficult job of proving a negative, in this particular case, the non-existence of natural norms. My goal is much more narrow: to show that West has not established the existence of such natural norms on the evidence she adduces from *The Floating Opera*. My case will be made, in other words, if I can win the Scottish verdict: not proved.¹⁵⁹

West's case for the existence of natural norms in *The Floating Opera* rests on a central episode, Todd's shattering experience as an eighteen-year-old foot soldier in the Battle of the Argonne Forest.¹⁶⁰ Separated in the heat of battle from his comrades-in-arms, Todd finds himself in a shell-pit, cowering in abject terror, "a shocked, drooling animal in a mudhole."¹⁶¹ Resigned to the certainty of death, he recounts, "[t]he only thing I was able to wish for was someone to keep me company while I went through with it."¹⁶²

Suddenly an enemy soldier, a German sergeant, leaps into the hole beside Andrews, who says he "fell on him instantly and embraced him as hard as I could."¹⁶³ Once the German realizes that Andrews is not trying to kill him, he reciprocates the embraces.¹⁶⁴ They bandage each other's wounds, exchange food and tobacco, eat and smoke together, laugh that each had soiled his trousers.¹⁶⁵ "There was," Andrews recalls,

a complete and, to my knowledge, unique understanding between us. . . . Never in my life have I enjoyed such intense intimacy, such clear communication with a fellow human being, male or female, as I enjoyed with that German sergeant. . . . For the space of some hours we had been one man, had understood each other beyond friendship, beyond love, as a wise man understands himself.¹⁶⁶

159. In making that case, however, I do want to make the additional, positive showing, that West's effort to establish natural norms re-capitulates what Hume classically identified as the problem of moving from the "is" to the "ought." HUME, *supra* note 21, at 469.

160. BARTH, *supra* note 1, at 61-68.

161. *Id.* at 63.

162. *Id.* at 64.

163. *Id.*

164. *Id.* at 65.

165. *Id.* at 66.

166. *Id.* at 65-66.

But this intimacy does not last. Increasingly suspicious that what he experienced as deep sympathy might not be genuinely shared, and accordingly anxious lest the German do him harm, Todd tries to sneak away, back to American lines, while the German sleeps.¹⁶⁷

A perfect solution! I rose to my feet, holding my rifle and not taking my eyes from the German soldier's face. At once he opened his eyes, and although his head didn't move, a look of terrible alarm flashed across his face. In an instant I lunged at him and struck him in the chest with my bayonet. The blow stunned him, and my weight on the rifle held him pinned, but the blade lodged in his breastbone and refused to enter.

My God! I thought frantically. *Can't I kill him?* He grasped the muzzle of my rifle in both hands, trying to force it away from him, but I had better leverage from my standing position. We strained silently for a second. My eyes were on the bayonet; his, I fear, on my face. At last the point slipped up off the bone, from our combined straining — our last correspondence! — and with a tiny horrible puncturing sound, slid into and through his neck, and he began to die. I dropped the rifle — no force on earth could have made me withdraw it — and fled, trembling, across the shattered hollow. By merest luck, the first soldiers I encountered were American, and the battle was over for me.¹⁶⁸

For West, this incident illustrates a fundamental conflict between two irreducibly different sources of value, animal nature and social convention. In her account, the former is real and presumptively good; the latter, artificial and presumptively bad. Andrews's experience in the shell-pit placed him in direct contact with his animal needs and impulses which, when satisfied naturally, produced his euphoric private armistice with his German counterpart. Their harmony is disturbed only when Todd lets his professional, socially constructed role as soldier supercede; it is Todd's choice of the social over the natural that necessarily implies his killing of his new-found comrade.¹⁶⁹

This analysis must, however, be questioned at several crucial points. First, the distinction West draws—or purports to find—between the natural and the social is not nearly so clear as she would have us believe on the

167. *Id.* at 67.

168. *Id.* at 68.

169. WEST, *supra* note 3, at 165-73.

evidence she adduces.¹⁷⁰ How does West know that the embrace, which she takes to be a loving, natural impulse, is not a carefully though imperfectly produced cultural by-product of, say, Western culture generally and Western religion in particular? “Love thy neighbor as thyself” is, presumably, a directive to creatures inclined to conduct themselves otherwise, more or less naturally. Andrews clearly did not experience the embrace as a conscious moral choice under the sign of the Golden Rule. But, for all we can know from his account, it could as easily have sprung from a deeply ingrained moral habit as from a natural moral instinct. And there is a third, and I think more likely, possibility: the embrace grew from an inseparable combination of innate fellow-feeling and social cultivated good will. (Recall, again, our respective burdens of proof: West purports to show that the incident can be understood only in terms of natural norms; I maintain only that other accounts are possible.)

On the other hand, how does West know that the bayonetting, which she takes to be a hateful, artificial, professionally required act, is not the product of “innate aggression,”¹⁷¹ or a “death instinct,”¹⁷² or “original sin,”¹⁷³ each a supposedly inherent and essential aspect of human nature?¹⁷⁴ Todd himself gives no indication that, when bayonetting the German soldier, he was acting according to professional norms. Rather, from all he reports, he seems to have acted impulsively, even instinctually, out of sheer animal terror and intense concern for his own self-preservation, without awareness of any social end of soldiery.

170. JAC THARPE, JOHN BARTH: THE COMIC SUBLIMITY OF PARADOX 19 (1974) (“The incident with the German soldier reveals a great deal more. Instinct operates in the flesh, instinct of self-preservation, instinctive desire for companionship in the midst of threat and fear, instinctive response to kindness and instinctive killing for self-preservation.”).

171. See KONRAD LORENZ, ON AGGRESSION 40 (Marjorie Kerr Wilson trans., 1966); KONRAD Z. LORENZ, KING SOLOMON’S RING 193-99 (1952); see also LESLIE STEVENSON, SEVEN THEORIES OF HUMAN NATURE 106-17 (1974) (overview of Lorenz’s theory).

172. See SIGMUND FREUD, WHY WAR (1936); SIGMUND FREUD, BEYOND THE PLEASURE PRINCIPLE (James Strachey ed. and trans., rev. ed. 1961); SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 66-69 (James Strachey ed. and trans., 1962) (arguing for the existence of an original destructive instinct, Thanatos or death, running counter to the life instinct Eros). West herself has called for a reconstruction of liberal legal theory on the more optimistic aspects of Freud’s social theory. West, *supra* note 158, at 818-21.

173. See CALVIN: INSTITUTES OF THE CHRISTIAN RELIGION 241-55 (John T. McNeill ed., Ford Lewis Battles trans., 1960) (classical statement of doctrine of original sin).

174. As we shall see, this distinction between the original and natural on the one hand and the corrupt or artificial on the other is impossible to maintain at the margin. See *infra* text accompanying notes 177-84. Thus Calvin, no soft touch on the subject of original sin, recognized that the doctrine was something of a misnomer. Since God created humanity innocent and, indeed, in his own image, our original, pre-lapsarian state must have been good. Accordingly, although our sinful state is natural, it is neither original nor essential. CALVIN, *supra* note 173, at 254-55.

Indeed, both of the courses he saw as open to him at the time—the stereotypically natural “fight or flight” responses—probably violated professional norms. His proper course as soldier was almost certainly to take the German prisoner and guard him in the foxhole or return with him to allied lines. More significantly, even if escape by himself was not inconsistent with professional duty, killing the German almost certainly was.¹⁷⁵ Much of the law of war—and quite specifically much of the law of war as it relates to prisoners—is designed to curb the adrenalized fury that all too often results in their slaughter.¹⁷⁶

There is, finally, a more fundamental flaw in trying to distinguish the natural from the social. In one of the principal strands of the Western natural law tradition, human beings are essentially and naturally social and political, Aristotle’s *zoon politicon*.¹⁷⁷ West herself insists that Todd’s loneliness in the foxhole manifests a natural need for companionship and, more generally, that the need for companionship is paradigmatically human.¹⁷⁸ The kind of nature that we humans have, according to the natural law tradition of which West herself is a part, implies a society for its fulfillment.

As these examples suggest, the difficulty in distinguishing the natural from the social shades into another difficulty, that of equating the natural with the morally good. Take, first, the problem of homicidal impulses. Even if we were shown, beyond the peradventure of a doubt, that such impulses are natural, would that in any moral sense preclude our taking steps to curb them, socially or individually? Indeed, on the question of whether war itself is a product of human nature or a social construct, the jury is still very much out.¹⁷⁹ But neither war’s more enthusiastic celebrants nor pacificism’s more prominent exponents have awaited a final proof. In the

175. See HARRIS, *supra* note 101, at 20 (describing the killing as cold-blooded murder and analyzing it as evidence of Todd’s deceptive tendency, typical of schizophrenics, to falsely portray himself as obedient to rules); E.P. WALKIEWICZ, JOHN BARTH 21, 25 (1986) (referring to the killing as murder).

176. JOHN KEEGAN, *THE FACE OF BATTLE* 109 (1976).

177. Aristotle, *On Statecraft*, in PHILIP WHEELWRIGHT, *ARISTOTLE* 279, 280 (1951).

178. WEST, *supra* note 3, at 167; West, *supra* note 158, at 859-61.

179. David Papineau, ‘*You Scratch My Back, I’ll Scratch Yours*,’ N.Y. TIMES, May 11, 1997, § 7, at 13 (reviewing MATT RIDLEY, *THE ORIGINS OF VIRTUE* (1997) and criticizing too direct a link between biological evolution and genetics on the one hand and human behavior and ethics on the other, with particular reference to war and aggression); see also Michael Sherry, *Primal Instinct*, N.Y. TIMES, May 25, 1997, § 7 (book review) at 12 (reviewing BARBARA EHRENREICH, *BLOOD RITES: ORIGINS AND HISTORY OF THE PASSIONS OF WAR* (1997)) (Ehrenreich traces “sacralization” of war to deep history of humans as prey, rather than predators, a thesis the reviewer places in the context of an extensive literature on “constructivist” and “essentialist” divide).

words of one commentator on the contemporary “essentialists/ constructionists” debate, “it is arguable that war and philandering are in some biological sense natural, but this does not make them right. Nor does it make them inevitable.”¹⁸⁰ Even if they were inevitable, they wouldn’t necessarily command our approbation. As old Capt. Osborn, the novel’s wise fool and a favorite of Todd’s, says of two of nature’s ultimate realities, aging and death: “Ain’t nothing I can do about it . . . but I ain’t got to like it.”¹⁸¹

And take, more generally, the relationship between the natural and the social.¹⁸² As we have seen, West herself concedes that individuals and society are mutually interdependent.¹⁸³ But if the natural is to some extent social, and the social to some extent natural, how are we to know which social norms to reject and which to embrace? Here is West’s answer, from the penultimate sentence of her analysis of *The Floating Opera*: “The relationship must be reciprocal: professionalism gives us a referent from which to critique our natural self and our natural setting, just as our natural self gives us a position from which to critique the products of history, culture, and professionalism.”¹⁸⁴

In some sense, this is almost certainly true, but it is not especially helpful without an elaboration that West fails to provide. In fact, concession of this link between nature and culture very much blunts the initial thrust of West’s critique of Andrews’s actions in the foxhole. She began not just by contrasting his natural with his socially constructed impulses, but also by suggesting that he should have followed the natural simply because they were natural, and therefore good. As we have seen, however, the natural and the social are not so readily distinguishable, and the natural is not always the clearly preferable. West ends by conceding as much, but without giving us any hint of how to distinguish the naturally bad from the socially good, or socially bad from the naturally good. Nature turns out sometimes to be

180. Papineau, *supra* note 179, at 14. On the nature-versus-nurture theories of war, see Sherry, *supra* note 179; for an argument that philandering is natural among certain higher primates, including homo sapiens, see DIANE ACKERMAN, A NATURAL HISTORY OF LOVE (1994). West herself acknowledges this point elsewhere. WEST, *supra* note 158, at 13 (“the existence of a biological root of an undesirable behavior counsels the *need*, indeed the imperative, for legal and social intervention; it hardly counsels the futility of it”).

181. BARTH, *supra* note 1, at 14.

182. Todd is himself quite aware of the problem; of love in its various forms, he wonders, “Is this thing a fact of nature, like thirst, or purely a human and civilized invention?” *Id.* at 36.

183. WEST, *supra* note 3, at 173.

184. *Id.*

preferable to culture, sometimes not; we are given little clue as to when, and how we are to know.¹⁸⁵

The point of her extended analysis of the foxhole scene, you will recall, was to refute metaethical skepticism by showing that a careful inspection of our natural selves will reveal certain inherent, ahistorical and non-social values. What that analysis shows, however, is something quite different, and quite compatible with metaethical skepticism. All West shows is that some things—sometimes natural, sometimes not—can be valued, not that they must be valued, or are inherently valuable. This demonstration is entirely consistent with Todd's premise that nothing is inherently valuable. Moreover, it is equally consistent with his concluding observation that meaningful moral life does not, as a matter of logic, end with the rejection of an objective, rationally accessible foundation for our values. At least as a matter of logic, there remains the possibility of arriving at our values by non-rational means and grounding them in something other than the natural order of the universe.

