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The Will to Tax Avoidance:  
Nietzsche and Libertarian Jurisprudence

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**Abstract:** The Will to Power is a fundamental aspect of Nietzschean thought. The Will to Power often manifests for Libertarians in the accumulation of money and the avoidance of taxation. The avoidance of income taxation involves a Will to Power against the state and over “lesser” wage-earning taxpayers. Libertarians also attempt to use money to “will” past physical death – to *overcome* death. In Nietzschean terms, this represents a psychological attempt to defeat Nihilism typically in the absence of a general belief in God or strong community values. Estate taxes in particular therefore represent permanent “death” since the Libertarian believes in the affirmation of “life” through tax avoidance. The idea of tax avoidance is therefore held as a *fundamental right*. The article describes the optimum design of tax systems as subject to a “minimum tax” threshold, thus preserving the Libertarian taxpayer an opportunity to affirm life through tax avoidance.

*Keywords:* libertarian; Nietzsche; jurisprudence.

*JEL Classification:* H20; K34

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## I. INTRODUCTION.

The current discourse on tax policy (i.e., a comparative analysis of the *fairness*<sup>1</sup> versus *efficiency*<sup>2</sup> versus *equality*<sup>3</sup> versus *simplicity*<sup>4</sup> of various proposed tax laws) is effectively a

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<sup>1</sup> Richard A. Epstein, *Taxation in a Lockean World*, 4:1 Soc. Phil. & Pol. 49 (1986); Richard A. Epstein, *Fairness in a Liberal Society*, New Zealand Business Roundtable (Astra Print, Ltd., Wellington 2005) (“We cannot examine the nature of rights that people have against other individuals solely at an abstract level; we have to consider the more concrete inquiry of what legal regime could be used to enforce and defend individual entitlements.”); Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 Am. J. Tax Pol’y 221, 223 (1995) (“The purpose of this Article is to challenge directly the notion that fairness requires that the burden of certain taxpayers be

dead-letter in Nietzschean terms. Nietzsche is more concerned with the exercise of *power*.<sup>5</sup> The accumulation of money is in this regard an exercise of power.<sup>6</sup> Such may represent also an alienation of man from his true essence, but Nietzsche does not judge as to how man *ought* to exercise his power. Nietzsche proposes more fundamentally the essence of man (as the human animal) is simply the exercise of power.<sup>7</sup> Therefore, Nietzsche does not comment on taxes as redistributive power over others in society. For example, from a Nietzschean perspective it is not insightful to complete the “money is power” syllogism as: Taxes reduce money. Therefore, taxes reduce power. Rather, it is the accumulation of money *as a human activity* that represents the exercise of power from a Nietzschean perspective, and particularly as an aspect of Libertarian ideology. From this fundamental distinction it follows that the Libertarian worldview centers on the Will to Power through tax avoidance. It is true that tax avoidance represents an aspect of money accumulation insofar as it may increase the total amount of dollar bills or other

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greater than that of other taxpayers, relatively or even absolutely. This Article confronts the widespread acceptance of progressive taxation as fair and as being compelled by fundamental considerations of justice.”).

<sup>2</sup> Geoffrey P. Miller, *Economic Efficiency and the Lockean Proviso*, 10 Harv. J.L. & Pub. Pol’y 401 (1987); Epstein (1986) at 56-7 (“A sound tax is designed to interfere as little as possible with the ordinary decisions that individuals would make in the investments and consumption of their capital and labor... The desirability of tax neutrality also follows from the more overtly economic view of the subject. In a well-functioning economy, every actor should have to face the full opportunity costs of his private decisions.... Tax neutrality represents one constraint on government policy that is designed to keep government activity as close as possible to the Pareto ideal.”).

<sup>3</sup> Schoenblum at 270-1 (“IV. Ethical Baseline: Fairness as Equal Taxation. The important point is that, despite certain difficulties in implementation, the philosophical premise is the correct one. All constituents are to be treated the same by the government; all are equal, largely autonomous members of the community. Nor should moral weight be given to decisions merely because they are reached by a transitory majority. Instead, it is necessary to have an ethical baseline grounded in equality. Even if equal taxation is unattainable, it should serve as a standard by which tax models are evaluated for their fairness. At present the designers of these models are failing to check the very foundation on which their elaborate structures are erected.”).

<sup>4</sup> See, Milton Friedman, *Capitalism and Freedom* (Univ. of Chicago Press, 1962) at Ch.2 (“The organization of economic activity through voluntary exchange presumes that we have provided, through government, for the maintenance of law and order to prevent coercion of one individual by another, the enforcement of contracts voluntarily entered into, the definition of the meaning of property rights, the interpretation and enforcement of such rights, and the provision of a monetary framework.”); Robert Nozick, *Anarchy, State & Utopia* (Blackwell Publishers, 1968).

<sup>5</sup> Nietzsche, *Will to Power* §§ 13, 259 (New York: Random House, 1967); see also, Philippe Nonet, *What is Positive Law?*, 100 Yale L.J. 667 (1990); Guyora Binder & Robert Weisberg, *The Critical Use of History: Cultural Criticism of Law*, 49 Stan. L. Rev. 1149, 1156 (1997).

<sup>6</sup> Stephen Ansolabehere & James M. Snyder, Jr., *Money and Institutional Power*, 77 Tex. L. Rev. 1673 (1998-9) (“Money is power. The identity is simple enough, even axiomatic.”).

