



10-1-2005

Imperfect Order: Reflections of the Law in Two Classic Children's Novels

Thomas C. Klein

Follow this and additional works at: <https://scholarship.law.tamu.edu/txwes-lr>

Recommended Citation

Thomas C. Klein, *Imperfect Order: Reflections of the Law in Two Classic Children's Novels*, 12 Tex. Wesleyan L. Rev. 303 (2005).

Available at: <https://doi.org/10.37419/TWLR.V12.I1.13>

This Symposium is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas Wesleyan Law Review by an authorized editor of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

IMPERFECT ORDER: REFLECTIONS OF THE LAW IN TWO CLASSIC CHILDREN'S NOVELS

Thomas C. Klein†

I.	INTRODUCTION.....	303
II.	DISCUSSION	305
III.	CONCLUSION	315

I. INTRODUCTION

Man-made law, or “positive” law,¹ and its related legal institutions are represented in children’s novels as complicated, sometimes corrupt, and often arbitrary structures that prevent the protagonists from reaching their desired goals or resolving their difficulties. Rather than presenting positive law and its related institutions as a means to resolve conflicts and provide repose to the characters, children’s novels present such law and institutions as aggravating or prolonging conflict, and creating uncertainty about how the protagonist will extricate himself or herself from the legal predicament. Children’s novels do not offer the child reader any known points of reference in the legal landscape so the positive law and legal institutions themselves appear imposing, largely unknown, and mysterious. Positive law and legal institutions in children’s stories create dramatic tension because the protagonist must negotiate out of, or around, a predicament that a legality, or a collision with a legal institution, has complicated. In some stories,² the legal situation itself is the central predicament out

† Member, Wilson Sonsini Goodrich & Rosati, P.C., Palo Alto, California, and Adjunct Lecturer in Law, Santa Clara University School of Law, Santa Clara, California. The views expressed in this Article are solely those of the author and do not necessarily represent the views of Wilson Sonsini, Santa Clara University, or any party associated with them.

1. “A system of law promulgated and implemented within a particular political community by political superiors, as distinct from moral law or law existing in an ideal community or in some nonpolitical community. Positive law typically consists of enacted law—the codes, statutes, and regulations that are applied and enforced in the courts.” BLACK’S LAW DICTIONARY 1182 (7th ed. 1999).

2. In particular, see KENNETH GRAHAME, *THE WIND IN THE WILLOWS* (Holt, Rinehart & Winston, 1980) (1908) and PHYLLIS REYNOLDS NAYLOR, *SHILOH* (1991). Cf. ROALD DAHL, *JAMES AND THE GIANT PEACH* (1961) (the legal system gives orphaned James Henry Trotter to his two cruel aunts, Aunt Spiker and Aunt Sponge, from whom he is later liberated); BEATRIX POTTER, *THE TALE OF PETER RABBIT* 8 (Scholastic, Inc. 1986) (inferring that Peter’s trespass onto the McGregor’s private property could be punishable by death because Mrs. McGregor put Peter’s father into a pie after he trespassed into Mr. McGregor’s garden); HARVE ZEMACH, *THE JUDGE* (1969) (a judge imprisons citizens who warn him of a terrible danger approaching the town and the judge gets his extra-legal punishment when the monster of which the judge was warned arrives).

of which the protagonist must escape. These stories present, from a child's perspective, the law as a quagmire with few understandable points of reference or clear exits. As a complex and largely³ arbitrary system, this imperfect order rendered by the positive law in children's novels reflects an avenue that inevitably leads the protagonist to outcomes inferior to those if the law is avoided, ignored, or flouted. This portrayal of positive law and legal institutions is evident in two classic children's novels *The Wind in the Willows* by Kenneth Grahame,⁴ and *Shiloh* by Phyllis Reynolds Naylor.⁵

Both of these novels might not be considered classic legal novels in that they do not present the law as a central institution in their stories as do the novels of John Grisham, Scott Turow, or of other authors writing for an adult audience, whose novels feature a dramatic trial scene, a grisly criminal investigation, or the operation of the criminal justice system.⁶ Popular legal novels such as these,⁷ like children's novels, create dramatic tension by the constraints the legal system imposes on the main characters, the difference being that the legal institutions in these popular, non-children's novels are not unknown or unfamiliar, and therefore do not inspire any fear of the unknown even though these novels may convey a sense of constraint, foreboding, or frustration with a de-humanizing, plodding legal process. Both *The Wind in the Willows* and *Shiloh* present man-made law and legal institutions as a hazy, ill-marked morass that the protagonist must avoid or escape. The law is largely unknown or random, and the protagonist cannot reconcile it to what the protagonist believes ought to be the right outcome.

In both *The Wind in the Willows* and *Shiloh*, however, there is a fundamental legal order, a foundation most akin to a form of natural law⁸ that is presupposed, and on which rests central assumptions for

3. The qualifications of "largely" unknown and with "few" understandable points of reference is intended to convey that although there are some familiar legal actors and structures that do appear in children's novels—for example, the police, judges, a courtroom, a prison, etc.—the mystery for a child reader lies in the laws themselves, the actions of legal agents, and the operation of legal institutions.