Thus to Todd's unsettling questions, "Why not blow up the Floating Opera? . . . On the other hand, why bother?"¹⁸⁶ one might answer in any one of several ways. One might answer, with West, that to do so would ignore the inherent value of human life, which we are all morally obliged to respect. But one might also answer that our culture condemns the senseless destruction of human life, and that one affirms that culturally grounded norm, even if it rests on no metaethically firmer foundation. Humanity, as old Protagoras argued against Socrates's version of moral naturalism, may be the measure, not just the measurer, of all things. Or one might respond that God's will forbids such killing (though one might believe that it could as easily and logically require it). One might, finally, answer simply "the sort of person I am and want to be wouldn't do such a thing." Each of these alternatives to West's position (except, perhaps, the invocation of God) suggests a meaningful moral life without reliance upon moral absolutes independent of human choice.

185. See Lisa Davis, Book Note, 18 HARV. WOMEN'S L.J. 307, 314 (1995) (reviewing ROBIN WEST, *NARRATIVE, AUTHORITY AND LAW* (1993)); and noting that West's proposed solutions involve the Archimedean paradox, the difficulty of standing above or outside the position one critiques). Walkiewicz analysis of the Argonne incident involves a parallel over-simplification. In his view, the incident is basically a conflict between emotion, which led to the embrace, and reason, which led to Todd's doubts. While this is true as far as it goes, it is only half of the story: the killing was as emotionally charged as the embrace, and no more rational. WALKIEWICZ, *supra* note 175, at 21, 25.

186. BARTH, *supra* note 1, at 246-47.

Todd's story is emphatically not an account of how such a life might be lived. Though he holds out that prospect at the very end of his story, he has certainly not lived it in his story. But we must be careful here: The fact that Todd has not yet lived a meaningful life according to less than absolute values, and may never, does not logically preclude the possibility that others, or even he, may. Negative experimental results are notoriously inconclusive. West seems to generalize from the specific case of Todd's failure to the general impossibility of that at which he failed. But a single failure, even a series of failures, does not prove an impossibility, as Robert the Bruce famously learned from his spider.

Yet there is, in the final analysis, something deeply disturbing about Todd's question about blowing up the Opera. It is not, however, so much that we may be unable to give him a rationally compelling answer grounded in the order of nature. It is, rather, that he asks the question at all, in the way that he does. He poses the question, after all, not as a law school or philosophy seminar hypothetical to raise a metaethical point. He is very seriously contemplating a second attempt at violently killing a host of people he knows personally, including two adults who, by his own account, love him very much and a child whom he strongly suspects to be his own biological daughter. There is something thoroughly unsettling, not so much about the metaethical status of the question, but about the moral status of anyone who would seriously entertain anything but an absolutely negative practical answer. What should arrest our attention, in other words, is not so much whether the question has a "really right" answer, but what kind of person would even consider answering anything but "No!"

To return to an earlier point, nothing in Todd's radically skeptical metaethics logically compels an affirmative answer, the taking of his own life or that of anyone else. Indeed, as he himself quite explicitly points out, his metaethical position leaves wholly open to him the option of valuing both his own life and the lives of others over death. The critical question in his case is why he does not; the more general question is why others do.

This question is only now getting the attention it deserves from law and literature scholars,¹⁸⁷ particularly in Martha Nussbaum's search for what she

187. Here again, the immodesty of postmodernism is perhaps apparent. Socrates suggested an answer in the *Symposium* and elsewhere: love, our concern for each other's souls. *Symposium, in GREAT DIALOGUES OF PLATO* 69 (Eric H. Warmington & Philip G. Rouse eds., W.H.D. Rouse trans., 1956). The arch-skeptic Hume gave a detailed account of what he called the moral sentiments. HUME, *supra* note 21, at 575-91.

calls “rational emotions.”¹⁸⁸ Todd is not the purely rational being he believes, but his emotions and his reason are poorly integrated:

To Barth, he is a man in whom reason and emotion run in separate directions. Without emotion, reason can give him no purpose for living. It cannot establish permanent value or affirm life. It can only determine that there are no absolutes. Without reason, emotion turns sour. . . . The implication, of course, is that Todd can find value and affirm life only by a unity of reason and emotion. A passionate reason is required for a genuine involvement.¹⁸⁹

What, then, accounts for Todd’s lack of passion and involvement, his profoundly odd indifference, right up to the end of his story, toward both life and death? Why do the normal impulses toward the preservation of life, especially the lives of oneself and one’s friends and relatives, have no purchase on him? As we shall see in the next section, West cannot adequately account for these fundamental flaws in Todd’s personality because her analysis focuses on the rational and volitional to the virtual exclusion of the irrational and unconscious.

3. The Premise: Radical Free Will

To the problems of Todd’s personality, West gives the standard answer of political and theological liberalism. Assuming that “Andrews’s suppression of his natural self and the values he might generate from it is based almost entirely upon his memory of” his experience in the Argonne, West turns to that experience for an answer.¹⁹⁰ She describes his actions there in purely volitional terms:

Andrews did have a choice: he chose to kill. He chose to act professionally when he could have acted naturally. He chose to reject need, nature, life, and intimacy and act instead with the full destructive power of the professional. He chose to oppose rather than embrace. He could have acted on the basis of natural need, and instead he acted on the basis of professional power. He could have fled, and instead he fought.¹⁹¹

188. MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 53-78 (1995).

189. Noland, *supra* note 77, at 17.

190. WEST, *supra* note 3, at 166.

191. *Id.* at 173.

West thus sees Andrews's actions in the Argonne shell-pit as a conscious rejection of one set of values, one distinct way of being, in favor of another.

We have already seen that these alternatives are not as starkly opposed, normatively or descriptively, as West maintains. What we need to focus on here is West's tendency to see the course Andrews took as the wholly unconstrained, entirely rational choice of a morally free agent. "Andrews's act was a choice, not a historical necessity," she insists, "and should be judged as such."¹⁹²

Todd himself sets out to account for what he calls a change of mind. This very statement of his undertaking implies what West is seeking, an explanation in purely voluntaristic terms. But as Todd comes to realize within his story, and as we come to appreciate in reading that story, it is as much about how a mind is *made* as about how a mind is *made up*. In that respect, it is important to remember that what we have before us is not an *apologia pro vita sua*, a defense of a life, but an autobiography, a person's effort to understand his own life and make it intelligible to others.

In fairness to West, it must be said that the principal point in her entire analysis of *The Floating Opera* is to identify a set of norms over against which the demands of job and role, even culture and law, can be assessed. She is not, that is to say, at pains to deny that Andrews acted without any constraints, but rather to insist that he had other options. In other contexts, indeed, West herself is powerfully critical of liberal voluntaristic psychology.¹⁹³ Even here, she acknowledges that "[t]he professional imperatives within which Andrews acted help the reader forgive the act."¹⁹⁴

Nevertheless, her implicit insistence on the primacy of choice in the course of Todd's actions obscures the essence of the incident. She uses the incident to demonstrate Todd's conscious rejection of an alternative set of values;¹⁹⁵ Andrews himself cites it for a very different purpose. Quite significantly, he sees the incident not so much as reflecting a conscious change of mind, but as effecting a much more radical transformation. He describes the incident in a chapter entitled "My unfinished boats," as the cure of his youthful tendency to start things without adequate preparation and to fail to see them through to completion.¹⁹⁶

192. *Id.*

193. This is especially clear in her extensive debate with Richard Posner over consent and autonomy in Kafka's fiction. *Id.* at 27-87.

194. *Id.* at 173.

195. *Id.* at 166.

196. BARTH, *supra* note 1, at 57-72.

That's my war story. I told it — apropos of what? Oh yes, it cured me. In fact, it cured me of several things. I seldom day-dream any more, even for an instant. I never expect very much from myself or my fellow animals. I almost never characterize people in a word or phrase, and rarely pass judgment on them at all. I no longer look for the esteem or approbation of my acquaintances. I do things more slowly, more systematically, and more thoroughly. To be sure, I don't call that one incident, traumatic as it proved to be, the single cause of all these alterations in me; in fact, I don't see where some of them follow at all. But when I think of these alterations, I immediately think of the incident (specifically, I confess, of that infinitesimal puncturing noise), and that fact seems significant to me, though I'll allow the possibility of the whole thing's being a case of *post hoc, ergo propter hoc*, as the logicians say. I don't really care.¹⁹⁷

Several aspects of this account are remarkable. First, as we have seen, Andrews does not speak of changing his mind or choosing his values based on the incident; rather, the incident itself fundamentally alters various aspects of his personality. With particular reference to his new meticulousness, for example, he elaborates:

Not that I believe, as many people do, that there is some intrinsic ethical value in doing things properly rather than improperly. I don't subscribe, as an ethical premise, to the proposition that anything worth doing is worth doing well. It's simply that I've been incapable, temperamentally, of doing things otherwise than correctly since 1918, just as prior to then I was very nearly incapable of doing anything just right.¹⁹⁸

As he sees it, he hasn't changed his mind; he himself has been changed. The range of his options as a functioning human being has been narrowed, or at least re-directed, not so much against his will, as anterior to any exercise of his will. This is, of course, entirely consistent with Todd's insistence, already noted, that his philosophical principles flow from things that happen to him, rather than the reverse, and that the process is "often an involuntary one."¹⁹⁹

But we must be careful not to take Andrews too much at his word in this passage; the second thing to note about it is that it reveals—or confirms—him

197. *Id.* at 68.

198. *Id.* at 69.

199. *Id.* at 16.

to be an unreliable narrator.²⁰⁰ His statement that, after the battlefield incident, "I seldom daydream any more, even for an instant," is contradicted on the very next page.²⁰¹ Referring to the boat he now has under construction, he says: "Many mornings I remember, I simply sat in the garage and stared at her, thinking out the wisest next move, or at the wall, thinking of nothing."²⁰²

As with all unreliable narrators, not everything that he tells us is untrue,²⁰³ we must be careful to sort out the false from the true, testing what he says against what he does.²⁰⁴ He has said, for example, that, after the foxhole incident "I do things more slowly, more systematically, and more thoroughly,"²⁰⁵ and, in the details he gives us of his two years' work on the boat, he offers ample reason to believe at least part of that statement.²⁰⁶ But then the chapter concludes with this: "If anyone ever took the trouble to finish my boat, I reflected without sorrow, he'd have himself an excellent vessel."²⁰⁷ For all his claim to thoroughness in all things, he makes clear that he doesn't mean to finish the boat. Indeed, he is making his last visit to the boat, on the morning of the day in which he plans to blow up the Floating Opera.

This should remind us of a point Todd makes at the beginning of the chapter. Despite ample opportunity as a boy growing up on Chesapeake Bay, Todd has never learned to sail; he tells us there that, although he has done some sailing since he began practicing law at age twenty-seven, "I still can't handle a sailboat myself."²⁰⁸ Though his current boat-building project is much better conceived and executed than the one he abandoned as a boy of twelve, he is no closer to actually sailing. We come to suspect that his post-1918 attention to detail is at best an ambiguous advance. From this

200. See Barbosa, *supra* note 146, at 225 ("[T]he masks that Todd wears in *Opera* disperse the locus of meaning . . . and lead the reader to avoid taking any statement at face value.").

201. BARTH, *supra* note 1, at 68.

202. *Id.* at 69; see also *id.* at 4 (Todd's observation that he deems "staring at walls" as much his career as law and that his daydreaming has interrupted the writing of his first chapter); *id.* at 103 (referring to "a fine staring-wall, a wall that I keep scrupulously clear for staring purposes").

203. As David Lodge points out, completely unreliable narrators are difficult to imagine except as the product of highly experimental fiction. David Lodge, *The Unreliable Narrator*, in DAVID LODGE, *THE ART OF FICTION* 154, 154-55 (1992). Barth, it must be noted, is just such a novelist, and we must take up in due course the prospect raised by Thomas LeClair, *John Barth's The Floating Opera: Death and the Craft of Fiction*, 14 TEX. STUD. IN LIT. & LANG. 711-15 (1973) that Todd's narration and Barth's fiction are both deeply mendacious. See *infra* Part II.B.

204. LODGE, *supra* note 203, at 155.

205. BARTH, *supra* note 1, at 68.

206. *Id.* at 69.

207. *Id.* at 70.

208. *Id.* at 57.

perspective, his meticulousness appears to be less a way of getting the job done better and more a neurotic way of perpetuating the preparations and never getting on with the real action. Here he is manifestly a modern Hamlet.

This is a critical insight, for one of the skills that Andrews reports having relearned correctly after being mustered out of the army in 1919 is "the technique of thinking clearly."²⁰⁹ The product of that technique is a vast inquiry into the causes of his father's suicide in the wake of the stock market crash and a parallel inquiry into why he himself did not commit suicide when the Floating Opera failed to explode.²¹⁰ A part of that latter inquiry is the account we have before us. We begin strongly to suspect that Andrews' infinite researches are something other than healthy, that they have become, like Hamlet's, an alternative rather than a guide to life.²¹¹ The over-examined life, as Nietzsche loved to point out, is not really being lived at all.²¹² In that light, we can appreciate the irony of Todd's assertion, after wondering about the causal connection between the wartime event and the changes he perceived in himself afterward, that "I don't really care."²¹³ That he seems to care excessively may be one of the most significant, and yet least appreciated, effects of the event.

