



1987

Adjudication Is Not Interpretation: Some Reservations About the Law-As-Literature Movement

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Georgetown Public Law and Legal Theory Research Paper No. 11-73

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54 *Tenn. L. Rev.* 203 (1987)

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ADJUDICATION IS NOT INTERPRETATION: SOME RESERVATIONS ABOUT THE LAW-AS-LITERATURE MOVEMENT

ROBIN L. WEST*

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I. INTRODUCTION

Among other achievements, the modern law-as-literature movement has prompted increasing numbers of legal scholars to embrace the claim that adjudication is interpretation, and more specifically, that constitutional adjudication is interpretation of the Constitution.¹ That adjudication *is* interpretation—that an adjudicative act

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1. The law-as-literature movement is becoming increasingly difficult to define, as it comes of age. It has, I think, at least three strands. First, there is a growing body of scholarship from legal scholars regarding the legal and jurisprudential ideas contained *in* literature. See, e.g., Kuffler, *Capital in Hell: Dante's Lesson*

is an interpretive act—more than any other central commitment, unifies the otherwise diverse strands of the legal and constitutional theory of the late twentieth century. Owen Fiss, for example, begins his influential article *Objectivity and Interpretation* with the claim that “Adjudication is interpretation: Adjudication is the process by which a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text.”² Ronald Dworkin begins his article *How Law is Like Literature* with a remarkably similar declaration:

I shall argue that legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally [W]e can improve our understanding of law by comparing legal interpretation with interpretation in . . . literature. I also expect that law, when better understood, will provide a better grasp of what interpretation is in general.³

Tom Grey summarizes the state of the art in the opening paragraphs of his most recent contribution to the interpretivism literature, *The Constitution as Scripture*, thusly:

If the current interest in interpretive theory, or hermeneutics, does nothing else, at least it shows that the concept of interpretation is broad enough to encompass any plausible mode of constitutional adjudication. *We are all interpretivists*; the real arguments are not over whether judges should stick to interpreting, but over what they should interpret and what interpretive attitudes they should adopt.⁴

on Usury, 32 RUTGERS L. REV. 608 (1985); Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor With an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1 (1982); West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1986). Second, both legal and literary scholars are studying the relationship between literary criticism and legal criticism, and between literary theory and legal theory. In addition to the articles discussed in this piece, see R. DWORKIN, *How Law is Like Literature*, in A MATTER OF PRINCIPLE 146 (1985) [hereinafter DWORKIN]; *Symposium on Law and Literature*, 60 TEX. L. REV. (1982); *Interpretation Symposium*, 58 S. CAL. L. REV. (1985). See also Cover, *The Supreme Court, 1982 Term — Forward: Nomos and Narrative*, 97 HARV. L. REV. 1 (1983); Michelman, *The Supreme Court, 1985 Term—Foreward: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986). Third, there is a growing awareness amongst legal scholars that both law and legal theory can profitably be read as literature. See, e.g., J. WHITE, *THE LEGAL IMAGINATION* (1982) (reading law as literature); West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985). For a general bibliography of writings of the law and literature movement through 1979, see Suretsky, *Search for a Theory: An Annotated Bibliography of Writings on the Relation of Law to Literature and the Humanities*, 32 RUTGERS L. REV. 727 (1979).

2. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

3. DWORKIN, *supra* note 1, at 146.

4. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984) (emphasis added).

However, Grey's claim that "we are all interpretivists," while it states an important truth, also misleads. For while it is true, in a sense, that *today* most constitutional theorists are interpretivists, it is not the case that *all* constitutional theorists are interpretivists, and it is surely not the case that this has always been so. That adjudication consists primarily of the interpretation of texts is a very old claim—its roots lie in Blackstone's insistence that adjudication is primarily the discovery, not the creation of law. But in our century as in Blackstone's time, there is a competing, non-interpretivist vision of what adjudication is, and although no longer dominant that competing vision is nevertheless still a part of American legal theory. The competing vision is that adjudication, including constitutional adjudication, is an *imperative* act, not an interpretive act. According to this tradition, what might be called the "imperativist" tradition, the essence of adjudication, including constitutional adjudication, is the creation of law backed by force, not the interpretation of a pre-existing legal text guided by reason. Adjudication is an act of power, not of cognition. It is a branch of politics, not a branch of knowledge. Grey's claim and state-of-the-art hermeneutic theory notwithstanding, these two conflicting traditions—one united around the claim that adjudication is interpretive, and the other around the opposing claim that adjudication is imperative—are both still with us, and in one form or another have always been with us. In the eighteenth and nineteenth centuries the imperativist-interpretivist debate could be heard in the competing tenets of the English legal positivists and the natural lawyers.⁵ In the early twentieth century, the imperativist-interpretivist divide could be found in the competing theories and pedagogies of the legal formalists and the legal realists.⁶ In the second half of this

5. The legal positivist's classic formulation (that law is "the command of the sovereign") is, of course, Austin's. See J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 13-14 (1965). The sentiment is echoed in J. BENTHAM, *OF LAWS IN GENERAL* 31-33 (H.L.A. Hart ed. 1970). For the leading positivist's exposition of the interpretive-imperative debate, see J. BENTHAM, *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* (J.H. Burns & H.L.A. Hart eds. 1977). For a modern review of the Blackstone-Bentham debate, see H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* (1982).

6. For the realists' exposition of the imperative-interpretive debate, see GRAY, *THE NATURE AND SOURCES OF THE LAW* (1909); K. LLEWELLYN, *THE BRAMBLE BUSH* (1930); Bingham, *What is the Law?*, 11 MICH. L. REV. 1, 109 (1912); Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 CORNELL L.Q. 568 (1932); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-62 (1897); Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1 (1915); Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918); Hutcheson, *Lawyer's Law and the Little, Small Dice*, 7 ILL. L. REV. 1 (1932); Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943); Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

century, we feel the same imperativist-interpretivist tension between the contrasting visions of the liberal legalists and at least a few (by no means most) of the critical legal scholars.⁷

In *this* decade, though, and in *this* country, and in *this* legal culture (meaning law schools and law reviews), Grey is surely right. Interpretivism—the view that adjudication is primarily an interpretive enterprise—dominates in the academy and in the law reviews; and imperativism—the view that adjudication is primarily an imperative enterprise—is declining. Today, it is indeed the case that most modern American legal theorists, and almost all modern constitutional theorists, are interpretivists of one sort or another. This fact alone is significant but not really surprising. As Grant Gilmore observed in a different context,⁸ imperativism and interpretivism tend to come and go in waves, with one tradition dominating one generation's jurisprudential fancy, only to be supplanted in the next generation by some re-vamped version of the out-of-fashion minority view.

What *is* surprising about our modern theory, I believe, is that the widely shared commitment to interpretivism has not generated a consensus on the nature and justification of adjudication itself. In fact, far from producing consensus, modern interpretivism is today a house badly divided—far more so than in its past. The rift is over the nature of interpretation. On the one hand, “objective interpretivists” claim that interpretation—whether of legal, literary, or, indeed, “behavioral” texts—is a rational and objective enterprise.⁹ When applied to legal theory, this turns out to be not just a descriptive claim about the nature of interpretation, but also a *prescriptive* claim about the morality of adjudication: its interpretive core gives adjudication both its rational persuasive power and its moral justification. “Subjective interpretivists,” on the other hand, claim that interpretation of texts—whether of legal, literary, or behavioral texts—is “subjective,” arational and “free,” rather than bounded and objective.¹⁰ When applied to legal theory, this turns out, again, to be not just a descriptive claim about the nature of interpretation, but also a “debunking” claim about the purported morality of adjudication claimed by objectivists. Because interpre-

7. See generally Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979); Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 674-75 (1983).

8. G. GILMORE, *THE AGES OF AMERICAN LAW* (1977).

9. See, e.g., Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); DWORKIN, *supra* note 1, at 119-181; R. DWORKIN, *LAW'S EMPIRE* (1985).

10. See, e.g., S. FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980); Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984); Fish, *Anti-Professionalism*, 7 CARDOZO L. REV. 645 (1985).

tation is subjective, legal interpretation, including adjudication, is also subjective. If the morality of adjudication depends on its objectivity, then while adjudication is indeed interpretive, as the objectivists correctly insist, this fact gains nothing: if morality requires objectivity, then adjudication cannot rely on its interpretive core for either its claim to rationality or for its moral justification.

Thus, the distinctive feature of modern constitutional and legal theory is that the loudest debate is not between interpretivists and imperativists, but is instead between contending schools who agree that adjudication is an interpretive enterprise, and disagree over the nature and consequences of interpretation. According to the first school, adjudication is objective and rational—and therefore morally defensible—because it is an interpretive enterprise, and interpretation is objective and rational; according to the second school, adjudication is subjective and free—and therefore morally arbitrary—because adjudication is an interpretive enterprise, and interpretation itself is subjective and free.

I will argue in this article against *both* modern forms of interpretivism. The analogue of law to literature, on which much of modern interpretivism is based, although fruitful, has carried legal theorists too far. Despite a superficial resemblance to literary interpretation, adjudication is *not* primarily an interpretive act of either a subjective or objective nature; adjudication, including constitutional adjudication, is an imperative act. Adjudication is *in form* interpretive, but in substance it is an exercise of power in a way which truly interpretive acts, such as literary interpretation, are not. Adjudication has far more in common with legislation, executive orders, administrative decrees, and the whimsical commands of princes, kings and tyrants than it has with other things we do with words, such as create or interpret novels. Like the commands of kings and the dictates of a majoritarian legislature, adjudication is imperative. It is a command backed by state power. No matter how many similarities adjudication has with literary linguistic activities, this central attribute distinguishes it. If we lose sight of the difference between literary interpretation and adjudication, and if we do not see that the difference between them is the amount of power wielded by the judiciary as compared to the power wielded by the interpreter, then we have either misconceived the nature of interpretation, or the nature of law, or both.

Furthermore, I will argue, the danger posed by interpretivist excesses is not simply conceptual confusion. By insisting that adjudication is interpretation, interpretivists misconceive not only the nature of adjudication, but also the nature, and even the possibility, of legal *criticism*. As a result, I will argue, both objective and subjective interpretivists dangerously undercut the viability of radical legal criticism—including radical critique of adjudication. Again, the problem stems from an insistence on identity, where there is at

best similarity, between literary and legal enterprises. From literary critics, legal interpretivists have adopted the insight that normative criticism of any practice is necessarily interpretive. Criticism of a piece of literature, for example, is inevitably "interpretive"—saying how good a novel is inevitably entails declaring what it means—and an "interpretation" of a piece of literature is at the same time inevitably normative, or critical—when we try to say what a novel means, we aim for the *best* meaning we can give it according to some aesthetic theory of the nature of art.¹¹ According to this argument, the boundary between interpretive claims about the meaning of a work of literature and critical claims about the value or merit of a work of literature—how good is it—is inevitably blurred. It is an easy step from this argument to the analogous position that criticism of *law* is also inevitably interpretive, and that an interpretation of law is therefore inevitably critical. After all, if law is like literature, then whatever is true for literature ought also hold for law: critical claims about the value of a law are inextricably tied with claims about the law's meaning, and interpretive claims about its meaning are inevitably value laden. Finally, when this argument is coupled with the two claims that adjudication is interpretive, and that adjudication is law, they yield this sum: If both adjudication *and criticism* of adjudication—both the criticism of law as well as the creation of law—are interpretive, then the criticism of law and the creation of law turn out to be one and the same, or at least more similar than dissimilar. The result is that the distinction between the "law" that *is* and the moral ideal that *ought* to be becomes blurred, just as for the literary theorist, the distinction between literature and literary criticism has become blurred.¹²

It is one thing, though, to blur the divide between the creation and criticism of *literature*, and quite another to blur the distinction between the creation and criticism of *law*. Historically, the conse-

11. This argument forms the basis of Dworkin's view of adjudication as interpretation. See DWORKIN, *supra* note 1, at 146.

12. Dworkin, of course, regards this feature as the strength of his position:

There is a better alternative: propositions of law are not merely descriptive of legal history, in a straightforward way, nor are they simply evaluative in some way divorced from legal history. They are interpretive of legal history, which combines elements of both description and evaluation but is different from both

Lawyers would do well to study literary and other forms of artistic interpretation Not all of the battles within literary criticism are edifying or even comprehensible, but many more theories of interpretation have been defended in literature than in law, and these include theories which challenge the flat distinction between description and evaluation that has enfeebled legal theory.

Id. at 147-48.

quence of the blending of the law and the moral basis from which we criticize law has almost always been a politically regressive insistence upon the morality of existing power;¹³ and the present decade's fashionable denial of the difference between fact and value (whether indulged by the political left or by the political center) has proven to be no exception. The most obvious and compelling implication of the claim that there is no real difference between the law that is and the law that ought to be is that the law which is, is perfect: the law that is, is as it ought to be. The anti-positivist blurring of that which is from that which ought to be entails a non-critical, accepting complacency with the status quo.

The routes, of course, by which objectivists and subjectivists arrive at their shared conservatism, are drastically different from each other. Objectivism, I will argue, entails a conservative vision of the scope of legal criticism because it embraces a relativistic account of morality. Subjectivism, I will argue, entails a limited, regressive vision of the scope of legal criticism because it embraces a nihilistic account of morality (although not for the reasons most often put forward by objectivists). But the difference in the arguments put forward by objective and subjective interpretivists has diverted attention from the incredible amount of ground that they share. They both view adjudication—or “law”—and criticism of adjudication as “interpretive” acts. By so doing, they tie the basis of legal criticism to “communicative texts” written or conceived by the community's collective or not-so-collective past. Accordingly they tie the use of power, as well as its critique, to the norms and ideals generated by the *audible* voices of our political history. As a consequence they both preclude on their own terms the possibility of a truly radical critique of power: a critique based on the norms and ideals generated not by the audible voices of our political past, but instead by a “self” who has been trampled, not celebrated, by our history, and whose vision has been ignored, not expressed, in the collective “communicative texts” of our culture's political past.

In order, partly, to demonstrate what I take to be the real value of literature to lawyers, I will argue that two works of literature themselves teach us the irresponsibility of viewing legal analysis as either an objective or subjective interpretive act. I will argue that the exploits of two fictional lawyers—Mark Twain's “Pudd'nhead

13. Thus Bentham noted that the natural lawyer's identification of law with a higher morality almost always serves the ends of the powerful. See J. BENTHAM, *A Commentary on Humphreys' Real Property Code*, in 5 WORKS OF JEREMY BENTHAM 389 (1962). H.L.A. Hart makes the same point in Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

Wilson" from the novel of the same name,¹⁴ and John Barth's Todd Andrews from *The Floating Opera*¹⁵—are illustrative of where, in my view, interpretivism has gone wrong. Thus, it is my contention that Mark Twain and John Barth have done important work for legal theorists: Twain's lawyer protagonist "Pudd'nhead Wilson" scrupulously follows the objective interpretive strategies of Ronald Dworkin's mythical and interpretive Hercules, yet he is no hero. And John Barth's lawyer protagonist Todd Andrews just as scrupulously lives out the assumptions of subjectivist interpretivism in his law practice in a small town on Maryland's Eastern Shore. Todd Andrews, similarly, is no hero; in fact, he constitutes a form of evil. These two works of fiction about lawyers and lawyering reveal important truths about interpretivism: both stories reveal "interpretivism" to be a justificatory illusion. When we exercise power, through courts or otherwise, we must do better than Wilson and Andrews. We must do better than even the highest ideal of interpretive behavior upon which our modern interpretivists insist.

In Part Two I will argue that objective interpretivism, as defined in Owen Fiss's influential article *Objectivity and Interpretation*,¹⁶ should be rejected. Part Three argues that the danger of relativism posed by objective interpretivism is thematically explored in Mark Twain's legal novel *Pudd'nhead Wilson*. Part Four argues that subjective interpretivism, as expressed in a recent article by Stanley Fish entitled *Anti-Professionalism*,¹⁷ should be rejected because it rests on a nihilistic morality. Part Five argues that the dangers of subjective interpretivism are dramatized by the exploits of the protagonist Todd Andrews in John Barth's legal novel *The Floating Opera*. In the conclusion I will argue briefly that only by first focusing on the imperative core of adjudication can we state and clearly apply the moral criteria by which law should be criticized.

II. OBJECTIVE INTERPRETIVISM

Modern objective interpretivism (hereinafter "objectivism") is rooted in a fear of power. It is not power, objectivists claim, but wisdom tempered by the dictates of objective texts, that constitutes the essence of the adjudicative act. Adjudication cannot be power, because power is bad—power destroys—and adjudication is good. Adjudication, which is good, *restrains* power, which is bad. Thus, it is primarily a fear of power and distrust of politics that drives Fiss's modern attack on the deconstructionists:

14. M. TWAIN, *PUDD'NHEAD WILSON*, reprinted in S. CLEMENS, *PUDD'NHEAD WILSON AND THOSE EXTRAORDINARY TWINS* (1980) [hereinafter TWAIN].

15. J. BARTH, *THE FLOATING OPERA* (1967).

16. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

17. Fish, *Anti-Professionalism*, 7 CARDOZO L. REV. 645 (1986).

A recognition of the interpretive dimensions of adjudication and the dynamic character of all interpretive activity . . . might enable us to come to terms with a new nihilism, one that doubts the legitimacy of adjudication — a nihilism that appears to me to be unwarranted and unsound, but that is gaining respectability and claiming an increasing number of important and respected legal scholars, particularly in constitutional law. They have turned their backs on adjudication and have begun a romance with politics. This new nihilism might acknowledge the characterization of adjudication as interpretation, but then would insist that . . . for any text . . . there are any number of possible meanings, . . . and that in the choosing of one of those meanings, . . . the judge will inevitably express his own values. All law is masked power. In this regard the new nihilism is reminiscent of the legal realism of the early twentieth century. It too sought to unmask what was claimed to be the true nature of legal doctrine. . . . It saw law as a projection of the judge's values.¹⁸

This fear of power, both judicial and otherwise, is not new to modern objectivism. It echoes the natural lawyer's eighteenth and nineteenth century distrust of legal positivism, and the turn-of-the-century formalistic reaction to the legal realists. Roscoe Pound expressed the same passionate distrust of power in his attack on the legal realists half a century ago:

I suggest to you that so-called realism in jurisprudence is related to realism in art rather than to philosophical realism. Like realism in art it is a cult of the ugly An artist commissioned to paint the portrait of one of the outstanding judges of the recent past noted that he had a huge fist and a habit of holding it out before him. Accordingly, as a realist, he painted the fist elaborately in the foreground as the chief feature of the portrait, behind which, if one's gaze can get by the fist, one may discover in the background a thoughtful countenance. The judge did have such a fist and did hold it out in front of him on occasion. But having known him well for years, I doubt if anyone thought about it till the artist seized upon it and made it the main feature of his portrait. The fist existed. But was it the significant feature of the judge? Was reality in the sense of significance in the fist or in the countenance?¹⁹

For Fiss, no less than for Pound, the judge who simply wields power, who effectuates politics through adjudicative decisions, who uses his power to promote his *own* vision of our social ideal, is acting amorally or immorally: he is acting outside the parameters of the Rule of Law. In Fiss's view, such a creature constitutes an apocalyptic nightmare: he "threatens our social existence and the

18. Fiss, *supra* note 16, at 740-41.

19. R. POUND, JUSTICE ACCORDING TO LAW 90-91 (1951).

nature of public life as we know it in America,"²⁰ and he "demeans our lives."²¹ To return to Pound's metaphor, for the objectivist the appropriate symbol for power is the fist. Power is destructive. Like the fist, it has no constructive function. Like the fist, it lashes out and destroys. Fiss ends his piece by decrying our social future, should the imperativist implications of the new nihilism—subjectivism—ever come to be widely accepted:

The great public text of modern America, the Constitution, would be drained of meaning. It would be debased. It would no longer be seen as embodying a public morality to be understood and expressed through rational processes like adjudication; it would be reduced to a mere instrument of political organization—distributing political power and establishing the modes by which that power will be exercised. Public values would be defined only as those held by the current winners in the processes prescribed by the Constitution; beyond that, there would be only individual morality, or even worse, individual interests.