4. GRAHAME, *supra* note 2.

5. NAYLOR, *supra* note 2. Ms. Naylor was awarded the Newberry Award in 1992 for *Shiloh*. The Newberry Award is awarded annually "to the author of the most distinguished contribution to American literature for children." American Library Association, Newbery Medal, <http://www.ala.org/ala/alsc/awardsscholarships/literaryawds/newberymedal/newberymedal.htm> (last visited Sept. 18, 2005).

6. *See, e.g.*, TOM WOLFE, *THE BONFIRE OF THE VANITIES* (1987); SCOTT TUROW, *PRESUMED INNOCENT* (1987).

7. *See* WOLFE, *supra* note 6; HARPER LEE, *TO KILL A MOCKINGBIRD* (1960); STEVE MARTINI, *UNDUE INFLUENCE* (1994); JOHN GRISHAM, *A TIME TO KILL* (1989).

8. Natural law has many formulations, many not always susceptible of providing actual guidance for human, or in the case of many children's novels, anthropomorphic animal, conduct. Nevertheless, as discussed *infra*, insofar as there is some content to natural law, that may be the only legal order presented favorably, albeit tacitly, in children's fiction.

the novels' conflicts. That order encompasses notions of property,⁹ respect for certain customs, an essential morality, and an elevation of self-help over legal process. One also finds a prominent concern with the rights of animals in many children's novels, *The Wind in the Willows* and *Shiloh* included, and existing legal institutions and human-made law is generally presented as wholly or partially ineffective at protecting the rights of animals.¹⁰ This ineffectiveness is consistent with the general presentation of positive law and legal institutions as imperfect and leading to unsatisfactory end points.

II. DISCUSSION

The *Wind in the Willows* begins near a peaceful riverbank in springtime with Mole (one of the many anthropomorphic animals in the story) cleaning his home when the urge strikes him to wander above-ground. Mole finds the Water Rat at home on the riverbank and Rat sculls across the river to greet Mole. Beyond the river lies the Wild Wood, Rat informs Mole, where there are some disagreeable animals, such as weasels and stoats. Beyond the Wild Wood, Rat tells Mole, lies the Wide World, and "that's something that doesn't matter, . . . and I'm never going, nor you either, if you've got any sense at all."¹¹

This first introduction to the world of men, the Wide World, is a cautionary one. The reader does not yet know Rat's reason for admonishing Mole against the Wide World, but at least along the riverbank the animals leave their homes open and unattended without concern about losing possession. They enjoy an outdoors without predators, and the dark uncertainties are confined to the Wild Wood and the Wide World.¹² The natural order for the animals along the river consists of established customs of etiquette and hospitality, security in their "person" and property without any obvious means of that order being enforced, and the animals live without any visible governmental institutions, not even a judiciary. It is a legal order

9. Notions of property in these works include attendant ideas such as ownership, theft, bequests, takings, commons, and the like.

10. Certain animals, however, are not always presented sympathetically. One quasi-animal in children's literature, the dragon, receives ambivalent treatment. At times the dragon is there for slaying as part of the protagonist's development, while others, the dragon itself is a secondary protagonist. See RUTH STILES GANNETT, *MY FATHER'S DRAGON* (1948); KENNETH GRAHAME, *THE RELUCTANT DRAGON* (The Trumpet Club 1989) (1938). For an inspired collection of dragon stories with renowned illustrations, see *THE BOOK OF DRAGONS* (Michael Hague ed. 1995). For further study of dragons and their treatment by authors and artists outside of literature, see the movies *PETE'S DRAGON* (Walt Disney 1977), *SHREK* (DreamWorks Animation SKG 2001), and *SHREK 2* (DreamWorks Animation SKG 2004) where even more modern influences are involved in the dragon *leitmotif*.

11. GRAHAME, *supra* note 2, at 8.

12. See *id.* at 4–8, 41–42.

without man-made laws or legal institutions, and no one within the novel¹³ is disadvantaged by the absence of legal institutions.¹⁴

Rat and Mole later visit Toad who lives in a grand, red brick home by the name of Toad Hall. Toad persuades Rat and Mole to join him on a trip in a horse-drawn caravan¹⁵ during which trip the conceited, lazy, spontaneous, and unrestrained Toad sings paeans to this mode of travel. When an automobile traveling on the same road startles the horse drawing the wagon and causes the caravan to topple over in a ditch, Toad is immediately smitten with automobiles, and cares not even to right the caravan. The Rat, livid, cursed those in the automobile: “You villains! . . . You scoundrels, you highwaymen . . . ! I’ll have the law of you! I’ll report you. I’ll take you through all the Courts!”¹⁶

The fact that the Rat cursed those who wronged him by calling down the evil of the positive law and legal process on them strongly implies that the legal process is somehow odious. One infers that the law is an abhorrent process that one must avoid. The threat to “take one through the Courts” is at once ironic (“Law’s aim is to mediate, often to diffuse, but rarely if ever to aggravate conflict.”¹⁷) and telling. Rat’s curse suggests that man-made law, legal institutions, and legal processes are, in some unspecified way, a punishment in and of themselves as if one uses these institutions and processes as bludgeons to execute a harsh retribution on those who have committed wrongs.