Armed with these insights, we are ready to appreciate the fundamental paradox of Andrews' commentary on his wartime experience. On the one hand, we have every reason to believe that Andrews is right in analyzing the incident as a watershed event in his life. Yet, on the other hand, his basic assessment of it as the "cure" of certain childhood tendencies is obviously skewed. Ironically, the incident seems to have continued, even aggravated, those very tendencies, especially the inclination to substitute thinking for acting, the inability to sustain meaningful contact with other people, and the deep aversion to the messiness of animal existence.

Todd's analysis of the foxhole incident is skewed in the other direction as well. Just as he is wrong about what flowed out of this watershed event, so

209. *Id.* at 69.

210. *Id.* at 217-22.

211. Barbosa, *supra* note 146, at 225 ("[I]n *The Floating Opera* the insertion of 'operas-within-operas' brings about a frame-creating and frame-breaking that leads the reader to question not only Todd's 'interpretation' of certain facts but also his compulsive way of looking for truth in his writing."); HARRIS, *supra* note 101, at 12 (analyzing in terms of Laingian schizophrenia Todd's "obsessive devotion to his *Inquiry*").

212. FRIEDRICH NIETZSCHE, *THE BIRTH OF TRAGEDY AND THE CASE OF WAGNER* 89-98 (Walter Kaufmann trans., 1967); JAN GORAK, *GOD THE ARTIST: AMERICAN NOVELISTS IN A POST-REALIST AGE* 152 (1987) ("But [Todd's] decision to commit suicide shows how his endlessly examined life is not worth living.").

213. BARTH, *supra* note 1, at 68.

he seems to be mistaken, or imperfectly clear, about what flowed into it, and the relationship between the two. Here again, West's counter interpretation is itself skewed by her assumption of the radical voluntariness of Todd's actions. Oddly absent from her account of natural human needs is any emphasis on how the extremes of battlefield stress on the body and the mind are likely to distort normal thought processes, including moral decision-making. Todd himself reports convulsions of vomiting and diarrhea before the German appeared; we can safely assume that his judgment, moral and otherwise, was anything but unclouded. Under the circumstances, we might reasonably expect, and at least partially excuse, less than exemplary behavior.

Having thus discounted West's implicit attribution of complete rationality to Andrews's actions, we are nevertheless left to wonder why he did what he did, and what it tells us about him as a person. Why did Todd perceive the unarmed, obviously terrified German sergeant as a threat? Todd had subdued him once before, and presumably could have bound his limbs. Why did Todd succumb to the suspicion that the German had not genuinely reciprocated his sympathy? And why did Todd, totally lost on the field of battle, risk a foray across no-man's land rather than remain in the relative safety of the hole with the German?

We must, of course, be careful not to regard actions taken under extremes of stress as entirely typical. Nevertheless, two patterns consistent with Todd's prior and subsequent conduct do emerge here.²¹⁴ The first is a deep ambivalence toward intimate contact. In this very chapter, Todd reports that, as a child, he had an intense longing to escape, a longing that lay near his desire to build boats.²¹⁵ We learn later that his mother died when he was young, and that his primary care-givers were an aloof father and an uncertain series of housekeepers. The need for, yet inability to sustain, close human conduct thus has prior sources, and the problem continues to plague Andrews long after the war.²¹⁶

In the second place, Andrews had long been acutely aware of, and intensely uncomfortable with, the grosser aspects of his animal nature. The incident with the German, he reports, was "the second of two unforgettable demonstrations of my own animality."²¹⁷ The first, significantly, was his sexual initiation with a somewhat older schoolgirl. In addition, he tells us,

214. HARRIS, *supra* note 101, at 24-25 (tracing obscure origins of Todd's disturbed mental state before Argonne incident).

215. BARTH, *supra* note 1, at 58.

216. HARRIS, *supra* note 101, at 28 ("Union with the other frightens him; withdrawal from the other leaves him empty and ultimately despondent.").

217. BARTH, *supra* note 1, at 61.

his father made a fetish of neatness, and from his father he formed the habit of working on his boat and doing other manual labor in his good clothes, staying clean and tidy all the while.²¹⁸ Todd warns us against inferring that his own neatness, like his father's, is the result of some ideological commitment. Here again, rather the reverse seems to be the case: Todd's fetish seems to have come before the terms in which he tries either to explain or discount it.²¹⁹

In the encounter with the German, these two streams—the unfulfilled need for human contact, traceable to his absent mother, and the aversion to messiness, attributable to his perhaps all too present father—come together with extraordinary force. That the confluence should overwhelm Todd, under the circumstances, is hardly surprising. Nor is it surprising that further problems flow from those old sources through a deepened psychological channel.

That channel is further deepened by another, equally important wartime incident, which West's account of Todd's intellectual life fails to include. As he himself tells it, this incident is closely related to, and ultimately at least as important as, his encounter with the German. It is his discovery that he has a potentially fatal heart condition. Here is how he relates the two:

Of the noises in my life, one of the loudest in my memory is the tiny popping puncture of my bayonet in the German sergeant's neck. . . . To a noise like that, [the intervening] thirty-six years is a blink of the eye. . . .

Of the human voices I have heard, one of the very clearest in my memory is the gravelly, somnolent Missouri voice of Capt. John Frisbee, the Army doctor who examined me after a heart attack just prior to my discharge.²²⁰

After a verbatim account of the doctor's dire diagnosis and prognosis, Todd asks: "Can you understand at once—I neither can nor will explain it—that I was relieved? To say that the puncture had deranged me would be too crude, but—well, I was relieved, that's all, to learn that every minute I lived might be my last."²²¹

In this account, Todd introduces the incident with the German and the Doctor's report in precisely parallel language, implicitly giving them equal

218. *Id.* at 71-72.

219. HARRIS, *supra* note 101, at 21 ("The statement, unlike any Todd makes elsewhere, resembles rationalization; he simply protests too much. He has let the reader get too close to his 'inner' self.").

220. BARTH, *supra* note 1, at 126.

221. *Id.* at 127.

psychological weight. Beyond that, he explicitly links the two with an incremental comment on the foxhole incident: because of what the incident had done to him, he welcomed the prospect of death. The roots of Todd's fixation on death, we are again given to understand, lie deep in the Argonne Forest, far deeper than his later philosophical musings, as West would have us believe.

Death, especially in the form of what Todd calls his Damocletian heart,²²² is indeed his constant preoccupation:

This fact . . . this for thirty-five years has been the condition of my existence, the great fact of my life. . . . This is the enormous question, in its thousand trifling forms . . . toward answering which all my thoughts and deeds, all my dreams and energies have been oriented. . . . This question, the fact of my life, is, reader, the fact of my book as well²²³

It is the imminence of his own death, he tells us, that convinces him that all projects, short term as well as long, have no value for him.²²⁴

This pre-occupation with one's own death as the ultimate question—as Heidegger put it, one's "ownmost potentiality-for-Being"²²⁵—is, of course, the great theme not only of Todd's story but of the existentialist zeitgeist of the era in which Barth both set the story and wrote the novel.²²⁶ Tipping us off very early to this point, Todd warns us not to make too much of the fact that "Tod" is German for death, and that sometimes even his own name is spelled without a second "d."²²⁷

In his retrospective on the re-publication of *The Floating Opera*, John Barth warns against interpreting Todd's "egregious condition . . . as merely psychopathological, as symptomatic rather than emblematic," lest we leave the novel with "no moral-dramatic sense."²²⁸ In this he is surely right.²²⁹

222. *Id.* at 132.

223. *Id.* at 49-50.

224. *Id.* at 50.

225. MARTIN HEIDEGGER, BEING AND TIME 294 (John Macquarrie & Edward Robinson trans., 1962).

226. John Barth, *The Literature of Replenishment*, 245 ATLANTIC MONTHLY 65, 66 (1980).

227. BARTH, *supra* note 1, at 3.

228. *Id.* at viii.

229. The better psychological interpretations of the novel heed or anticipate Barth's warning. *E.g.*, HARRIS, *supra* note 101, at 11-12 (arguing that Todd Andrews is best understood through R. D. Laing's analysis of schizophrenia, which is not a Freudian "literal" interpretation but, more in keeping with Barth's avowedly non-realistic goals, a "humanistic and existentialist approach"); *id.* at 28 (proposing that Todd "is a metaphor for the condition of the artist in modern times," especially this century). *But see* PATRICIA TOBIN, JOHN BARTH AND THE ANXIETY OF CONTINUANCE 22 (1992) (interpreting Todd as a Lacanian obsessional, fixed upon his own death, who "can be wholly comprehended through concepts developed within traditional psychoanalysis").

Todd's associated physical and psychological problems are not merely symptoms of his condition; they lie, literally and symbolically,²³⁰ at the heart of the matter.²³¹ Authentically facing death is the fundamental challenge in existentialist philosophy; as we have seen, Todd eventually realizes that all his philosophical stances are facades, "masks" concealing his fatal heart from his fearful mind.

Courage, etymologically a matter of the heart, is, as Paul Tillich argues in *The Courage to Be*, more than merely one among many moral virtues.²³² In a deeper sense, it has ontological significance as well, for it underlies the answer to the question from Hamlet that continuously worries Todd: To be or not to be?²³³ Without the courage to face that question, no moral life is possible. Courage is, in Tillich's existentialism, the capacity to face authentically the inevitability of one's own death and the absence of externally determined values in the world.²³⁴ Without this ontological kind of courage, this courage at the base of the kind of beings we are, none of the particular moral virtues (including courage in the narrower, moral sense) is possible. The lack of this ontological, pre-moral courage is, ultimately, what is wrong with Todd's heart; it is why his heart has fabricated masks for his mind.

This lack makes *The Floating Opera* an uncomfortable fit in the category of existential novels, a point of which Barth himself was aware, at least in retrospect.²³⁵ As Ihab Hassan rightly notes, the central problem for the hero in such novels

is the problem of identity: not only Who Am I? but also How Can I Be? And How Do I Continue To Be? It is really a problem of freedom: having earned at a great price the courage to *be*, what does one then *do*? What does one choose? Hence the implicit

230. If you are too sophisticated not to be troubled by this straightforward symbolism, you are in good company, or at least the company of the author. In the best post-modern fashion, Barth has Andrews lament the offensiveness of such obvious symbols, even as he laces his narrative with them. It is, as Barth titles the relevant chapter, "An instructive, if sophisticated, observation." BARTH, *supra* note 1, at 109-11; see also Maurice Couturier, *From Displacement to Compactness: John Barth's THE FLOATING OPERA*, 33 *Critique*, 3, 15-16 (1991) ("The parody of the novel as a genre takes also the form of a systematic attack against symbols and laborious coincidences.").

231. See Schickel, *supra* note 114, at 59-60 (interpreting Todd's encounter with the German soldier as an obvious symbol of modern loss of belief.); see also WEISBERG, *supra* note 3, at 75 ("Born in 1900, [Todd] has faithfully followed the patterns of experience of that period.").

232. PAUL TILLICH, *THE COURAGE TO BE* 1-3 (1952).

233. On the important parallels with Hamlet, see Couturier, *supra* note 230, at 17-18.

234. TILLICH, *supra* note 232, at 155.

235. BARTH, *supra* note 1, at viii (suggesting that Todd's position lies beyond that of the existentialist heroes of Camus).

dialectic of destruction, in order to gain freedom—and of creation, in order to achieve identity or being in the void freedom creates.²³⁶

Todd, as we have seen, does not free himself; his final mask is torn away by external events. And he seems to lack thereafter the capacity to choose, because he lacks the ontologically prior courage to be.

He is, like Hassan's typical existential hero, a species of anti-hero. But he does not quite "range[] freely between the poles of demonic self-affirmation . . . and the pole of saintly immolation."²³⁷ Todd's incipiently Nietzschean act of destructive self-affirmation is a resounding dud; once we hear the whimper, he reminds us that, knowing what we know by then of him, we cannot really have expected a bang. His saintliness is no heroic ascetism, but the kind of world-weary cynicism that Nietzsche scorned; his threatened immolation is not self-sacrifice, but suicide. Todd has elements of the anti-hero, to be sure, but in the mold of Hamlet; he does not choose very evil or loss in the end; up to the very end, he simply cannot choose. Todd does, finally, show "an emergent will . . . to meaning, to being," which Hassan takes to be the redeeming message of the existential novel.²³⁸ But what he chooses to do is deeply paradoxical: he writes his own story.²³⁹

On the central question of freedom to choose one's being, the post-war French existentialists famously split. Sartre held a radically absolutist notion of freedom; Merleau-Ponty and others, a more conditional and nuanced understanding.²⁴⁰ This division nicely reflects the split between Todd's thought and his action or, more precisely, between his rationalizing and his living.

When his client and friend, Harrison Mack, professes himself to be sick of life, too weak to accept the loss of his father's millions in the will contest, Todd heaps scorn in an almost paradoxically Sartrean fashion:

Forget about philosophy . . . You don't lack philosophy; you lack guts. . . .

236. Ihab Hassan, *The Existential Novel*, MASS. REV. 795, 796 (1962).

237. *Id.* at 796.

238. *Id.* at 797; see generally Noland, *supra* note 77 (analyzing *The Floating Opera* in its original form, with the more optimistic but less psychologically realistic ending, as an example of Hassan's existential novel).

239. According to Heide Ziegler, Barth uses a parody of the existential novel to explore a paradox of self-referentiality: unless the protagonist within the narrative structure of a novel can create his or her own story, essence will, contrary to existentialist metaphysics, precede existence. See HEIDE ZIEGLER, JOHN BARTH 19-25 (1987).