Against the nihilism that scoffs at the idea that the Constitution has any meaning, it is difficult to reason I believe it imperative to respond, . . . for this nihilism calls into question the very point of constitutional adjudication; it threatens our social existence and the nature of public life as we know it in America; and it demeans our lives It must be combatted and can be, though perhaps only by affirming the truth of that which is being denied—the idea that the Constitution embodies a public morality and that a public life founded on that morality can be rich and inspiring.²²

As noted above, this fear of unrestrained power is a familiar feature of the natural law tradition. What distinguishes modern objectivism from the rest of the natural law tradition—and what distinguishes Fiss from Pound—is the solution objectivism proposes to the problem of power. Unlike their natural law predecessors, modern objectivists insist that *obedience to an authoritative legal text* is the solution, and the only solution, to the problem of power posed by the "significance in the fist." Judicial obedience to legal text, the modern objectivist insists, will curb, legalize, restrain, and moralize "personal or partisan politics,"²³ the destructive exercise of power, and politically victorious "individual interests."²⁴ Obe-

20. Fiss, *supra* note 16, at 763.

21. *Id.*

22. *Id.*

23. Thus, Dworkin argues that "[l]aw . . . conceived [as interpretation] is deeply and thoroughly political. Lawyers and judges cannot avoid politics in the broad sense of political theory. *But law is not a matter of personal or partisan politics.*" R. DWORKIN, *supra* note 1, at 146 (emphasis added).

24. Fiss, *supra* note 16, at 763.

dience to text is everything that power is not. Power is destructive, demeaning, irrational, arbitrary, immoral, and threatening to the community's life; while obedience to text, particularly to constitutional text, is constructive, uplifting, communitarian, moral and rational. The judge who interprets the objective text and fairly applies it protects our public morality, promotes the community's collective existence, and ensures that our collective existence has meaning and value. Judicial obedience to text transforms power into reason. It converts personal partisan politics into objective, communitarian wisdom. Obedience to an objective text thus *purifies* as it *disciplines* subjective power. The morality of obedience to the objective text of the constitution is a fundamental commitment that simply cannot be challenged:

[W]hy must we respect the Constitution? [To] . . . answer such a question . . . one must transcend the text and the rules of interpretation to justify the authority of the text; to justify the Constitution itself or explain why the Constitution would be obeyed, one must move beyond law to political theory, if not religion. Such questioning can itself become a moment of crisis in the life of a Constitution, and since it is occasioned by a rigid insistence on the principles of positivism and the separation of law and morals, judges have an incentive to temper their commitment to that legal theory and thus to read the moral as well as the legal text.²⁵

The judge's willingness to obey the mandates of objective texts is both the necessary and sufficient condition for the morality of adjudication itself. It morally justifies the judge's institutional authority. Fiss puts the point this way:

[A]n individual has a moral duty to obey a judicial interpretation . . . because the judge is part of an authority structure that is good to preserve. This version of the claim of authoritativeness speaks to the individual's conscience and derives from institutional virtue, rather than institutional power. It is the most important version of the claim of authoritativeness, because no society can heavily depend on force to secure compliance It vitally depends on a recognition of the value of judicial interpretation. Denying the worth of the Constitution, the place of constitutional values in the American system, or the judiciary's capacity to interpret the Constitution dissolves this particular claim to authoritativeness.²⁶

The judge who is properly engaged in constitutional adjudication is not exercising power—objective interpretation is the opposite of power. Rather, he is *relinquishing* power. He is engaging in an act of "civil obedience." But the judge who interprets and obeys texts

25. *Id.* at 753-54.

26. *Id.* at 756.

is no automaton; he is doing truly heroic and profoundly difficult intellectual and moral labor. Objective interpretation is as difficult as it is moral. Dworkin calls his interpretivist judge "Hercules" to underscore the dimensions of the task. Fiss captures the complexity of interpretation in this passage:

A secure concept of the judicial role, and the priorities within that role, and a proper recognition of the source of legitimacy, may enable the judge to order and perhaps even reconcile tasks that may otherwise tend to conflict. The core of adjudication, objective interpretation, can be protected from the pressures of instrumentalism, as it can be protected from the tensions produced by the claim of authoritativeness. The multiple demands of adjudication often make law an elusive, partly realized ideal, for they mean the judge must manage and synthesize a number of disparate and conflicting roles—literary critic, moral philosopher, religious authority, structural engineer, political strategist; but it would be wrong to abandon the ideal in the face of this challenge. The proper response is increased effort, clarity of vision and determination, not surrender.²⁷

There are two problems with the modern objectivists' solution to the problem of power. The first problem might be called the problem of "moral contingency:" the *morality* of judicial obedience to an objective text depends entirely upon the morality of the objective text which is obeyed. An obedient, pliant attitude toward text is no more a guarantee against the evils of chaotic power than is fascism a moral alternative to anarchy. To borrow H.L.A. Hart's phrase, the "noble dream"²⁸ of the objective interpreter can indeed become a nightmare. The second problem is the practical problem of "possibility:" objective interpretation can only guarantee moral decision-making if there is some means of ensuring that judges will indeed engage in it. The objectivist must, that is, specify how it is that the text, and not the judge's whim, generates the final judicial outcome.

Objectivists have developed distinctive responses to both problems. First, modern objectivists *know* that the noble dream can become a nightmare. They know, even if they sometimes repress the knowledge, that the moral efficacy of obedience to legal text as a solution to the problem of power is dependent upon the morality of the legal text. South Africa, Nazi Germany, Stalinist Russia, and the slave-holding South, if nothing else, have taught us that there is no moral guarantee in the idea of law.²⁹ Yet, objectivists maintain

27. *Id.* at 762.

28. Hart, *supra* note 13.

29. Thus, Dworkin makes clear in *LAW'S EMPIRE* that he rejects the natural lawyer's claim that an "unjust law is not a law," citing both the laws of South African apartheid and those of Nazi Germany as obvious counter-examples. See R. DWORKIN, *LAW'S EMPIRE* 102-08 (1986).

their allegiance to legal text as the solution to the problem of power in the face of this knowledge. The first distinguishing feature of modern objectivism, therefore, has been its elaborate efforts to specify the "legal text" that judges ought to obey in such a way as to make plausible their claim that obedience to law's mandates will ensure the morality of adjudicatory power.

They begin by denying allegiance to older views which bear a strong but misleading resemblance to objectivism. Thus, "strict constructionists" identify the text narrowly with the intent of the framers while "textualists" identify the text as the written document itself. But both of these positions fail, and it has been modern objectivists who have made clear why: the framers, no matter how much we ought respect them, were neither Kings nor Gods; there is no good reason for thinking that obedience to their commands will ensure the moral purity of judicial actions. The document itself is just that—a legal document—not a sacred text. There is no good reason to worship it, no matter how understandable may be the impulse to do so.³⁰

For these reasons, objectivists have rejected an identification of the "text" to be obeyed with either original intent or literal meaning, and have carved out instead a third alternative: the "text" (including the constitutional text) which can morally purify judicial power, and the interpretation of which constitutes the core of adjudication, must embrace society's conventional morality. This position might be called "supplementalism." The appeal of supplementalism is obvious. If a "legal text" includes the community's moral code (as well as the community's statutes, precedents, and constitutions) and if the community's moral code is as close as one can possibly get to moral truth (or even better if it *is* moral truth), then adjudication conceived as interpretation is moral. Supplementalism is precisely the claim that is needed to transform the "rationality" that is obedience into a rationality that is noble and virtuous.³¹

30. The critical attack by modern interpretivists on strict constructionists and textualists is vast and, I am sure, all too familiar. See DWORKIN, *supra* note 1, at 154-58, 162-64; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980). On Constitution worship in general, and its relation to modern interpretivist movements, see Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 3 n.4 (1984).

31. Supplementalism, however, spawns problems of its own. One is causal: *How* did the law come to be supplemented with the community's moral code? The multiplicity and inconsistency of the metaphors used to explain this process of supplementation rather starkly reveal the interpretivists' uncertainty—is public, conventional morality read *into* the constitution, or does it emanate *from* it? Is it a separate "social text" which the judge is morally but not legally bound to abide by, or is it an addendum incorporated by reference into a contract? For some of the theorists, these are apparently not mutually exclusive alternatives. Fiss, for example,

It is the second problem, however—the charge that it is not *possible* to constrain a judge, even a well-meaning judge, to the objective meaning to be gleaned from a text—which has become the modern battleground for objectivism. Objective interpretation of the legal text is made possible, Fiss argues, by the existence of “disciplining rules” that narrow the range of interpretive discretion open to any particular judicial interpreter:

[T]he freedom of the interpreter is not absolute. The interpreter is not free to assign any meaning he wishes to the text. He is disciplined by a set of rules that specify the relevance and weight to be assigned to the material, . . . as well as by those that define basic concepts and that established the procedural circumstances under which the interpretation must occur [Disciplining rules] constrain the interpreter, thus transforming the interpretive process from a subjective to an objective one, and they furnish the standards by which the correctness of the interpretation can be judged. These rules are not simply standards or principles held by individual judges, but instead constitute the institution . . . in which judges find themselves and through which they act. The disciplining rules operate similarly to the rules of language, which constrain the users of the language, furnish the standards for judging the uses of language, and constitute the language.³²

Acquiescence in the disciplining rules is a necessary condition to participation in the “interpretive practice” that constitutes adjudication:

seems to endorse both positions. Public morality is a “prism” through which judges read the constitution, but furthermore, the Constitution itself *establishes*—positivistically, if you will—certain values which are and must be regarded as fundamental. Its fundamental justness cannot be questioned:

Positivism tries to separate law from morals, . . . but the separation will . . . never be complete. Two forces modulate the separation The first derives from the fact that the judge is trying to give meaning and expression to public values (those that are embodied in a legal text) and that his understanding of such values—equality, liberty, property, due process, cruel and unusual punishment—is necessarily shaped by the prevailing morality. The moral text is a prism through which he understands the legal text. The second force relates to an intellectual dilemma of positivism: A too rigid insistence on positivism will inevitably bring into question the ultimate moral authority of the legal text—the justness of the Constitution.

Fiss, *supra* note 16, at 753. However it is that the Constitution becomes permeated with moral values, Fiss, like Dworkin, is clear that it is indeed so permeated. He is also clear that it is by virtue of the incorporation of public morality, or values, into the legal text that obedience to that text is a moral act: “The idea of adjudication requires that there exist constitutional values to interpret, just as much as it requires that there be constraints on the interpretive process. Lacking such a belief, adjudication is not possible, only power.” *Id.* at 763.

32. *Id.* at 744.

Rules are not rules unless they are authoritative, and that authority can only be conferred by a community. Accordingly, the disciplining rules that govern an interpretive activity must be seen as defining or demarcating an interpretive community consisting of those who recognize the rules as authoritative [I]n law the interpretive community is a reality. It has authority to confer because membership does not depend on agreement. Judges do not belong to an interpretive community as a result of shared views about particular issues or interpretations, but belong by virtue of a commitment to uphold and advance the rule of law itself. They belong by virtue of their office. There can be many schools of literary interpretation but . . . in legal interpretation there is only one school and attendance is mandatory. All judges define themselves as members of this school and must do so in order to exercise the prerogatives of their office. Even if their personal commitment to the rule of law wavers, the rule continues to act on judges; even if the rule of law fails to persuade, it can coerce. Judges know that if they relinquish their membership in the interpretive community, or deny its authority, they lose their right to speak with the authority of the law.³³

Thus, substantive supplementation of the text with the community's values solves the problem of moral contingency, while the existence and operation of disciplining rules solve the problem of possibility. Disciplining rules facilitate interpretation of the legal text, while supplementation of the text with values moralizes the act. By virtue of the disciplining rules that constrain discretion, adjudication is an interpretive act of reason rather than an act of power, and by virtue of the values that supplement the text to be interpreted, it is an act of morality rather than politics. The objectivist thesis, then, is this: properly understood, adjudication is the *disciplined interpretation of a supplemented legal text*. It is by virtue of its substantive supplementation and its procedural discipline that it is a morally justified practice.

However, even assuming its coherence, objectivism thus defined—the view that adjudication consists of the disciplined interpretation of a supplemented, objective legal text—does not do what Fiss hopes: it does not transform acts of amoral power into acts of moral reason. It may indeed transform an act of power into an act of reason, but this does not necessarily translate into a gain in morality. For the conventional morality, or the “public morality,” with which the supplementalists gloss the legal text is not the same as true morality: there is no guarantee that the conventional code of virtue to which a community subscribes is a moral one. It might be felt as moral and in fact be horrific. The same is true of a disciplining rule. Supplementing the text of the Constitution with

33. *Id.* at 745.

the conventional morality of the community does not confer upon the Constitution any mantle of moral wisdom, and constraining the act of interpretation with disciplining rules may transform an adjudicative act into an interpretive act, but it does not transform an interpretive act into a moral act. Substantive supplementation confers upon the court only the wisdom of the community, which may be no wisdom at all; and obedience to rules of discipline derived from community practice imposes upon the judge obligations commensurate with the community's practices, which may or may not be just. Objective interpretivism does indeed guarantee the interpreter a modicum of popularity, or success, in the community. It ensures that Dworkin's Hercules will be loved, in spite of the fact that he was not elected. But it does not guarantee that his decisions will be just, or that his actions will be good.

Fiss has anticipated at least part of this objection. He knows, and even insists, that the degree of "objectivity" he is describing is relative:

[T]he objective quality of interpretation is bounded, limited, or relative. It is bounded by the existence of a community that recognizes and adheres to the disciplining rules used by the interpreter and that is defined by its recognition of those rules. The objectivity of the physical world may be more transcendent, less relativistic, . . . but as revealed by the reference to language and the disciplining rules of interpretation, the physical does not exhaust the claim of objectivity, nor does it make this bounded objectivity of interpretation a secondary or parasitic kind of objectivity. Bounded objectivity is the only kind of objectivity to which the law—or any interpretive activity—ever aspires and the only one about which we care. To insist on more, to search for the brooding omnipresence in the sky, is to create a false issue.³⁴

But unfortunately, Fiss fails to address the obvious implication of his concession, which is just this: If the source of adjudicative morality is its objectivity, and if objectivity is relative, then the morality of adjudication is relative as well. Thus what Fiss concedes of objectivity must also be conceded of morality, and Fiss's crucial penultimate sentence so amended becomes this—"Bounded morality is the only kind of morality to which the law . . . aspires and the only one about which we care." But this is just wrong: bounded morality is *not* the only kind of morality to which the law ever aspires, and bounded morality is not the only one about which we care. Moral relativism is no alternative to the moral nihilism Fiss fears in subjectivism. The claim that it is, I think, rests upon an optimism regarding "community," and more specifically our own historical community, which is simply unwarranted. Surely, from the perspective of those *most in need of the law's protection*—

34. *Id.* at 745-46.

slaves, women, workers, children, the poor, the illiterate, the uneducated, dissidents and other members of that vast and silenced majority whom the "community" in its relative moral wisdom has at one time or another cast off—a relativism that ties justice to community norms and practices is as odious and even frightening as the "nihilism" Fiss imagines he sees in the deconstructive instincts of his opponents.

My claim, then, is simply that the supplemental strategy of modern objectivism is marred by an undue optimism regarding community (as well as an undue pessimism regarding power). Objectivism indeed gives us a somewhat counter-positivist means by which to criticize adjudicative outcomes. According to objectivism's current supplementalist strategies, we can and should test substantive legal outcomes against the community's moral code. We can criticize its procedures against the community's interpretive practices, and if we discover that an act of adjudication does not accord with the community's moral sense or that the process breaks a disciplining rule, we can, if objectivism is right, infer from either fact that the decision is *legally* as well as morally wrong. If the Constitution incorporates the community's conventional morality and its interpretive practices by reference, then the adjudicative decision which incorrectly reads the conventional morality or the conventional rules will be as wrong, legally, as the decision which incorrectly reads the statute book. As progressive strategy, this enrichment of legal norms might be helpful and then again it might backfire, and badly. It might be progressive or regressive—explicitly depending upon the community's present moral mood. But whichever it is, we should be clear that *legal* enrichment of legal norms is *all* that supplementalism entails. The decision that is out of kilter with the community's moral sense (and therefore an "illegal" decision) is not necessarily an immoral decision, and a decision that is in accord with the community's conventional morality and conventional rules of reasoning is not necessarily morally righteous. Supplementing the legal text with the conventional morality of the community, and insisting upon judicial acceptance of such a supplemented text, might insure judicial popularity; it might, that is, ensure judicial stability. It does not, however, ensure judicial virtue. Relativism is not a moral alternative to what Fiss perceives, either rightly or wrongly, to be the spectre of nihilism, regardless of whether or not it is politic.

III. INTERPRETATION, POPULARITY AND FOLLY: CONVENTIONAL MORALITY AND PUDD'NHEAD WILSON

Mark Twain's legalistic novel *Pudd'nhead Wilson*³⁵ takes place in an interpretive community and as such it has a lot to teach

35. TWAIN, *supra* note 14.

about the relative virtues of interpretive practices. The interpretive community in this novel is a small town—"the town of Dawson's Landing, on the Missouri side of the Mississippi."³⁶ The business district is just one street, six blocks long, where "three brick stores three stories high towered above interjected bunches of little frame shops."³⁷ It is, Twain tells us, a "slave-holding town, with a rich slave-worked grain and pork country back of it."³⁸ The "chief citizen" of the town is a judge of the county court: York Driscoll, of Virginian ancestry, and a gentleman.³⁹ The second citizen is a lawyer, Pembroke Howard, another "old Virginian grandee with proved descent from the First Families,"⁴⁰ also a gentleman and an authority on the "Code." As the identity of its chief citizens reveals, the town respects its judges and lawyers immensely, and takes its law and its legal rights very seriously indeed.

Further, as Dworkin and Fiss would have it, the town's "law" which it holds in such high regard is by no means merely the positivistic legal enactments found in statute books, case reports, and constitutional documents. The "law" of Dawson's Landing is supplemented by the town's conventional morality. Thus supplemented, it is in constant need of interpretation. That interpretation, in turn, requires "disciplining rules." In fact, the positive "law" of Dawson's Landing is supplemented with at least three "social texts" and is interpreted in accord with at least three "disciplining rules" of interpretation.

The first supplemental text—and to the reader the most obvious—is the town's "Code of Honor," which governs relations among the town's nobility. According to the Code of Honor, a man is responsible not for his individual commission of legally proscribed acts, but for the honor of his family name. Where the Code of Honor conflicts with positive law, the Code of Honor prevails. Twain spells out the disciplining rule that governs the interpretive practices of the nobility—and hence the interpretation of the Code of Honor—explicitly:

In Missouri a recognized superiority attached to any person who hailed from Old Virginia; and this superiority was exalted to supremacy when a person of such nativity could also prove descent from the First Families of that great commonwealth. The Howards and Driscolls were of this aristocracy. In their eyes it was a nobility. It had its unwritten laws, and they were as clearly defined and as strict as any that could be found among the printed statutes

36. *Id.* at 3.

37. *Id.*

38. *Id.* at 4.

39. *Id.*

40. *Id.*

of the land. The F.F.V. was born a gentleman; his highest duty in life was to watch over that great inheritance and keep it unsmirched. He must keep his honor spotless. Those laws were his chart These laws required certain things of him which his religion might forbid: then his religion must yield — the laws could not be relaxed to accommodate religion or anything else. Honor stood first; and the laws defined what it was and wherein it differed, in certain details, from honor as defined by church creeds and by the social laws and customs of some of the minor divisions of the globe that had got crowded out when the sacred boundaries of Virginia were staked out.⁴¹

Second, and more important to the plot, the community's positive law is supplemented by the Racial Code, which governs relations between slaves—or, more accurately, “niggers”—and whites. The primary disciplining rule of the Racial Code (although nowhere explicitly stated) is that “niggers are guilty” and that slavery is their punishment. But unlike the disciplining rule governing the Code of Honor, Twain does not give us a direct recitation of this rule. Instead, he sets the plot around it. Thus, Twain begins the novel with a series of interpretations of the Racial Code, all of which are facilitated by its implicit disciplining rule. First, the novel opens with a white owner's legal interpretation of a *behavioral* text. A slave-owner accuses his slaves of a petty theft. The owner's interpretation of the slave's act and its appropriate sanction is “disciplined” by the owner's understanding not just of the law of property and the positive prohibition against larceny, but of that law “supplemented” by the disciplining rule of black guilt and its punishment of slavery:

Driscoll's patience was exhausted. He was a fairly humane man, toward slaves and other animals; he was an exceedingly humane man toward the erring of his own race. Theft he could not abide, and plainly there was a thief in the house. Necessarily the thief must be one of his Negroes. He called his servants before him “You have all been warned before. It has done no good. This time I will teach you a lesson. I will sell the thief. Which of you is the guilty one?”

. . . .
 “I give you one minute” . . . “if at the end of that time you have not confessed, I will not only sell all four of you, *but*—I will sell you DOWN THE RIVER!”⁴²

Twain next describes the slaves' interpretation of Driscoll's threat—itsself, of course, a command backed by sanction, and thus itself a legal text. The slaves' interpretation of the legal text “I will

41. *Id.* at 58.

42. *Id.* at 9-10 (emphasis added).

sell you down the river!" no less than Driscoll's interpretation of the slaves' act, is disciplined by, and thereby facilitated by, the "disciplining rule" that governs the Racial Code; to wit, that "niggers are guilty":

It was equivalent to condemning them to hell! No Missouri negro doubted this Tears gushed from their eyes, their supplicating hands went up, and three answers came in the one instant:

"I done it!"