<sup>7</sup> Nietzsche, *Beyond Good & Evil* at §13 (New York: Random House, 1967).

property accumulated throughout life, a point that Epstein (1986) makes directly.<sup>8</sup> Rather, to Libertarians the activity of tax avoidance represents a more fundamental Will to Power by the individual against the state, and also a display of power over other regular, wage-earning, perhaps “lesser” taxpayers. This then describes the Will to Power by the Libertarian over *income taxes* as a fundamental aspect of tax policy. But, there is an even more fundamental aspect of tax avoidance centered on the Libertarian view of life and death.

The individual Libertarian sets ought not only to exercise power over life, but to use money as a means to achieve eternal power – in Nietzschean terms to make oneself unto god.<sup>9</sup> In lay terms, Libertarians view money as passable at death, and therefore as a means to Will to Power over physical death. Perhaps notably, this Libertarian view arose only in a postmodern society with an absence of a general belief in God or strong community values. Estate taxes generally defeat the ability to pass money at death and thereby frustrate the attempted exercise of power over physical death. This then explains the strong Libertarian opposition to *estate taxes* as a fundamental aspect of tax policy.<sup>10</sup>

The final and perhaps the most fundamental aspect of Libertarian tax policy is a creative enthusiasm to devise new forms of taxes on regular, wage-earning “lesser” taxpayers, e.g., “flat tax”,<sup>11</sup> “consumption tax”,<sup>12</sup> or, a “cash flow tax”.<sup>13</sup> Although the justifications for aggressive taxation of the poor appear to be endless within the Libertarian mind, the fundamental view is that *regressive* taxation itself is the proper outcome for the lower classes.<sup>14</sup> The poor deserve to pay *more* because they are “lesser” beings.<sup>15</sup> Nietzsche would approve of such unequal result of tax policy:

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<sup>8</sup> Epstein (1986) at 70 (“Last, there is the problem of rent-seeking through the tax system.... As persons know their anticipated income with some degree of reliability, they can seek to impose the costs of government upon others while keeping the benefit for themselves.”)

<sup>9</sup> Nonet at 670 (“[T]he supremacy of positive law therefore signifies the rising of man to claim that position for man himself, that positivism thought in its most radical implications entails a kind of deification of human power, all this is quite apparent to Nietzsche.”)

<sup>10</sup> See generally, Jennifer Bird-Pollan, *Death, Taxes, and Property (Rights): Nozick, Libertarianism, and the Estate Tax*, 66 *Maine L. Rev.* 1 (2013).

<sup>11</sup> David A. Weisbach, *Ironing Out the Flat Tax*, 52 *Stan. L. Rev.* 599 (2000).

<sup>12</sup> See generally, David A. Weisbach & Joseph Bankman, *The Superiority of an Ideal Consumption Tax over an Ideal Income Tax*, 58 *Stan. L. Rev.* 1413, 1420 (2006) (“A consumption tax does not tax the return to savings. This means that savings are undistorted, and individuals choose the optimal amount to consume at each date. A consumption tax does, however, tax labor earnings, which means that decisions about how much to work are distorted.”)

<sup>13</sup> William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 *Harv. L. Rev.* 1113 (1974).

<sup>14</sup> *But see*, Reuven Avi-Yonah, *The Three Goals of Taxation*, 60 *Tax L. Rev.* 1 (2006); Edward J. McCaffery, *A New Understanding of Tax*, 103 *Mich. L. Rev.* 807, 938 (2005) (“The tax system is drifting, seemingly inexorably, towards a flat wage tax. All hope for effecting redistribution from rich to poor may soon be lost.”); Eric M. Zolt, *The Uneasy Case for Uniform Taxation*, 16 *VA. TAX REV.* 39 (1996) (“This article

You preachers of equality, the tyrannomania of impotence clamors thus out of you for equality: your most secret ambitions to be tyrants thus shroud themselves in words of virtue.... I do not wish to be mixed up and confused with these preachers of equality. For to *me* justice speaks thus: "Men are not equal." Nor shall they become equal! What would my love of the overman be if I spoke otherwise?<sup>16</sup>

In purely legal terms, Nonet (1990) sets the table for a discussion of tax laws in Nietzschean terms by rightly suggesting that Nietzschean philosophy generally demands *positive law* as opposed to *natural law*.<sup>17</sup> But, modern Libertarian tax theory is built directly on the philosophy of John Locke and *natural law*.<sup>18</sup> So we should ask: *Is tax law fundamentally the exercise of power through a modern positive law system – or is it the extension of natural law?* The Libertarian tax scholars Epstein (1985) and Nozick (1968) say *natural law*.<sup>19</sup> Epstein and Nozick carefully cite to Locke as if it were a religious text to draw weighted conclusions about *fairness* or even *equality* in tax policy by reference to *economic efficiency*.<sup>20</sup> Here we make the Nietzschean observation that to even discuss "*economic efficiency*" as a matter of tax policy presupposes the Will to Power to change the *natural law*.<sup>21</sup> As far as the tax law or policy is concerned – Locke's metaphysics as a source of binding *natural law* is thus dead. Indeed, Nietzsche famously announced he had killed all metaphysics and law.<sup>22</sup> Therefore, one cannot simply cite to the natural law of Locke and

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examines the case for uniform taxation on efficiency and equity grounds. It concludes that neither economic theory nor equity considerations require uniform treatment."); Michael J. Gratz, *Implementing a Progressive Consumption Tax*, Yale Faculty Scholarship Series. Paper 1634 available at [http://digitalcommon.law.yale.edu/fss\\_apers/1634](http://digitalcommon.law.yale.edu/fss_apers/1634).