240. FREDERICK A. OLAFSON, PRINCIPLES AND PERSONS 157-62 (1967); see also HEIDEGGER, *supra* note 225, at 219-24 (describing "thrownness" as a fundamental aspect of human existence); *id.* at 424-55 (describing "historicality" also as a fundamental aspect of human existence).

I know what weakness is. But you make your own difficulties, Harrison. It's hard because you never thought of it as easy. Listen. An act of will is the easiest thing there is—so easy it's laughable how people make mountains of it.²⁴¹

When Harrison objects, "You can't discount psychology," Todd will have none of it: "I'm not saying anything about psychology,' I maintained. 'Psychology doesn't interest me. We act as if we could choose, and so we can, in effect. All you have to do to be strong is stop being weak.'"²⁴² And he addresses the point to us directly: "there's little need for weakness, reader: you are freer, perhaps, than you'd be comfortable knowing."²⁴³

Even in relating to us the very conversation in which he puts his radically voluntarist position to Harrison, Todd undermines that position. Speaking of Harrison, Todd says, "he wasn't ready to be strong of his own choosing yet, apparently."²⁴⁴ The fact is, of course, that Todd himself is less free than he is comfortable admitting, and more troubled by the constraints on his freedom. The very cynicism he is affecting toward his friends is, he realizes later, just the last of the masks he has created to avert his own attention from his death. It was, moreover, a mask that the pressure of outside events ultimately tore off, very much at odds with his conscious wishes. In that sense, the fact of his own death is but one aspect of his human finitude that he wants to transcend. As E. P. Walkiewicz puts it, "What Todd balks at is not simply the death sentence he lives under but all human limitations, the general absurdity of being forced to exist as a creature that can conceive of absolutes and infinite chains of causality yet must die and reproduce like an animal."²⁴⁵

In showing us a thorough-going metaethical skeptic who lacks the radical, Sartrean version of free will, Todd's case illustrates an important philosophical point that West, with her own implicit assumption of free moral choice, fails to note. Metaethical skepticism, with its denial of values grounded in anything other than the human will, holds out, as we have seen, the prospect that values can be grounded in the will itself. That is the essence of Carlyle's "everlasting yea": Things are valuable to us humans as long as we humans value them by devoting ourselves to them.²⁴⁶ In that

241. BARTH, *supra* note 1, at 99-100.

242. *Id.* at 100.

243. *Id.*

244. *Id.*

245. WALKIEWICZ, *supra* note 175, at 15-16.

246. THOMAS CARLYLE, *SARTOR RESARTUS: ON HEROES AND HERO WORSHIP* 138-49 (J.M. Dent & Sons, Ltd. 1973).

sense, it is radically voluntaristic, in a quite traditional understanding of that term.²⁴⁷

Yet—and this is the important point here, and the point elided in both Sartrean existentialism and West's liberalism—a radically voluntaristic metaethics does not necessarily imply a radically voluntaristic psychology. Stated more positively, the human will may be the only possible foundation of values, even if the human will is not entirely or absolutely free. Stated in classic theological terms, salvation can come only through faith, though faith itself comes only through grace, because the will cannot free itself from sin and death.²⁴⁸

If we are to reject on the basis of these psychological observations a radically voluntaristic view of human agency, we must also beware the opposite extreme. To reject West's excessively voluntaristic interpretation of the crucial foxhole incident, and with it her account of Todd's moral development as a whole, is not to embrace a thorough-going determinism. As J. L. Austin has shown us, in our ordinary discourse we only question whether an action is voluntary when something about it strikes us as peculiar.²⁴⁹ My interpretation of the foxhole scene is consistent with Austin's insight that we unquestioningly—and safely—take most actions, most of the time, as voluntary. By contrast, there is much in the foxhole incident, and in Todd's life generally, that is far from normal. More generally, to point to various conditions influencing an agent's reason or will, internal or external, is not to imply that the agent is wholly constrained; it is, rather, simply to show ways in which he is not wholly free, or entirely rational.

247. OLAFSON, *supra* note 240, at 14-15.

248. There is, it should be noted, another possibility, much closer to nihilism proper in its denial of all values, relative as well as absolute. This is the position of the Absurdists. They deny external values, with me and the existentialists, and they deny absolute human freedom, with me and against the existentialists. But they also tend to deny even relative freedom, the liberation through outside intervention that I have identified with the traditional theological notion of grace, and thus the possibility of meaningful life at all. RICHARD HIPKISS, *THE AMERICAN ABSURD: PYNCHON, VONNEGUT & BARTH*, 2-3 (1984) (distinguishing Absurdism from Existentialism). For an interpretation of *The Floating Opera* as an Absurdist work, see *id.* at 79-82. As even Hipkiss concedes, however, Absurdism may be darker than Existentialism, but, at least in the hands of Barth, it is not totally black. *Id.* at 118. More fundamentally, even if a character could lead an Absurdist life, it is difficult to see how an author could without deep paradox write a book putting forward Absurdism as in any sense humanity's real condition. On Absurdist premises, what would be the point and, beyond that, how would making the point be possible? If life were as absurd as the more extreme Absurdists claim, how could they make that clear to us without undercutting their own position?

249. J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975).

Having said that, we are left at the threshold of a serious problem: how are we to explain and understand human actions? This is itself a central theme of Todd's book. Todd, remember, posed for himself at the outset the task of explaining just one thing: his decision in 1937 not to kill himself after all. That account—the one we have before us in *The Floating Opera*—is, he explains, but part of his larger life-inquiry, which is itself the reciprocal of two other, parallel inquiries: one into his father's life; the other, into his suicide.

In the course of this last inquiry, he reports

it became apparent to me after a mere two years of questioning, searching, reading, and staring, that there is no will-o'-the-wisp so elusive as the cause of any human act All this is just more or less laborious research. But it is another thing to examine this information and see in it, so clearly that to question is out of the question, the *cause* of a human act.²⁵⁰

He comes to see the task as impossible, and he attributes the problem to Hume's account of causation: "causation is never more than an inference; and any inference involves at some point the leap from what we see to what we can't see."²⁵¹

What he fails to see is that he is asking the wrong question or, more precisely, seeking the wrong kind of answer. We do not generally ask for the causes of human actions, because, as Todd himself observes elsewhere, we can act only on the assumption that we are free, not part of a closed circle of causation. What we look for in explaining human actions are reasons—unless something is wrong; unless, as we have seen, our normal assumption of freedom seems misplaced.

Yet even when it does, as it does to us in accounting for Todd's odd life, and as it does to Todd in accounting for his father's suicide and his own changes of mind, we usually need an account that lies somewhere between naked, unconditioned choice and wholly determined causation. We need an account of why a person who shares our own kind of conditioned, relative freedom did as he or she did, an account that fits the act in question into a larger pattern, ultimately, into an intelligible life. Paradoxically, that is what Todd has given us. At the end of his story, we know why he did what he did about as well as we believe we can, because we know what kind of person he is, and how he got to be that way. His story parallels, in its causative complexity, what we know about how we are as we are. As I said earlier,

250. BARTH, *supra* note 1, at 218.

251. *Id.*

Todd's story helps us see why, in the realm of human actions, "why" is so hard to see.

Critical reception of the original, more optimistic ending of *The Floating Opera* confirms this point. At the insistence of his editor, Barth brightened the ending in the novel's first edition.²⁵² In that version, Todd did not go through with his attempt to blow up the Floating Opera, discovering something worth preserving and living for in the life of the Macks' small daughter Jeannine. Critics generally found this change of heart unsatisfactory.²⁵³ Perhaps high literary tastes at the time could not tolerate so happy a conclusion; equally likely, they were troubled by the implausibly abrupt alteration in Todd's character. Knowing what they had come to know of him in his story, they could not accept that he could come around so suddenly psychologically, even if he could philosophically. As one of these early critics put it, the philosophy of the original ending was much more convincing than its psychology.²⁵⁴

This takes us back to my critique of West's first point: Todd's logic did not rule his life; it was much more nearly the other way around. His rejection of moral absolutes did not ruin his life and lead him to despair; he embraced the wholly rational rejection of objective value to explain the despair to which his ruined life led him. That he might have valued and found meaning in much that he found around him—his practice of law, his friends, his lover, her daughter—did not require these things to be valuable in themselves, a conclusion he logically reached himself. That he was not able to embrace that position personally—existentially, if you will—had nothing to do with its logical coherence and everything to do with his heart, the physiological and metaphorical core of his being. Knowing Todd as he reveals himself to us in his autobiography, we know how he came to lack the courage to be.

III. AN ALTERNATIVE ANALYSIS: FICTIONAL FRIENDS AND NORMATIVE DIALOGUE

A. *Fictional Friends (and Foes)*

What then, can *The Floating Opera* tell us about the fundamental question of legal ethics? Can a good person be a good lawyer? I have argued that its

252. BARTH, *supra* note 1 (prefatory note to the revised edition of 1967).

253. *Id.*

254. Noland, *supra* note 77, at 17.

essential moral message is not that of either West or Weisberg. Contrary to Weisberg's message, Todd Andrews is neither a good person nor a good lawyer. His neutral partisanship approach to professional life does not redeem his shockingly inadequate personal life. If anything, Todd's brand of professionalism complements, and in complementing casts into still higher relief, the scary detachment of his personal life. On the other hand, contrary to West's message, it is not Andrews' inadequate jurisprudence or, more deeply, his metaethical skepticism, that makes him a bad person. His personal problems precede, rather than follow, his jurisprudential and metaethical positions.

These observations, negative though they are, are not purely destructive; positive insights can be drawn from them. Showing the error of one way, whether it be the way of a character or of a commentator, permits us to channel our energies in another direction. Novels need not be read as encrypted commentaries on philosophical positions or professional ideologies; more strongly, they should not be, on peril of missing their more central messages. More fundamentally, novels ask us to live with other people, to get to know them in the way that we know ourselves, to learn the lessons of their lives as if they were our own.

Read that way, Todd's story is not simply a negative lesson, and the moral of his story not merely a cautionary "this way lies death," or, more in keeping with my analysis so far, "There but for . . . go I." Todd's story, rather, gives us reason to hope that a previously lost soul can be saved, in the way that souls are generally saved: by drawing on their own reserves, capacities derived ultimately from sources outside themselves, and by direct intervention of beneficent others. In this case, as perhaps in all cases, those others are us.

On the other hand, there is another, and not entirely positive, lesson to be learned here: helping others is a dangerous chore, not to be undertaken glibly or incautiously. Todd very much needs the help of others, but the others who have tried to help him in the novel have been very seriously harmed. In a deeply paradoxical way, Todd's interactions with others in the novel, particularly those who are closest to him, confirms for us outside the novel that his fears of human intimacy are not entirely unfounded. Some people with whom we might become intimate—Todd himself perhaps chief among them—can hurt us very much. We can never be quite sure, in Todd's case, whether he is a lost sheep or a wolf in sheep's clothing. Indeed—and this is the really disturbing prospect—he and many another we feel called upon to help, in our lives in a caring profession and as caring people, may be both. Beyond that, we who would prepare ourselves by studying literature

have another snare to be wary of: Barth the creator may be as treacherous as his creature Todd.

Additionally, there is a reciprocal danger suggested in Todd's story. Todd, as we shall see, was always suspicious of those who would help him, particularly his closest friends. Seeing their ministrations through his eyes, clouded as they are by a species of paranoia, we cannot be clear how mixed their motives are. Yet Todd presents ample evidence to raise our suspicions that they are as much using him to serve their ends as they are serving him and his. We are uncomfortably reminded that those who help are dangerously well positioned to help themselves, in all the various meanings of that pregnant phrase. Nevertheless, we must reach out, mindful of the dual danger of hurting and being hurt, or we cannot be the kind of people that, in dialogue with each other and our best moral traditions, we want to be.

In what follows, I expand upon these points. First, I examine the signs of hope in Todd's story, the indications that he may be at the verge of transcending his principal problem, his difficulty of meaningfully relating to others. Then I sound a cautionary note, exploring not only the dangers he and his creator may pose, but also those that may inhere in any effort to help. Finally, I suggest that, despite these dangers, reaching out to Todd and to Barth, embracing them and their story (albeit cautiously!), may well be the appropriate moral answer for us, even if both, character and creator, mean us harm.

1. The Hope of Helping Todd

By the end of his story, Todd seems genuinely to have come to terms with the imminence of his death, from which he says all his ideological masks have been designed to shield him.²⁵⁵ He awaits a doctor's report on his heart condition with equanimity, and he says, on the final page, "Even if I died before ending my cigar, I had all the time there was."²⁵⁶ Even the realization that his equipoise is provisional does not disturb him; he reflects that it works "at least for the time being; at least for me."²⁵⁷

But what he says he will do with the time that remains to him is less encouraging. If he has faced down death, he still seems unable to face up to life. He plans, he tells us, to resume his reciprocal inquiries, his explanation to himself of why his father committed suicide, and his explanation to his

255. BARTH, *supra* note 1, at 223-27.

256. *Id.* at 252.