"I done it!"

"I done it!" . . . "Very good," said the master, . . . "I will sell you *here*, though you don't deserve it. You ought to be sold down the river."

The culprits flung themselves prone, in an ecstasy of gratitude, and kissed his feet, declaring that they would never forget his goodness They were sincere, for *like a god he had stretched forth his mighty hand and closed the gates of hell against them*. He knew, himself, that he had done a noble and gracious thing, and he was privately well pleased with his magnanimity; and that night he set the incident down in his diary, so that his son might read it in after years and be thereby moved to deeds of gentleness and humanity himself⁴³

The one slave of the four who had not committed the theft, and was therefore not sold in retaliation, alone understands Driscoll's words for what they are: an act of power. Only Roxy, who becomes a major character, fully understands and acts upon the imperative import of Driscoll's spoken threat:

Percy Driscoll slept well the night he saved his house-minions from going down the river, but no wink of sleep visited Roxy's eyes. A profound terror had taken possession of her. Her child could grow up and be sold down the river! The thought crazed her with horror.⁴⁴

Roxy responds to Driscoll's threat by switching her own mulatto baby—who is a nigger, but is to all appearances white—with the Master's baby under her care, so as to ensure that her own baby will never be "sold down the river." Her moral justification for this act, both to herself and to God, is facilitated by her interpretation of an anecdote related by a preacher, in which a white nigger—an English servant girl—had done the same thing. Roxy's interpretation of the preacher's text depends upon the disciplining rule that white people are innocent:

" 'Tain't no sin—*white* folks has done it! It ain't no sin, glory to goodness it ain't no sin! *Dey's* done it—yes, en dey was de biggest

43. *Id.* at 12 (emphasis added).

44. *Id.* at 12-13.

quality in de whole bilin', too—*Kings!*" . . . De preacher said it was jist like dey done in Englan' one time, long time ago. De queen she lef' her baby layin' aroun' one day, en went out callin'; en one o' de niggers roun' 'bout de place dat was mos' white, she come in en see de chile layin' aroun', en tuck en put her own chile's clo'es on de queen's chile, en put de queen's chile's clo'es on her own chile, en den lef' her own chile layin' aroun' en tuck en toted de queen's chile home to de nigger quarter, en nobody ever foun' it out, en her chile was de king, bimeby, en sole de queen's chile down de river one time when dey had to settle up de estate. Dah, now, . . . it ain't no sin, caze white folks done it. *Dey* done it—yes, *dey* done it; en not on'y jis' common white folks, nuther, but de biggest quality dey is in de whole bilin'."⁴⁵

And third, the town's law is supplemented (or comes to be supplemented) by the familiar substantive parameters of legal liberalism, and comes to be interpreted in light of the familiar liberal-legalistic "disciplining rule" of individual responsibility: legal guilt or innocence attaches to an individual person by virtue of his commission of a legally proscribed act. At least at the beginning of the novel, however, this final and to our eyes most familiar disciplining rule is a hostile and foreign element in the town's interpretive practices. It is brought to the community from the outside by the novel's protagonist—an eastern-trained, eastern-born lawyer, David Wilson. Over the course of the novel, the community comes to accept Wilson as a lawyer, and comes to accept the legalistic individualism he propounds. But the town's initially hostile reaction to Wilson's brand of legalistic individualism is neatly conveyed in the novel's first explicit act of interpretation. Wilson tries to tell a joke, and the community's overly literal interpretation casts Wilson and his legalistic individualism as the outsider:

In . . . February Dawson's Landing gained a new citizen. This was Mr. David Wilson, a young fellow of Scotch parentage. He had wandered to this remote region from his birth-place in the interior of the State of New York, to seek his fortune. He was twenty-five years old, college bred, and had finished a post-college course in an eastern law school a couple of years before.

He was a homely, freckled, sandy-haired young fellow, with an intelligent blue eye that had frankness and comradeship in it and a covert twinkle of a pleasant sort. But for an unfortunate remark of his, he would no doubt have entered at once upon a successful career at Dawson's Landing . . . He had just made the acquaintance of a group of citizens when an invisible dog began to yelp and snarl and howl and make himself very comprehensibly disagreeable, whereupon young Wilson said, much as one who is thinking aloud—

"I wish I owned half of that dog."

45. *Id.* at 15.

"Why?" somebody asked.

"Because I would kill my half."

The group searched his face with curiosity, with anxiety even, but found no light there, no expression that they could read. They fell away from him as from something uncanny, and went into privacy to discuss him. One said —

" 'Pears to be a fool."

" 'Pears?" said another. "Is, I reckon you better say."

"Said he wished he owned *half* of the dog, the idiot," said a third. "What did he reckon would become of the other half if he killed his half? Do you reckon he thought it would live?"

"Why, he must have thought it, unless he *is* the downrightest fool in the world; because if he hadn't thought that, he would have wanted to own the whole dog, knowing that if he killed his half and the other half died, he would be responsible for that half, just the same as if he had killed that half instead of his own. Don't it look that way to you, gents?"

...
 "In my opinion the man ain't in his right mind."

"In my opinion he hain't *got* any mind."

...
 "I'm with you gentlemen," . . . it ain't going too far to say he is a pudd'nhead. If he ain't a pudd'nhead, I ain't no judge, that's all."

Mr. Wilson stood elected Within a week he had lost his first name; Pudd'nhead took its place That first day's verdict made him a fool, and he was not able to get it set aside, or even modified. The nickname soon ceased to carry any harsh or unfriendly feeling with it, but it held its place, and was to continue to hold its place for twenty long years.

...
 [H]is deadly remark had ruined his chance—at least in the law. No clients came. [He] offered his services now in the humble capacities of land surveyor and expert accountant With Scotch patience and pluck he resolved to live down his reputation and work his way into the legal field yet.⁴⁶

As modern interpretivists insist, legal interpretation is only one interpretive practice among many, and Dawson's Landing bears this out. The interplay of its three disciplining rules—(1) that individuals are responsible for their actions, (2) that the nobility are responsible, primarily, for their family's honor, and (3) that niggers are collectively guilty—governs the interpretation of a wide range of "texts"—not just legal texts. Most importantly, these supplementing Codes and the disciplining rules that regulate them also govern the interpretation of the various texts by which a "person" is demarcated. Thus, the primary "sub-text" according to which "identity" for purposes

46. *Id.* at 5-6.

of the first rule of responsibility—individual responsibility for legally prescribed actions—is established, is the *body*: continuity of physical identity. In the novel's climactic court scene, Pudd'nhead Wilson describes to the awestruck courtroom audience how the body can be read as a text so as to establish the physically continuous identity across time that is the necessary condition for legal and liberal responsibility:

“Every human being carries with him from his cradle to his grave certain physical marks which do not change their character, and by which he can always be identified—and that without shade of doubt or question. These marks are his signature, his physiological autograph, so to speak, and this autograph cannot be counterfeited, nor can he disguise it or hide it away, nor can it become illegible by the wear and the mutations of time. This signature is not his face . . . it is not his height, . . . it is not his form,

This autograph consists of the delicate lines or corrugations with which Nature marks the insides of the hands and the soles of the feet. If you will look at the balls of your fingers . . . you will observe that these dainty, curving lines lie close together, like those that indicate the borders of oceans in maps, and that they form various clearly defined patterns, . . . and that these patterns differ on the different fingers The patterns on the right hand are not the same as those on the left. One twin's patterns are never the same as his fellow-twin's patterns

“For more than twenty years I have amused my compulsory leisure with collecting these curious physical signatures in this town There is hardly a person in this room, white or black, whose natal signature I cannot produce, and not one of them can so disguise himself that I cannot pick him out from a multitude of his fellow creatures and unerringly identify him by his hands

“I have studied some of these signatures so much that I know them as well as the bank cashier knows the autograph of his oldest customer. While I turn my back, now, I beg that several persons will be so good as to pass their fingers through their hair and then press them upon one of the panes of the window near the jury, and that among them the accused may set *their* finger-marks.”

. . . Then, upon call, Wilson went to the window, made his examination, and said —

“This is Count Luigi's right hand. . . . Here is Count Angelo's right.

. . . Am I right?”

A deafening explosion of applause was the answer. The Bench said —

“This certainly approaches the miraculous!”⁴⁷

47. *Id.* at 108-110.

The "text" for reading *noble* identity, as opposed to individual identity, is not the body, but title and surname; as it is family membership, not one's individual history for which, according to the Code of Honor, one is responsible. Thus York Driscoll, the Judge and eventual murder victim, was "proud of his old Virginian ancestry, and in his hospitalities and his rather formal and stately manners he kept up its traditions. He was fine, and just, and generous. To be a gentleman—a gentleman without stain or blemish—was his only religion, and to it he was always faithful."⁴⁸ Similarly, Twain introduces Pembroke Howard, lawyer and bachelor, "another old Virginian grandee with proved descent from the First Families. He was a fine, brave, majestic creature, a gentleman according to the nicest requirements of the Virginian rule."⁴⁹ The Italian twins who play the foil to Tom's villainry (and become Pudd'nhead's clients, wrongly accused of murder), explain their noble identity in the same familial terms: "Our parents were well-to-do, there in Italy, and we were their only child. We were of the old Florentine nobility."⁵⁰ In this passage, the community interprets the text of the twins' surname:

None of these visitors was at ease, but being honest people, they didn't pretend to be. None of them had ever seen a person bearing a title of nobility before, and none had been expecting to see one now, consequently the title came upon them as a kind of pile-driving surprise and caught them unprepared. A few tried to rise to the emergency, and got out an awkward My Lord, or Your lordship, or something of the sort, but the great majority were overwhelmed by the unaccustomed word and its dim and awful associations with gilded courts and stately ceremony and anointed kingship, so they only fumbled through the handshake, and passed on, speechless.⁵¹

One's racial identity, by contrast to both liberal and noble identity, is neither a matter of individual continuity (race constitutes a collective, not an individual identity) nor is it a matter of family name (as the characters in this novel often remark, niggers have no surname). Thus, when Roxy tells the grown Tom that he is in fact her son, her message is clear: for purposes of guilt and for purposes of determining who can and who can't be sold down the river, it is blood line and racial heritage—not upbringing, family name, or continuity of physical identity—that constitutes the relevant text by which identity is determined:

"Yassir, en *dat* ain't all! You is a *nigger!*—*bawn* a nigger en a *slave!* — en you's a nigger en a slave dis minute; en if I opens my

48. *Id.* at 4.

49. *Id.*

50. *Id.* at 27.

51. *Id.* at 29.

mouf, ole Marse Driscoll'll sell you down de river befo' you is two days older den what you is now!" . . .

"It ain't no lie, nuther. It's jes' de truth, en noth'n *but* de truth, so he'p me. Yassir—you's my *son*—. . . .

. . . "[e]n dat po' boy dat you's been a kickin' en a cuffin' to-day is Percy Driscoll's son en yo' *marster* . . . en *his* name's Tom Driscoll en yo' name's Vallet de Chambers, en you ain't *got* no fambly name, becaze niggers don't *have* 'em!"⁵²

In one of the great interpretive triumphs of the novel, Roxy renders a masterful interpretation of Tom's egregious behavior. Her interpretation takes account of the discipline rules that govern blood-line, racial group, and family name:

It's de nigger in you, dat's what it is. Thirty-one parts o' you is white, en on'y one part nigger, en dat po' little one part is yo' *soul*. 'Tain't wuth savin'; 'tain't wuth totin' out on a shovel en tho'in' in de gutter. You has disgraced yo' birth. What would yo' pa [(a member of the white nobility)] think o' you? It's enough to make him turn in his grave." . . .

"What ever has 'come o' yo' Essex blood? Dat's what I can't understan'. En it ain't only jist Essex blood dat's in you, not by a long sight—'deed it ain't! My great-great-great-gran'father en yo' great-great-great-great-gran'father was ole Cap'n John Smith, de highes' blood dat Ole Virginny ever turned out; en *his* great-great-gran'mother or somers along back dah, was Pocahontas de Injun queen, en her husbun' was a nigger king outen Africa—en yit here you is, a slinkin' outen a duel en disgracin' our whole line like a ornery low-down hound! Yes, it's de nigger in you

"Ain't nigger enough in him to show in his finger-nails, en dat takes mightly little—yit dey's enough to paint his soul. . . . Yassir, enough to paint a whole thimbleful of 'em."⁵³

Twain leaves no doubt as to the relationship between supplemental social text and positivistic legal text. The supplemental texts and the disciplining rules that govern them—of individual responsibility for one's own acts, of black collective guilt, and of noble responsibility for family honor—do indeed constitute the moral prism through which the community's legal texts are interpreted. Pudd'nhead's climactic triumph in the book's final courtroom scene evidences this relationship, and also evidences Pudd'nhead's understanding of this fundamental law of interpretation. In a narrow sense, the novel celebrates the "Rule of Law": the "guilty" party is convicted, and is convicted by virtue of Pudd'nhead's interpretive prowess. However, Pudd'nhead does *not* achieve his legal triumph by convincing the community to abandon its noxious noble and racial codes in favor

52. *Id.* at 41.

53. *Id.* at 70.

of the morally preferable legalistic code of individual responsibility. At no point does he try to move the community to abandon its conceptions of racial guilt and familial nobility. Rather, what Pudd'nhead achieves is a Dworkinian, or Herculean, *interpretive* triumph: he convinces the town of Tom's guilt by interpreting the legal text prohibiting murder through the "prism" of the community's disciplining rules of race and family. Pudd'nhead triumphs at the book's conclusion, not by transforming the community's sense of law so as to match the liberal norms with which it has come into conflict, but rather through a masterful, even Herculean, act of interpretation. Pudd'nhead reads the legal text through the prism of the community's norms. He is truly a Dworkinian legal hero.

Pudd'nhead begins his case by explaining to the courtroom the means by which the body's "text"—or fingerprints—can be read so as to discover the historical continuity necessary to the liberal and legalistic notion of responsibility, on which legal liability rests. He then "reads"—or interprets—a range of fingerprints to demonstrate to the openly admiring spectators that the charged defendants, his clients, did not commit the murder. The fingerprints on the murder weapon, the knife, do not match the twins' fingerprints. After first explaining the phenomenon of fingerprints—the text of continuous physical identity—and demonstrating to the crowd's awestruck satisfaction that his clients are not "physically continuous" with the murderer who held the knife, Wilson concludes with a flourish: "These men are innocent—I have no further concern with them."⁵⁴

Wilson then turns to the next question: Who *did* murder the judge? Put aside, for now, the answer; the question is more complex than it appears. The question is complex because it involves conflicting disciplinary rules of the relevant interpretive community. In terms of physical continuity, the human being raised as "Tom" and known by the community as "Tom" committed the murder, and Wilson comes to Court prepared to prove as much. Thus, the answer to the *legal* and *liberal* question of who (where "who" now means what "physically continuous person") committed the murder is clearly "Tom," and Wilson comes prepared to prove it by reading the text of the physical body: the fingerprints on the murder weapon are the same as the fingerprints on the person known as Tom.

But he never has to. Wilson begins appropriately enough: he begins by emphasizing the legal-liberal meaning of continuous physical identity, and the legal-liberal meaning of "guilt" as responsibility for one's deeds which it implicates:

"May it please the court, the claim given the front place, the claim most persistently urged, the claim most strenuously and I may even

54. *Id.* at 111.

say, aggressively and defiantly insisted upon by the prosecution, is this—that the person whose hand left the blood-stained finger-prints upon the handle of the Indian knife is the person who committed the murder *We grant that claim. . . .*'

“Upon this haft stands the assassin’s natal autograph, written in the blood of that helpless and unoffending old man who loved you and whom you all loved. There is but one man in the whole earth whose hand can duplicate that crimson sign.”⁵⁵

But the question “who”—whether “who committed the murder” or “whose hand can duplicate that crimson sign” — is simply ambiguous, and it is in response to the ambiguity that Wilson’s interpretive prowess emerges. For Wilson must be careful to answer the question “who” not only by reference to disciplining rules of legal liberalism but also in light of the disciplining rules of identity and responsibility that govern the community’s supplemental texts: the Honor Code and the Racial Code. The murderer is Tom in terms of the legal text, and in terms of the liberal disciplining rule of identity that at least at times governs its interpretation: the person who committed the murder is physically continuous with the person known as Tom. But the murderer is not Tom in terms of the racial or noble meaning of identity and the disciplining rules that govern the interpretive practices by which such identity emerges. “Tom” was *born a slave*—and therefore, according to the Racial Code, *is a slave*, or more precisely, a nigger. “Tom” *is* Valet de Chambers *masquerading* as nobility. The apparent Tom lacks the family name that is definitive of the nobility, and possesses instead the racial blood that is sufficient for membership in the collectivity known as “slaves.”

To fully answer the question of who killed Judge Driscoll, then, Wilson must not only prove that the physically continuous person known as Tom killed Driscoll, in terms of the legal-liberal Code, but must also establish that that person is *really* Valet de Chambers, and not Tom at all, in terms of the racial and aristocratic Code. Interpreting physical, behavioral and historical facts in accord with the racial, liberal and noble meanings of identity and responsibility, Wilson achieves his climactic courtroom triumph:

“We will turn to the infant autographs of A and B. I will ask the jury to take these large pantograph facsimilies of A’s, marked five months and seven months. Do they tally?”

The foreman responded—“Perfectly.”

“Now examine this pantograph, taken at eight months, and also marked A. Does it tally with the other two?”

The surprised response was—

55. *Id.* at 106-109.

"No—they differ widely!"

.....
 "Do you know how to account for those strange discrepancies? I will tell you. For a purpose unknown to us, but probably a selfish one, somebody changed those children in the cradle.

.....
 "Between the ages of seven months and eight months those children were changed in the cradle . . . and the person who did it is in this house!"

.....
 "A was put into B's cradle in the nursery; B was transferred to the kitchen, and became a negro and a slave . . . but within a quarter of an hour he will stand before you white and free! . . . From seven months onward until now, A has still been a usurper, and in my finger-records he bears B's name. Here is his pantograph, at the age of twelve. Compare it with the assassin's signature upon the knife handle. Do they tally?"

The foreman answered—

"To the minutest detail!"

Wilson said solemnly —

"The murderer of your friend and mine—York Driscoll, of the generous hand and the kindly spirit—sits among you. Valet de Chambre, negro and slave — falsely called Thomas à Becket Driscoll—make upon the window the finger-prints that will hang you!"

Tom turned his ashen face imploringly toward the speaker, made some impotent movements with his white lips, then slid limp and lifeless to the floor. Wilson broke the awed silence with the words—

"There is no need. He has confessed."⁵⁶

A. *The Racial Code and the Code of Honor: Disciplining Rules and Supplemental Texts*

The three supplemental Codes involved in *Pudd'nhead Wilson*—the Liberal Code, the Code of Honor and the Racial Code—fulfill in virtually every respect the criteria Ronald Dworkin establishes for supplemental moral texts in *Taking Rights Seriously*. The disciplining rules similarly fulfill in every respect the criteria Owen Fiss establishes for disciplining rules in *Objectivity and Interpretation*. First, as Dworkin would insist, the supplemental Codes do indeed have legal force: they define the interpretive limits of the community's legal texts. The Code of Honor limits the "jurisdictional" reach of the law in a relatively overt manner: gentlemen are responsible for breaches of family honor, not individual breaches of law. In Dworkin's world, the "principle of honor" that "no man can profit from

56. *Id.* at 111-13.

his own wrong," for example, limits the positivistic impact of both wills and the law of testamentary disposition. Similarly, in *Pudd'nhead Wilson* we learn that whatever the written law of homicide, the unwritten Code of Honor requires that an assault upon one's honor of a certain magnitude be met with death. We also learn that the Code of Honor demands that a gentleman defend an assault on one's brother, to the death if necessary. And, we learn that upon being assaulted, a gentleman responds on the field of honor, and not in a court of law.

Furthermore, just as we learn of the rule that "no man can profit from his own wrong" from a court, we learn virtually *all* of the rules of the Code of Honor operative in Dawson's Landing from the town's legal community; either from the Judge, from Pembroke, or from Pudd'nhead himself. Each important member of the legal "interpretive community" makes explicit his complete endorsement and embrace of the disciplining rules of Honor. Indeed, Judge Driscoll is not just surprised to learn of his (purported) nephew's breach of the "jurisdictional rule" that a victim of an assault must respond on the field of honor, he is horrified:

"You cur! You scum! you vermin! Do you mean to tell me that blood of my race has suffered a blow and crawled to a court of law about it? Answer me!