<sup>15</sup> Nietzsche, *Beyond Good & Evil* at §203; Nonet at 674 ("[the] perfect herd animal, . . . the animalization of man into the dwarf animal of equal rights.").

<sup>16</sup> John Linarelli, *Nietzsche in Law's Cathedral: Beyond Reason and Postmodernism*, 53 Cath. U. L. Rev. 413, (2004) citing Nietzsche, *Thus Spoke Zarathustra*, On the Tarantulas, Part II, at 99-100.

<sup>17</sup> Nonet at 667 ("I. Positive Law as Will to Power. What is positive law? We may begin with the familiar account that the word "positive" suggests immediately: positive law (Nietzsche calls it Gesetz) is law that exists by virtue of being posited (gesetzt), laid down and set firmly, by a will empowered so to will.").

<sup>18</sup> John Locke, *Second Treatise of Government* (1690), ed. by C.B. Macpherson (Cambridge: Hackett Publishing Company, Inc., 1980).

<sup>19</sup> Nozick at 10 ("Individuals in Locke's state of nature are "in a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or dependency on the will of any man."); Epstein at 7 ("Hobbesian Man, Lockean World. It may seem odd to find in Hobbes the defender of absolute sovereign power, one of the fathers of our constitutional system.").

<sup>20</sup> Epstein (1986) at 49-58; Nozick at 3-48.

<sup>21</sup> Nonet at 671-2 ("When we criticize our laws, our legal system, or our lawmakers, we do so by way of evaluating them, by measuring them up to the values we have set for ourselves, and thus in the light of an assumed power to legislate.").

<sup>22</sup> Yovel at 638 citing Nietzsche, *The Gay Science*, Book III, § 125 ("I seek Law! I seek Law!" Whither is Law? I shall tell you: we have killed him--you and I. But how could we do this thing? Where are we moving

pretend to have rightfully derived a meaningful tax policy from the natural state of mankind. Nietzsche thus frees the tax policy discourse from both Nozick and Epstein's hierarchical references to a dead-letter theory of law.

We might imagine that Nietzsche would enthusiastically approve of the use of his framework to undermine the jurisprudential basis of Libertarian tax policy. Nietzsche says:

I know the pleasure in annihilating to a degree that fits my power to annihilate -- in both respects I obey my dionysian nature which cannot separate doing No from saying Yes. I am the first immoralist: thus I am the annihilator par excellence.<sup>23</sup>

But this is not the fundamental point. The philosophy of Nietzsche is to confront the abyss of Nihilism – to say God is dead, there is no meaning to life, and all of the prior metaphysics of religion and philosophy is a charade, history is a charade<sup>24</sup> – and ask, now how I ought to behave in the present? Therefore, the fundamental question posed by Nietzsche is how to approach life itself in the absence of historical values<sup>25</sup> – how to *exercise power* over life itself. This is the actualization of self-will. Nietzsche states, “A living thing seeks above all to discharge its strength – life itself is Will to Power.”<sup>26</sup> That is Nietzsche's fundamental point both as to the individual and to society in general.<sup>27</sup>

Now Nietzsche directly confronts the *individual Libertarian* ostensibly engaged in the self-design of tax policy. In the Libertarian ethos, taxes can only be cut.<sup>28</sup> A Libertarian in

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now? Are we not plunging continually, in all directions? Is there still any up or down? Do we smell nothing as yet of the legal decomposition? Law is dead, and we have killed it.”).

<sup>23</sup> Nonet at 697 *citing* Beyond Good & Evil §2.

<sup>24</sup> James M. Boland, *A Progressive Revolution: Man, Superman, and the Death of Constitutional Government*, 4 Charlotte L. Rev. 249, 276 (2013) (“For Nietzsche, historical interpretation based on the scientific method and absolute truth, leads to the danger of fiat veritas pereat vita (let there be truth and may life perish), (i.e., life is more important than truth). “The facts of history only have meaning within a framework of interpretation, a framework that the historian imposes upon it, and this is what Nietzsche means when he writes that the ‘fact is always stupid.’” Only those who are quite unconcerned about the past, but who have a creative concern for our lives in the present and the future, can legitimately interpret it. The concept that “the past is only accessible by means of our opening onto the future, amounts to, and in fact presupposes, the idea that the past is what it is only by means of the future.”).

<sup>25</sup> Linarelli at 434 (“Nietzsche explains the purpose of law in *On the Genealogy of Morals*: Finally, one only has to look at history: in which sphere has the entire administration of law hitherto been at home-also the need for law? In the sphere of reactive men, the weaker powers that stand under it.”).

<sup>26</sup> Beyond Good & Evil at §13.

<sup>27</sup> *Beyond Good & Evil* at §259 (“‘Exploitation’ does not belong to a depraved, or imperfect or primitive society it belongs to the nature of the living being as the primary organic function, it is a consequence to the intrinsic Will to Power, which is precisely the Will to Life...”).