257. *Id.*

father of why he himself did not.²⁵⁸ Even at the end, he seems on the brink of lapsing back into his endless, life-avoiding analysis: "I would take a good long careful time, then, to tell Dad the story of *The Floating Opera*. Perhaps I would expire before ending it; perhaps the task was endless, like its fellows."²⁵⁹

He projects that his life will continue in its present rut: "I would *in all probability*, though not at all necessarily, go on behaving much as I had thitherto, as a rabbit shot on the run keeps running in the same direction until death overtakes him."²⁶⁰ Having dismissed Hamlet's question as meaningless, he ironically follows Hamlet in substituting inquiry for living. He has yet to learn the lesson of the wise but world-weary Solomon: "Of making many books there is no end; and much study is a weariness of the flesh."²⁶¹

And yet, significantly, it is not his father to whom he has told the story of *The Floating Opera*; it is us.²⁶² Throughout the story, he has been addressing himself, not, like the Prince of Denmark, to his dead father or to the impersonal pages of a personal journal, but to a living audience of other people, you and me.²⁶³ He has appealed, not to the solipsistic standards of a floating opera, but to the shared standards of dialogue. Unlike other notorious literary note-takers,²⁶⁴ Todd has not only created a finished whole; he has given it to us. There may even be hope in the title he chose.²⁶⁵ *The*

258. *Id.*

259. *Id.*

260. *Id.* at 251.

261. *Ecclesiastes* 12:12 (Revised Standard Version).

262. See Patrick Haney, *John Barth: The Floating Opera*, in *CRITICAL ESSAYS ON JOHN BARTH*, *supra* note 77, at 73 (finding evidence of hope in the ending, especially in Todd's having written a book); see also WALKIEWICZ, *supra* note 175, at 14-29 (suggesting that Todd's obsessive concern with control ultimately leads him past nihilism to solipsism, the creation of an alternative universe, which was also a concern of Barth himself). Walkiewicz sees the writing of the novel is a critical move for Todd because it is a step away from inquiry and description and into creation of an alternative universe. *Id.* at 26-28. But if a novel is an alternative universe, the first-person narrated novel is a move beyond solipsism, since it is addressed to readers "out there," thus implying a common world outside the writer's mind.

263. Couturier, *supra* note 230, at 6-7 ("In fact, it is the reader who must take the place of the father and put on his mask: the reader is and must be the absent/present addressee of Todd's self-explanation."); see also GORAK, *supra* note 212, at 150 (rejecting wholly negative interpretations of *The Floating Opera* because they "ignore[] . . . Todd's aspiration to create a work that will celebrate a common world, a task requiring that he unpeel his mask of mastery and replace it with a more hesitant and less absolute point of view").

264. Cf. Dr. Casaubon, the cadaverous and fraudulent scholar whose worthless work nearly devours the protagonist in *Middlemarch*. See GEORGE ELIOT, *MIDDLEMARCH: A STUDY OF PROVINCIAL LIFE* (1930) (original publication 1871-72), and the comically caricatured German scholar whose patched-up notes we have fictively redacted in Carlyle's *Sartor Resartus*.

265. GORAK, *supra* note 212, at 156 (analyzing positive aspects of title).

Floating Opera within the text, after all, is not merely a meaninglessly drifting tale told by an indolent, as Todd's initial explanation of his title implies.²⁶⁶ It is, rather, a series of carefully scheduled performances on a well-planned itinerary, all presided over by a benevolent captain solicitous of the safety and enjoyment of his guests.²⁶⁷

Todd himself has been quite solicitous of our comfort and interest, "like a host fussing over a guest,"²⁶⁸ and, to all appearances, as candid as he could be about very personal matters.²⁶⁹ By the end of his story, we are inclined to take him at his word, and to meet him halfway. We know him by then to have many engaging qualities: He is a clear analyst, a clever raconteur, and in many ways a charming fellow all around. To academics, he is especially appealing: The one thing he never ceases to love and celebrate, even in his most cynical phase, is the excellent education he got at Johns Hopkins, in the grand tradition of the great German universities.²⁷⁰ He went there out of filial devotion, and he kept his heart condition from his father to avoid causing him undue pain.²⁷¹

To be sure, some of the thoughts and actions he reports are genuinely shocking—most saliently, his plan to blow up the floating opera. But what makes them particularly appalling is that they are the doings not of an obviously malevolent crank or psychopathic manic, but of a strikingly likeable fellow, someone whom the very townsfolk he is about to destroy seem genuinely, and by no means altogether ill-advisedly, to like. We come to think—and in the very way he addresses us, he gives us some reason to believe—that we could talk him out of his bizarre idea, if he hasn't already dropped it, that we could help him, or at least get him help. We feel we have a good sense of what his problems are and that, even if we ourselves could not solve them, someone else perhaps could. Even if we don't entirely like him, we come to take him seriously as a person.²⁷²

266. BARTH, *supra* note 1, at 6-8.

267. All this becomes clear when Captain Adams, the owner and stage-manager of the Opera, takes Todd and the Macks' daughter Jeannine for a tour of the boat in Chapter 22.

268. BARTH, *supra* note 1, at 2.

269. *Id.* at 3 ("If I tell you that I've figured some things out, Ill tell you what those things are and explain them as clearly as I can [to you]."); *see also* Couturier, *supra* note 230, at 5 (from the beginning "we feel that he desperately needs to make contact with someone").

270. BARTH, *supra* note 1, at 130.

271. *Id.* at 129.

272. *See* Stanley Edgar Hyman, *John Barth's First Novel*, in CRITICAL ESSAYS ON JOHN BARTH, *supra* note 77, at 75, 76 ("Barth's feat has been to make this shallow and conventional Maryland gentleman . . . not only interesting to us but important.").

2. The Risk of Helping Todd

If we know that the signs of hope in *The Floating Opera* are a small beginning—that, as one commentator observed, “it is potential rather than achievement that emerges as the overriding impression of the book”²⁷³—this is by no means the worst of it. We also know, by the end of Todd’s story, that he is a very slippery, almost diabolical, character, one who is capable of doing serious harm, sometimes quite calculatedly, to those who care enough for him to get emotionally close to him.²⁷⁴ The closer others get, in fact, the more harm he seems inclined to do. This is amply borne out in several intimate relationships: with the young woman with whom he had his first sexual experience; with old Mr. Haecker, one of his elderly neighbors at the hotel; and especially with the younger Macks, Harrison Jr. and his wife Jane, for whom he litigated the scatological will case.²⁷⁵

Andrews’ first consummated sexual experience was on his seventeenth birthday, in his father’s house, with Betty June Gunther, a somewhat older classmate. According to him, “[s]he was not considered unattractive in my set, though socially she was certainly of an inferior caste.”²⁷⁶ Her chief attraction lay in her greater sophistication. Although Todd had long lusted after her from a distance, his real relationship with her began when she became infatuated with his twenty-seven-year-old neighbor. To be near the neighbor, she began spending afternoons with Todd, talking with him about her unrequited love.

Todd, who begins this account with the observation that “my mother having died when I was seven, I grew up under the inconsistent tutelage of my father and a succession of maids and housekeepers,”²⁷⁷ found these conversations intoxicating:

I was violently sympathetic, and helping her articulate her grievances I discovered that I could converse more easily and naturally with her than with anyone in my experience: there was no stultifying embarrassment, as there was with other girls, nor was

273. GORAK, *supra* note 212, at 156.

274. As Gorak observes, Todd becomes “a sort of God by virtue of his superior rationality,” but “[u]ntil he writes his *Floating Opera*, Todd’s godliness is a matter of pure power, of using real people as pawns on his private chessboard.” *Id.* at 151. Such a god is, of course, a very devil, violating the foundation of humanist ethics, treating others as ends in themselves, rather than as means only. See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 47 (Lewis White Beck trans., Robert Paul Wolff ed., 1969) (1785).

275. Hyman, *supra* note 272, at 75, 76-77 (noting sadistic aspects of these relationships); see also Noland, *supra* note 77, at 17 (following Hyman’s assessment of Todd’s sadistic tendencies).

276. BARTH, *supra* note 1, at 118.

277. *Id.* at 115.

there the necessity to impress that falsified all my communication with my male companions. Moreover, the things Betty June discussed were of a new and thrilling order²⁷⁸

It was to these conversations with Betty June, even more than to their eventual sexual intercourse, that Todd attributed his loss of innocence.²⁷⁹

Todd professes profound gratitude to Betty June for the gentleness and warmth with which she took his "spiritual virginity."²⁸⁰ Many of their conversations, however, took a distinctly sado-masochistic turn. Betty June, herself with no father and a mother of dubious repute, bespoke her love in willingness to be beaten by her lover for want of kinder attention. She and Todd fantasized together various tortures and violent deaths for her to undergo as proof of her devotion.²⁸¹ When she finally fell into Todd's arms upon learning that her lover was secretly married and soon off to war, Todd responded with a false but apparently convincing facade of bodice-ripping bravado.²⁸² She calls his bluff—or he, hers—and they engage in vigorous adolescent sex, only to be interrupted when Todd catches their reflection in the bedroom mirror.

He erupts in uncontrollable laughter, unable not only to continue love-making, but also to answer Betty June's increasingly distressed questions, to console her when she cries, or to stop her when she leaves.²⁸³ This was, he reports, his first encounter with his own animality; his experience in the Argonne Forest was the second.²⁸⁴ In his estimation, his uncontrollable hilarity was entirely appropriate, and, he implies, not further analyzable. In this context, however, we cannot help but suspect that it has to do with his profound difficulty in achieving and maintaining intimate human contact. His emphasis on his animality serves as a shield, a way of refusing to reveal his full humanity, to take the full risk of human intimacy.²⁸⁵

That, however, is not the worst of it for his paramour, who descends rapidly into prostitution. When Todd encounters her by chance in a Baltimore brothel during his riotous student days six years later, she attacks him with a broken bottle. Reflecting later on that sequence of events, Todd

278. *Id.* at 119.

279. *Id.*

280. *Id.*

281. *Id.* at 118.

282. *Id.* at 121-22.

283. *Id.* at 123.

284. *Id.* at 124.

285. See HARRIS, *supra* note 101, at 15 ("His stance is of course defensive, a means of enclosing that which is physical and emotional in a humorous, therefore rational, frame."). Cf. Hyman, *supra* note 272, at 75, 76-78 (inferring latent homosexuality from aversion of female animality).

himself realizes—without any very striking evidence of remorse—“that I had done to Betty June a thing warranting murder at her hands.”²⁸⁶

Todd’s effort to distance himself from his elderly neighbor, Mr. Haecker, is even more devastating. Mr. Haecker is one of an assortment of elderly eccentrics with whom Todd hangs out at his hotel; they form a loosely organized pre-breakfast kaffeeklatch, which Todd dubbed the “Dorchester Explorers’ Club.”²⁸⁷ At seventy-nine, Mr. Haecker is intensely aware of his impending death, and greatly at pains to make the best of old age.²⁸⁸ As a retired high school principal, he ransacks the classics for comfort, citing Cicero on the advantages of advanced years, but with a pitiable lack of conviction.²⁸⁹ Todd realizes that Haecker is only fooling himself,²⁹⁰ but he fails to notice that the old man’s self-deception is very much what he himself is about.

This becomes clear in a discussion between the two of them on the very day Todd plans to die. Mr. Haecker, won over by Todd’s bonhomie and evident erudition, comes down to Todd’s room and confides his fear.²⁹¹ Todd titles this chapter “A matter of life and death,”²⁹² and both the content and emotional intensity of the conversation resemble a Socratic dialogue. Furthermore, the parallels between Todd and Haecker are many and obvious.²⁹³ Both live alone, and both incline to scholarly allusion. Mr. Haecker has kept a voluminous personal journal; Todd has his interminable inquiries. In their conversation on the meaning of life, Todd finds it revolting that Mr. Haecker keeps retreating from honest discourse about death behind various inauthentic masks;²⁹⁴ in the very next chapter, Todd comes to the shocked realization that all his own intellectual positions have been only masks to hide his mortality from himself.²⁹⁵

Even so, Todd never quite sees the similarity of their predicaments, and, perhaps in unconscious revulsion from that realization, he treats the old man brutally. Todd’s flawed logic, which he himself abandons later in the day, presses the old man to suicide.²⁹⁶ Yet it is as much Todd’s lack of sympathy

286. BARTH, *supra* note 1, at 142.

287. *Id.* at 12.

288. *Id.* at 12-14.

289. *Id.* at 12, 14-15.

290. *Id.* at 47-48.

291. *Id.* at 162-69.

292. *Id.*

293. HARRIS, *supra* note 101, at 22-23.

294. BARTH, *supra* note 1, at 162-69.

295. *Id.* at 223-24.

296. *Id.* at 248-49.

as his unnecessarily brutal honesty that undoes Mr. Haecker.²⁹⁷ Against all better judgment, Todd virtually dares Mr. Haecker to kill himself; the old man's suicide note, a marginal annotation to the passage in Hamlet that Todd recommended, is transparently a rejoinder to his tormentor.²⁹⁸ Intent on his own self-destruction, Todd was not only indifferent to the despair of someone who actively sought his help; he also knowingly increased his fellow's desperation.