One might argue that Rat is such a gentleman that the worst curse he could call down on the wrongdoers was simply justice, and that the threat to take them through all of the courts was simply the worst curse that Rat, the gentleman, could envision: justice applied more than once perhaps, but justice nevertheless. In fact, Rat’s epithets of “villains”¹⁸ and “highwaymen”¹⁹ are hardly harsh words, but certainly as harsh as would likely be articulated by a gentleman of the river-

13. The Author uses the term “within the story” because some critics have registered extrinsic criticisms by noting that women play only minor, and subordinate, roles in *The Wind in the Willows* and to this extent may be considered disadvantaged by the natural legal order in the novel.

14. Peter Hunt notes that the forces in Grahame’s society contributed to a yearning for an idyllic, stable, agrarian world of an England of the past, rather than what some might interpret as an emergent environmentalism or a disenchantment on the part of Grahame with English legal institutions. Grahame, at the time of publication, was already serving as the secretary of the Bank of England, one of the three highest positions at the Bank, and, Hunt argues, Grahame was likely yearning for stability in a turbulent private life and in a rapidly changing society and changing world position for England. See PETER HUNT, *THE WIND IN THE WILLOWS: A FRAGMENTED ARCADIA* 3–8 (1994).

15. In the novel, it is referred to as a “gypsy caravan,” a term that may be considered pejorative today.

16. GRAHAME, *supra* note 2, at 27.

17. RICHARD A. POSNER, *LAW AND LITERATURE* 23 (rev. ed. 1998).

18. GRAHAME, *supra* note 2, at 27.

19. *Id.*

bank. This interpretation of Rat just being gentlemanly, rather than implying criticism of positive law and legal institutions, would be plausible if not for the portrayal of the criminal justice system with which Toad finds himself involved when caught after stealing an automobile.

After the incident with the automobile and the caravan, Toad was transformed: he became infatuated with automobiles, an understandable infatuation with the new technology of the time: “Glorious, stirring sight!” murmured Toad, never offering to move. “The poetry of motion! The *real* way to travel! The *only* way to travel. Here today—in next week tomorrow! Villages skipped, towns and cities jumped—always somebody else’s horizon! O bliss! O poop-poop! O my! O my!”²⁰

Subsequently, the novel sketchily implies that Toad had purchased, driven, wrecked, and paid fines for several automobiles before his friends Rat, Mole, and Badger decide to forcibly hold Toad in his house against his will to depart and drive in order to rid Toad of his automobile addiction. They do this because as the solemn Badger explained to Toad:

You’ve disregarded all the warnings we’ve given you, you’ve gone on squandering the money your father left you, and you’re getting us animals a bad name in the district by your furious driving and your smashes and your rows with the police. Independence is all very well, but we animals never allow our friends to make fools of themselves beyond a certain limit; and that limit you’ve reached.²¹

That is, Toad has breached the unwritten, natural customs that have the force of law among the animals and must be made to conform to such customs. This is to preserve the natural order along the riverbank. His discipline by the police, the enforcers of man-made law, has been unsuccessful and resulted only in an imperfect order. Toad continues to disturb the peace, and naturally, the community of animals takes notice to resolve this breach of custom notwithstanding that his forcible detainment in his home by his friends would constitute, under the positive law, false imprisonment.²²

Despite the best efforts of his friends, Toad deceives his friends and escapes. At the Red Lion Inn, Toad heard a car draw up to the Inn, and “Toad had to hold on to the leg of the table to conceal his overmastering emotion.”²³ Toad then slipped out of the Inn and stole the

20. *Id.* at 30.

21. *Id.* at 86.

22. The elements of false imprisonment being: (1) actor acts intending to confine another within boundaries fixed by the actor; (2) his act results in such confinement; and (3) the other is conscious of the confinement or harmed by it. RESTATEMENT (SECOND) OF TORTS § 35 (1965).

23. GRAHAME, *supra* note 2, at 93.

automobile. He was “as if in a dream, all sense of right and wrong, all fear of obvious consequences, seemed temporarily suspended.”²⁴

Toad is apprehended and brought before a Court. The Chairman of the Bench of Magistrates finds the case clear cut:

“To my mind,” observed the Chairman of the Bench of Magistrates cheerfully, “the *only* difficulty that presents itself in this otherwise very clear case is, how we can possibly make it sufficiently hot for the incorrigible rogue and hardened ruffian whom we see cowering in the dock before us. Let me see: he has been found guilty, on the clearest evidence, first of stealing a valuable motorcar; secondly, of driving to the public danger; and thirdly, of gross impertinence to the rural police. Mr. Clerk, will you tell us, please, what is the very stiffest penalty we can impose for each of these offences? Without of course, giving the prisoner the benefit of any doubt, because there isn’t any?”²⁵

To demonstrate the seeming irrationality of the law, the Clerk opined that although the worst offense was stealing the car, “cheeking the police,” should carry the severest penalty.