...
 "A coward in my family! A Driscoll a coward! Oh, what have I done to deserve this infamy!" He tottered to his secretary in the corner repeating that lament again and again in heart-breaking tones, and got out of a drawer a paper, which he slowly tore to bits

"There it is, shreds and fragments once more—my will. Once more you have forced me to disinherit you, you base son of a most noble father! Leave my sight! Go—before I spit on you!"⁵⁷

Pudd'nhead Wilson, retained as counsel for the defendants in the assault case, is equally offended by Tom's breach, and makes clear his understanding of the limit on the criminal law of assault and battery imposed by the Code of Honor:

"Tom, I am ashamed of you! I don't see how you could treat your good old uncle so. I am a better friend of his than you are; for if I had known the circumstances I would have kept that case out of court until I got word to him and let him have a gentleman's chance.

...
 "You degenerate remnant of an honorable line! I'm thoroughly ashamed of you, Tom!"⁵⁸

57. *Id.* at 60.

58. *Id.* at 62-63.

Judge Driscoll and Pudd'nhead Wilson are not the only characters devastated by Tom's multiple breaches of the Code of Honor. Roxy (Tom's true biological mother) knows what the rest of the community does not know, and that is Tom's true paternity. For although Tom is not the nephew of Judge Driscoll, as he is pretending, he is indeed the biological son of another descendent of the First Families (in addition to being a slave, by virtue of his mother's identity). In Roxy's eyes, therefore, Tom is as committed to uphold the Code of Honor by virtue of his paternity as he is collectively guilty by virtue of his nigger blood. She too is horrified to hear of the breach:

"What is you mumblin' 'bout Chambers?"

"The old man tried to get me to fight one [(a duel)] with Count Luigi, but he didn't succeed; so I reckon he concluded to patch up the family honor himself."

He laughed at the idea, and went rambling on with a detailed account of . . . how shocked and ashamed the Judge was to find that he had a coward in his family. He glanced up at last, and got a shock himself. Roxana's bosom was heaving with suppressed passion, and she was glowering down upon him with measureless contempt written in her face.

"En you refuse' to fight a man dat kicked you, 'stid o' jumpin' at de chance! En you ain't got no mo' feelin' den to come en tell me, dat fetched sich a po' low-down ornery rabbit into de worl'! Pah! It make me sick!"⁵⁹

The Racial Code similarly limits the jurisdictional and remedial reach of the positive law. Niggers are guilty, but they are guilty not by virtue of individual responsibility for breaches of law; they are guilty by virtue of collective identity, and the appropriate punishment for this collective guilt is slavery itself, not legally prescribed sanctions. In the novel's final act of legal interpretation, the newly reconstituted "interpretive community"—the court, the governor, the community and the murder victim's creditors—reads the relevant "texts"—Tom's act, Tom's status, the law of property, and the law of murder—in accord with all of the appropriate disciplining rules. They pose, collectively, a very difficult interpretive problem. Tom committed a murder, for which the legal punishment is imprisonment, but "Tom" is a slave, for which the racial punishment is slavery. In the book's denouement, they arrive at this highly creative interpretive solution to their legal problem:

The false heir made a full confession and was sentenced to imprisonment for life. But now a complication came up. The Percy Driscoll estate was in such a crippled shape when its owner died that it could pay only sixty percent of its great indebtedness, and was settled at that rate. But the creditors came forward, now, and

59. *Id.* at 70.

complained that inasmuch as through an error for which *they* were in no way to blame the false heir was not inventoried at that time with the rest of the property, great wrong and loss had thereby been inflicted upon them. They rightly claimed that "Tom" was lawfully their property and had been so for eight years; . . . [and that but for the false inventory] they would have sold him and he could not have murdered Judge Driscoll, therefore it was not he that had really committed the murder, the guilt lay with the erroneous inventory. Everybody saw that there was reason in this. Everybody granted that if "Tom" were white and free it would be unquestionably right to punish him—it would be no loss to anybody; but to shut up a valuable slave for life—that was quite another matter.

As soon as the Governor understood the case, he pardoned Tom at once, and the creditors sold him down the river.⁶⁰

As Fiss would insist they should, the disciplining rules do indeed discipline: there is only one school, and attendance is mandatory. The rules of discipline rule *out* certain interpretations, just as they validate and enable others. Indeed, for each "text" and textual interpretation facilitated by a disciplining rule, another text and another interpretation is ruled out. Twain gives three examples of this principle of exclusion, one for each of his central disciplining rules. First, we learn early on that Pudd'nhead Wilson has in fact taken up two hobbies during his extended period of relative under-employment—fingerprinting *and* *palmistry*. But Pudd'nhead is clear, even if others are not, that it is fingerprinting, not the palm, which must constitute the "text" from which individual, continuous identity is read. The "disciplinary rule" of legalistic individualism is physical continuity with the person who committed the deed, and only the fingerprint can give absolute testimony to that continuity across time. Nevertheless, to those members of the community who do not understand as fully as does Wilson himself the nature of legal liberalism and individualism, the allure of the palm as a text for individual responsibility is great:

Wilson began to study Luigi's palm, tracing life lines, heart lines, head lines and so on, . . . he felt of the fleshy cushion at the base of the thumb, and noted its shape; he felt of the fleshy side of the hand between the wrist and the base of the little finger, . . .

He mapped out Luigi's character and disposition, his tastes, aversions, proclivities, ambitions and eccentricities

Next, Wilson took up Luigi's history. He proceeded cautiously . . . moving his finger slowly along the great lines of the palm, and now and then halting it at a "star" or some such landmark and examining that neighborhood minutely. He proclaimed one or two past events, . . . and the search went on. Presently Wilson glanced

60. *Id.* at 114-15.

up suddenly with a surprised expression—

“Here is a record of an incident which you would perhaps not wish me to—”

“Bring it out,” said Luigi, good-naturedly, “I promise you it shan’t embarrass me.”

“*You have killed some one—but whether man, woman or child, I do not make out.*”

“Caesar’s ghost!” commented Tom, with astonishment. “It beats anything that was ever heard of! Why, a man’s own hand is his deadliest enemy! Just think of that—a man’s own hand keeps a record of the deepest and fatalest secrets of his life, and is treacherously ready to expose him to any black-magic stranger that comes along.”⁶¹

Similarly, the “sham text” for racial identity is appearance: dress, skin color, and, in general, the perceptions of others. Although you might think you could infer racial identity by these factors, you cannot. The disciplining rule that governs interpretation of the Racial Code precludes such an interpretation, and precludes such a text; it is birth and bloodline, not behavior, that provides the link to collective guilt that is race. Thus, when Roxy switches her baby for the child of her Master, she learns the proffered difference that clothes can make. But this text, like palmistry, is a sham and a trap. The interpretation of racial identity from clothes, bearing, perception of others and skin color is a compelling one, but it is not determinative, for it is precluded by the disciplining rule itself:

She undressed Thomas à Becket, stripping him of everything, and put the tow-linen shirt on him. She put his coral necklace on her own child’s neck. Then she placed the children side by side, and after earnest inspection she muttered—

“Now who would b’lieve clo’es could do de like o’ dat? Dog my cats if it ain’t all *I* kin do to tell t’other fum which, let alone his pappy.”

She put her cub in Tommy’s elegant cradle and said —

“You’s young Marse *Tom* fum dis out, en I got to practice and git used to ’memberin’ to call you dat, honey, or I’s gwyne to make a mistake some time en git us bofe into trouble. Dah—now you lay still en don’t fret no mo’, Marse Tom—oh, thank de good Lord in heaven, you’s saved! . . . —dey ain’t no man kin ever sell mammy’s po’ little honey down de river now!”

She got up light-hearted and happy, and went to the cradles and spent what was left of the night “practicing.” She would give her own child a light pat and say, humbly, “Lay still, Marse Tom,” then give the real Tom a pat and say with severity, “Lay *still*,

61. *Id.* at 51 (emphasis added).

Chambers! . . .

As she progressed with her practice, she was surprised to see how steadily and surely the awe which had kept her tongue reverent and her manner humble toward her young master was transferring itself to her speech and manner toward the usurper, and how similarly handy she was becoming in transferring her motherly curtness of speech and peremptoriness of manner to the unlucky heir of the ancient house of Driscoll.⁶²

And third, the sham text for nobility is upbringing, and the habits of self-regard they instill. Again, this text is compelling but the interpretations it suggests are bound to be misleading. The disciplining rule itself precludes it:

[After Tom learned his true identity], . . . [f]or days he wandered in lonely places thinking, thinking, thinking — trying to get his bearings. It was new work. If he met a friend he found that the habit of a lifetime had in some mysterious way vanished—his arm hung limp instead of involuntarily extending the hand for a shake. It was the “nigger” in him asserting its humility, and he blushed and was abashed. And the “nigger” in him was surprised when the white friend put out his hand for a shake with him. He found the “nigger” in him involuntarily giving the road, on the sidewalk, to the white rowdy and loafer So strange and uncharacteristic was Tom’s conduct that people noticed it and turned to look after him when he passed on; . . . it gave him a sick feeling, and he took himself out of view as quickly as he could.

. . . .
In several ways his opinions were totally changed, and would never go back to what they were before, but the main structure of his character was not changed, and could not be changed. . . . Under the influence of a great mental and moral upheaval his character and habits had taken on the appearance of complete change, but after a while with the subsidence of the storm both began to settle toward their former places. He dropped gradually back into his old frivolous and easy-going ways, and conditions of feeling, and manner of speech, and no familiar of his could have detected anything in him that differentiated him from the weak and careless Tom of other days.⁶³

And, as Fiss also would insist, the disciplinary rules that govern these texts are the *definitive* parameters of the “interpretive community”—again, there is only one school, and attendance is indeed mandatory. To be a member of the community of Dawson’s Landing *is* to accept and live by the Honor and Racial codes—those codes define the members, as much as the members define the codes. This mandatory attendance policy has two consequences. First, while there

62. *Id.* at 14-16.

63. *Id.* at 44-45.

are other non-mandatory "codes" subscribed to by parts of this community, they play no role in the community's core interpretive practices, and therefore play no role in the interpretation of law. Religion, for example, constitutes a non-mandatory moral code subscribed to in some form by most members of the community, but not by its "first citizen" the judge—head of the town's agnostic "freethinkers" society. Similarly, the ethic endorsed by the villainous Tom—a lawless, gambling-prone and profit-motivated greed—may be the wave of the future (as Twain foresees) but it is not sanctioned by this conservative community, complete with its debauched democratic politics and its aristocratic bias. Twain makes his own contempt for it equally clear.

Second, the mandatory attendance policy entails that the members of this interpretive community—lawyers and judges—are incapable of transcending the disciplining rules that govern them; to do so would constitute expulsion from the interpretive community that is law. Not once does it occur to the town's "freethinkers"—Pudd'n-head and Judge Driscoll—to question either the racial code or the Code of Honor (or the sanctity of property, another major theme of the novel). Indeed these freethinkers have more thoroughly and expertly absorbed these codes than has the rest of the community. They each earn the community's highest accolades of respect through their masterful interpretations of the community's definitive texts. It is the disciplinary rules that define the boundaries of acceptable interpretation, and it is indeed submission to the disciplinary rules that defines membership in the interpretive community responsible for the town's legal order.

B. Disciplining Rules, Objectivity and Hidden Imperatives

The objectivity that legal interpretation achieves through reliance on disciplining rules comes with a high cost: it masks the imperative nature of the text being interpreted, and consequently the criteria against which the text and the rules that facilitate interpretation should be judged. Thus, the declaratory grammatical form of the "disciplining rule" that "niggers are guilty," like the "racial code" whose interpretation it facilitates, masks its imperative origin, and hence masks the criteria against which it should be judged. That "niggers are guilty" in Dawson's Landing is a true proposition, as are the related propositions that "Tom is a slave" and that "Roxy is black" and that both, therefore, can be (and are) sold down the river. But all of these true propositions are true by virtue of white fiat, not natural fact. They are true by virtue of an act of power, not an act of reasoned observation. It is not natural fact, but white dominance over slaves, which is reflected in the rule's proclamation of meaning—to be a "nigger" *means* to be guilty. It is most assuredly not skin color (for Roxy's skin is white), but white fiat, reflected in

the claim that "Roxy is black." And finally, it is not his individual guilt for his individual act of murder, but rather the white collective power over his collective race, that is reflected in the court's conclusion that Tom is guilty, for which his punishment is to be sold down the river.

The cost of objective interpretivism is just this: When we accept a state of the world that derives from an act of *power* as a part of the natural world, we lose sense of how to evaluate that state of the world; it becomes "arbitrary" in a perfectly benign sense. Twain gives us a metaphor. In an early passage, Roxy notes the arbitrary power of God to damn and save at whim. So long as the power is unquestioned, the result is viewed as natural. If guilt is a matter of celestial fiat, the "arbitrariness" of the outcome is no more something to be challenged or questioned than the natural fact that grass is green and the sky blue:

[A]in't nobody kin save his own self — can't do it by faith, can't do it by works, can't do it no way at all. Free grace is de *on'y* way, en dat don't come fum nobody but jis' de Lord; en *He* kin give it to anybody He please, saint or sinner—*He* don't k'yer. He do jis as He's a mineter. He s'lect out anybody dat suit Him, en put another one in his place, en make de fust one happy forever en leave t'other one to burn wid Satan.⁶⁴

If it is part of God's nature that salvation and damnation are at whim, and if God is omnipotent, then it makes as little sense to question the "arbitrariness" of his judgment as to object to the sun's daily rising. Similarly, if it is part of being white to have unchecked power over blacks, and if black collective guilt simply *is* the white judgment, then it will not occur to any member of the interpretive community to question the "arbitrariness" of this judgment. Thus, the question "what did the nigger *do* that accounts for his guilt" is not just *unanswerable*; more importantly, it is *unaskable*. Like the question "what did the sinner do to deserve salvation," the question is precluded by the disciplining rules that enable the discourse. Black guilt is a function of collective identity, not individual deed; the question "what did he do" is *ruled out*. It is therefore not surprising that the only character in the novel who ever broaches the question is Tom, and he raises it only once, right after he has learned he is a "nigger." When Tom learns his true identity, after twenty-five years of believing himself white, he is suddenly cast out of the interpretive community—he is neither white nor black. Because of his exclusion, and only because of his exclusion, he can ask the very question that the members of the community cannot themselves possibly utter:

"Why were niggers *and* whites made? What crime did the uncreated first nigger commit that the curse of birth was decreed

64. *Id.* at 15.

for him? And why is this awful difference made between white and black? . . . How hard the nigger's fate seems, this morning!—yet until last night such a thought never entered my head."⁶⁵

In this case, of course, objective interpretation and submission to the disciplining rules which facilitates it, has not only masked the imperative nature of the primary rule of the racial text—that niggers are guilty—it has also masked the imperative nature of the rule's constitutive *parts*. For to take Tom's questions in order: Niggers and whites were *not* made by God—the division of the species into niggers and whites is not a part of the natural order. There are no natural niggers; there is no such natural attribute. The niggers in *Pudd'nhead Wilson* underscore this truth. Both Roxy and Tom share the skin coloring of *whites*. Roxy is one-sixteenth black, Tom is one thirty-second. The categories "nigger" and "white" were indeed made, but they were made by whites, not by God, as Tom's question falsely implies. When the imperative is exposed, and only when the imperative is exposed, does the "why" become askable and answerable: niggers were made by whites to serve the interest of whites.

Thus, the *reader* of the novel, free of the disciplining rules that govern and define the interpretive community of Dawson's Landing, unlike the interpretive community itself, can assess the merits of this imperative. In a parallel fashion, I believe, the careful reader of this novel, unlike the interpretive community itself, can correctly "interpret" Pudd'nhead Wilson's ill-fated joke, for it is squarely in this macabre joke, I believe, that the central message of this peculiar novel is to be found. As mentioned above, at the outset of the novel Wilson hears an invisible dog barking, and jokes that he wished he owned half of it, for if he did, he would kill his half. The joke never receives an adequate interpretation through the entire novel—in fact it may be the *only* thoroughly misinterpreted text in the book. This suggests, I submit, that the joke is in there for the reader, not the characters, to interpret.

What does the joke mean? First, as several commentators have noted, "dog" is a central metaphor in this book for "nigger." Sometimes "dog" metaphorically connotes "villain" and sometimes "victim," but it is *always* a symbol for "niggers." Niggers generally and Tom in particular are referred to as "dogs" no less than half a dozen times. The most telling reference of the first type (dog as metaphor for guilty villain) is made by Pudd'nhead Wilson himself when he finally solves the murder mystery (but before he discovers the switch in identity). Tom is visiting Wilson the night before the twins' trial is to commence, and inadvertently leaves a fingerprint on one of Wilson's glass plates:

65. *Id.* at 44.

[Tom] took up another strip of glass, and exclaimed—"Why, here's old Roxy's label! Are you going to ornament the royal palaces with nigger paw-marks, too? By the date here, I was seven months old when this was done and she was nursing me and her little nigger cub. There's a line straight across her thumb-print. How comes that?" . . .

"That is common," said the bored man, wearily. "Scar of a cut or a scratch, usually"—and he took the strip of glass indifferently and raised it toward the lamp.

[As Wilson recognized Tom's fingerprints as the same as those on the murder weapon] [a]ll the blood sunk suddenly out of his face; his hand quaked, and he gazed at the polished surface before him with the glassy stare of a corpse

[A]s Tom went out he couldn't deny himself a small parting gibe: "Don't take it so hard; a body can't win every time; you'll hang somebody yet."

Wilson muttered to himself, "It is no lie to say I am sorry I have to begin with you, miserable dog though you are!"⁶⁶

The most telling reference of the second sort—dog as a metaphor for victim—is made by Roxy, upon learning that Tom has committed the ultimate betrayal, and sold her down the river in order to reap the cash: "Sell a pusson down de river—*down de river!* . . . I wouldn't treat a dog so!"⁶⁷ Roxy immediately follows this exclamation with a comparison of Tom with a dog-as-scoundrel:

"What could you do? You could be Judas to yo' own mother to save yo' wuthless hide! Would anybody b'lieve it? No — a dog couldn't! You is de low-downest orneriest hound dat was ever pup'd into dis worl'—en I's 'sponsible for it!" — and she spat on him.⁶⁸

How, even with this information, should we interpret Pudd'nhead's joke? The reader can interpret the joke in light of the disciplining rules by which the community lives but fails to question: first that a "dog" is a metaphor for "slave," and second that a dog, like a slave, is both property and villain, both owned and guilty. Now in a fairly literal sense, both the novel in general and the joke in particular are about the problem white slave-owning communities faced regarding mulattoes. As mentioned above, both of the central "nigger" characters in this novel are of mixed blood: Roxy is one sixteenth black, and Tom is one thirty-second. Further, both characters have the blood of nobility as well as the blood of the negro race. One interpretation of the joke then is simply this: Enslavement of the negro race is tantamount to ownership of half a dog—it is just as cruel and just as foolish. You cannot enslave the "nigger" half of

66. *Id.* at 103.

67. *Id.* at 85.

68. *Id.* at 90.

Tom and expect the "noble half" to be honorable; you cannot victimize the slave half and expect the noble half to be strong; you cannot damn the slave half and expect the noble half to be virtuous; you most assuredly cannot *own* the slave half and expect the noble half to breathe free. To *try* to do so—to own the slave, and sell him as property, and condemn him to hell by selling him down the river—is to kill him; and as the neighbors rightly insist, you cannot kill half a living creature and expect the other half to live. What they do not see, of course, is that this is as true of human beings as it is of dogs. Nor do they see, therefore, the necessary implication of their own literalistic interpretation of Pudd'nhead's joke: the man that owns and kills half the dog will be equally responsible for the death of the other half. The race that owns, enslaves, kills and damns half a human being as "slave," will kill the other half as well, and some day be held responsible for doing so.

If we turn our backs on the disciplining rule of Dawson's Landing, and embrace instead one closer to our own frame of reference, we can generate a related and more powerful interpretation of Wilson's joke. A dog is a living organism, and in a different sense so is a community. We might, then, regard the dog in the joke as a metaphoric reference to the community itself. Owning and killing half a dog, with this disciplining rule of interpretation, is a metaphor for the imperative institution of slavery itself: the owning and killing of a half of the community, with the same consequences. You cannot enslave and kill half the community without killing the whole, any more than you can kill half a dog and keep the whole alive. If you try, you may, one day, be held responsible for the death of the whole, where the whole is a community no less than where the whole is a dog.