<sup>28</sup> Milton Friedman: “I am in favor of cutting taxes under any circumstances and for any excuse, for any reason, whenever it's possible. ... because I believe the big problem is not taxes, the big problem is

favor of a tax increase exists only in the same dimension as the purple leprechaun. Accordingly, *Libertarianism always manifests itself as the relative prioritization of the individual to the state in tax matters*. Thus, it is correct to say that Libertarianism is fundamentally opposed to taxation for reasons ranging from *fairness* to *efficiency* to *simplicity*. But, one could posit to the contrary that it is not *always* the case that taxes should be cut, as on occasion taxes must be increased for the common good. Therefore, Libertarianism prioritizes the individual over the state as to the minimization of tax even where it may not always be in the common interest to do so – *Why?*

Nietzsche tells us why. Power is the Nietzschean goal of the human animal, and the exercise of will is the purpose of life.<sup>29</sup> All libertarians exercise the will to power to money. The Libertarian mind accepts both the accumulation of money as the Will to Power over physical death, and the accumulation of money as the primary essence of life. Thus, it follows directly the payment of taxes is equivalent to death.<sup>30</sup> Henry David Thoreau described the Libertarian view as follows: “When I meet a government which says to me ‘Your money or your life’, why should I be in haste to give it my money?”<sup>31</sup>

Chen (2012) makes a fairly compelling case that progressive taxation ought to be “restored” as a central idea of modern democratic capitalism.<sup>32</sup> Then, how does one construct taxing and spending policy in partnership with a Libertarian who would rather die than pay taxes? How does one convince a Libertarian that it makes sense to educate poor children even at great expense? In philosophical terms, how does one argue with Nietzsche himself? The goal of tax law in this regard can only be to overcome the capitalist Nietzsche in the guise of the modern Libertarian.

The author suggests there are three primary options. First, one could apply the philosophical tools the Libertarians want to apply to formulate a convincing normative

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spending. I believe our government is too large and intrusive, that we do not get our money's worth for the roughly 40 percent of our income that is spent by government ... How can we ever cut government down to size? I believe there is one and only one way: the way parents control spendthrift children, cutting their allowance. For government, that means cutting taxes.“ *quoted by* Richard A Viguerie, *Conservatives Betrayed: How George W. Bush and other big government Republicans hijacked the conservative cause* at 46 (2006).

<sup>29</sup> Note that Nietzsche refers to the exercise of power as the Will to Power and not power for the sake of power. *See*, Jonathan Yovel, *Gay Science as Law: An Outline for a Nietzschean Jurisprudence*, 24 CARDOZO L. REV. 635, 647 (2003) (“Grammatically, in the sentence “the will desires power” the use of the word “power” entails a representation of something that the will desires. This indeed is a mistaken reading generated by a linguistic blunder. It is not the will that wants power, but power that desires...”).

<sup>30</sup> Epstein euphemistically refers to “death” instead as “surrender”. *See*: Epstein (1986) at 53 (“Taxation is the form of surrender, and security is the good received in exchange.”).

<sup>31</sup> Henry David Thoreau, *Civil Disobedience* (1849) at 40 (New York: Signet’s Classics).

<sup>32</sup> Jim Chen, *Progressive Taxation: An Aesthetic and Moral Defense*, 50 U. Louisville L. Rev. 659 (2012) (“After decades of intense debate, progressive taxation deserves to be restored to its rightful place ‘as one of the central ideas of modern capitalism.’”) *citing* Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. Chi. L. Rev. 417, 417 (1952).

argument (i.e., one argues with the Libertarian about the proper interpretation of Locke, or natural law generally). An example would be to argue that it is *efficient* to educate even poor young people.<sup>33</sup> Second, one could use Nietzsche to undermine natural law generally in such a manner that Libertarians have no choice but to acknowledge that positive law is all that remains.<sup>34</sup> This will be done in Part II of this article. Third, one could engage Nietzsche on Nietzsche's terms. This would be to force the Libertarian to confront Nihilism specifically – and to acknowledge his or her own mortality and the inevitability of death. This is to say there is nothing special about tax avoidance and that it does not constitute creative human activity. The most potent manner to achieve this is to show the Libertarian that other people are able to achieve what Nietzsche termed an “Aesthetic” result without tax avoidance. This will be done in Part IV.

The ultimate goal is of course to prove that money accumulation itself is an indirect aspect of life and not participating in life. Various novels by Charles Dickens might indirectly accomplish the same goal in literary terms.<sup>35</sup> An aspect of this approach would be to further ask Nietzsche (or the Libertarian) to define “death”, or “nothing”, or the “will to nothing”, or the “will to *spend* money”.<sup>36</sup> As Nonet (1990) illustrates, the “will to nothing” is a problem for Nietzsche where “[t]he essence of nihilism is not that man neglects being, but that being abandons beings, so that man ceases to wonder at the wonder of being.”<sup>37</sup> As applied to the individual Libertarian engaged in the “hoarding” of money one might ask – do you Libertarian have any desire to travel? Do you Libertarian have any desire to see Machu Picchu during this life? As applied to the Libertarian policymaker one might ask – at what point will society have accumulated enough wealth that the nation could “afford” to educate the children of the poor? The outright rejection of the “hoarding” view of money leads to a metaphysic of Aesthetic “love” for the celebration of life by mankind.<sup>38</sup> Nietzsche says in this regard: “Without music, life would be a mistake.”<sup>39</sup> To this celebration of life and human creativity, Libertarian ideology appears as an anathema. The Libertarian anathema is the exercise of power without the celebration of human life and creativity.

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<sup>33</sup> See, e.g., Chen at 659 (“Progressive taxation is to distributive justice as competition is to economic efficiency. So that some parties may prosper, others must lose. Redistribution and the attendant destruction of entrenched wealth serve as society's ultimate weapons of ‘creative destruction.’”).

<sup>34</sup> Nonet at 669 (“With Nietzsche, the relation between positive law (Gesetz) and higher law (Recht) is turned upside down. Recht is brought down from its eminent place as higher Law of the land, and reduced to the standing of a mere creature of Gesetz.”).

<sup>35</sup> Charles Dickens, *A Christmas Carol* (Chapman & Hall Pub. 1843).