“Some people would consider,” he observed, “that stealing the motor-car was the worst offense; and so it is. But cheeking the police undoubtedly carries the severest penalty; and so it ought. Supposing you were to say twelve months for the theft, which is mild; and three years for the furious driving, which is lenient; and fifteen years for the cheek, which was pretty bad sort of cheek, judging by what we’ve heard from the witness-box, even if you only believe one-tenth part of what you heard, and I never believe more myself—those figures, if added together correctly, tot up to nineteen years”²⁶

“First-rate!” said the Chairman, as if cheering him on. The Clerk then suggested: “So you had better make it a round twenty years and be on the safe side.”²⁷ A suggestion of which the Chairman heartily approved and then he gleefully sentenced Toad to twenty years. “Then the brutal minions of the law fell upon the hapless Toad; loaded him with chains, and dragged him from the Court House, shrieking, praying, protesting . . . [and brought him to] . . . the grimmiest dungeon that lay in the heart of the innermost keep.”²⁸

Thus, from the perspective of a child, the workings of the criminal justice system, where the accused has no opportunity to explain his actions,²⁹ where the judges seem to be in league with the police, where

24. *Id.* at 94.

25. *Id.*

26. *Id.* at 94–95.

27. *Id.* at 95.

28. *Id.*

29. Given all of the evidence of Toad’s infatuation with automobiles, and being an animal in a human world, one wonders whether a mitigation of the punishment was

the clerks seem to try to please the judges, and where the judges take obvious pleasure in meting out excessive punishments, must seem arbitrary, but not so un-tethered to reality that the portrayal lacks plausibility to a child. Thus, the legal system seems at once realistic, but also unduly harsh, disproportionate, and merciless. It would be unexpected that the crime of stealing the car would carry a lesser penalty than insulting the police and that the penalty for stealing, something fundamental from a child's perspective, would be punished less severely than that of speeding³⁰ or of not heeding the police. The depiction of the legal system culminates in a scene of hopelessness for Toad, when he is loaded with chains, publicly jeered, brought into a fortified castle, past soldiers and mastiffs, and thrown into a dungeon for twenty years. At the same time, rather than the legal system resolving the conflict of Toad's criminality, it creates uncertainty because for the child reader the matter has not been resolved at all. The child reader expects Toad to somehow extricate himself from the seemingly hopeless situation in which the law has placed him. Rather than repose, the novel creates excitement by the sheer lack of conflict resolution that the law has wrought.

Thus, one can see that Rat's curses to those in the motorcar-caravan accident, indeed implied a derogation of the law, rather than Rat being merely gentlemanly.

To further demonstrate the depiction of corruption inherent in the criminal justice system, the jailor after learning that Toad was well off pointed out that "many comforts, and indeed luxuries, could by arrangement be sent in—at a price—from outside."³¹ The warden's daughter, who had taken pity on Toad, was allowed by her father to visit Toad and socialize with him. The girl later informs Toad that her aunt is a washerwoman for the prison. "[W]e try to keep any paying business of that sort in the family, you understand."³² Furthermore, the girl then describes a plan for Toad to escape from her father's prison by an appropriate bribe of her aunt: for the aunt and Toad have a similar lumpy, thick-bodied appearance making an escape possible by Toad if he were to masquerade as the washerwoman. Having a daughter conspire with a prisoner against her father the prison warden demonstrates a base corruption within the legal system.

Through comical scenes of escape, stealth, theft, and swindle, Toad ultimately finds himself diving into a river to escape the police pursu-

merited under the "irresistible impulse" doctrine of the insanity defense. See MODEL PENAL CODE § 4.01 (1962).

30. The speed limit at the time in England was 20 miles per hour. Prior to that time, in 1896, Charles Stewart Rolls, who later partnered with Frederick Henry Royce to form Rolls-Royce, spearheaded a lobbying effort on behalf of car enthusiasts against the 4-mph UK speed limit, getting it raised to 12-mph. Peter Benesh, *Rolls, Royce Reinvented Wheels*, INVESTOR'S BUSINESS DAILY, June 14, 2005, at A3.

31. GRAHAME, *supra* note 2, at 114.

32. *Id.* at 117.

ing him as an escaped convict; the river from which Rat then reels an exhausted Toad into Rat's home. It is there Toad learns that weasels and stoats from the Wild Wood have overtaken Toad Hall after learning of Toad's imprisonment. Rather than calling on the police as representatives of the law to rid his property of the trespassers and squatters, Toad listens to Badger's plan to take back Toad Hall by force, even though self-help to recover possession when there will be an obvious breach of the peace is prohibited by the common law.³³ Nevertheless, the novel ends with a fierce routing of the stoats and weasels by Badger, Toad, Rat, and Mole, in the retaking by force of Toad Hall, Toad cured of his automobile addiction, and Toad's victims adequately compensated so Toad need not return to jail, all without recourse to the positive law or legal institutions.