It is in his relationship with the Macks, however, that Todd's dangerously diabolical side comes most to the fore. He introduces the Macks with this observation:

She was, indeed, my mistress, and a fine one. To make the triangle equilateral, Harrison Mack was my excellent friend, and I his. Each of the three of us loved the other two as thoroughly as each was able, and in the case of Jane and Harrison, that was thoroughly indeed.²⁹⁹

Todd's case, however, was quite another matter, as he himself is careful to explain: "The truth is that while I knew very well what copulation is and feels like, I'd never understood personally what love is and feels like."³⁰⁰

Todd is remarkably perceptive about how the affair began and about the likely course it would take. Harrison and Jane concoct a plan to seduce him on a sailing trip; Todd convincingly analyzes their motives as a mixture of radical chic and extreme comradeship, both mostly on the husband's part.³⁰¹ For his own part, Todd claims that analysis was the affair's principal interest: "I scarcely regarded myself as involved in it at all: my curiosity lay entirely in the character of Harrison and, to a lesser degree, of Jane."³⁰² Indeed, in telling of the affair, Todd insists that "the whole purpose of the digression was to explain why it was that I was incapable of great love for people, or at least solemn love."³⁰³

But he has an uncanny ability to draw others to himself, and, when his relationship with the Macks gets uncomfortably close, Todd takes dramatic and markedly cruel steps to curtail it. He ends the first phase of the affair by suggesting to the deeply prejudiced Harrison that he is sleeping with one of his lower-income Black clients;³⁰⁴ he ends the second phase by suggesting to

297. WEISBERG, *supra* note 3, at 77 (referring to Todd's "brilliantly cold rejoinder").

298. BARTH, *supra* note 1, at 248-49.

299. *Id.* at 19.

300. *Id.* at 36.

301. *Id.* at 26-34.

302. *Id.* at 36.

303. *Id.* at 43.

304. *Id.* at 39-42.

Jane that she sleep with Captain Osborn, another of his elderly neighbors.³⁰⁵ These steps manifest not only an indifference to his effect on the Macks, but also an unmistakable delight in discomfiting and even distressing them. There is at least a hint that he is driven, perhaps by his mother's death and his father's suicide, to leave before he is abandoned, to hurt before he is injured, and there is something of an echo here of his episode with the German sergeant. But whatever its origin, Todd's tendency to break off relationships involves a quite conscious cruelty, and the effects on the Macks are painful and profound.³⁰⁶

On the evening of the night Todd tries to blow up the floating opera, the Macks announce to him their intent to leave the country for an extended trip abroad.³⁰⁷ The purpose is clearly to make a clean break with him;³⁰⁸ when they return, it is to suburban Baltimore, not to rustic Dorchester County, where Todd lives.³⁰⁹ This announcement seriously unsettles him; it is only in its wake that he contemplates venturing beyond suicide to mass murder.³¹⁰ When he envisions the wreckage he plans to wreak aboard the floating opera, the Macks' bodies are among those he particularly imagines: "Calmly I thought of Harrison and Jane: of perfect breasts and thighs scorched and charred; of certain soft, sun-smelling hair crisped to ash. . . . I considered a small body, formed perhaps from my own and flawless Jane's, black, cracked, smoking."³¹¹

If he cannot manage to be close to the Macks, neither can he bear to be away from them; if the relationship is to end, he must be the one to end it, violently if necessary.³¹² This is not the despairing self-immolation of a rigorously consistent nihilist; it is the desperate murder-suicide of a frustrated lover. Jealousy links the murder and the suicide even more closely than is apparent on the surface, for Todd admits that Harrison is essentially his alter-ego: "I might even say that if this were a rational universe and if I could be any person I chose, I should not choose to be Todd Andrews at all. I should choose to be very much like my friend Harrison Mack."³¹³

305. *Id.* at 44-45, 48, 146.

306. *Id.* at 39-42, 153-55, 160.

307. *Id.* at 206.

308. *Id.* at 206-09, 247.

309. *Id.* at 247.

310. *Id.* at 206-45.

311. *Id.* at 243.

312. See WEISBERG, *supra* note 3, at 77 ("The 'unlogical' impetus for Todd's death wish, when all the novelistic evidence is examined, is sexual rejection . . .").

313. BARTH, *supra* note 1, at 150. Cf. Hyman, *supra* note 272, at 78 (analyzing Todd's relationship with the Macks as "an affair with a man variously disguised as an affair with a woman

And no wonder: Todd elsewhere describes Harrison as “a fine, muscular, sun-bronzed, gentle-eyed, patrician-nosed, steak-fed, Gilman-Schooled, soft-spoken, well-tailored aristocrat.”³¹⁴ Those of us who would help Todd from the wings are on severest notice: If he finally goes down, he may well manage to take those closest to him along.

Yet the Macks, who were closest to him in the novel, are not entirely without fault, as they themselves conceded,³¹⁵ and there is a warning for us in that as well. By their own admission to him, they intended their *ménage à trois* initially as a test of their love for each other, a token of their transcendence of middle-class convention,³¹⁶ what Harrison defensively belittles as “[t]he ‘one-and-only-and-always’ idea.”³¹⁷ Minutes after seducing Todd, Jane won’t hear of his loving her; it is, she insists, to be a friendly affair, just for fun.³¹⁸

Nor is this Todd’s first experience that proffered affection may be deeply self-serving: Mary June’s emotional advances to Todd were strictly incidental to getting closer to her true beloved, and her initial physical advances were teases, if not taunts, born more of frustration than affection.³¹⁹ And Todd found it possible to get close to his father only after fulfilling the latter’s wish for him to go to Hopkins and Maryland law school and to return to practice law in the family firm.³²⁰

Thomas Shaffer has made a compelling case that the more we lawyers approximate being genuine friends with our clients, the more good we can do them, and the more personally fulfilled we are likely to be.³²¹ But there is a downside here as well, as Shaffer himself warns: the closer we are, the more vulnerable we are to each other: the more they can hurt us, and we, them.³²² Nowhere is this more true, for example, than in the area of sexual relations

... in which two male friends attain symbolic union by sharing the body of a woman”); *see also* Noland, *supra* note 77, at 17 (following Hyman’s analysis).

314. BARTH, *supra* note 1, at 20-21.

315. *Id.* at 156-57.

316. *Id.* at 210-12.

317. *Id.* at 35.

318. *Id.* at 26-29.

319. *Id.* at 121-22.

320. *Id.* at 221; *see also id.* at 73 (“[I]t had been assumed from earliest memory that I was to study for the Maryland Bar and enter Dad’s firm, and I never protested.”); *id.* at 128-29 (Todd’s father’s proposal of Todd’s education and career path, and the elder’s being overwhelmed when the younger announced his acceptance of them).

321. SHAFFER, *supra* note 11, at 21-33. West herself eloquently generalizes this point: “As valuable, as pleasurable, as life-sustaining, and as central to our moral lives as most of these connections with others obviously are, however, some of the connections that characterize intimate and private life carry tremendous potential for harm.” WEST, *supra* note 158, at 2.

322. *Id.* at 28-32.

between lawyer and client³²³ and between faculty and student.³²⁴ Nor need the relationship be sexually intimate for the damage to be seriously deep—remember Mr. Haecker.

Here the Macks' dealings with Todd reveal a further problem with would-be rescuers: not only may their motives be mixed, their methods may be unorthodox in ways that are dangerous to both themselves and their intended beneficiaries. Monogamy may or may not be natural,³²⁵ and either way it is no stronger candidate for absolute goodness than any other human institution. But Todd and the Macks' extreme anguish at glibly assuming they could transcend a mere social convention recalls the dictum of Bradley: "to wish to be better than the world is to be already on the threshold of immorality."³²⁶ Here is a hint that natural law, or something very like it, may have an irreducible role in moral and political life, though hardly the role its more ambitious advocates advance. Even if we can never derive a moral "ought" from a naturally occurring "is," a moral imperative from a fact of nature, it is nevertheless true that these facts—the "is"—very definitely condition what is humanly possible, the "can." The "is" may never produce the "ought," but it frequently restricts the "can." One need not be as conservative as Burke to suspect that ancient institutions, whatever their pedigree, may be disturbed at our peril, particularly when we act on our own wisdom alone.

This presents a deeper danger in Todd's predicament, one that lies closest to the way out that he discovers and that I am recommending. In a world lacking in absolute values, we are free, within the confines of our character and our culture, to construct the set of values we will live by, to try to expand if not transcend our personal and social limitations. In the Socratic tradition, as J. B. White has eloquently argued, the way forward into this new and better world is through dialogue with our friends.³²⁷ That way forward is not paved on the bedrock of any absolute values, but laid on the even keel of mutual, if provisional, assent.

It may well be too ambitious to hope, as the civic republican movement fervently does, that this process can be expanded to include the entire

323. ABA/BNA Lawyers' Manual on Prof'l Conduct 51:407-410 (2000) (collecting and analyzing State Ethical Code Prohibitions); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 364 (1992).

324. Eileen N. Wagner, *Fantasies of True Love in Academe*, CHRONICLE OF HIGHER EDUC., May 26, 1993, at B1-B3.

325. See ACKERMAN, *supra* note 180.

326. F. H. BRADLEY, *ETHICAL STUDIES* 199 (2d ed. 1927).

327. White, *supra* note 22, at 871.

political community of a modern nation-state.³²⁸ But those of us who argue for moral communities on a smaller scale must beware: if the problem of normative disagreement expands exponentially as the community grows, so the danger of moral self-delusion expands as the community shrinks. Love may have reasons of its own, but these may not bear the scrutiny of a wider circle of friends. We may well thrill to Luther's declaration that popes, princes, and councils all have erred, but we would do well to remember the Emperor Charles's reply: Are you alone wise? Socrates's moral deliberations, it is worth recalling, took place in neither the closet nor the cloister, but in the daylight of the marketplace, and he welcomed as friends anyone who would join him in a spirit of open inquiry and mutual moral concern.³²⁹

That, of course, only raises again our original problem: knowing the danger of betrayal, what are we to do about Todd; more generally, whom shall we take to our bosom? Even Socrates, after all, had his Alcibiades, and Jesus, his Judas Iscariot. From the beginning, dialogue has been dangerous, especially with a disguised and insinuating devil.³³⁰ As Todd unforgettably learned with Mary June, discussing intimate things is an easy, if not inevitable, route to intimacy. As he learned with Jane, exposing one's vulnerability, even impotence, is a source of vast psychological power.³³¹ The serpent was never more subtle.

One obvious way of deflecting the question, of course, is to dismiss Todd as a fictional character. A fundamental tenet of the law and literature movement is that, by opening ourselves up to characters in fiction as if they were real, by empathetically sharing in their experiences, albeit fictional, we can deepen and broaden our own experience.³³² Though Todd is not "real," so the argument would run, there are others like him; dealing with him helps us anticipate dealing with them. This is not, in the nature of the case, a

328. Compare Frank Michelman, *The Supreme Court, 1985 Term - Foreword: Traces of Self-Government*, 100 HARV. L. REV. 1, 21-22 n.96, with Stephen G. Gey, *The Unfortunate Revival of Civil Republicanism*, 141 U. PA. L. REV. 3, 801 (1993) (criticizing contemporary civic republicanism on this and other grounds).

329. See *Apology*, in GREAT DIALOGUES OF PLATO, *supra* note 187, at 423, 426-30.

330. *Genesis* 3:1-7.

331. BARTH, *supra* note 1, at 27-28.

332. See WEISBERG, *supra* note 3, at 3-5, 41; WEST, *supra* note 3, at 17-23, 175; see also WAYNE C. BOOTH, *THE COMPANY WE KEEP* 157 (1988) (demonstrating that this thesis is not unique to the law and literature movement, but central to ethical criticism generally).

proposition that can be proved abstractly.³³³ One is tempted to say, it works for you or it doesn't.

And yet, I think, we must resist the temptation to dismiss skeptics too quickly here, for here the ranker forms of philistinism may, whatever their source or motive, bring us to the threshold of a very real problem. It may well be that empathizing with fictional characters generally, and Todd in particular, works for us because we are in a real way deluding ourselves, or being deluded.

To give these doubts their due, notice that several relationships of trust are simultaneously operating on parallel planes as one reads *The Floating Opera*.³³⁴ Within the novel, Todd brings the Macks to trust him, to befriend him and love him. In reading his account of that relationship, we as readers enter into a relationship of wary trust with Todd the story-teller. He is, as we have seen, an unreliable narrator. He is our only source of information in the story, yet his very narration reveals inconsistencies between his various affirmations and between his affirmations and his actions. These inconsistencies arouse our suspicions and put us on our guard. As he insinuates himself into the Macks' confidence, only to play cruel jokes on them, we begin to wonder if he isn't doing the same with us.³³⁵ On that very point, he teases us. He tells us he cultivates a paradoxically consistent inconsistency in all aspects of his life, chiefly for the pleasure of ensuring that his fellow townsfolk never fully comprehend him, and he avers that this is an important aspect of his charm.³³⁶ He also tells us of the Macks that "they'd believe anything I told them."³³⁷ As Richard Weisberg rightly observes, "the reader is possibly more likely than Todd's fellow characters to be manipulated into a too-facile acceptance of the protagonist's statements."³³⁸ This obviously counsels in favor of the healthy distance I have already recommended, one of the lessons I have suggested that we draw from the novel.

But at this very point it is important to note a third relationship. Paralleling the relationships between the Macks and Todd, the character, and between us and Todd, the narrator, is the relationship between us and Barth,

333. BOOTH, *supra* note 332, at 162-66; *see also* ARISTOTLE, *supra* note 18, at 159-60 (insisting that no more clarity be required in ethical and political philosophy than their subject matter allows).