<sup>36</sup> Nonet at 685.

<sup>37</sup> *Id.*

<sup>38</sup> *Infra* Note 89.

<sup>39</sup> Wolfert Von Rahden, *Individual Law: On Some Aspect of Nietzsche's Juridical and Aesthetic Discourse*, 24 *Cardozo L. Rev.* 723, 777 (2003) *citing Thus Spoke Zarathustra* at fragment 16 [24].

## II. NIETZSCHE AND THE RISE OF NIHILIST TAX POLICY.

*“In general, over the last century, a variety of defenses has been offered to justify the state's lack of regard of private property and unequal treatment of its members in terms of progressive or proportional income taxation. None of these defenses, however, can withstand analysis from a fairness standpoint. No adequate ethical basis has been offered to date.”* – Schoenblum (1995)<sup>40</sup>

To Nietzsche, metaphysics and God are the same. Therefore, when Nietzsche pronounces that “God is dead”, or, that he “killed law” such is the same idea. Nietzsche is pronouncing the death of the *a priori* or historical basis for any prior philosophical claim to ethics or moral behavior. To secular philosophers the death of metaphysics implies “Nihilism” meaning the absence of any values by which to judge human action. Rahden (2003) describes the impact of Nietzsche to philosophy generally:

The “death of God” confronts human beings with a tremendous and terrible challenge in that they must henceforth create laws through their own power and thus establishing human legitimacy. Not only is their mere survival at stake, but rather, they are confronted with the chance of heightening and “enhancing” life.<sup>41</sup>

To religious philosophers the death of “God” likewise implies the rise of Nihilism in the absence of God. Accordingly, in the postmodern monotheistic tradition, religious thought is often associated with a basis for morality and not a pronouncement of it. For example, the postmodern might say I believe the Old Testament is a collection of stories I choose to live by and I do not accept these as fact. In other words, I believe in a god – *not the God* – that religion tells me to believe in.<sup>42</sup> In that case, the postmodern has simply defined himself or herself as the origin of moral behavior based on a loose collection of stories. This appears to reflect the postmodern Will to Power over morality generally.

The same process occurred with regard to tax policy. This was summarized nicely by Schoenblum (1995) as follows:

II. The Dictates of Fairness. Fairness, in the sense of a just result, is not an easy concept to define. The problem of reaching an agreed upon meaning for the term is that people simply cannot agree on its meaning. Those commentators who assume a shared concept of fairness are manipulating the argument and should not be permitted to bypass this primary analytical step. “Fairness”

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<sup>40</sup> Schoenblum at 225.

<sup>41</sup> Rahden at 725.

<sup>42</sup> See Nonet at 676 (“As long as the death of God is experienced as a loss, an absence, a lack, nihilism remains at once incomplete and destructive: incomplete, insofar as in the thought of a lack persists a belief in the necessity of a supernatural world to cure the defects of this world; destructive, because the lack makes life in this world seem senseless and worthless.”).

connotes in day-to-day parlance what is “just,” “good,” and “right.” But these terms do not further the issue any more than does “fairness”.<sup>43</sup>

Schoenblum (1995) expresses despair at the lack of a proper definition of “fairness” with regard to tax policy. Such despair represents a frustration that so many different theorists could each pronounce a different concept of fairness and claim this to be “truth” of tax policy. Accordingly, Schoenblum (1995) complains: “[P]eople simply cannot agree on its meaning.” This reflects the ongoing despair of the economist who having identified absolute “truth” in his own mind wants to apply a fixed “truth” to the tax laws. Nietzsche shares Schoenblum’s (1995) despair over metaphors as the presentation of truth in general terms. Rahden (2003) describes Nietzsche’s presumptive view of modern tax policymaking discourse as follows:

A mobile army of metaphors, metonymies, anthropomorphisms, in short a sum of human relations that have been poetically and rhetorically heightened, made figurative, ornamental, and which by long use have come to seem fixed, canonical and binding. Truths are illusions whose illusory nature has been forgotten, worn out metaphors powerless to affect the senses.<sup>44</sup>

Schoenblum (1995) therefore is quite correct that such metaphors cannot represent an exclusive claim to truth. Yet, the standard metaphors of tax policy: “fairness”, “efficiency”, “equality” and “simplicity” are each given as “truth”. Indeed, each of these truth metaphors has its leading advocates. For example, Judge Posner (1995) seeks to apply “efficiency”-economics to the law as absolute “truth”. Posner (1995) describes this in *Overcoming Law* where he says, “[m]odern economics can furnish the indispensable theoretical framework for the empirical research that the law so badly needs.”<sup>45</sup> In other words, Posner (1995) argues that all normative tax policy can be overcome if “we just knew the numbers”, then we could decide what would be “fair”, “equitable” and “just”.<sup>46</sup> But, perhaps the most famous Libertarian, Milton Friedman, expressly disagreed with Posner (1995). As a member of the Federal Reserve, Friedman said that taxes should *always be cut*.<sup>47</sup> The expanding use of linguistic and numerical metaphors to draw inapposite conclusions is representative of the general decline of the discipline of law and economics as applied to tax policy. Accordingly, Huigens (2003) identified law and economics as *Nihilism*. Huigens (2003) says:

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<sup>43</sup> Schoenblum at 259 (citations omitted).

<sup>44</sup> Rahden at 728.

<sup>45</sup> Richard A. Posner, *Overcoming Law* 2, 2-3, 19, 393 (Motilal Books, 1997).