The depiction of the positive law in *The Wind in the Willows*—its complexity, mystery, corruption, and ambivalence—is similarly reflected in *Shiloh*, a novel of American realism set in West Virginia. *Shiloh* is a morally complex story of eleven-year-old Marty Preston who finds a young dog in the hills near his home. Marty senses that the dog, which he names Shiloh, has been abused because of the way the dog reacts when Marty calls him. Shiloh follows Marty home. Marty knows that he cannot keep the dog. "If you can't afford to feed 'em and take 'em to the vet when they're sick, you've no right taking 'em in, Ma says, which is true enough."³⁴

Marty's father, Ray Preston, insists that the dog be returned to its owner, Judd Travers, notwithstanding Marty's articulated concerns that Shiloh has been mistreated. Ray tells Marty that Shiloh is not Marty's concern. On the road to return Shiloh to Judd, Marty and his father talk about the treatment of animals:

"If this dog's mistreated, he's only about one out of fifty thousand animals that is," Dad says. . . . 'Wouldn't be the first dog that wasn't treated right. . . . If it's Traver's dog, it's no mind of ours *how* he treats it."

. . .

"What if it was a child?" I ask him.

. . .

"This here's a dog, not a child, and it's not our dog. I want you to quit going on about it. Hear?"³⁵

33.

[S]o, thirdly, a remedy of the same kind for injuries to *real* property is by *entry* on lands and tenements when another person without any right has taken possession thereof. This depends in some measure on the like reasons with the former; and like that, too, must be peaceable and without force.

3 WILLIAM BLACKSTONE, COMMENTARIES 5 (The University of Chicago Press 1979) (1768).

34. NAYLOR, *supra* note 2, at 16.

35. *Id.* at 24–25.

Judd kicks the dog immediately when he sees it and Shiloh yelps and runs under Judd's front porch. Judd tells Marty and his father that if the dog runs off again, he'll "whup the daylights out of him."³⁶

Judd is a hunter and uses the dogs to help him hunt. Marty recalls seeing on a ridge near his home a dead dog with a bullet hole in its head. He asks his father if a man can shoot at anything when he's hunting.

Of course not. You can only shoot at what's in season. . . . We've got a new game warden in the county, and I hear he's plenty tough. Used to be a man could kill a deer on his own property anytime if that deer was eating his garden; warden would look the other way. But they tell me the new warden will fine you good.³⁷

Marty asks what is the consequence of shooting a dog:

"Dogs aren't ever in season, Marty. Now you know that."

"But what if a man shoots one, anyway?"

"That would be up to the sheriff to decide what to do, I guess."³⁸

This exchange is one of the first in the novel about the law and its enforcement. For a child, it is viewed as inevitable that if a person breaks the law that person is swiftly and proportionately punished. Breaking the law and punishment, for a child, are cause and effect. Marty is at an age of questioning, and the concept that the warden could look the other way or that the sheriff would decide an outcome suggests to a child reader that the law may not have determined outcomes. Certain legal actors have discretion and can choose whether to punish lawbreakers. From a child's viewpoint, this discretion regarding enforcement exacerbates the uncertainty inherent in the positive law.

The Prestons do not have money for a pet in the house. Marty has two younger sisters and although Ray has a good job as the mail delivery person, Ray's mother is elderly and requires nursing care in Clarksburg, West Virginia and an elderly aunt also needs occasional assistance. Thus, the Prestons have never had pets, although Marty and his younger sisters, as the novel later shows, delight in Shiloh.

When Marty finds Judd's dog again, Marty does not want to return the dog to Judd, even though he had promised Judd to do so. Marty builds a pen for Shiloh on the hill behind the Preston home and keeps the dog there secretly. Marty recognizes that he is violating the law by keeping another person's property, but he rationalizes his actions as being right to save the animal from further mistreatment. One evening Judd, looking for his dog, stops by the Preston home. He asks Marty if he had seen the dog and Marty lies that he had not seen the dog "in his yard" all day, even though he had the dog on the hill in the

36. *Id.* at 27.

37. *Id.* at 38.

38. *Id.* at 38–39.

pen. Judd says that if the dog was not such a good hunting dog that he would have shot him by now. Ray tells Judd the sheriff would get onto him if he did something like that. Judd replied that the “Law never told me before what I could do with my dogs, won’t be tellin’ me now.”³⁹

Marty is plagued by his lies to Judd and to his family and his friend David Howard. He reflects that he is doing right to save the dog, but it is not right to lie to his family. One day Marty’s mother discovers Marty playing with the dog on the hill behind the house and she insists that the dog be returned to Judd. She tells Marty that even though he loves Shiloh more than Judd does, “That doesn’t make him yours. Not in the eyes of the law, it doesn’t.”⁴⁰ She tells Marty that she must tell his father because if she keeps one secret from him, he will believe that she is keeping other secrets. Nevertheless, she reluctantly agrees to not tell anyone about Shiloh until the next morning.

The law thus far has been working against Marty; the law dictates that Shiloh belongs to Judd notwithstanding the mistreatment. The law does not dictate that his mother not keep secrets from his father, but Marty understands that as the right behavior. He understands that his lies have complicated his situation. Nevertheless, he relentlessly seeks an extra-legal solution to his predicament. The law commands that the dog be returned, and the law provides no means for Marty to resolve his conflict with Judd. The law is again depicted as an obstacle to the protagonist’s desired outcome.