C. *The Morality of the Objective Interpretivist*

The most difficult and ambiguous aspect of Twain's novel concerns the character of Pudd'nhead himself. No issue more divides the criticism and interpretations of this novel than whether or not Pudd'nhead, surely the protagonist, is also a hero. The case for his heroism (endorsed by nineteenth-century critics far more consistently than twentieth) is straightforward: Pudd'nhead is smart, even a genius. He is inventive, clever, and legalistic; he is a Dworkinian Hercules. He understands the community and the community's foibles better than do its members. He is shunned for twenty years, but perseveres, and finally comes into his own. He goes from town fool to town mayor, and he does so through the honorable means of success in the law. He is neither materialistic nor greedy. He is funny. He rises in popularity as he brings Tom, the villain, down. He brings both law and science to a relatively lawless and superstitious community. He is respectful of the community he seeks to reform. He

knows human nature, he is insightful, and finally, of course, he is successful.

All this, though, leaves a bitter taste, and I suspect that the further we move in history from the date of the novel, the stranger the taste becomes. There is something deeply wrong with this fairly standard interpretation of the heroic Pudd'nhead. First, and most simply, there is something wrong with the idea that Mark Twain—who gave us Huckleberry Finn, Jim, the Mississippi River, and the journey *up* the Mississippi River as a powerful symbol of freedom and salvation—would create a *hero* who sends a slave *down* the river into slavery and damnation, no matter how evil the slave. Second, there is something wrong with the idea that Mark Twain would give us a novel *heralding* the racist and aristocratic values of a small slave-holding town, and trumpeting as a hero an outsider who becomes an insider by embracing those values. Furthermore, Twain himself referred to Wilson's role in the novel as a mere "machine."⁶⁹ (Surely, author's intent should count for *something*.) But considerably more than author's intent must be put aside to accommodate a reading of Wilson as a lawyer-hero. There is no doubt that Wilson is clever, and there is no doubt that he achieves what he's craved: popularity and success in the community. Wilson's virtue, however, depends upon the virtue of the community that has embraced him, and on the virtue of this community, not just Twain, but the novel itself, is anything but ambiguous. The community is evil, plain and simple. The irony of this novel, finally, is that while as reader we condemn the community's values, we want to applaud the protagonist who has won that community's approval, even when he achieves it by advocating the values we wish to condemn.

One plausible interpretation of the meaning of Twain's novel, I believe, is that we should learn to be skeptical (if we aren't naturally so) of the interpretivist means by which Wilson wins his way into the community's embrace—and into the hearts of many readers as well. How we evaluate Wilson's character depends upon how we regard his interpretive legal practices, and thus how we regard the nature of law itself. If we regard law, properly supplemented by community values, as a set of texts to be interpreted, we will also tend to regard Wilson as a hero. If we regard law as a set of imperative commands, we will tend to regard Wilson as complicit, to some degree commensurate with his power, in the town's evil. The "objectivity" of the supplemental, disciplined interpretation in which Wilson engages, I submit, masks the moral character of this most

69. This remark is attributed to Twain by Marvin Fisher and Michael Elliott in their interpretive essay, *Pudd'nHead Wilson: Half a Dog is Worse than None*, in S. CLEMENS, *PUDD'NHEAD WILSON AND THOSE EXTRAORDINARY TWINS* 309 (1980). The reference is to M. TWAIN, *THE DEVELOPMENT OF A WRITER* 181 (1962).

masterful interpreter, as well as the criteria by which we should evaluate his acts.

For it is undoubtedly true that from a Dworkinian and Fissian perspective, Pudd'nhead is a hero—he achieves the kind of success for which Hercules is the ideal. The story of Pudd'nhead's success is the story of Hercules' success: it is a story of the triumph of legalism. Disputes are resolved in court, advocated by lawyers, decided by neutral judges, according to agreed upon rules. And furthermore, the triumph of law in the community is not a victory of an invading, foreign or hostile force. Wilson achieves his triumph by *incorporating* the town's moral values into the legal values he brings with him from back East, not by displacing those values. As Fiss would concede must be the case, and as Dworkin insists should be the case, Wilson learns to read the law through the prism of the town's values. Through that process the town's morality becomes infused in the town's law, and the distinction between moral and legal rules dissolves. The town's legal order becomes circumscribed by the town's moral order—they each define as they facilitate the other. It is by mastering that process that Wilson (like Hercules) achieves success.

More specifically, from what Fiss calls an *internal* perspective,⁷⁰ Pudd'nhead emerges from Tom's trial a community hero, a widely acclaimed interpretive Hercules. He reads the objective legal text through the "prism" of the town's moral values, and he interprets the resulting supplemented text in accordance with the disciplining rules that govern the town's interpretive practices. He performs as both a "servant of the law and a servant of the community." He holds the community's values—not his own—paramount in his legal analysis. By interpreting the town's multiple codes, by respecting their interpretive practices, by integrating their moral values with their legal text, he achieves the popularity he had so long craved—he becomes successor to the title "first citizen" previously held by the murdered judge. And, even from what Fiss calls the outsider's external perspective,⁷¹ Pudd'nhead is absolved from responsibility. The same "objectivity" that constitutes his internal heroism shields him from external responsibility. Pudd'nhead *himself* is not responsible for the town's morality—Pudd'nhead is an Eastern-trained outsider. And, it is the town's morality—not the lawyer's—which must supplement the text of the positive law, and discipline its interpretation. Consequently Pudd'nhead, no less than Hercules, cannot be held responsible for the results the legal system, supplemented as it must be by the town's morality, generates. More graphically, Pudd'nhead *himself* does not sell Tom down the river. Pudd'nhead simply supplies the most coherent, most correct, and

70. Fiss, *supra* note 16, at 748.

71. *Id.*

most powerful interpretation of the community's texts. It was those *texts* that sold Tom down the river. The law did it, not the lawyer.

However, if we regard law, including the values that supplement it, and the disciplining rules that govern it, as a set of imperatives rather than objective texts, Pudd'nhead's character takes on a different hue. Wilson is a political actor in a political community, and like all the actors in that community he has some power. Not much, but some. With power comes responsibility—not much, perhaps, but some. If we regard law as an imperative, Wilson's incorporation of the community's racial code into the law is an act of power and a choice, not an act of passive interpretation. As such it renders him complicit in the town's corruption; it does not ennoble him. And in fact, Wilson *is* complicit in the town's evil: Wilson *does* sell Tom down the river. For it is not by virtue of the "liberal legalism" to which Wilson is purportedly committed that Wilson feels he must expose Tom as a slave in court. All Wilson has to do to show who killed the victim is prove that the fingerprints on the knife are Tom's. Although it has escaped notice of most commentators on this novel, there is no reason either in law or in liberal logic that this "heroic" lawyer-protagonist *has to* go the extra step and expose Tom as a slave. He chooses to. And it is because he chooses to that Tom is delivered downstream.

Wilson exposes Tom as a slave as well as a murderer not because the legal code demands it, but because the community's *racial code* demands it, and Wilson has learned that to be successful—to be popular—in this town, he must interpret the law through the prism of the rules of race. This act of interpretation, however, was neither natural nor necessary: Wilson chose to interpret the law in light of the racial code; he did not have to do so. He could have done otherwise. He could have forfeited popularity, and used his small amount of power instead to challenge the racial code. He could have challenged the social construction by which black is delineated from white. But he did not. Instead he embraced, endorsed, absorbed, incorporated and then used the community's racial code. He mastered it, and became the town's first citizen by virtue of that mastery. By doing so, he became an authority on its meaning and responsible for its content. By endorsing the community's code, Wilson perpetuated it; by incorporating the racial code into the legal code he *authored* it. He read the objective law through the prism of the community's moralistic embrace of evil, and by doing so he embraced that evil as his own. Wilson got the wish he initially expressed as a joke: he owned and then killed half the dog—he exposed Tom as a slave and sent him down the river. And he should be held responsible for having done so.

Why did he do it? This is not a hard question. Wilson craved what Hercules has: popularity and respect. For twenty years, he craved the town's respect, and through his interpretive prowess he

eventually got it. He achieved the popularity he needed through an act of paradigmatic conformity: objective, disciplined interpretation of the community's supplemented legal texts. What Wilson doesn't gain is a more just community, and what Tom doesn't gain, of course, is justice. Pudd'nhead Wilson is no hero, nor is Dworkin's Hercules, and neither are the judges, lawyers, and legal footsoldiers that emulate his aspirations. Pudd'nhead, like Hercules, is the ultimate conformist, and conformity for the sake of popularity is no virtue.

Of course, conformity for the sake of popularity, success, or for that matter survival is no sin, either, at least during the normal run of things. It is natural for us to interpret our community's mores just to survive in our community; perhaps it is even inevitable. And, it is natural for those of us who are political actors to become expert interpreters, and to turn that skill into political gain. But we should not confuse what is natural, and excusable, and understandable, with what is virtue, any more than we should confuse the absence of villainy with heroism. Pudd'nhead may be a popular mayor and Hercules may be a popular judge. Both political triumphs are achieved through interpretive prowess rather than the ballot box. But they are just that: political victories. Whether or not they are moral victories as well is a separate question entirely.

IV. SUBJECTIVE INTERPRETIVISM

Subjective interpretivism, as the name I have given it implies, shares one commitment with objective interpretivism: like their objective counterparts, subjective interpretivists view adjudication as an interpretive act. Thus for subjectivists such as Stanley Fish, no less than for objectivists such as Dworkin and Fiss, adjudication is primarily an act of interpretation. Subjective interpretivists differ from objectivists over the nature of interpretation, and as a result over the *consequences* of adjudication's interpretive core. Subjectivists insist that the malleability of text—its lack of an "objective meaning"—renders interpretation itself inevitably "subjective." Therefore, the "interpretation" of a text is really an act of power rather than an act of understanding. The interpreter *chooses* the meaning; he does not deduce it. For the subjectivist, the fact that adjudication is interpretation, far from being what *constrains* the judge, is what *empowers* the judge. The fact that adjudication is interpretation, then, creates rather than cures the problem of power. The interpretive core of adjudication is precisely what renders adjudication an act of power. Interpretation is imperative. Adjudication is interpretive. Therefore, adjudication is imperative.

As a consequence of their view of the nature of interpretation, subjective interpretivists *also* share a commitment with the imperativist tradition. Like the imperativists, they hold that adjudication is an

act of power, and not an act of discovery. Their argument, however, for the claim that adjudication is an act of power is different from that put forward by the imperativists. For the imperativists, including both the British legal positivists and the American legal realists, that adjudication is power follows from the force distinctively wielded by the judiciary: adjudication is an act of power because it is backed by the command of the state. For subjective interpretivists, by contrast, that adjudication is imperative follows not from the force commanded by the judiciary, but instead from its interpretive core. Adjudication is an act of power *because it is interpretive*, and interpretation is *itself*, inevitably, an act of power. For the subjective interpretivist, it is the *interpretive* core of adjudication that entails its imperative nature, not the force it wields.

Subjective interpretivism is typically criticized today (almost always by objective interpretivists) on the grounds that its claim that interpretation is necessarily subjective (and hence that objective interpretation is impossible) is wrong. What is at stake in this debate between objective and subjective interpretivists is the possibility of objectivity in interpretive adjudication. If the objectivists are right about the nature of interpretation, and if adjudication is primarily an interpretive act, then adjudication is an act of discovery rather than an act of power. If the subjectivists are right about the nature of interpretation and if adjudication is an interpretive act, then adjudication is an act of power rather than an act of discovery. If adjudication is indeed interpretation, the debate between objective and subjective views of the interpretive enterprise is surely an important one. It is not, however, the question I will pursue here.

What I will argue here is that subjectivists are wrong about the nature of interpretation, and more specifically, that they are wrong in their claim that so many of the things we do with words—including both adjudication and criticism of adjudication—constitutes interpretation. In one respect, their incredibly inclusive view of the scope of our interpretive practices is false, but harmlessly so. Adjudication is not primarily interpretation, it is primarily imperative and secondarily interpretation. This mistaken emphasis, however, is relatively harmless. We can reap the benefits of subjectivist analysis of the interpretive aspect of adjudication without having to accept (or reject) their underlying claim that adjudication is *primarily* interpretation. But in another respect the wide net subjectivists have cast in the name of “interpretation” is dangerously overbroad: it is dangerously overbroad because of its implication that *criticism* of law, no less than adjudication itself, is an “interpretive act.” I will argue that the view of criticism that emerges from the subjectivist’s view of interpretation is not just mistaken, but dangerously so. Contrary to the claim of at least some of its adherents, the view of criticism that follows from subjectivist premises is deeply reactionary, not progressive, in its political implications.

A. *Subjective Interpretivism and Imperativism*

Subjective interpretivism (hereinafter "subjectivism") and imperativism are often confused for good reason: they share a vision of law and adjudication that is more similar than dissimilar. Both traditions view adjudication as imperative, and both traditions differ from objectivism on precisely that point. The proposition "this contract is unconscionable," for example, would be regarded by the objective interpretivist as a statement of legal fact, or a part of legal knowledge. It is either right or wrong; it is either true or false. For both the subjectivist and the imperativist, the same proposition is declaratory in grammatical form only, and that grammatical form is misleading. In fact, when uttered by a judge, the proposition states (or masks) an imperative: this court will refuse to enforce this contract. This shared commitment to the underlying imperative core of adjudication is an important one. It is this shared belief that constitutes the premise, for both traditions, of their central work: the discovery (or the unmasking, or the deconstruction) of the imperative lurking behind all purportedly propositional statements of legal truth.

However, imperativism and subjectivism reach this shared commitment by wildly divergent analyses of the nature of interpretation, which in turn entail wildly divergent views of the nature of legal criticism. For the imperativist the proposition "this contract is unconscionable," uttered by a court, is a masked imperative—it is declaratory in form only. It expresses a command of the court, not a truth about an existing "contract." Its "truth" or "falsity," then, depends upon the power of the court, not upon the content of some pre-existing legal rule or the nature of the "contract." But the imperative nature of *legal* truths is solely a function of judicial power; it does not imply the imperative nature of *all* truths. By contrast, the critical claim, for example, that "unconscionable contracts frustrate real human needs" is a claim about our real human needs, not a hidden imperative. The critical claim is just what it appears to be: a propositional claim about the relation between a political practice and a human need. Whether or not it is true or false depends upon whether or not it is true or false that unconscionable contracts frustrate real human needs. Its truth or falsity depends on the nature of our real human needs, not on the power or lack of power of the critic.

Subjective interpretivists, distinctively, deny this. For the subjectivist, both legal adjudication and legal criticism are "interpretive" acts, and *all* interpretive acts are imperative in the same way that adjudication is imperative. An interpretive act is a (necessarily subjective) interpretation of a "text" that is itself "socially constructed." Thus, the "legal text" that constitutes the major premise for the court's conclusion that "this contract is unenforceable" is not a "real

contract" or a "real precedent" or a "real legal doctrine" existing in a land of discoverable legal reality, but rather is a social construction generated by political processes. Similarly, the subjectivist holds, the "social text" for the *critical* (rather than adjudicatory) claim that "enforcing unconscionable contracts frustrates real human needs" is not "our real human needs." Human beings do not have "real human needs" any more than the legal world has "real contracts" or "real rules of law." The critical claim that we have a "real need"—and that a law frustrates it—is but an interpretation, necessarily subjective, of a socially constructed "text" generated by political processes. The criticism of law, then, because it is no less interpretive, is therefore no less imperative than the adjudication of law. The critical claim that "enforcing unconscionable contracts frustrates real human needs," like the adjudicative claim that "this contract is unconscionable," is not something which is either "true" or "false." Like all acts of interpretation, it is a masked assertion of power. It is a chosen "interpretation" of a social "text" that we have created, not a proposition (either true or false) about our human needs. All we can say about the claim that "unconscionable contracts frustrate real human needs" is whether or not the claim has attained political success: if it is something a great number of people have come to live by, it is successful; if not, it is unsuccessful. We cannot determine whether it is "true" or not for the simple reason that there are no "real human needs" against which it can be judged, any more than there are contracts pre-labeled "unconscionable" or "enforceable." All there is, is the speaker's desire to see certain contracts struck, the speaker's desire to couch that commitment in the language of real human needs, and the speaker's relative power (of persuasion or force) in imposing that preference on others. We should not be fooled by this mystifying claim that there are "real needs" any more than we should allow ourselves to be fooled by the obfuscating declaratory rhetoric of courts regarding the "real" existence of contracts.

The central and distinguishing commitment of subjective interpretivism, unshared by imperativism, then, is this: there is no "real" basis for moral criticism of law any more than there is a "real" basis for adjudication. There are no "real human needs" (or "real" anything else—real rights, real justice, real human potential) by which to criticize law any more than there are "real contracts" or "real" neutral principles by which to adjudicate. That there are "real needs" is an illusion in precisely the way (and for precisely the reason) that it is an illusion that there are "real contracts." Both illusions manifest as well as result from the power of some political actor. There are no real needs because there is no ahistorical, non-contingent "human nature." There are only conflicting critical "subjective interpretations" of our contingent social and political history, including the history of our various political imaginings. The human nature we

think we see, with its attendant human needs, and perhaps human rights, is but a product of some strand of our contingent social history, which could well have been otherwise. There are no real needs, rights or justice that transcend our history, or our conventions. There is only political will: felt, perceived, and interpreted in a thousand different ways.

This rift between imperativists (whether they regard themselves as legal realists or legal positivists or critical legal scholars) and subjective interpretivists (whether or not they regard themselves as “deconstructionists”), typically obscured by their considerable common ground, has recently come to the surface. In a revealing article entitled *Anti-Professionalism*,⁷² Stanley Fish, our foremost subjective interpretivist, attacks a range of theorists he calls, generically, “anti-professionals,” including two prominent legal critics—Bob Gordon and Duncan Kennedy. Fish takes the anti-professionals to task for their insistence on the existence of “real” needs and “real” ideals and a “real” human potential, as a basis for criticism of politics, professions, laws, and institutional histories. The article is the clearest exposition to date of the nature of the divide between subjectivists on the one hand, and imperativists on the other.

Fish begins his attack on Gordon by laying stake to their common ground. Gordon and Fish agree on the nature of law. They agree that purportedly neutral law is in fact political:

Gordon [has discovered] . . . that legal reasoning is not “a set of neutral techniques available to everyone” but is everywhere informed by policy, and that judicial decisionmaking, despite claims to objectivity and neutrality, rests on “[s]ocial and political judgments about the substance, parties, and context of a case . . . even when they are not the explicit or conscious basis of decision.” [He] has discovered, in short, that rather than being grounded in natural and logical necessity, the legal process always reflects the interests and concerns of some political or economic agenda, and [he] moves on to unfreeze the world as it appears to common sense as a bunch of more or less objectively determined social relations and to make it appear as (we believe) it really is: people acting, imagining, rationalizing, justifying.⁷³

With Gordon’s legal imperativism, Fish is in agreement. But, Fish complains, Gordon next implies that we should *criticize* these “actings, imaginings, rationalizings and justifyingings” of the legal culture by reference to our “real” nature. This, Fish insists, we cannot do. There is no more of a “real” human nature than there are “real” contracts (or neutral principles). From Fish’s point of view, Gordon’s insistence on the viability of such criticism is not only ill-founded,

72. Fish, *Anti-Professionalism*, 7 *CARDOZO L. REV.* 645 (1986).

73. *Id.* at 656.

but illogical. It is illogical, Fish argues, because it is inconsistent with Gordon's insistence on the political underpinnings of purportedly neutral law:

The full force of this contradiction becomes clear . . . when Gordon declares that the "discovery" that the "belief structures that rule our lives are not found in nature but are historically contingent" is "liberating"; but of course the discovery can only be liberating (in a strong sense) if by some act of magic the insight that one is historically conditioned is itself not historically achieved and enables one . . . to operate outside of history. Gordon's capitulation to the essentialist ideology he opposes is complete when he fully specifies what he means by liberating: "This discovery is . . . liberating . . . because uncovering those [belief] structures makes us see how arbitrary our categories for dividing up experience are." . . . What Gordon wants (although by his own principles he should want no such thing) are categories uninvolved in interest; and it is in the context of that absolutist and essentialist desire, that the ways and categories we have can be termed arbitrary.⁷⁴

Fish next criticises Duncan Kennedy for the same sin. Having exposed the imperative and political underpinning of the declaratory form of legal ideology, doctrine and culture, Fish argues, Kennedy cannot then assert the existence of a "real" natural basis for normative criticism of those unmasked imperatives:

Exactly the same line of reasoning is displayed by Gordon's colleague Duncan Kennedy when he moves from the observation that legal reasoning is everywhere informed by policy to the conclusion that those who teach legal reasoning teach "nonsense," *only* argumentative techniques, "policy and nothing more." But arguments based on policy can be devalued and declared nonsensical only if one assumes the existence and availability of arguments . . . based on a sense beyond policy, a sense which, because it is apolitical or extrapolitical, can serve as a reference point from which the merely political can be identified and judged He buys into that vision again when he declares that "the classroom distinction between the unproblematic, legal case and the policy-oriented case is a *mere artifact*." [Artifact] is a "hinge" word, poised between the insight that reality as we know and inhabit it is institutional and therefore "man-made" and the desire (which contradicts the insight) for a reality that has been made by nature. That desire is the content of "mere," a word that marks the passage (already negotiated) from an observation—that the distinction between the unproblematic and the policy-oriented case is conventional—to a judgment—that because it is conventional, it is unreal Both [Kennedy and Gordon] proceed, in an almost unintelligible sequence, from the insight that the received picture of things is not given but historically

74. *Id.* at 658.

contingent to the conclusion that history should be repudiated in favor of a truth that transcends it. Kennedy's specific target, . . . like Gordon's, . . . is to "abolish . . . hierarchies, to take control over the whole of our lives, and to shape them toward the satisfaction of our real human needs."⁷⁵

Both Kennedy and Gordon, Fish argues, improperly assume the existence of "real human needs" as the basis for criticism of exercises of power. This insistence is impermissible. There are no real human needs. There are only more or less politically successful claims to the existence of such:

The key word in the last sentence—taken from Peter Gabel and Jay Feinman's essay *Contract Law as Ideology*,—is "real" The complaint is that a set of related and finally equivalent realities—real truth, real values, real knowledge, real authority, real motives, real need, real merit, the real self—is in continual danger of being overwhelmed or obscured or usurped by artifacts (fictions, fabrications, constructions) that have been created (imposed, manufactured) by forces and agencies that are merely professional or merely institutional or merely conventional or merely rhetorical or merely historical; and the program is simply to sweep away these artifacts—and with them professions, institutions, conventions, rhetorics and history—so that uncorrupted and incorruptible essences can once again be espied and embraced.⁷⁶

According to Fish, *any* critical claim that a professional, empowered group (such as lawyers, judges, doctors, or chairmen of English departments) has used that power in a way that frustrates something "real" (such as "real human needs") is confused, disingenuous, incoherent, and, worst of all, right-wing. Any such criticism violates the fundamental commitment of subjective interpretivism: there are only *interpretations* of right, *interpretations* of needs, or *interpretations* of truth; there are no *real* rights, needs or truths against which these interpretations can be evaluated:

What is surprising, . . . is to find this the declared program of intellectuals who think of themselves as being on the left, and who therefore begin their considerations with a strong sense of the constitutive power of history and convention, and this leads me to [this] declaration . . . : at the moment that a left-wing intellectual turns anti-professional, he has become a right-wing intellectual in disguise.⁷⁷

What left-wing critics *ought* to be doing, Fish informs us (and them), is not criticising law on the basis of our "real" human needs

75. *Id.* at 659-60.