334. BOOTH, *supra* note 332, at 125-55.

335. HARRIS, *supra* note 101, at 18 ("Todd-the-character lies to the Macks to protect his 'real' inner self. Todd-the-author lies to his audience for the same reason."); *id.* at 23 ("*The Floating Opera* is largely lies posing as autobiography.>").

336. BARTH, *supra* note 1, at 57-58, 125.

337. *Id.* at 41.

338. WEISBERG, *supra* note 3, at 74.

the author.³³⁹ Analogous to the deceptions we see Todd foist on the Macks, and which we begin to suspect he may be trying to foist on us, a grander hoax may be at work here: Barth himself may be laughing up his authorial sleeve.³⁴⁰ He may have gulled us earnest, middle-class readers—real-world counterparts of the Macks—into taking seriously a surreptitious send-up of a cherished bourgeois institution.

If the novel, that proto-typically bourgeois institution, has come conventionally to be recognized as a medium for questioning middle-class values, could not a novel that explicitly questions the root of all value be a spoof on the value of all questioning, or at least of the novel as a means of such questioning? Friendship, Todd tells his putative friend Harrison, is ridiculous, even if it is not impossible.³⁴¹ Could Barth be making the same point about fiction, at the expense of his over-earnest readers?³⁴² Are we at risk, not only of being taken in by Todd, as the Macks were, but also of being taken in by Barth, in a much more fundamental way?

Ultimately, I think not, for reasons I shall take up in the final section of this part. But before I explain why not, I must first say a bit more about how real the risk is. So far, I have only given a kind of internal evidence of the risk, in the three parallel relationships I have identified. There is external evidence as well, both in Barth's other work, fictional and critical, and in the literary culture of which his fiction and criticism are very consciously a part.

Barth is self-consciously a writer of meta-fiction, of fiction that is self-conscious of itself as fiction and that questions the traditional role of fiction.³⁴³ In its effort to explore the farthest fringes of its sphere, and to call

339. Couturier, *supra* note 230, at 6-7 (comparing relationships among Todd, his father, Barth, and us).

340. *Id.* at 6 ("Barth has succeeded . . . to block the process of narrative communication and to burden his reader with an impossible task: namely, to extricate himself from the lures of the text or rather of the texts."); *id.* at 13 ("*The Floating Opera* can be read as an autopsy of the genre [the novel] since Richardson.>").

341. BARTH, *supra* note 1, at 41.

342. John Barth, *The Literature of Exhaustion*, 220 ATLANTIC MONTHLY, 29, 31 (1967) (praising Jorge Luis Borges's "Pierre Menard, Author of the *Quixote*," as "a remarkable and original work of literature, the implicit theme of which is the difficulty, perhaps the unnecessary, of writing original works of literature").

343. Couturier, *supra* note 230, at 3 ("Barth's first novel, *The Floating Opera*, is perhaps above all a metafictional novel; the status of the text and of the narrator is uncertain and keeps changing; the referential layers, including the one concerning the writing proper, keep overlapping; the intertext is massively mobilized at all levels."); MAX F. SCHULZ, THE MUSES OF JOHN BARTH: TRADITION AND METAFICTION FROM *LOST IN THE FUNHOUSE* TO *THE TIDEWATER TALES* xii (1990) ("The literary preoccupation of his lifetime has been the metafictional concerns of self-reflexivity and intertextuality."); Richard K. Sherwin, *Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543, 589 n.158 (1988); see also ZIEGLER, *supra* note 239, at 19-20; GORAK, *supra* note 212, at 146-47 (acknowledging Barth's awkward place as a post-modernist,

into question not just the boundaries but also the heartland of its traditional scope, such fiction, like modern art generally, poses an inherent problem: in its very essence, it is difficult to distinguish from fraud.³⁴⁴ More than one literary-critical account has concluded that much of Barth's fictional corpus is a hoax,³⁴⁵ perhaps in *The Floating Opera*, Barth's first novel, we have in the bud what later appeared in fuller flower.³⁴⁶ From the initial reviews, its fraudulence was suspected, though doubts were generally resolved in its favor.³⁴⁷

If one is an ambitious young novelist, convinced that the Great American Novel has already been written—or that the opinions of one's elders on the point cannot be changed—one might be tempted to write the Novel to End All Novels.³⁴⁸ The anxiety of influence, to borrow Harold Bloom's phrase, may press one to destruction or deception as well as to transcendence. First

given his insistence on "telling the whole story," against postmodernism's antithesis to what went before, and his insistence on godlike creativity). In a later, more overtly metafictional work, *Letters*, Barth explores his relationship with Todd through the device of an exchange of letters, in which Todd accuses Barth of plagiarizing the novel. Couturier, *supra* note 230, at 9; SCHULZ, *supra*, at xiii-xiv. For Barth's own assessment of postmodernism and his place within it, see Barth, *supra* note 226, and *supra* note 342.

344. David Luban, *Legal Modernism*, 84 MICH. L. REV. 1656, 1657-58 (1986).

345. This view is spelled out most extensively in a watershed commentary by Le Clair, *supra* note 203; see also Earl Rovit, *The Novel as Parody: John Barth*, 6 CRITIQUE 77, 82-84 (1963) (faulting Barth's *The Sot-Weed Factor* for being "a conjuror's trick of deception" and "a joke upon the reader," who has been "cheated of the honest confrontation with the basic questions of his own secret soul that Barth's talents had led him to expect"); David Lodge, *This Way to the Folly*, N.Y. TIMES, May 30, 1980, at 607 (reviewing John Barth's *Letters*) (noting the danger of philistinism but nevertheless dismissing *Letters* as "a literary folly: an eccentric and extravagant production, breaking most of the rules of good taste and conventional aesthetics, plagiarizing and freely adapting an obsolete form, mixing incompatible styles, recklessly self-indulgent and self-delighting," but ultimately "not an authentic contribution to the developing tradition of an art form, being parasitic upon the past and sterile as regards the future").

346. This is Le Clair's thesis. Le Clair, *supra* note 203, at 711.

347. Orville Prescott, *Book of the Times*, in CRITICAL ESSAYS ON JOHN BARTH, *supra* note 77, at 71 ("It is difficult to know just how seriously Mr. Barth expects his readers to take the ideas in a story that, after all, is basically a frenzied farce. But they are developed at such length that I suspect Mr. Barth sets much store by them.")

348. TOBIN, *supra* note 229, at 31 (making an extensive comparison of Barth to Joyce, and *The Floating Opera* to *Portrait*, in Bloomian terms, the central aim of which is to frame the realistic and tragic with the maturer comic, at which *The Floating Opera* only partly succeeds). And Barth can perhaps be made to testify against himself here:

There is a kind of mentality — I'm afflicted with it — which delights in setting itself increasingly complicated tasks to see if one can bring them off: raising the bar ever higher on the jump to see if one can clear it with some brio and grace, and perhaps passion as well.

TOM LECLAIR & LARRY MCCAFFERY, ANYTHING CAN HAPPEN, INTERVIEWS WITH CONTEMPORARY AMERICAN NOVELISTS 17 (1983).

novels notoriously tend to be autobiographical; Todd's deceptive and destructive impulses may reflect something in his creator.

Barth's muse, he is fond of saying, is Scheherazade;³⁴⁹ she, you will recall, engaged her captor husband with the tales of the Arabian nights. She told her tales to delight and seduce; she lived under a constant death sentence if they failed.³⁵⁰ For her tales to work, they had to be engaging; to be engaging, they had to conceal what was really at issue for her, from her audience and perhaps from herself. In this respect, Barth's narrators and their stories, prototypically Todd Andrews and *The Floating Opera*, may be very like her and hers:

They and their heroes, who make their lives into fanciful floating operas, are amoral. The only limiting provision of this value—the fictionalizing of experience—is that it work: psychologically to protect, aesthetically to interest. The floating-opera man does not want to give himself away but does want to interest others. For Barth's characters it is a way of living in the world while retreating from it. For Barth as a novelist it is a way of writing a book without the curse of sincerity, a way of having protean secrets protected by protean disguises.³⁵¹

This last—the curse of sincerity—is a serious problem for Barth as a post-modern novelist, a problem neatly analogous to Scheherazade's death sentence. Barth's deep regard for the traditions of both western moral philosophy and the western literature is unmistakable in his work; as we have seen, *The Floating Opera* is richly laden with allusions to both philosophy and fiction. Yet this very aspect of his work jeopardizes his credentials as an avant-gardiste; for his reactionary interests, he has been threatened with expulsion from the post-modern movement altogether.³⁵² With wonderful irony, the charge from the right that he is a nihilist academic

349. John Enck, *John Barth: An Interview*, 6 WIS. STUD. IN CONTEMP. LITERATURE 3, 6 (1965); see also John Barth, *John Barth, My Two Muses*, 12 JOHNS HOPKINS MAGAZINE 9, 12 (1961) ("Like Scheherazade the author lives by day on the borrowed time of mere mortality; at night, when the tale begins, time stops."); BARTH, *supra* note 1, at vi (referring to Scheherzade as one of the earliest sources of his literary inspiration).

350. HARRIS, *supra* note 101, at 28-29 (noting Scheherazade's parallel desperation).

351. LeClair, *supra* note 203, at 722.

352. GORAK, *supra* note 212, at 146-47 (noting tension, if not quite inconsistency, between Barth's interest in tradition and his position as a postmodernist); cf. Jerome Klinkowitz, *John Barth Reconsidered*, 49 PARTISAN REV. 407, 408 (1982); see also Barth, *supra* note 226, at 66 (acknowledging that Klinkowitz "consigns Pynchon and me to some 1960-ish outer darkness").

foisting hoaxes on unsuspecting readers³⁵³ is met by a countercharge from the left that he is a smug academic merely going through the motions of genuine artistic radicalism. Caught in the cross-fire, who wouldn't be concerned about cover—or camouflage?³⁵⁴

B. Normative Dialogue - The Right to Read Aright

The danger that we will be taken in—duped by Todd or Barth, or both—is thus very real. But it is, I think, ultimately avoidable; beyond that, each of them is more likely to be hoist with his own petard, or trapped in his own snare. There are two principal reasons for this, one aesthetic, the other moral.

1. The Aesthetic Defense

There is among contemporary literary critics a widely (though not universally) shared conviction that a work of literature is to be judged aesthetically on its internal merits, not according to what its author meant it to be (the so-called intentionalist fallacy)³⁵⁵ or according to the effect it has on its audience (the so-called affective fallacy).³⁵⁶ It is the literary equivalent of the legal *res ipsa loquitur*: let the thing speak for itself. We need not worry here whether this is a universally valid standard; as you might suspect by now, I myself am deeply suspicious of all claims to universal validity for normative standards, aesthetic as well as moral. It is enough that we have available to us such a standard; we can make it ours if it suits us, and apply it where we will: in this case, to Barth's *The Floating Opera*.

By that standard, if we can sustain our reading of the novel by persuasive reference to internal evidence, it is no objection to say that Barth meant it as

353. Rovit, *supra* note 345, at 77 (dismissing Barth's *The Sot-Weed Factor* (1960) as "in a sense, a kind of prolonged academic joke," reflecting nefarious trends traceable to *The Floating Opera*).

354. To his credit, Barth occasionally returns discreet fire from his middle ground. Barth, *supra* note 342, at 29 (reminding soi-disant radicals of "the tradition of rebelling against Tradition," as one who "chooses to 'rebel along traditional lines'"); *see also*, Barth, *supra* note 226, at 65-66 ("[A] principal activity of postmodernist critics . . . consists in disagreeing about what postmodernism is or ought to be, and thus about who ought to be admitted to the club—or clubbed into admission, depending on the critic's view of the phenomenon and of particular writers").

355. W.K. Wimsatt, Jr. & Monroe C. Beardsley, *The Intentional Fallacy*, in W.K. WIMSATT, JR., *THE VERBAL ICON* 3 (1954).

356. W.K. Wimsatt, Jr. & Monroe C. Beardsley, *The Affective Fallacy*, in *THE VERBAL ICON*, *supra* note 355, at 21.

a joke or a hoax;³⁵⁷ it is, as the limiting case, no objection to say that Barth himself says he meant it as such. It is, on this view, what it seems to be; it means what it says. We do not live in Humpty Dumpty's world, his insistence to the contrary notwithstanding³⁵⁸ (and even if we did, his instance would have to be in the language of our world for it to work³⁵⁹).

This is not to say (as some critics of Barth's fiction, especially his later, less realistic fiction, have said) that novels must not be merely formal, stylistic experiments, but must also have a substance, be about something, or affirm some value.³⁶⁰ It is rather to say that, if one writes a novel that by all external, objective, and conventional measures is *not* merely a formal experiment, but rather *is* about something, then we are entitled to read it as such. We may, that is, react to it emotionally and assess it rationally as a story, as someone's story. Here again, it doesn't much matter that Barth himself, in his role as autobiographer or critic-at-large, says he has a renewed interest in substance as opposed to form, the thing said as opposed to how it is said,³⁶¹ what he once called the Windex as opposed to the stained glass function of literature.³⁶² We needn't—on the stronger anti-intentionalist view, shouldn't or can't—take him at his word outside his work: we can (or should or must) let his work speak to us itself, in the public domain and by the usual public standards.