<sup>46</sup> *But see*. Linarelli at 438-9 (“Law and economics assumes that people are rational, which means that people act in their own self-interest to maximize their own satisfaction. Behavioral economists and cognitive scientists are producing research that throws the rationality assumption into question. Using the idea of ‘bounded rationality,’ economists model the effects of uncertainty and imperfect information on human choice.”)

<sup>47</sup> See *infra* Note 4.

Nietzsche would have predicted a bad end for law and economics, because its commitment to an austere conception of truth that would lead to nihilism. And Nietzsche would have been right. While it might seem that law and economics has conquered the world, the truth is that in the last five years or so it has reached a point of exhaustion and contradiction...<sup>48</sup>

Furthermore, as to the tax policy debate, not only do the participants choose differing metaphors – tax policymakers choose different *numbers*.<sup>49</sup> As such, every significant publication in the field of public economics must begin with a section entitled “model” where numbers and metaphors are re-defined from the ordinary meaning. To the public economist *numbers are metaphors*. According to Flessas (2003), in Nietzschean terms this “drive” to know the truth about tax policy reflects an academic culture where the lack of tax knowledge has been institutionalized.<sup>50</sup> Far from settling the debates within tax policy, economists have made it far worse.<sup>51</sup>

**a. The Libertarian “Divine Laws”.**

Libertarians such as Milton Friedman go beyond an economic form of Nihilism as the source of truth. Rather, Libertarian theorists simply ignore moral values outside of *natural law* entirely. In this sense Libertarianism represents the adoption of a quasi-religion in establishing Locke’s metaphysics as *exclusive or divine law*. The metaphysical precept of the Libertarian philosopher always manifests as simply a citation to Hobbes or Locke to arrange property rights as the final analysis of right and wrong. Some Libertarians, including notably Epstein, appear to view the U.S. Constitution also as the *final* expression of positivist law.<sup>52</sup> Accordingly, it represents a form of blasphemy to interpret the Constitution as a living document.<sup>53</sup> In other words, it is blasphemy to

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<sup>48</sup> Kyron Huigens, *Nietzsche and Aretaic Legal Theory*, 24 Cardozo L. Rev. 563, 565-6 (2003).

<sup>49</sup> See: Nonet at 673-8 (“In place of the promise of salvation and the beatific vision, there moves now the promise of “progress” toward “Happiness” on this earth through the advance of science and democracy... triumph of the slave brings philosophy under the dominion of science and scholarship.”).

<sup>50</sup> Tatiana Flessas, *Cultural Property Defined, and Redefined as Nietzschean Aphorism*, 24 CARDOZO L. REV. 1067, 1087 (2003) (“The drive to know the truth about an object, according to Nietzsche, is “evidence of a culture in which lack of self-knowledge has been systematically institutionalized.”).

<sup>51</sup> *But see*, Linarelli at 442 (“Thus, humans are valuating, calculating agents similar in nature to the utility maximizing persons of utilitarianism and law and economics. Nietzsche's propositions about the origins of morals share similarities with theorizing economists on why and how people cooperate. These economists are looking for the incentives that assumedly rational or boundedly rational humans require in order to engage in contract or society.”).

<sup>52</sup> See, Richard A Epstein, *Taxation, Regulation and Confiscation*, 20.3 Osgoode Hall Law Journal 433 (1982) (“Unchecked confiscation, total or partial, is always inconsistent with the ideal of limited government.”).

<sup>53</sup> See, Boland at 277-8 (“Nietzsche dedicated his philosophical work to the concept that all cultural values change over time and are devoid of a permanent and stable interpretation of reality.”).

interpret the Constitution in any way except by reference to the intent of the founders as an expression of Locke's *natural law*.<sup>54</sup>

Nietzsche would view this as an extraordinary perversion and surrender of the human will.<sup>55</sup> Indeed, the U.S. Constitution includes a prohibition on the establishment of religion. Libertarian philosophy now requires an interpretation of the U.S. Constitution under its exclusive interpretation of Locke's *natural law*. As to the responsibility of the wealthy to the poor, Epstein refers to this simply as "imperfect obligations".<sup>56</sup> Accordingly, Epstein denies any legal responsibility of the state to the poor, suggesting instead the problem must be resolved within the dictates of the field of economic policy.<sup>57</sup> It does not occur to the Libertarian philosopher that anyone else might derive values from *other than* Hobbes or Locke. At minimum, it therefore follows: *An acceptance of pure Libertarianism indicates the rejection of God or any religious values.*

Furthermore, virtually no inherent similarity or common ground exists as between Libertarianism and religious thought or values.<sup>58</sup> Pure Libertarianism represents the express rejection of God as a source of moral values and in particular the rejection of any concern for the "lesser" poor as a matter of tax policy. To some individual Libertarians, the idea of the accumulation of money may be analogous to a self-financed indulgence where the money is given to charity at death. In the sixteenth century such idea was given as: "As soon as the coin in the coffer rings, the soul into heaven springs."<sup>59</sup>

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<sup>54</sup> See, Boland at 294 ("This is a perfect Nietzschean conundrum. This allows the evolving constitutional interpretive model to have equal legitimacy with the written Constitution. If nothing can be defined as legitimate, then there is no standard to evaluate any interpretive method as either legitimate or illegitimate. Power relations are all that remain. The laws of nature and nature's God are relegated to a dark and hoary past, and thus can be ignored, not based on any principled grounds, but on purely non-valueless, pragmatic ones.").