76. *Id.* at 661.

77. *Id.*

or “real” potential, but instead, simply presenting alternative “imaginings, rationalizings, justifications, etc.” to those presently espoused by the dominant vision. Just as the judge can’t claim “truth” when he asserts that a contract does or doesn’t exist (but can only claim institutional power), similarly a critic can’t assert truth when she asserts that a law is frustrating our real needs, or is hurting us more than helping us, or is or isn’t morally repugnant. All the critic, like the judge, can assert is institutional power—she either has it or she doesn’t. The critic’s alternative imagining, then, also cannot be judged on the basis of whether its assumptions are true or false to our real nature, our real needs, or our real potential. It can only be judged on the basis of whether or not the criticism has proven successful—whether it has displaced the dominant vision and become dominant itself. Thus, Fish completes his critique of Kennedy:

Kennedy is right to say that teachers who persuade students that “legal reasoning is distinct *as a method* . . . from ethical and political discourse in general” have persuaded them to something false; but that is not the same as saying that they teach nonsense; they teach a very interested sense and teach it as if there were no other. The way to counter this is to teach or urge some other interested sense, some other ethical or political vision, by means of alternative arguments which, if successful, will be the new content of legal reasoning. This is in fact what Kennedy is doing in his essay, but it isn’t what he thinks he’s doing—he thinks he’s clearing away the “mystification” of mere argument and therefore replacing nonsense with sense; but he can only think that in relation to a sense that is compelling apart from argument, a sense informed not by policy, but by something more real; and once he begins to think that way he has already bought into the ahistorical vision of his opponents, a vision in which essential truths are always in danger of being obscured by the special . . . pleading of partisan interest.⁷⁸

My sense (although perhaps not shared by either Gordon or Kennedy) is that Fish has exposed neither “closet right wingism” (Marx, for example, clearly believed there were such things as “real” human needs) nor confused, self-contradictory left intellectuals, but rather left-wing imperativism. What Fish objects to in Kennedy and Gordon is not a function of the latter’s hidden right wing politics, but the profound difference, often masked by the ground they share, between Fish’s subjective interpretivism and the imperativism of Gordon and Kennedy. For Gordon and Kennedy, whatever their other sins, have never committed the sin of self-contradiction that Fish thinks he has uncovered. Neither Gordon nor Kennedy have ever espoused the subjectivist thesis. Both thinkers, like Fish, are committed to the proposition that law is an act of power—that

78. *Id.* at 659.

adjudication is political. But their reasons for thinking this differ from Fish's, and as a result of the difference, they are simply not bound to the view of the nature of criticism with which Fish wishes to saddle them. For Fish, adjudication is political *because it is interpretive* and all interpretation—including all critical acts such as legal criticism as well as literary criticism—is political. There are no more “real” human needs than there are real legal constructs (such as contracts, or rights, or duties). There are only interpretations of needs. For Kennedy and Gordon (as for the legal realists before them), adjudication is imperative because it is backed by force, not because it is interpretive. That adjudication is imperative, then, does not, for Kennedy and Gordon, imply the non-existence of a reality on which criticism of such imperatives can be built. From the imperativist perspective, the non-existence of “real” legal categories that preexist adjudication is a function of the power of judges to create those categories. The non-existence of real legal knowledge does not entail the non-existence of “real” anything else, such as human needs. Kennedy and Gordon may be right or wrong to insist on the existence of real human needs (or in their claims regarding what those needs are). But their claim that they exist does not ensnare them in contradiction, or in “right-wing” intellectual thinking.

In fact, Fish's charge is peculiarly inappropriate, for it is his own view, not the view he attacks, that mutes radical criticism of law. For Fish, just as law is contingent on the political, historical will that creates it, *value* as well, whether derived from needs or rights, is contingent on the political will that creates it. We cannot criticize our political acts on the basis of their tendency to promote or frustrate real human needs or create real value: there are no real human needs just as there is no objective value. There are only claims to the existence of real human needs which may or may not prove politically successful. The claim that a particular law frustrates our real needs has no more truth value than the claim that there exists a set of voidable contracts, tainted by objectively discoverable standards of unconscionability. Since value can only be whatever the historically powerful have succeeded in claiming it to be (just as contracts are whatever the courts enforce), and since criticism of law can only proceed by reference to value, we can only criticize law for its failure to comply with the standards generated by the powerful. We can ground our criticisms in our alternative “imagining,” but we cannot ground that imagining in a vision of our real needs, or nature, or potential. Such a vision is nonsense—we have none. All we “really” have are varying degrees of power.

Thus, subjective interpretivism is at one and the same time profoundly radical and profoundly conservative. As a mechanism for uncovering the political basis of legal ideology, it is radical: it goes to the root. The root of law is indeed power, and that insight is essential for any radical criticism of law. It shares this radicalism

with imperativism, and it is this feature, I believe, that makes subjectivism attractive to critical theorists such as Kennedy and Gordon. But subjective interpretivism, *unlike* imperativism, is also committed to a conservative vision of the potential of criticism. We cannot criticize the world given us by the powers that be on the basis of what ought to be—for there is no realm of the “ought” that is not itself an aspect of that which is. Criticism is interpretive, and interpretations must be based on texts. Texts are things that people—and more particularly, empowered people, such as people in professions—*create*. Criticism, then, can only be based upon interpretations of the positive values created by that branch of the community which has at some time made itself heard. We can use those positive values to criticize political acts that diverge from them. But we cannot criticize the values themselves on the basis of human needs drawn from extra-professional (or extra-political or ahistorical) sources. To do so is to commit the logical error of “anti-professionalism.”

B. *Pro-Professionalism*

Fish insists that his attack on anti-professionalism—the misguided tendency to criticize the dominant values of a profession (or a society) by reference to real human needs, real human potential, or a real human nature—is dictated by necessity: he is only describing what must be. We cannot coherently attack professionalism itself, or institutionalism itself, or power itself, because professionalism, institutionalism, and contingent power are all there is: they give us the values with which we criticize the part, and there are no independent values to which we can turn to criticize the whole. There is no real need to meet, or true potential to frustrate. There are, at best, alternative “imaginings.”⁷⁹

Yet, if deconstruction has taught us anything useful at all, it has taught us to be suspicious of precisely these sorts of claims of necessity. Fish is, after all, engaged in an interpretive act: he is interpreting the nature as well as the content of our social life. All of Fish’s interpretations rest on his rock-bottom conviction that there is no ahistoric, non-contingent, “natural” realm, beyond (or beneath) history, against which history and the products of history (such as judicial decisions) can be judged. From this it follows that there are no natural needs, identities, pleasures, pains, “potentials,” or values. But surely this dreary view is not the only possible “interpretation” one can give of our experience of social life. Here’s another: we have real needs that may or may not be met

79. *Id.* at 673-75.

by the historical, contingently chosen values of the empowered. To name a few, we need love, food, shelter, meaningful work, nurturance, healing, play, and community. We have a natural need for and attraction to life itself. We have a natural self inside our three piece suits: it is the self who finds the suit stifling. We have a real potential for growth, creativity, work, community and meaning in our lives, and that potential may well be frustrated by our current social institutions. We judge those institutions, and we *should* judge those institutions including the professions and professionalism itself, by reference to how well they meet our very real human needs, whether they foster or stunt our very real potential, and whether they encourage or stifle our very real and natural longing for community. We criticize our "professionalism" by reference to the natural needs, feelings, and sensitivities of our non-contingent, ahistorical, non-institutional and thoroughly non-professional selves. If our social history, our professional selves—in short, the society we have created through our contingent choices—frustrates our natural needs we have good reason to change course. If professionalism stifles our natural and naturally social human life rather than encourages it to flourish then we have reason to question professionalism. Professionalism, or the institutional history of the empowered, is not, as Fish insists, *all there is*. It is not the only source of value.

Why does Fish go to such lengths to deny the natural self? More importantly, why do so many? Why is *this* dreary interpretation—that we "are," essentially, not what we eat, or what we love, or what we read, or what we dream, but what we *profess* in our public, professional lives—such a popular modern interpretation of life? Why has it captured the attention and the imagination of so many "left" critical scholars? The reason *Fish* is attracted to this vision is not hard to discern. Underscoring all of Fish's interrelated claims—that we have no "real" human nature; that our lives are exhaustively political; that we have no "real needs" or "real" potential against which to judge the acts or decisions of the powerful, but only conflicting "imaginings" which from time to time, and for various strategic reasons, assert that we do; that as a result of all of this, criticism, like law, is a series of commands with no "real" referent; that criticism, like law, can only be judged successful or unsuccessful, not warranted or unwarranted—is an unabashed celebration of power, in its institutional and professional manifestations. All there is, Fish argues again and again, is institutional, professional, and historical power, and therefore the only critical values there "are" are those generated by institutions and professions. But Fish reassures us, this turns out to be not cause for alarm, *but cause for content*. Power—and its historical manifestation in professional organizations, hierarchies, law and elsewhere—is generally benign. Power doesn't crush, Fish reassures us,

power *facilitates*. Power enables. Power is energy itself. Power is the life-force.⁸⁰

Thus, Fish asserts a pro-professional faith which is at least as relentless as the anti-professionalism he is attacking. He defends the hierarchies in traditional English departments,⁸¹ is scornful of attacks on the professional roles of lawyers,⁸² and even comes to the defense of the gynecological community of the late-nineteenth century.⁸³ Power, Fish concludes, "not only constrains and ex-

80. *Id.* at 670.

81. Fish states:

[W]hen . . . [Fanto] . . . comes to describe the hierarchical form of the profession, he can only view it as a grand deception practiced on . . . victimized initiates: "The profession . . . establishes a hierarchy and sets some individuals . . . at its summit together with the symbols associated with their names . . . [T]hose new to the profession receive these symbols—they are formed by them; they submit to their authority." What is missing here is any notice of the *content* of what Fanto calls "symbols," the research accomplishments, methodological techniques, powerful interpretations, pedagogical innovations, etc. that bring some men and women to the "summit" and from the basis of the authority that in Fanto's account is magically and arbitrarily conferred (seized rather than earned). He is so convinced beforehand that the deference accorded to institutional superiors is without foundation that he never bothers to catalogue the tasks, long-standing puzzles, crucial problems, the negotiation and completion of which leads to professional recognition and promotion. To be sure, these tasks, problems and puzzles can be challenged as not worth doing, and there are some who "rise" independently of any such accomplishments; but, nevertheless, there is a great deal more to the acquiring of professional power than "the frequent celebration of the master in reviews" and other such gestures of servility that seem to make up Fanto's entire understanding of the matter.

Id. at 669.

82. Fish states:

[In the anti-professional's] . . . view, it is not to much to say . . . that in the act of becoming a professional one is in danger of losing his very humanity. This is the burden, for example, of a recent booklength complaint by a number of lawyers and law professors against the narrowing effects of their own education and professional experience [T]he authors produce a virtual compendium of anti-professionalist attitudes and arguments. Professionalism is indicted as a threat to humanity and to values; the openness of disinterested inquiry is replaced by the unworthy goal of "master" or manipulation, and . . . the professional is himself mastered . . . by the constricted "roles and patterns" that are at once his weapons and his prison. The professional, in short, becomes his own victim as the cynicism he practices transforms him into its image, leaving him with the base motives of an empty and self-serving careerism.

Id. at 647.

83. Fish states:

[A]nti-professionalism . . . [is] any attitude or argument that enforces a distinction between professional labors on the one hand and the identification and promotion of what is true or valuable on the other It is

cludes, but enables, and . . . without some institutionally articulated spaces in which actions become possible and judgments become inevitable there would be nothing to do and no values to support."⁸⁴ Thus underlying at least Fish's subjective interpretivism is an unabashed embrace of professional power. The contrast with Fiss is striking. Whereas Fiss solves the problem of power by constraining it with objectivity, Fish solves the problem of power by celebrating it. Fish sees interpretation, and therefore power, everywhere: he sees it not only in the courts (although of course he sees it there), but also in medical diagnoses, literary reviews, and in English departments. Of course interpretations of literature are acts of power, Fish explains, of course it is true that they are generated by as well as themselves determine careers, tenure decisions, appointments and dismissals. But this is not cause for alarm; in fact, all is more or less as it should be. Power "enables." The politics

in this spirit that Burton Bledstein ends his study of *The Culture of Professionalism*, calling his readers to an awareness of the "arrogance, shallowness, and potential abuses . . . by venal individuals who justify their special treatment and betray society's trust by invoking professional privilege, confidence, and secrecy." In many of Bledstein's examples, this betrayal takes the form of allowing professional considerations to overwhelm considerations of public and client welfare. Thus he cites late nineteenth-century "[g]ynecologists and psychiatrists" who "diagnose female hysteria as a pathological problem with a scientific etiology related to an individual's physical history rather than anger the public by suggesting it was a cultural problem related to dissatisfied females in the middle-class home." Underlying this criticism is something like the following scenario: faced with a situation in which they could choose from a number of explanations, these doctors chose that explanation which would strengthen their already entrenched interest by solidifying rather than alienating the support of middle-class America. It is a perfectly reasonable scenario, especially given the anti-professionalist perspective, but it depends upon assumptions about the nature of the choice and the freedom of the choosing agents that I will later challenge [I]n this particular example the professional's betrayal of his clients is simultaneously a betrayal of the truth In the popular mind this particular form of professional abuse is typified by the behavior of lawyers who are entrusted with the determination and protection of truth, but who in practice deliberately obfuscate it by deploying procedural strategems that constitute the center of their craft and finally, of their commitment. In the process, or so the story goes, the very values for which the enterprise supposedly exists—justice and the promotion of the general welfare—are sacrificed to the special interests that the legal profession at once represents and embodies.

Id. at 646.

84. Although Fish would never put the point this way, what we mean by the claim that the departmental power wielded in English departments is generally benign, may simply be that English departments, even with their internal wars, further more than they frustrate our "real" human need for culture, diversity, language and intellectual and linguistic stimulation.

of interpretation is necessary. Far from being a necessary evil, it is an affirmative and necessary good.

Noxious and even dangerous as I take the general view to be, there is nevertheless something refreshing about Fish's happy acceptance of the powers that be in English departments: many outsiders have begun to suspect that the critics of literary traditionalism have been protesting too much. Perhaps it is true that the institutional power wielded in English departments enables, or facilitates, more than it crushes, just as Fish suggests. It might be true that English departments, and the hierarchies that define them, promote discourse more than they silence it. They probably do encourage speech, over the long haul, more than they censure. Even the most sadistic, wrong-headed, ill-willed and ruthless departmental chairperson—of which, I suspect, there are relatively few—has limited reach. He or she can crush careers. But she cannot, and does not, fine, imprison, or execute. The exercise of power in English departments may well be generally benign. Although Fish would never put the point this way, English departments, even with their internal wars, may further more than they frustrate our "real" human needs for culture, diversity, language, and intellectual and linguistic stimulation.

It is a mistake though, and an unnecessary one, to view English departments and law courts as part of a seamless, interpretive web. Fish's optimism regarding the use of power in English departments is wildly out of place when applied to the power wielded by courts or legislatures. We can, perhaps, afford to be complacent about the power wielded by the departmental chair and the interpretive discourses that power facilitates. But we cannot afford to be complacent about the power wielded by judges, lawyers, police, the wealthy, the dominant race, or the dominant gender. We cannot afford complacency about the extent of power held by legal professionals any more than we can afford the opposite tendency, evidenced by Fiss, to be blindly fearful of their power. Professionalism may facilitate, as Fish insists, but it also crushes. Power may sometimes enable, but it oftentimes destroys. We must recognize power when we see it, and we cannot afford to trivialize the discovery by insisting that we see it everywhere. We cannot afford to view the critic—whether literary or legal—as simply another center of power, professing simply another "imagining," which may or may not prove successful. What the critic does—criticize the law—is profoundly different from what judges do, which is to command. They both use words and they both interpret the words of others. But we allow their shared tools to overshadow the difference between them at great risk. One speaks with the force of the state, and the other speaks, at best, with the force of reason. We should beware of the pro-professional's insistence that they are both cut from the same cloth.

V. SUBJECTIVISM, POLITICS AND NATURE: *The Floating Opera*

John Barth's nihilistic novel *The Floating Opera*⁸⁵ relates the story of a day in the life of a lawyer-protagonist named Todd Andrews on Maryland's Eastern Shore. On this day, Todd decides to commit suicide, then decides to commit mass murder, and finally decides not to do either. The burden of the novel is to explain these decisions. The novel is also a stinging indictment of "subjective interpretivism." For Todd Andrews, like Stanley Fish, is a "subjective interpretivist." Like Fish, Andrews embraces a subjective theory of interpretation, an imperative theory of law, a nihilistic theory of value, and an acquiescent, pro-professional attitude toward the powers that be and the values they have generated. The novel reveals Andrews' suicidal and murderous urges as attempts to come to grips with the logical derivatives of these premises.

A. *Todd Andrews as a Subjective Interpretivist*

Early in the novel, Andrews explains his subjective view of interpretation. Social life, Andrews claims, is a "floating opera." What we see as life, and what we see as "law," and what we see as "value," are all simply what we have happened to glimpse of the opera from our historical, contingent, and pathetically accidental spot along the shore. What we claim to "know" is entirely derived from the constructs given us by the creator of the opera, and the creator of the opera is us. We cannot know anything other than the floating opera. As a consequence, the interpretations we place upon the parts of the opera we happen to see are subjective: they depend upon our place on the shore—our perspective upon what we have made:

Ah, me. Everything, I'm afraid, is significant, and nothing is finally important

Why *The Floating Opera*? . . . That's part of the name of a showboat that used to travel around Virginia and Maryland tide-water areas . . . It always seemed a fine idea to me to build a showboat with just one big flat open deck on it, and to keep a play going continuously. The boat wouldn't be moored, but would drift up and down the river on the tide, and the audience would sit along both banks. They could catch whatever part of the plot happened to unfold as the boat floated past, and then they'd have to wait until the tide ran back again to catch another snatch of it, if they still happened to be sitting there I needn't explain that that's how much of life works; our friends float past; we become involved with them; they float on, and we must rely on hearsay or lose track of them completely; they float back again, and we either renew our

85. J. BARTH, *THE FLOATING OPERA* (Doubleday & Company ed. 1967).

friendship—catch up to date—or find that they and we don't comprehend each other any more. And that's how this book will work, I'm sure. It's a floating opera, friend, fraught with curiosities, melodrama, spectacle, instruction, and entertainment, but it floats willy-nilly on the tide of my vagrant prose⁸⁶

For Andrews as for Fish, this subjective theory of interpretation entails an imperative theory of law:

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.