That evening, a neighbor’s German shepherd gets into the confine with Shiloh and grievously injures him. Marty and his father take Shiloh to the family doctor, who agrees to try to save Shiloh’s life. On their way back from the doctor’s home, Ray asks if Marty is keeping any other secrets from him or telling him any other lies. Marty asks if his dad wanted Marty to return the dog to Judd for Judd to kick around:

“That what you want me to do, Dad?”

“I want you do to what’s right.”

“What’s right?”

...

“You’ve got to go by the law. The law says a man that pays money for a dog owns that dog. You don’t agree with the law, then you work to change it.”⁴¹

While the doctor is working on Shiloh, Marty considers that what the German shepherd did to Shiloh was probably worse than anything Judd would have done, short of shooting the dog. Thus, even though Marty had good intentions, the damage suffered by the dog was

39. *Id.* at 54.

40. *Id.* at 82.

41. *Id.* at 94.

greater than that had Marty followed the law and returned the dog to Judd. The novel introduces the fundamental legal questions of intent versus actions. After Shiloh is stabilized, the doctor returns Shiloh to the Prestons to recover from the injuries. Meanwhile, word spreads around town about the Prestons holding Judd's dog.

Judd comes to the Preston home to retrieve his dog, and he sees him injured. Judd is furious that Marty had kept his dog. Judd yells at Marty that he never mistreated his dogs and that he never caused them an injury like the ones Shiloh received under the "care" of Marty.⁴² Mrs. Preston offers to purchase the dog, but Judd tells her the dog is not for sale. Judd agrees to let the Prestons keep the dog until Sunday while the dog recovers from its injuries. Marty thinks about going to the courthouse to report Judd's mistreatment of his dogs. "Dad says that's where we'd have to go, all right, but how am I going to prove it about Judd? Think about that he says."⁴³ Marty's thoughts were that Judd would not admit to such actions and no investigator is going to hide out near Judd's place for a week just to see for himself.

Tyler County hasn't hardly got the money to investigate reports of children being kicked, Dad says, much less dogs. Even if I told the animal rights people that I found a dog with a bullet hole in its head up near Judd's house, don't prove that Judd was the one who killed it.⁴⁴

Marty is again frustrated by the law. The law requires proof that Marty does not have, so the law and the legal system offer no solution. Furthermore, Marty considers the strain on the community law enforcement entails. "Around here it's serious business when you got a quarrel with your neighbor and you got to carry it as far as the law."⁴⁵ Again, the law is not an avenue that resolves conflicts; it seemingly creates them.

As the day to return Shiloh to Judd nears, Marty starts off to Judd's home to tell Judd that Marty will not return Shiloh to Judd. On his way to deliver that message to Judd, Marty sees a deer grazing in a meadow near Judd's home. Then a shot rings out and the deer falls to the ground dead. Marty knows someone just killed a deer out of season. Marty then sees Judd Travers, rifle in hand, approach the dead deer. When Judd sees Marty, Judd says he found the deer eating his garden this morning and that he chased her to the meadow. Marty tells Judd that he is lying because Marty was in the woods watching her eat. Marty tells Judd there is a two hundred dollar fine for killing a doe. Marty thinks:

42. *Id.* at 111–12.

43. *Id.* at 113.

44. *Id.* at 113–14.

45. *Id.* at 117.

All at once I realize I got Judd Travers right where I want him. One way you look at it, it's my duty to report a killed doe. The way folks up here look at it, though, that's snitching. And if I might could tell, but bargain not to, it's something else again: It's blackmail.⁴⁶

Marty also tells Judd the new game warden won't make any allowance even if the deer was eating Judd's garden.

Judd negotiates to test Marty's resolve about whether Marty would report Judd to the game warden and Marty says he would go. Judd offers Marty half of the meat from the doe, but Marty says he does not want meat, he wants Shiloh and he thinks: "I begin to see now I'm no better than Judd Travers—willing to look the other way to get something I want."⁴⁷

Ironically, the law that forbade Marty from keeping Shiloh now serves as a threat over Judd, and that threat coerces Judd to agree to give up Shiloh. The law, not through its regular operation, but through a perverse use of the law as a threat rather than a means to diffuse threats and conflicts, finally assists Marty in getting him close to securing Marty's ownership of Shiloh. Again, the law and the legal system are something to be avoided—Judd is eager to avoid the law and its sanctions and Marty too because although it might sanction Judd it would not deliver Shiloh—rather than used to resolve the conflict with the protagonist.

Judd bargains with Marty and a bargain is struck that Marty will work for Judd for two hours each day for ten days earning two dollars an hour to pay Judd forty dollars for Shiloh. Marty says he wants the agreement in writing. Judd writes on a piece of grocery sack: "[Shiloh] hunting dog to Marty Preston for twenty hours work. J. Travers."⁴⁸ Marty later speculated that once Judd rid himself of the deer that he could renege on his agreement and deny writing on the grocery sack. Thus, Marty continued to be concerned with the legal enforcement of his contract. The law did not give Marty certainty—it seemed to raise new questions and not give Marty repose.