The Floating Opera may well re-affirm an ancient point about those standards themselves, even as it challenges them. Aristotle famously said of narratives that they must have a beginning, a middle, and an end.³⁶³ As

357. Thus, according to Wayne C. Booth, "For our purposes, all stories, even those modern novels that use elaborate distancing tricks to subvert realism and prevent identification, can be viewed not as puzzles or even as games but as companions, friends - or . . . as *gifts* from would-be friends." BOOTH, *supra* note 332, at 175.

358. LEWIS CARROLL, *THROUGH THE LOOKING-GLASS* 131-32 (St. Martin's Press 1941).

359. R. Rhees, *Can There Be a Private Language?*, in *PHILOSOPHY AND ORDINARY LANGUAGE* 90 (Charles E. Caton ed., 1963); Stanley Cavell, *Must We Mean What We Say?*, 1 *INQUIRY* 172 (1958).

360. Rovit, *supra* note 345, at 78; Noland, *supra* note 77, at 27 (following Rovit and insisting in particular that Barth move from the implicit critique inherent in parody to a more positive position).

361. LECLAIR & MCCAFFERY, *supra* note 348, at 17 ("I have at times gone farther than I want to go in the direction of a fiction that foregrounds language and form, displacing the ordinary notion of content, of 'aboutness.' But beginning with the *Chimera* novellas . . . I have wanted my novels to be *about* things: about the passions, which Aristotle tells us are the true subject of literature. I'm with Aristotle on that.")

362. BARTH, *supra* note 1, at v.

363. Rovit, *supra* note 345, at 78 ("Regardless of the metaphysical quiddities which our contemporary debate over Existentialism entails, the novelist is still faced with the old Aristotelian injunction to make a beginning, a middle, and an end—to start somewhere and conclude with some artifice of finality.")

narrator, Todd self-consciously struggles with the task of narration, with the temptation to digress and the difficulty of distinguishing the extraneous from the significant;³⁶⁴ more generally, if less consciously, with the problem of making his story, which is his life, intelligible to others.³⁶⁵ He succeeds, and, with him, so does his creator. The plot does not, contrary to Todd's initial worry, "float willy-nilly on the tide of my vagrant prose."³⁶⁶ It spirals downward through the flotsam and jetsam of his wrecked life—widely, gradually, and lightly at first, but gaining focus, depth, and darkness—bottoming finally on the black abyss at his and his story's center.

Within the novel, in the sphere of ethics, Todd rejects Kant's categorical imperative, the unconditioned and absolute ought, but leaves open the possibility of what Kant called hypothetical imperatives, which take the form of "if you want to achieve this particular end, you must use these means."³⁶⁷ One such end, of course, is the telling of an intelligible story. Here again, a novel need not be such a story if it can be something else; there need not be categorical imperatives in the aesthetic realm any more than in the moral. But it may be, as Aristotle anciently appreciated, that if you do want to tell a story, you must adhere to some basic principles.

2. The Moral Defense

Paralleling this formal point is a substantive one: if you want to tell an intelligible story, particularly if it is your own, you must not only have a minimal but recognizable structure; you must also have the trust of your audience. The fact that Todd's story, and Barth's novel, is a fictional autobiography reminds us of another point, a point at which the aesthetic and moral aspects of the novel converge: if you want to have friends, you must tell them your story. You must be candid, if carefully candid, for you must risk being hurt. There may be no categorical imperative to have friends, to be the kind of person who knows others and is known by them in the intimate way unique to friendship. As Todd's life up to the very end

364. This is the ostensible subject of his first chapter, entitled "Tuning my piano," and he returns to it repeatedly. BARTH, *supra* note 1, at 1.

365. This is the particular theme of chapter XXV, "The Inquiry," but, as he tells us there, the work that we have before us is but a part of his larger inquiries into his father's life and the reason for his father's suicide. The basic problem of them all, he insists, is imperfect communication. *Id.* at 220.

366. *Id.* at 7.

367. *Id.* at 168. Todd's statement of the point nicely illustrates the point: "If you want to make sense, I've learned, you should never use the word *should* or *ought* until after you've used the word *if*." *Id.*; see also *id.* at 164 ("Even if you start with *If he wants to die content*, you'll find that different people are content with different things.").

indicates, it is possible to live without friends. But as his story illustrates—and, again, as Aristotle long ago appreciated³⁶⁸—most of us would not want a life without friends, even if we had everything else.

Conversely, those who would be friendly—or, beyond that, friends—must be willing to trust others' accounts of themselves. Here again, caution is in order: we must watch for the self-serving and the self-concealing.³⁶⁹ We must be wary of Todd and his creator, but, if we are, we will have the last word. More importantly, we can ensure that what is last is indeed a word, not a laugh.

Your fellows may think you a fool—I think quite rightly—if you believe too firmly in magic carpets. And your better-bred neighbors may chuckle—not without unkindness but not entirely without warrant—if they recognize your prized antique Persians as re-tread Kharustans. Aristocrats, after all, tend to be supercilious, and social climbers, absurd; these are but two of the many lessons novelists have taught us.

But if someone literally pulls the rug out from under you, landing you on your bottom, the joke is on you, but that is not the end of the matter. The rug is real, and so is the pain; your reliance is also right, and rightly to be honored. It won't quite do for them to say that they have taught you a lesson in misplaced trust; you are entitled to ask why the lesson couldn't be taught less painfully, and, in default of an adequate answer, to repose your future confidence and comradeship elsewhere. And, at least for some of us, it certainly won't do for them merely to say that this is a joke. Such jokes doubtlessly continue to be played, but not by people we keep as friends.

So, too, metaphorically speaking, if the rug that is pulled from under you is a novel. A text that purports to be fiction, bearing all the conventional indicia of a novel, may not be just another novel, but neither is it a just a joke. It may be a subtle form of dialogue between author and reader,³⁷⁰ or it may be a deception, a lie. For literary purposes, as we have seen, it may be permitted, if not imperative, to take the work as it is, irrespective of the author's intent or the audience's response. But even if a work's artistic merit can be—or must be³⁷¹—separated from moral considerations, we are still free

368. ARISTOTLE, *supra* note 18, at 214 (stating “[n]o one would choose to live without friends, even if he had all other goods”).

369. As Wayne C. Booth points out, “Why should we expect choices between true friends and flatterers, lovers and sado-masochists, wise companions and pretentious frauds to be easier in literature than they are in our daily encounters?” BOOTH, *supra* note 332, at 178.

370. For optimistic assumptions about what Barth is up to, see Couturier, *supra* note 230, at 7, esp. 19-20; HARRIS, *supra* note 101, at 28-29. For links with parodic tradition in novel's history, see Couturier, *supra* note 230, at 13, 19.

371. Wimsatt & Beardsley, *supra* note 355, at 5-6.

to assess those aspects independently. In the moral realm, the agent's intent and its effect on others are two conventional foci of inquiry, which we are free to make our own. Here the coincidence of aesthetic and moral judgment may produce an odd paradox: If an author means to trick us with a pseudo-novel, he may, despite his worst intentions, create a real, and really good, novel; in the process, however, he risks becoming a very bad person.³⁷² In each case, the aesthetic and the moral, we will be the judges, on the evidence before us.

CONCLUSION: FROM DESPAIR TO FRIENDSHIP

Having failed at love and friendship,³⁷³ Todd declares them impossible.³⁷⁴ From his anguished loneliness, he illogically deduces what may be the ultimate metaethical truth: There is no moral truth; nothing has intrinsic value. But from that conclusion nihilism does not necessarily follow, as he himself finally came to see. We, for our part, can readily see both the tragedy of Todd's life and the error of his logic. Having concluded with Todd that nothing has intrinsic value, we may nevertheless affirm that what remains to give life meaning is precisely what his meaningless life lacks, what one cannot supply oneself: love and friendship.

We can see that, contrary to Todd's understanding, the wise do not understand themselves "beyond friendship, beyond love," but in them and through them, in the kind of dialogue they make possible. This is not just the embrace of those we happen to meet in shattering moments of externally imposed personal crisis, as Todd met the German sergeant. It is also—and

372. Having raised these serious charges against *The Floating Opera*, I must say I think they cannot be sustained against Barth the author. By his own admission, as noted above, his fiction has returned to the classic substantive issues of traditional literature. His *Literature of Exhaustion*, *supra*, note 342, which explored the prospect that the novel as literary form might be "used up," was explicitly not a counsel of despair but an exploration of new possibilities, and he has supplemented if not entirely supplanted that mildly optimistic piece with his *Literature of Replenishment*, *supra* note 226, which he subtitled "Postmodernism and the rebirth of the novel." In the later piece, he calls for a synthesis of the better elements of nineteenth century realism and its antithesis, early twentieth century high modernism, giving as his exemplar Garcia Marquez's *One Hundred Years of Solitude*, *id.* at 70-71; even in the earlier piece, he counseled, "it's a matter of every moment throwing out the bath water without for a moment losing the baby." *Berth*, *supra* note 342, at 32. Perhaps most encouragingly—and admirably—he has remained in dialogue with his severest critics. Thomas Leclair, who most telling charged him with diabolism, edited the dialogue in which he professed his return to the substantivist fold. LECLAIR & MCCARRERY, *supra* note 348, at 17.

373. Noland, *supra* note 77, at 17 ("[S]ince love and friendship are not erotically directed, only abstract systems are left by which people attempt to communicate with each other.").

374. BARTH, *supra* note 1, at 41.

much more typically—the company of those we meet in ordinary life and in stories that end more hopefully than his. With Carlyle’s re-stitched tailor, we can hurl back the curse of an inherently meaningless universe;³⁷⁵ with Faulkner, we can refuse to accept the end of humanity;³⁷⁶ with George Eliot, we can work to advance the old values even as we build them a new foundation.³⁷⁷

This cosmic defiance is, of course, a grandly modern pose, chically assumed by Sartre and his set in the cafes of newly liberated Paris, perhaps all too glibly affirmed in the American universities of John Barth’s youth.³⁷⁸ Against that heady self-confidence, Todd’s tragedy stands as a cautionary tale, a reminder of a more humble humanism. If we cannot quite affirm, in our thankfully skeptical age, “there but for the grace of God go I,” we can nevertheless acknowledge a near equivalent: if we had never been given love and friendship, we would never be able to receive them, much less return them. The capacity for caring—though encoded by organic evolution in our very genes, though cultivated by every human culture, though the ontological essence of our very being³⁷⁹—can only be awakened and actualized in any of us if others care for us individually. Without that we, like Todd, are already lost; with that, even he might yet be saved—even we might save, if not him, then others like him.

There is, in other words, ample modern and secular meaning in the ancient and religious text: “By grace are ye saved through faith, and that not of yourselves; it is the gift of God, not of works, lest any man should boast.”³⁸⁰ More succinctly, in the motto of the early Protestants, who consciously borrowed the Latin of the church fathers, even as they translated it into the idiom of their own era: *Soli gratia*; By grace alone. If we were to find their God, what better could he be than a gracious friend, as we are told he was to Abraham and Adam? If we do not find him, all need not be lost, for we need not be friendless. If it is sobering to realize we may be alone, left without fixed values in a morally meaningless universe, it is also

375. CARLYLE, *supra* note 246, at 128.

376. William Faulkner, *Address Upon Receiving the Nobel Prize for Literature* (Stockholm, Dec. 10, 1950), in *THE PORTABLE FAULKNER* 723, 724 (Malcolm Cowley ed., rev. ed. 1967).

377. This is what I believe she is doing not only in her fiction, most notably *Middlemarch*, with its paean to German critical scholarship, but also in her non-fiction, perhaps most significantly her translation from the German of Ludwig Feuerbach’s treatise on Christian atheism, *The Essence of Christianity*. A.S. Byatt, *George Eliot’s Essays*, in A.S. BYATT, *PASSIONS OF THE MIND* 77, 78-93 (1991) (tracing influence of theology of Feuerbach and D. F. Strauss on Eliot’s work).

378. BARTH, *supra* note 1, at vi (“I had picked up from the postwar *Zeitgeist* some sense of the French Existentialist writers . . .”).

379. HEIDEGGER, *supra* note 225, at 225-41.

380. *Ephesians* 2: 8-9.

reassuring to remember I am not alone as long as you are there, as long as we continue this conversation.³⁸¹

Here is the consolation of another eighteen year old soldier caught alone in a shell-hole in the no-man's land of World War I, soon to be culpable of killing a terrified enemy who joins him there:

There I hear sounds and drop back. Suspicious sounds can be detected clearly despite the noise of the artillery-fire. I listen; the sound is behind me. They are our people moving along the trench. Now I hear muffled voices. To judge by the tone that might be Kat talking.

At once a new warmth flows through me. These voices, these few quiet words, these footsteps in the trench behind me recall me at a bound from the terrible loneliness and fear of death by which I had been almost destroyed. They are more to me than life, these voices, they are more than motherliness and more than fear; they are the strongest, most comforting thing there is anywhere: they are the voices of my comrades.

I am no longer a shuddering speck of existence, alone in the darkness; — I belong to them and they to me, we all share the same fear and the same life, we are nearer than lovers, in a simpler, a harder way; I could bury my face in them, in these voices, these words that have saved me and will stand by me.³⁸²

381. MILNER S. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* xiii (1985) ("law as forming and stimulating an ongoing conversation").

382. *REMARQUE*, *supra* note 51, at 214.