Surely, though, I am curious about things that the law can be made to do, but this disinterestedly, without involvement. A child encounters a toy tractor, winds it up, and sets it climbing over a book. The tractor climbs well. The child puts another book here, so, and angles the first. The tractor surmounts them, with difficulty. The child opens the pages of the first book, leans the second obliquely against it, and places his shoe behind the two. The tractor tries, strains, spins, whirrs, and falls like a turtle on its back, treads racing uselessly. The child moves on to his crayons and picture puzzles, no expression on his face. I don't know what you mean, sir, when you speak of justice.

. . . .
All right. I have no general opinions about the law, or about justice, and if I sometimes set little obstacles, books and slants, in the path of the courts, it is because I'm curious, merely, to see what will happen. On those occasions when the engine of the law falls impotently sprawling, I make a mental note of it, and without a change of expression, go on to my boat or my *Inquiry*.⁸⁷

Furthermore, adjudication is imperative, Andrews shows, not by virtue of the judge's institutional power (as imperativists would have it)—it is not that adjudicative judgments are backed by force—but because judges use words. Words, through their multiple meanings, give their users, including judges, interpretive power. A court's interpretation of a will, for example, is "subjective" (and therefore chosen, not mandated) because it must be: there is no "objective meaning" of the will's provision to be discovered, whether or not the court makes a pretense of looking for one. Andrews demonstrates the point with a case. The issue in the case was whether Andrews' client, Harrison Mack, had breached a will condition that Harrison not engage in activities that show "sympathy" for communist causes. The lawyers' conflicting interpretations of the relevant social facts underscored the subjectivity of legal interpretation:

86. *Id.* at 6-7.

87. *Id.* at 84-85.

Froebel . . . announced that he had such evidence [of communist sympathies] . . . enough to warrant the reversal of bequests provided for by our will

"For Heaven's sake!" Harrison whispered. "You don't think he means my Spanish donations!"

"If you were silly enough to make any, then I daresay he does," I replied, appalled anew at Harrison's innocence.

And indeed, the "Spanish donations" were precisely what Froebel had in mind

"May I point out," Froebel continued blandly, "that not only is a gift to the Loyalists in essence a gift to Moscow, but this particular subscription agency is a Party organization under FBI surveillance. A man . . . doesn't send checks to this subscription outfit unless one is sympathetic with the Comintern. Young Mr. Mack, like too many of our idle aristocrats is, I fear, a blue blood with a Red heart."

I believe it was this final metaphor that won Froebel the judgment 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. Even I was not a little impressed, and regretted only that we had no jury to be overwhelmed by such a purple plum from the groves of advocacy. *A blue blood with a red heart!* How brandish reasonableness against music? Should I hope to tip the scales with puny logic, when Froebel had Parnassus in his pan?

"My client, a lover of freedom, and human dignity," I declared, "made his contributions to the oppressed Loyalists as a moral obligation, proper to every good american"

And on I went for some minutes, trying to make capital out of the Spanish confusion, wherein the radicals were the *status quo* and the reactionaries the rebels. It was an admirable bit of casuistry, but I knew my cause was lost [T]he room was filled with [the sound of] *blue bloods with Red hearts*.

And Judge Lasker, as I think I mentioned, was famously conservative. Though by no means a fascist himself . . . he epitomized the unthinking antagonism of his class toward anything pinker than the blue end of the spectrum: a familiar antagonism that used to infuriate me when . . . I was interested in such things as social justice.⁸⁸

The judge, of course, must render an opinion consistent with law, not with poetry. The issue for the judge was whether or not Harrison's checks to the subscription agency representing the Spanish Loyalist government constituted, within the meaning of the phrase in the will, an act manifesting communist sympathies, thus precluding Mack's inheritance under the will. The Judge reasoned that it did:

It does not matter whether there is a difference between the Moscow and Madrid varieties of communism, . . . or whether the Court or

88. *Id.* at 93-95 (emphasis original).

anyone else approves or disapproves of the defendant's gifts or the cause for which they were intended. The fact is that the subscription agency involved is a communist organization under government surveillance, and a gift to that agency is a gift to communism. There can be no question of the donor's sympathy with what the agency represented, and what it represented was communism. The will before me provides that should such sympathy be demonstrated, . . . the terms of the document are to be reversed. The Court here orders such a reversal. Well, we were poor again. Harrison went weak, and when I offered him a cigar he came near to vomiting.⁸⁹

Andrews, of course, like Fish, sees a multiplicity of meaning in the will's phrase. Andrews is as good as Fish at spotting linguistic and behavioral ambiguities. The ambiguity Andrews spots in the judge's reasoning turns on the meaning of "sympathy." The judge had given "sympathy" a non-intentional meaning. Andrews points out, correctly, that such a meaning is by no means mandated by the will's language. Just as plausibly, the will could be read as requiring an intent to foster communism, which in this case, given Andrews' interpretation of Harrison's behavior, was absent:

"Do you give up?" I asked him. "Or shall I appeal?"

. . . . He clutched at the hope. "Can we appeal?"

"Sure," I said. "Don't you see how unlogical Lasker's reasoning is? . . . He said the subscription agency was sympathetic to communism. You give money to the agency; therefore you're sympathetic to communism. It's like saying that if you give money to a Salvation Army girl who happens to be a vegetarian you're sympathetic to vegetarians. The communists support the Loyalists; you support the Loyalists; therefore you're a communist."

Harrison was tremendously relieved, but so weak he could scarcely stand "Well! That puts us back in the race, doesn't it? . . . Damned judge! We've got it now, boy!"⁹⁰

The answer to Mack's question, of course, is "not necessarily." Andrews, like Fish, knows that judges decide cases by any number of factors, and that the "disciplining rule" that is deductive logic is not one of them. Unlike Fish, however, Andrews has the unpleasant task of explaining this to his client:

"I'll appeal," I said, "but we'll lose again, I guess."

"How's that? Lose again!" He laughed, and sucked in his breath.

"Forget about the logic," I said. "Nobody really cares about the logic. They make up their minds by their prejudices about Spain. I think you'd have lost here even without Froebel's metaphor. I'd have to talk Lasker into liberalism to win the case."

89. *Id.* at 95-96.

90. *Id.* at 96.

I went on to explain that of the seven judges on the Court of Appeals . . . three were Republicans with a pronounced antiliberal bias, two were fairly liberal Democrats, one was a reactionary "Southern Democrat," . . . and the seventh, an unenthusiastic Democrat, was relatively unbiased.

"I know them all," I said. "Abrams, Moore, and Stevens, the Republicans, will vote against you. Forrester, the Southern Democrat, would vote for you if it were a party issue, but it's not; he'll go along with the Republicans. Stedman and Barnes, the liberals, will go along with you, and I think Haddaway will too, because he likes me and because he dislikes Lasker's bad logic.

"But hell, that's four to three!" Harrison cried. "That means I lose!"

"As I said." . . . Harrison was crushed. "It's unjust!"⁹¹

Finally, like Fish, Andrews subscribes to the distinguishing commitment of subjectivism: the denial of the existence of "objective" values. Like Fish, Andrews derives from his imperative vision of law and his subjective theory of meaning the nonexistence of such things as justice or fairness. This too must be explained to the client. Just as there are no "real" needs, or truths, or rights, or "testator's intents," Mack is going to have to come to grips with the fact that there is no real justice either:

I smiled. "You know how these things are." "Aw, but what the hell!" He shook his head, tapped his feet impatiently, pursed his lips, sighed in spasms. I expected him to faint, but he held on tightly, though he could scarcely talk. The truth was, of course, that it is one thing—an easy thing—to give what Cardinal Newman calls "notional" assent to a proposition such as "There is no justice"; quite another and more difficult matter to give it "real" assent, to learn it stingingly, to the heart, through involvement. I remember hoping that Harrison was strong enough at least to be educated by his expensive loss.

I appealed the judgment of the Court.

"Just to leave the door open," I explained. "I might think of something."⁹²

Thus, for Andrews as for Fish, there are no more "objective values" than there are "objective laws." All values are socially constructed, or "subjective":

What was on my mind, as I walked, was the grand proposition that had occurred to me while I was licking my cigar: that absolutely nothing has intrinsic value. Now that the idea was articulated in my head, it seemed to me ridiculous that I hadn't seen it years ago. All my life I'd been deciding that specific things had no intrinsic value—

91. *Id.* at 96-97.

92. *Id.* at 97-98.

that things like money, honesty, strength, love, information, wisdom, even life, are not valuable in themselves, but only with reference to certain ends—and yet I'd never considered generalizing from those specific instances. But one instance was added to another, and another to that, and suddenly the total realization was effected—*nothing* is intrinsically valuable; the value of everything is attributed to it, assigned to it, from outside, by people.

I must confess to feeling in my tranquil way some real excitement at the idea Doubtless (as I later learned) this idea was not original with me, but it was completely new to me, and I delighted in it like a child turned loose in the endless out-of-doors, full of scornful pity for those inside. *Nothing is valuable in itself*. Not even truth; not even this truth. 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.⁹³

The consequences of Andrews' moral nihilism, however, are far more devastating for Andrews than for his client. Andrews' adamant denial of the existence of objective value leads him to contemplate suicide:

On this particular evening, to be sure, their progress would cease, for the notes I took then I intended to be my last.

- I. *Nothing has intrinsic value.*
- II. *The reasons for which people attribute value to things are always ultimately irrational.*
- III. *There is, therefore, no ultimate "reason" for valuing anything.*
- IV. *Living is action. There's no final reason for action.*
- V. *There's no final reason for living.*⁹⁴

Andrews' argument against objective value tracks Fish's. The "source" of value, Andrews argues, is social history—the floating opera. Our social history is the "floating opera," and the floating opera is all there is. All we "know" about life is the sum total of our interpretations of the opera. The floating opera is the sole text

93. *Id.* at 170-71.

94. *Id.* at 222-28.

from which subtexts are generated, so any values we adopt or employ are but interpretations of some subscript from the text of the floating opera. We can indeed criticize parts of the opera, but we can only criticize parts of the opera by reference to parts of the script we have heard or witnessed elsewhere. To translate from the metaphor: there are no objective interpretations of "values" by which we can criticize law (or politics, or "professionalism," or the values of the dominant) just as there are no objective "laws" by which we adjudicate cases. We cannot evaluate "institutionalism" or "professionalism" objectively for the same reason that we cannot interpret law objectively: we are institutional and professional creatures, our values are institutional and professional values, and the criticisms we make will reflect our institutional and professional situation; indeed they will be dependent upon it. Value, like law, is a product of history: it is all a part of the opera. Our critical inclinations, like all our interpretive choices, are functions of our historical contingency. Values, far from being the bases for criticism of the powerful acts of others, are themselves nothing but disguised or not so disguised grabs at power and influence.

B. *Todd Andrews as a Pro-Professional*

Like Fish, Andrews emerges from his subjectivism as a card-carrying "pro-professional." Andrews also harbors an acquiescent and even celebratory attitude toward the professions that generate dominant values. Like Fish, Andrews has moved beyond critique (and like Fish, he repeatedly reminds the reader of that fact). Andrews has seen the subjectivist's light. Life is the floating opera, and life is *only* the floating opera. Thoughts, perceptions and most importantly critical values are *all* dependent upon communicative texts generated by whatever snippets the opera provides the audience on the shore. The values that emerge from the opera exhaust the evaluative options open to us, and the values that emerge are, unsurprisingly, those of professions. Thus, Andrews explains his attitude toward his law practice:

Winning or losing litigations is of no concern to me, and I think I've never made a secret of that fact to my clients. They come to me, as they come before the law, because *they* think they have a case. The law and I are uncommitted.

One more thing, . . . if you have followed this chapter so far, you might sensibly ask, "Doesn't your attitude—which is, after all, irresponsible—allow for the defeat, even the punishment, of the innocent, and at times the victory of the guilty? And does this not concern you?" It does indeed allow for the persecution of innocence—though perhaps not so frequently as you might imagine. And this persecution *concerns* me, in the sense that it holds my attention, but not especially in the sense that it bothers me. Under

certain circumstances, to be explained later, I am not averse to pillorying the innocent, to throwing my stone, with the crowd, at some poor martyr. Irresponsibility, yes: I affirm, I insist upon my basic and ultimate irresponsibility. Yes indeed.

It did not deeply concern me, as I said before, whether Harrison received his inheritance or not, though I stood to profit by some fifty thousand dollars or more if he did.⁹⁵

And also like Fish, Andrews is utterly scornful of critical claims that lawyerly professionalism can sometimes frustrate real justice, real needs, or real individuals.⁹⁶ In the Mack will case, the testator's

95. *Id.* at 85.

96. Andrews' pro-professionalism extends to the use of power facilitated by all political and hierarchical institutions, not just the legal profession. Thus, for example, the testator in the Mack case, like Andrews himself, harbors a pro-professional attitude toward the power which testamentary capacity and wealth bestows. Andrews thoroughly approves:

Old man Mack, . . . died in 1935, after years of declining physical and mental health. He left a large estate It was, undeniably, an estate that many people would consider worth going to court about.

Now of the several characteristics of Harrison *pere*, three were important to the case: he was in the habit of using his wealth as a club to keep his kin in line; he was, apparently, addicted to the drawing up of wills; and, especially in his last years, he was obsessively jealous of the products of his mind and body, and permitted none to be destroyed

It seems that disinheritance, or the threat of it, was the old man's favorite disciplinary measure, not only for his son, but also for his wife. When young Harrison [Andrews' eventual client] attended Dartmouth rather than Johns Hopkins; when he studied journalism rather than business; when he became a communist rather than a Republican; he was disinherited until such time as he mended his ways. When Mother Mack went to Europe rather than to West Palm Beach; when she chose sparkling Burgundy over highballs, Dulaney Valley over Ruxton, Roosevelt and Garner over Hoover and Curtis; she was disinherited until such time as she recanted her heresies.

All these falls from the reinstatements to grace, of course, required emanations of Father Mack's will After the old man's death, when his safe was opened, a total of seventeen complete and distinct testamentary instruments was found, chronologically arranged, each beginning with a revocation of the preceding one

Now this situation, though certainly unusual, would in itself have presented no particular problem . . . because the law provides that where there are several wills, the last shall be considered representative of the testator's real intentions, other things being equal But alas, with Mr. Mack all other things weren't equal. Not only did his physical well-being deteriorate in his last years, . . . his sanity deteriorated also In the first stages he merely inherited and disinherited his relatives and his society; in the second he no longer went to work, . . . and he allowed nothing of his creation—including hair and nail clippings, urine, feces, and wills—to be thrown away; in the last stages he could scarcely move or talk To be sure, the stages were not dramatically marked, but blended into one another imperceptibly.

Id. at 85-87.

own mercurial and imperative attitude toward will-making had resulted in a multiplicity of wills, and it had remained to his legatees and their lawyers (including Harrison and Andrews) to fight over which was binding. This prompted a thoroughly professional lawyer's brawl. Andrews thoroughly approved:

Of the seventeen wills . . . only the first two were composed during the time when the old man's sanity was pretty much indisputable; that is, prior to 1933. The first left about half the estate to Harrison Jr. and the other half to Mother Mack, provided it could not be demonstrated to the court that she had drunk any sparkling burgundy since 1920. . . . The other . . . left about half the estate to Mrs. Mack unconditionally and the rest to Harrison, provided it could not be demonstrated to the court that during a five year probationary period, 1932-37, Harrison had done, written, or said anything that could reasonably be construed as evidence of communist sympathies

Of the other fifteen documents, ten were composed in 1933 and 1934, years when the testator's sanity was open to debate. The last five . . . could be established without much difficulty . . . as being the whims of a lunatic: one left everything to Johns Hopkins University on condition that the University's name be changed to Hoover College (the University politely declined)

Luckily for the majesty of Maryland's law, there were only two primary and four secondary contestants for the estate [T]he testator's widow was interested in having Will #6 . . . adjudged the last testament: it bequeathed her virtually the entire estate, on the sparkling-burgundy condition described above. Harrison Jr., preferred #8, . . . it bequeathed *him* virtually the whole works, on the clean skirts condition also described above. [Three] . . . registered nurses . . . liked Wills #3, 9, and 12, . . . therein, . . . their late employer provided them remuneration for services beyond the line of duty. The final contestant was the pastor of the Macks' neighborhood church; in Will #13 the bulk of the estate was to pass to that church, with the express hope that the richer and more influential organized religion became, the sooner it would be cast off by the people.⁹⁷

Andrews' argument is Fish's: the dependency of inheritance entitlements on the outcome of a lawsuit rather than the intent of the testators—and hence on the vagaries of professionalism rather than the disinterested application of objective norms—is entirely necessary, thus obviating the issue of whether it is justifiable. If the “text” that is the judicial system is the only text we have by which to determine inheritance entitlements, then obviously, an inheritance entitlement “means” the sum total of whatever courts might be persuaded to rule. The “anti-professional” complaint that the court's ruling might

97. *Id.* at 87-89.

be “wrong” because the entitlement was “really” otherwise rests upon the false claim that there exists “ideal” legal entities that transcend the history and politics that is adjudication—such as “entitlements,” or “intents” or “testamentary capacities.” Thus the Mack case, Andrews explains, was ultimately decided not through the disciplined application of objective standards of testamentary capacity, but rather, through a “welter of legal nonsense, threats and counterthreats:”

Each of [the three contestants], . . . must attempt to prove two things: that Father Mack was still legally sane when the will of their choice was written, and that by the time the subsequent wills were written, he no longer could comprehend what he was about. On this basis, Miss Kosko (the nurse) had the strongest case, since her will . . . was the earliest of the three. But love was her undoing: she retained as her attorney her boy friend, a lad fresh out of law school, none too bright. After our initial out-of-court sparring, I was fairly confident that he was no match for either Froebel or myself, and when, late in 1936, he refused on ethical grounds a really magnanimous bribe from Froebel, I was certain.

And sure enough, when the first swords clashed in Baltimore Probate Court, . . . Froebel was able, with little trouble, to insinuate that the young lawyer was an ass; that the nurse Miss Kosko was a hussy out to defraud poor widows of their honest legacies by seducing old men in their dotage; that Mrs. Mack . . . had already offered the trollop a gratuity more munificent than she deserved . . . and that even to listen tolerantly to such ill-concealed avariciousness was a tribute to the patience and indulgence of long-suffering judges. In addition, Froebel must have offered some cogent arguments, for surrogate courts, even in Baltimore, are notoriously competent, and the judge ruled in his favor⁹⁸

With the field narrowed, the case became a dispute between mother and son. That the lawsuit was hostage to the lawyers’ overriding adversarial interest—whether for money or for the thrill of the game, was entirely appropriate. Andrews insists on the professional prerogative:

There was not much difference between Mack’s mental state in late 1933 and his mental state in early 1934 I got the impression that the judge—a staid fellow—believed Mack had been insane from the beginning. The newspapers, too, expressed the opinion that there was no particular evidence on either side, and that, besides, it was a disgraceful thing for a mother and her son to squabble so selfishly. 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

98. *Id.* at 89-90.

thought he could win, and wanted the money; I thought I could win, and wanted to see.⁹⁹

C. *The Floating Opera and Pro-Professionalism*

Like Fish's, Andrews' pro-professional attitude proves hard to contain to the professions. Andrews acquiesces not only in the professional mores of his own field, but in all dominant mores. If the legal text is "the only text there is" for testamentary entitlements, then there is no way to criticize the legal outcome as untrue to the "real" entitlement. In a perfectly parallel fashion, if the floating opera—our social history—provides the only text of *moral value*, then there is no way to criticize the opera itself as untrue to the "real text" of value. We cannot evaluate the opera by reference to values derived from the opera's text. Our reaction to the floating opera can only be a reaction to the part of the opera we happen to see, and the part we happen to see is a function of our place on the shore. We can criticize parts of the opera on the basis of other parts of the opera, but we cannot criticize the opera itself.

Andrews, however, carries this argument one step further than Fish, and that step is both logical and murderous. The lack of a "real" basis for criticism of the opera directly implies the lack of a "real" basis for its justification. The floating opera cannot provide a basis for justification of its own existence any more than it can provide a basis for critique. There is no ultimate "reason" why the floating opera should not be destroyed. And if that's so, Andrews asks, why not blow it up? Andrews can see no reason to either blow it up or not blow it up. In a moment of mercurial and imperative pro-professional whimsy, Andrews resolves to destroy the opera, with himself as a member of the audience:

It was, of course, entirely dark outside except for the *Opera's* lights. I found myself, as I'd planned, on the outboard side of the theatre I walked swiftly down the starboard rail . . . and let myself into the dining room, under the stage I struck a match and lit three kerosene lanterns mounted along the dining-room walls, Finally I entered the galley, a few feet away, put a match to one burner, and turned the others . . . full on, unlighted. A strong odor of bottled illuminating gas filled the little room at once.