Marty lies further to his parents by not telling them about the deer; instead, just that he must work for Judd for twenty hours for Shiloh to be his. Marty also wonders further about the law:

Wondering, too, about whose business it is when someone breaks the law. Wonder if Dad wouldn't never tell on Judd no matter what he done. Bet he would. There's got to be times that what one person does is everybody's business.⁴⁹

After one week of work, Judd uses the law to vex Marty:

46. *Id.* at 122.

47. *Id.* at 124.

48. *Id.* at 126. Judd actually wrote "Beagle hunting dog" but Marty thought Judd might try to pay him off with a different dog so he told Judd to write Shiloh, and Judd crossed out Beagle and wrote "Shiloh." *Id.* at 126–27.

49. *Id.* at 132–33.

You think you're goin to get my dog just 'cause you got some hand-writin' on a piece of paper? . . . Why, that paper's not good for anything but to blow your nose on. Didn't have a witness. . . . You don't even know what's legal and what's not, do you? Well, you show a judge a paper without a witness's signature, he'll laugh you right out of the courthouse. Got to have somebody sign that he saw you strike a bargain And nobody here but my dogs.⁵⁰

Marty, thinking this may be a trick by Judd, nevertheless continues to fulfill his side of the bargain. In the meantime, Marty frets about the purported witness requirement. He asks his father, but his father does not know. To a child, the law could be this rigid because the law is a hazy structure without understandable points of reference. Judd could have taken advantage of Marty by tricking Marty with the law's requirements; after all, Marty used the law to blackmail Judd into bargaining away Shiloh in the first place. To a child, the positive law and legal institutions can be, and are, used in this perplexing manner.

Marty does fulfill his obligations under the agreement and Judd, grudgingly admiring Marty's determination, gives him a new dog collar and tells Marty that the dog is Marty's. Shiloh then becomes the property of Marty, although legally, there would certainly be grounds for Judd to challenge the agreement because it was procured under duress but doing so would expose himself to greater sanctions. Accordingly, the legal status of Shiloh for an adult reader would still be in question, but for a child reader, the protagonist has successfully avoided the law and achieved his goal.

III. CONCLUSION

If the positive law and its legal institutions are, from a child's perspective, mysterious and corrupt systems, the only law that inclines the two novel's characters to abide by agreements, respect property, and treat animals as more than mere property is some form of natural law. That is, the characters directly or through their actions interpret the positive law on moral grounds; if the positive law impedes the protagonist's achieving worthy goals, then the positive law is somehow checked. Thus, children's novels tend to convey that positive law can and should be evaluated on moral grounds. This idea of morality having a superior status than that of the positive law is a concept at the core of traditional natural law theory, which posits a "higher law"

50. *Id.* at 137. Aside from real estate transactions, there does not appear to be any West Virginia authority requiring a witness for enforceability of a contract. Even husbands and wives can make property agreements between themselves provided only that the agreement be in writing signed by both parties. See W. VA. CODE ANN. § 48-29-301 (LexisNexis 2004).

against which man-made law can be analyzed, a prevalent concept in the children's legal novel.⁵¹

This idea of an individual evaluating the morality of man-made law was articulated by traditional or early natural law theorists such as Cicero,⁵² Aquinas,⁵³ and Saint Augustine.⁵⁴

Natural Law is essential justice, justice itself, the origin and test of all positive laws It is above all rational, discoverable through reason, and therefore *justifiable*. . . . With its aid humankind can live compatibly in the rational order of nature.

. . . .

While earlier traditions of Natural Law relied solely on reason, Christianity, largely through Aquinas and in England St. German, added conscience. The Christian version of the theory maintains that God established a universe governed by reason, and he imprinted conscience on the human mind to enable us actively to choose virtue and reject vice.⁵⁵

Marty Preston's actions to protect Shiloh, even though Marty understood that the positive law commanded him to return Shiloh to Judd, implies that even a child is not only capable but has a responsibility to make worthy moral decisions and that such a decision may conflict with the commands of the positive law. This is one reason that *Shiloh* is regarded as a complex novel of morality.⁵⁶ Also, Toad's escape from his confinement after his excessive punishment and the repossession of his property, particularly after he has compensated all of his victims, appears to the child reader of *The Wind in the Willows* as the meritorious outcome compared to the available alternatives in the novel, notwithstanding the commands of the positive law.

51. See William P. MacNeil, "Kidlit" as "Law-and-Lit": *Harry Potter and the Scales of Justice*, 14 *CARDOZO STUD. L. & LITERATURE* 545, 546 (2002) ("So what Rowling may point to here is not so much the utility of the law, but its *limits* (and, by the way, the indeterminacy of judgment), urging the society of Hogwarts to go 'beyond the law,' realizing [sic] in its stead a community of fairness, a realm of justice.").

52. "The law which was never written and which we were never taught which we never learned by reading, but which was drawn from Nature herself, in which we have never been instructed, but for which we were made, which was never created by man's institutions, but with which we are all imbued." JOHN MAXCY ZANE, *THE STORY OF LAW* 135 (Liberty Fund, Inc., 2nd ed. 1998) (1927) (quoting Cicero in his speech for Milo).