<sup>55</sup> Peter Berkowitz, *On the Laws Governing Free Spirits and Philosophers of the Future: A Response to Nonet's "What is Positive Law?"*, 100 Yale L.J. 701 (1990) ("The jealously guarded secret of positive law, according to Philippe Nonet, is that natural right and divine law are figments or products of the human imagination. From this it follows for Nonet that, not only laws, but the beliefs, principles, customs, mores, and manners which govern ordinary life, are without foundation or sanction.").

<sup>56</sup> Epstein (2005) at 6.

<sup>57</sup> *Id.* at 6 ("Imperfect obligations are enforced by conscience and social convention, not by legal rules. People can discriminate and pick the individuals or charity of their choice, but they must do something to remain in the good graces of their fellow citizens.").

<sup>58</sup> *Id.* at 14 ("The great question that I will leave unresolved is whether the theory of imperfect obligation is strong enough to handle systemic wealth differences, or whether some social mechanism of forced redistribution is called for in a civilized society to underwrite a certain minimum living standard.").

<sup>59</sup> Roland Bainton, *Here I Stand: a Life of Martin Luther* (New York: Penguin, 1995) citing Martin Luther, *The Ninety-Five Theses on the Power and Efficacy of Indulgences* (1517) ("27. They preach only human doctrines who say that as soon as the money clinks into the money chest, the soul flies out of purgatory.").

Indeed, no libertarian thinker as of yet – *not Friedman, Nozick, Epstein, nor Locke* – confronts the idea that “natural law” is itself a construct of the human will under the Nietzschean precepts. Therefore, in perhaps a major irony, it remains appropriate to cite the New Testament as a potential response to *natural law* theorists. For example, C.S. Lewis might be applied to respond to the Libertarian philosopher to imply charity and concern for the poor.<sup>60</sup> Furthermore, Martin Buber might be applied as an interpretation of the Old Testament to say the U.S. Constitution requires a construction of “I” and “Thou” meaning *not* strict individualism.<sup>61</sup> This flies in stark contrast to the self-obsession of Libertarian *natural law* theory.<sup>62</sup>

Finally, in the time of Martin Luther it was ostensibly the case that much of the population was illiterate, or at least not literate in Latin. But, now the population is literate, and Locke is not written in Latin. If we are to accept Hobbes or Locke directly as quasi-religious texts and the source of exclusive law, it also becomes quite appropriate to cite Luther in response to Epstein’s citations to such *natural law* and simply say: “I’ll read Locke myself and *tell you* what it says.”<sup>63</sup>

An approach of allowing the reader to interpret Locke on his or her own terms could easily result in splinter sects from Libertarianism. Some Libertarians presumably do not agree precisely with the secular prophets of Friedman, Epstein, and Nozick in each their own interpretation of the writings of Hobbes and Locke. One might observe the Tea Party and the political landscape within the United States and conclude such splintering has already occurred. All this leads to the inevitable conclusion that Libertarianism represents an illustration of the exercise of the Will to Power *exactly as* Nietzsche initially prescribed.

### III. TAX AVOIDANCE AS THE LIBERTARIAN WILL TO POWER.

*“The idea that taxes, particularly personal income and wealth transfer taxes, involve the confiscation of private property is widely held in popular thinking and scholarly writing.... Politically, the conviction*

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<sup>60</sup> C.S. Lewis, *Mere Christianity* (Macmillan Publishers, 1952) (“And out of that hopeless attempt has come nearly all that we call human history—money, poverty, ambition, war, prostitution, classes, empires, slavery—the long terrible story of man trying to find something other than God which will make him happy.”)

<sup>61</sup> Martin Buber, *I and Thou* (Charles Scribner & Sons, 1937) (When two people relate to each other authentically and humanly, God is the electricity that surges between them.”).

<sup>62</sup> Linarelli at 431 (“Finally, Nietzsche had no concern about the common good. Nietzsche's herd or slave morality is good for the group or collective but not for the individual; noble morality is about how to make the individual better off, regardless of what the community might need from the individual.”).

<sup>63</sup> *Supra* Note 61.

*that taxes deprive people of their money shapes both conservative arguments for tax cuts and liberal arguments that taxes are the price that must be paid for a civilized society.*” – David Duff (2005)<sup>64</sup>

Tax avoidance is the ultimate form of civil power. You pay and I don't. Stated in such Nietzschean terms, the Libertarian world view is not premised on economic “efficiency” or “fairness”. Instead, Libertarian doctrine represents the Will to Power over life and over society through the tax laws. The various “metaphors” and references to various *natural law* theorists are from a Nietzschean perspective are simply used by Libertarians to justify the exercise of power. Libertarian tax doctrine is now set forth as the rejection of a general welfare and is directed exclusively toward the fair treatment of the individual. Schoenblum (1995) describes the rejection of the welfare and benefit theories of progressive taxation as follows:

Both benefit and equal sacrifice theory are linked to individual benefit or utility. By way of contrast, welfare economists sought a total escape from all such limitations, by shifting the focus from the individual to the society's welfare as a whole. Rather than see the issue as what is fair to particular persons, the concern is one of maximizing total welfare, even though certain individuals may be treated relatively unfairly in the process. In large part, this vision is based on the assumption that the current distribution of wealth and income itself is unfair and was arrived at unjustly.<sup>65</sup>

The Libertarian doctrine on tax policy is comprised specifically of three distinct elements: (i) the avoidance of income taxes during life; (ii) the elimination of estate taxes as a psychological means to overcome physical death; and (iii) the causing of “lesser” persons to pay high wage taxes as an exercise of absolute power. Each of these specific elements are discussed herein in relation to the particular exercise of the Will to Power by the Libertarian.