. . . Then I slipped out as I'd entered and took my place again in the audience, now wonderfully agitated, . . . My heart, to be sure, pounded violently, but my mind was calm. Calmly I regarded my companion Captain Osborn Calmly I thought of Harrison and Jane: of perfect breasts and thighs scorched and charred; of certain soft, sun-smelling hair crisped to ash. Calmly too I heard

99. *Id.* at 90-91.

somewhere the squeal of an overexcited child, . . . I considered a small body, formed perhaps from my own and flawless Jane's, black, cracked, smoking. Col. Morton, Bill Butler, old Mr. and Mrs. Bishop—it made no difference, absolutely.¹⁰⁰

For unexplained reasons, however, the boat does not explode. The opera does not burn. Andrews, true to form, doesn't particularly care. The unexpected turn of events does, though, prompt a new answer to his question "why not blow up the floating opera?" The answer: "Why bother?"

I rather suspected that either some hidden source of ventilation . . . or wandering member of the crew had foiled my plan. Need I tell you that I felt no sense either of relief or disappointment? As when the engine of the law falls sprawling against my obstacles, I merely took note of the fact that despite my intentions six hundred ninety-nine of my townspeople and myself were still alive.

Why did I not, failing my initial attempt, simply step off the gangplank into the Choptank, where no fluke could spoil my plan? Because, I began to realize, a subtle corner had been turned. I asked myself, knowing there was no ultimate answer, "Why not step into the river?" as I had asked myself in the afternoon, "Why not blow up the Floating Opera?" But now, at once, a new voice replied casually, "On the other hand, why bother?" There was a corner for you! Negotiated unawares, . . . this corner confronted me with a new and unsuspected prospect—at which, for the moment, I could only blink.¹⁰¹

There is a better answer to Andrews' question than "why bother." Of course it is true, as both Andrews and Fish correctly insist, that the answer to the question "why not blow up the floating opera," or "why preserve the floating opera," or "why not make the floating opera better," cannot be found in the floating opera itself; it is the floating opera whose value is in question, including any values the opera establishes. We cannot turn to the values generated by professionalism, or the legal system, or institutional histories, if we wish to determine the value of professionalism, the legal system, or institutionalism. If we look only to the opera, we will not find there values by which we can judge the opera. The values created by a profession cannot be used to judge the profession. The values created by the system of law cannot be used to judge it. The values held by a community cannot be the referent against which the community is judged.

But that doesn't mean the question is unanswerable. If we want to judge the opera—if we want an answer to the question "why not blow up the floating opera"—we must look to a different text.

100. *Id.* at 242-43.

101. *Id.* at 246-47.

Andrews' question is only unanswerable if the floating opera is the only text there is. But it isn't. As Andrews reminds us at the beginning, the floating opera is *social life*, not life itself. It is a metaphor for our socially created, contingent, constructed history. If we want to judge the social life we have politically created, we must look not to our held social values (for those are part of our creation), but to the needs and values of the unconstructed, ahistorical animal self within. The natural self and its needs—for fulfillment, nurturance, intimacy, productivity, security, and variety—provide the stable text against which to judge the value of the floating social self we have created.

D. *The Animalistic Self and the Rejection of Nature*

Andrews, like Fish, rejects the natural self as a moral text for criticism of social life, but for entirely different reasons. Fish, as argued above, denies the existence of the natural, ahistorical self, and accordingly denies the reality of "natural human needs." Andrews does not. In fact, Andrews insists upon the reality of a natural, ahistorical, non-contingent, animalistic self, complete with natural, ahistorical, non-contingent and "real" human needs, defined by nature instead of social history. Andrews does not *deny* the animal within (as does Fish); he *suppresses* the animal within. Andrews' professionalism is not an attitude masked as logical necessity. Rather, it is an openly acknowledged *preference*. Andrews simply *prefers* the floating opera to the stable, instinctual, universal, and natural experiences of animalism. Andrews' suppression of his natural self and the values he might generate from it is based almost entirely upon his memory of a war experience. The war story is worth retelling—for Andrews' interpretation of it, I will argue, is wrong, as is the anti-naturalism lesson he learned.

The story, as Andrews relates it "approprios of nothing," is as follows. During World War II, in the middle of the Battle of the Argonne, in the middle of vast confusion and in the middle of the night, Andrews experienced for the first and only time in his life "real" fear. The fear was animalistic. It was not "socially constructed." It was not a part of the floating opera. It was not the product of professionalism, power, choice or social construct. The feeling originated in his natural, not his social, self:

The next thing that happened . . . happened in the dark. Suddenly it had been nighttime for a while. This time it was I who was in a hollow, on all fours in a shell hole half full of muddy water. I still had my rifle, but it was empty, and if I owned any more ammunition, I didn't remember how to put it in the rifle And now there came real fear, quickly but not suddenly, a purely physical sensation. It swept over me in shuddering waves from my thighs and buttocks to my shoulders and jaws and back again, one shock

after another, exactly as though rolls of flesh were undulating. There was no cowardice involved; in fact, my mind wasn't engaged at all— Cowardice involves choice, but fear is independent of choice. When the waves reached my hips and thighs I opened my sphincters; when they crossed my stomach and chest I retched and gasped; when they struck my face my jaw hung slack, my saliva ran, my eyes watered. Then back they'd go again, and then return. I've no way of knowing how long this lasted: perhaps only a minute. But it was the purest and strongest emotion I've ever experienced. I could . . . regard myself objectively: a shocked, drooling animal in a mudhole. It is one thing to agree intellectually to the proposition that man is a species of animal; quite another to realize, thoroughly and for good, your personal animality, to the extent that you are actually never able to oppose the terms *man* and *animal*, even in casual speech. . . .¹⁰²

Next, Andrews continues, he experienced "real" loneliness—a "real need" for intimacy and companionship. Furthermore, when the feeling came upon him it was in sharp conflict with the demands of his professional role of soldier:

The other part of the incident followed immediately. Both armies returned from wherever they'd been hiding, and I was aware for the first time that a battle was really in progress. A great deal of machine-gun fire rattled across the hollow from both sides; . . . and there was much shooting, shouting, screaming and cursing With a part of my mind I was perfectly willing to join in the fighting, though I was confused; if someone had shouted orders at me, I'm certain I'd have obeyed them. But I was left entirely alone, and alone my body couldn't move

Finally the artillery opened up again, apparently laying their fire exactly in the hollow, where the hand-to-hand fighting was in progress. Perhaps both sides had resolved to clean up that untidy squabble with high-explosive shells and begin again. Most of the explosions seemed to be within a few hundred feet of my hole, and the fear returned. There was no question in my mind but that I'd be killed; what I feared was the knowledge that my dying could very well be protracted and painful, and that it must be suffered alone. The only thing I was able to wish for was someone to keep me company while I went through it.

Sentimental? It certainly is, and I've thought so ever since. But that's what the feeling was, and it was tremendously strong, and I'd not be honest if I didn't speak of it.¹⁰³

His natural need for companionship, however, overcame his professional duty as soldier. Thus, when an enemy soldier jumped unexpectedly into Andrews' hole, instead of attacking him, Andrews attempted to embrace him:

102. *Id.* at 62-63.

103. *Id.* at 63-64.

It was such a strong feeling that when from nowhere a man jumped into the mudhole beside me, I fell on him instantly and embraced him as hard as I could. Very sensibly he assumed I was attacking him, and with some cry of alarm he wrenched away. I fell on him again, before he could raise his rifle, . . . I shouted in his ear that I didn't want to fight with him; that I loved him; and at the same time—since I was larger and apparently stronger than he—I got behind him and pinioned his arms and legs. He struggled for a long time, and in German, so that I knew him to be an enemy soldier. How could I make everything clear to him? . . . [H]e would certainly think me either a coward or a lunatic, and kill me anyway. He had to understand everything at once.¹⁰⁴

Andrews next wrestled with an internal as well as external struggle between need and power, loneliness and conquest, natural life and professional role:

Of course, I could have killed him, and I'm sure he understood that fact; he was helpless. What I did, finally, was work my rifle over to me with one hand, after rolling my companion onto his stomach in the muddy water, and then put the point of *my* bayonet on the back of his neck, until it just barely broke the skin and drew a drop of blood. My friend went weak—collapsed in fact—and what he cried in German I took to be either a surrender, a plea for mercy, or both. Not wanting to leave any doubts about the matter, I held him there for several minutes more, . . . until he broke down, lost control of all his bodily functions, as I had done earlier, and wept. He had, I believe, the same fear; certainly he was a shocked animal.

Where was the rest of the U.S. Army? Reader, I've *never* learned where the armies spent their time in this battle!¹⁰⁵

Finally, these two “shocked animals,” shed of their professional roles, fulfilled what Fish denies exists: their natural, human needs. They acted on the basis of natural need, rather than on the basis of professional role. To judge the acts of two shocked animals by reference to the values derived from the contingencies of professionalism, history, and “power,” Andrews insists, would simply be “stupid”:

Now read this paragraph with an open mind; I can't warn you too often not to make the quickest, easiest judgments of me, if you're interested in being accurate. The thing I did was lay aside my rifle, bayonet and all, lie in the mud beside this animal whom I'd reduced to paralysis, and embrace him as fiercely as any man ever embraced his mistress. I covered his dirty stubbled face with kisses: his staring eyes, his shuddering neck. Incredibly, now that I look back on it, he responded in kind! The fear left him, as it had left me, and for

104. *Id.* at 64.

105. *Id.* at 64-65.

an hour, I'm sure, we clung to each other.

If the notion of homosexuality enters your head, you're normal, I think. If you judge either the German sergeant or myself to have been homosexual, you're stupid.¹⁰⁶

As the professional power of the two men subsided, the fear diminished as well, and in its place arose feelings of pleasure and intimacy that accompany the satiation of need. Andrews' experience, I believe, stands as a sharp rebuke to Fish's claim that there are no natural needs, and that the satiation of those needs cannot constitute a natural text for the derivation of ethical values against which to judge our historical and professional exercises of power. For one night for these two soldiers, the battle had moved elsewhere, and the de-professionalized soldiers enjoyed animalistic pleasure of intimacy:

After our embrace the trembling of both of us subsided, and we released each other. There was a complete and, to my knowledge, unique understanding between us . . . A great many shells were whistling overhead, but none were bursting very near us, and the hand-to-hand fighting had apparently moved elsewhere.

The German and I sat on opposite sides of the shell hole, perhaps five feet apart, smiling at each other in complete understanding. Occasionally we attempted to communicate by gestures, but for the most part communication was unnecessary. I had dry cigarettes; he had none. He had rations; I had none. Neither had ammunition. Both had bandages and iodine. Both had bayonets. We shared the cigarettes and rations; I bandaged the wound in his neck, and he the wound in my leg. He indicated the seat of his trousers and held his nose. I indicated the seat of my trousers and did likewise. We both laughed until we cried, and fell into each other's arms again—though only for an instant this time: our fear had gone, and normal embarrassment had taken its place. We regarded each other warmly. Perhaps we slept.

Never in my life had I enjoyed such intense intimacy, such clear communication with a fellow human being, male or female, as I enjoyed with that German sergeant . . . While he slept I felt as jealous and protective—I think *exactly* as jealous and protective—as a lion over her cub. If any American, even my father, had jumped into the shell hole at that moment, I'd have killed him unhesitatingly before he could kill my friend. What validity could the artifices of family and nation claim beside a bond like ours? I asked myself . . . He and I had a private armistice . . . 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.¹⁰⁷

106. *Id.* at 65.

107. *Id.* at 65-66.

As light returned, however, Andrews' sense of professionalism returned, and with that sense came power, suspicion, role-morality, professional duty, and fear:

Let me end my story [A]fter a while [there arose] a germ of a doubt in my mind How could I be certain that our incredible sympathy did not actually exist only in my imagination, and that he was not all the while smiling to himself, taking me for a lunatic or a homosexual crank, biding his time . . . until he was good and ready to kill me? Only a hardened professional could sleep so soundly and contentedly in a mudhole during a battle. There was even a trace of a smile on his lips Was it not something of a sneer?

. . . .
I grew increasingly nervous, and peered out of my hole. Not a living soul was visible, though a number of bodies lay in various positions and degrees of completeness on the ground The air was full of smoke and dust and atmospheric haze, I sat back in the hold and stared nervously at the German sergeant, waiting for some sign of his awakening. I even took up my rifle . . . just to be safe. I was getting jumpier all the time¹⁰⁸

Next ensued—again—the familiar struggle between natural need and professional power, between intimacy and fear, between mutual trust and destruction, and finally, between life and death. This time, professional suspicion overtook natural need. Andrews killed his friend and enemy:

Finally I decided to sneak quietly out of the hole and make my way to the Americans, . . . leaving the German asleep. A perfect solution! I rose to my feet, holding my rifle and not taking my eye 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, . . . 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 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 . . . and fled, trembling, across the shattered hollow. By merest luck, the first soldiers I encountered were American, and the battle was over for me.¹⁰⁹

108. *Id.* at 66-67.

109. *Id.* at 67-68.

It is on the basis of this experience that Andrews decided to reject naturalism and limit his moral universe to the conventionalism that emerged from the floating opera:

That's my war story [I]t cured me of several things 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 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 But when I think of the alterations, I immediately think of the incident (specifically, I confess, of that infinitesimal puncturing noise), and that fact seems significant to me, ¹¹⁰

But Andrews has misinterpreted his own war story. It was not animalism, but professionalism, that prompted him to kill the German sergeant. The two "animals" in the hole in the battle of the Argonne met each others' needs—for sustenance, for intimacy, for companionship, for love, for "merging" (Barth's word), for union, for healing and for nurturance. When stripped of their professional identities and roles, these two animals fed each other, embraced each other, protected each other, healed each other, and loved each other. It was only as their culturally created, socially constructed, professionally defined "roles" returned, that the two men came, once again, to see themselves as in "opposition" to each other. As Andrews became more of a professional and less of an animal, he viewed his friend as less of a friend and more a professional sergeant, less a companion and more a German enemy, less a source of nurturance and more a threat. It was the re-awakened professional, not the animal, that killed the German soldier. It was Andrews' participation in the floating opera, not his participation in nature, that dictated his final act of power. It was professionalism, not animalism, that Andrews should have learned to mistrust.

Furthermore, because Andrews has wrongly interpreted these acts, he has also wrongly judged them. If our evaluative and critical strategies are constrained by professional imperatives, then Andrews' act in the Argonne—his unnecessary killing of the German soldier—surely cannot be criticized. If, as Fish would insist, the professional text Andrews was given—the professional duty to kill or capture enemy soldiers, and the enemy status of the German sergeant—was all that was critically available to him, then he could not *help* but employ those texts. He killed within a professional context that rendered that behavior both right and inevitable. "To kill" was the imperative of the professional context in which he found himself. If

110. *Id.* at 68.

it is true that our professional context provides the only basis on which we can ground the "critical moment," then Andrews' action is beyond criticism: he literally had no choice. It was what the professionalism of his place and time demanded.

However, the professional text is not the only test, and it was not the only text available to Andrews. If, as opposed to Fish's view, the professional script that dictated Andrews' act was one of (at least) two possible scripts, one professional and the other natural, then Andrews' act was a choice, not an historical necessity, and should be judged as such. 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. The professional imperatives within which Andrews acted help the reader forgive the act. But professional imperatives do not, as Fish suggests, exhaust our critical capacities.

We can indeed criticize our professional acts and professional roles from the point of view of our real human needs. The natural, intimate, needy, and animalistic self can criticize the contingent, historical, powerful and professional killer. The animalistic self alongside the "professional" self generates value that transcends historical values, and a knowledge beyond and beneath that which history provides. The knowledge and value of the animalistic self provide what Fish insists does not exist: an ahistorical referent from which we can critique the product of history; an ahistoric point of view from which to critique the floating opera. The animalistic self is a way of being that is not contingent on the happenstance of history, and provides us a source of value that is tied to nature rather than culture. From the vantage of the natural self, we critique the floating opera, just as, from our position in the floating opera, we critique the animal within us. 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. From the natural text, we evaluate the communicative text. It is the natural self to which we must return, if we are to question the value of our professional roles.

VI. CONCLUSION

I do not mean to insist by this critique that lawyers and legal scholars have nothing to learn from the many conflicting views on the nature of literary interpretation and criticism presently being

debated by hermeneutic thinkers. Law is surely like literature in some important ways, and legal criticism—whether done by judges as a part of the adjudicative enterprise, or by legal theorists as part of the critical enterprise—is surely like literary criticism in important ways. Literature and law, literary criticism and legal criticism, and literary interpretation and legal interpretation all deal in verbal texts. But insights drawn from literary theory can mislead as well as inform, if applied to law too unthinkingly. There are important differences between literature and law, between literary criticism and legal criticism, and between literary interpretation and legal interpretation. The most important difference is the most obvious: law—including adjudicative law—is imperative and literature is expressive. People who create law use words to express commands backed by sanctions; novelists do not. The legal text is a command; the literary text is a work of art. This difference implies others. Legal criticism—criticism of law—is criticism of acts of power; literary criticism—criticism of literature—is the criticism of acts of expression. Legal interpretation is the attempt to ascertain the meaning behind a command; literary interpretation is the attempt to ascertain the meaning behind an artistic expression. Law is a product of power. Literature, when it is good, is not. Participants in the law as literature movement go to great lengths to deny these differences. For all interpretivists, power does not distinguish adjudication from other uses to which we put our language.

The arguments of objectivists and subjectivists for the law-literature parallel, and the consequences they draw from that parallel, radically diverge, and it is to these internal divisions that the energies of subjectivists and objectivists have been devoted. Objective interpretivists insist that it follows from the interpretive core of adjudication that law is not an act of power, but is instead an act of cognition, while the subjective interpretivist insists that it follows from the interpretive core of adjudication that law is indeed an act of power, as are all interpretive acts. But both groups deny the central claim of imperativism: to wit, that adjudication, of all interpretive acts, is *distinctively* an act of power—that adjudication, *even though* it is interpretive, has more in common with legislation than it has with either literary creativity or literary criticism. As a consequence of their shared ground, both views have stultifying consequences for the criticism of law. To the objective interpretivist, our basis for legal criticism is limited to standards of consistency, coherence, or, in Dworkin's telling phrase, "integrity" with the community's moral codes: we should ask for consistency with the community's positivistic morality, but we can't ask for much more. For the subjective interpretivist, legal criticism is even more constrained: like law itself, criticism is a product of power, and like law itself, there is no non-political realm against which its value or truth

can be measured. Legal criticism is limited to standards of consistency, not with the *community's* moral code, but with the professional's.

By focusing on the distinctively imperative core of adjudication, instead of its interpretive gloss, we free up meaningful criticism of law. Adjudication, like all of law, is imperative—it is a part of politics. Politics, like all of history, is contingent—it is part of that which is—and interpretation of law is and should be grounded in this historical, contingent, and positive text. The *criticism* of law, by contrast, must be grounded in a different text. It cannot be grounded in yet another interpretation of that which is. It must rest on a claim regarding that which ought to be, not a claim regarding that which is, or how power has been used to date. It must be grounded in the text we didn't write—the text of our natural needs, our true potential, our utopian ideals. Criticism of law must be grounded in the natural and ideal text, not the contingent text, if it is to be truly critical.

How do we, or should we, criticize an act of power? In public life, no less than in private life, I believe we should criticize acts of power not by reference to their rationality, or their coherency, or their "integrity," but by reference to their motivation and their effects. An act of power in public life as well as in private life that is praiseworthy is an act of power which, in short, is loving: it is the act that originates in the heart and is prompted by our sympathy for the needs of others, and empathy for their situation. I see no reason not to hold adjudicatory acts of power to this standard. *Brown v. Board of Education*,¹¹¹ for example, is a good opinion, because it is a sympathetic rather than cynical response to a cry of pain, not because it renders "consistent" conflicting strands of constitutional jurisprudence. Indeed, the strength of the opinion lies more in its willingness to *ignore* the community's texts rather than its willingness to read them: the opinion speaks to our real need for fraternity rather than our expressed xenophobia; and it taps our real potential for an enlarged community and an enlarged conception of self rather than our expressed fear of differences. The test of the morality of power in public life as in private life may be neither compliance with community mores, as objectivists insist, nor political success, as subjectivists claim, but love. Imperativism, distinctively, frees the critic for this possibility.

111. 347 U.S. 483 (1954).