53. "'And if a human law is at variance in any particular with the Natural Law, it is no longer legal, but rather a corruption of law.'" R.S. WHITE, *NATURAL LAW IN ENGLISH RENAISSANCE LITERATURE* 1 (1996) (quoting Saint Thomas Aquinas).

54. "There is no law unless it be just." *Id.* (quoting Saint Augustine).

55. *Id.* at 1-2.

56. Certain critics found Marty's moral analysis precocious for an eleven-year-old boy, characterizing his moral reasoning at Stages 5 and 6 on Kohlberg's Stages of Moral Development. Edgar H. Thompson et al., *Exceeding Our Grasp: An Examination of Moral Development* 25 *THE ALAN REVIEW* 42, available at <http://scholar.lib.vt.edu/ejournals/ALAN/winter98/thompson.html>.

Thus, in children's novels that rely on virtuous action without necessarily following the dictates of positive law, if one is to find legal relationships or conceptions of law in such works of literature, such relationships or conceptions reflect notions of natural law. R.S. White has argued with regard to renaissance literature that:

Poetic justice is about as close as we can come to an observable enactment or construction of Natural Law, in a kind of dynamic experiment set up by the writer. The connections between legal theory and imaginative literature in the Renaissance are sometimes direct and at other times oblique, but they centre on the shared reliance on the justice that poetry can enact. Both legal and literary theory in the Renaissance insisted that right and wrong exist prior to positive law, can be known by people through reason and conscience, and can finally prevail as a resolution to conflicts.⁵⁷

Similarly, in *The Wind in the Willows* and *Shiloh*, right and wrong discovered through conscience prevails over the positive law. Thus, one can see natural law as a foundational legal assumption in these classic children's novels.

The law-schooled reader perceives not just criticism of the procedural aspects of man-made law and the functioning of legal institutions, but also criticisms of certain substantive law. The forcible taking back of Toad Hall by Toad and his allies reflects a belief that repossession of property by force should be tolerated (and some would argue encouraged) regardless of breaches of the peace. Natural law as represented by the poetic justice of the stoats and weasels getting their comeuppance by those they dispossessed suggests that the substantive law of re-capture or repossession of property is sub-optimal.

Similarly, the substantive law of the rights of animals seems bankrupt when it cannot, at a minimum, protect *Shiloh* from Judd's cruelty. There seems to be criticism in *Shiloh* of animals being mere property of their human owners, something man-made law supports within some bounds set forth in anti-cruelty laws. *Shiloh* and *The Wind in the Willows* offer a deeper respect for animals than merely the protection of being free from cruelty. *Shiloh* promotes a concept not inherent in man-made law that animals have inherent value and have if not consciousness, then at least feeling. Further, *Shiloh* pleads for the injustice of "regarding any animal whatsoever as a meaningless automaton, to be worked, or tortured, or eaten, as the case may be, for the mere object of satisfying the wants or whims of mankind."⁵⁸

The Wind in the Willows, too, endorses a concept of animals as sentient beings not recognized in man-made law:

57. WHITE, *supra* note 53, at 6-7.

58. HENRY STEPHENS SALT, *ANIMALS' RIGHTS* 16-17 (Soc'y for Animal Rights, Inc. 1980) (1892).

The animals did not hold with villages, and their own highways, thickly frequented with as they were, took an independent course, regardless of church, post office, or public-house.

...

Once beyond the village, . . . they could smell through the darkness the friendly fields again . . . They plodded along steadily and silently, each of them thinking his own thoughts.

...

We . . . have not even the proper terms to express an animal's intercommunications with his surroundings . . .⁵⁹

There is even a passage in *The Wind in the Willows* where it is stated that Toad would take offense were the warden's daughter to suggest that she appreciates animals "as pets."⁶⁰ Thus, both novels overtly and impliedly endorse a respect for animals greater than that afforded by human-made law and correspondingly, human-made law is again censured for its inability to protect and afford some greater legal significance to animals.⁶¹

This framework of natural law in children's literature suggests that human law does not do a suitable job of ordering the lives of humans, or animals. At best, human law provides an imperfect order. A aberrant behavior or behavior that runs counter to customs (as in *Willows*) or conscience (as in *Shiloh*) is ill-managed by human law, but properly addressed by the natural law reflected in the novels. It is unlikely that a child would see the relations as "legal" in these novels, although the law that is portrayed—the positive law—is portrayed unfavorably. Even in the story of *Dick Whittington and His Cat*,⁶² a story founded on the concept of respect for contracts—a very legalistic story—would not be seen by a child as a story about or involving the law at all. Thus, all that is left in many children's novels is an impoverished view of man-made law and its legal institutions.

59. GRAHAME, *supra* note 2, at 66–67.

60. *Id.* at 116.

61. The novels do not suggest the abolition of the concept of animals as property. For an argument in support of such a concept, see GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 253–61 (1995).

62. One popular version for children is MARCIA BROWN, *DICK WHITTINGTON AND HIS CAT* (Charles Scribner's Sons 1950) (1950).