#### **a. The Will to Power over the State.**

The ability of the Nietzschean aristocracy not to pay tax, notwithstanding all manner of laws requiring it to do so, represents an exercise of the Will to Power.<sup>66</sup> Epstein (1986) describes this as a reversal of the fundamental Nietzschean order, “where the citizen is made the servant instead of the master of the sovereign.”<sup>67</sup> Libertarians re-define the democratic state tax power generally as a deprivation of liberty, or “theft”.<sup>68</sup> In the

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<sup>64</sup> David Duff, *Private Property and Tax Policy in a Libertarian World: A Critical Review*, 18 Can J. L. & Juris. 23 (2005).

<sup>65</sup> Schoenblum at 247 (citations omitted); Nozick at 149-51.

<sup>66</sup> The term “aristocrat” or “aristocracy” is applied here as synonymous with Nietzsche’s “oberman” or societal “overlord”.

<sup>67</sup> Epstein (1986) at 49.

<sup>68</sup> Epstein (1986) at 49-50 (“Liberty and sovereignty are in conflict”); *Infra* Note 69, Rothbard (2006) at 37.

*Libertarian Manifesto*, the famous modern Libertarian Rothbard (2006) described the “attitude” of Libertarians toward the state as follows:

For Libertarians regard the state as the supreme, the eternal, the best organized aggressor against persons and property of the mass of the public... [I]f you wish to know how Libertarians regard the state and any of its acts, simply think of the State as a criminal band, and all of the Libertarian attitudes will fall into place.<sup>69</sup>

Here the Libertarian defines itself as in opposition to the democratic state in the exercise of the taxing power insofar as that represents the aggression of the state against the public. This is a general defiance against the rule of law, or stated differently, the culmination of Thoreau’s *Civil Disobedience* generally. Furthermore, in the opposition to the state, the Libertarian relishes in the *unreasonableness* of the act of *Civil Disobedience*, the “special power” to resist against an all-powerful state. Linarelli (2004) describes Nietzsche’s *unreasonable* man as follows:

Nietzsche is saying something similar to George Bernard Shaw's “[t]he reasonable man adapts himself to the world: the unreasonable one persists in trying to adapt the world to himself. Therefore all progress depends on the unreasonable man.” To Nietzsche, hardship, striving, unreasonableness – these are all attributes that are required for the enhancement of the human condition.<sup>70</sup>

Notably, no mention of “economics” or “efficiency” appears in this section of the *Libertarian Manifesto*. The approach is purely on Nietzsche’s terms in that the analysis is in the actualization of self without regard to the impact on others. The Libertarian wills himself to be the *unreasonable man* and perceives in it the advancement of mankind general in the defiance of the taxing power of the state.

#### **b. The Will to Power over Physical Death.**

The Libertarian attempt to overcome physical death arises in the context where the Libertarian feels empowered in civil society. That is, the Libertarian feels powerful in the civil laws and is not subject to a higher moral standard, such as with a traditional religion. This is the “bright side” of Nihilism, typically for the younger Libertarian. As Nonet (1990) says, “In this transposing and postponing of the ends of life to the afterlife begins the movement by which ‘the highest values devalue themselves,’ namely the destructive phase of nihilism.”<sup>71</sup> But, as the Libertarian ages a transition begins to the “dark side” of Nihilism – the beginning to question that the human will may not be powerful enough to

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<sup>69</sup> Murray Rothbard (2006), *For a New Liberty: The Libertarian Manifesto* at 56-7 (Ludwig von Mises Institute, Auburn, Alabama).

<sup>70</sup> Linarelli at 438 (citations omitted).

<sup>71</sup> Nonet at 673.

overcome death itself and that life may not continue forever. Therefore, the Libertarian begins to seek to exercise the Will to Power over physical death. The outcome is described by the Libertarian author Vance (2010):

To the libertarian, the arguments against the estate tax all come down to liberty and property.... The right of the deceased to dispose of his accumulated wealth – whether it is earned or “unearned” – is a natural and inviolable right.... [T]hat must be his decision, not the state’s. Every American should have the liberty to dispose of his property – in life or in death – as he sees fit.<sup>72</sup>

Here then is the complete expression of the Libertarian Will to Power over death. Vance (2010) explains precisely that the libertarian will dispose of wealth – *in physical death*. Such is a “natural right”. The Libertarian expressly denies that *death* is an aspect of man’s natural existence. To the contrary, *life* and *death* are the essence of the *natural order*. The Will to Power of the individual becomes simply the will to eternal life through property. This is the direct exercise of the Will to Power from the grave. Therefore, in the defiance of any estate tax the Libertarian continues to believe in eternal life and the ability to psychologically overcome physical death in Nietzschean terms.

### c. The Will to Power over “Lesser” Wage Taxpayers.

The final expression of the Libertarian Will to Power is the dominance over others. Such power is distinguishable from the defiance of the power of the state to the direct application of power against others within the construct of the tax laws. Berkowitz (2003) explains the Nietzschean view generally:

What Nietzsche stresses is not the specifics of any particular division of nature, but rather that nature – and with it life – demands distinctions among men. Life, understood as will to power, is the natural drive for man and all beings to assert themselves in their difference and superiority over others.<sup>73</sup>

Within the tax laws, therefore, it is not only necessary for the Libertarian not to pay taxes. This is simply the defiance of the power of the state. More is required. To fully exercise the Nietzschean Will to Power, the Libertarian must also cause someone else to pay. In modern tax parlance the “wage-worker” that actually pays tax is a “lesser” being in comparison to the Nietzschean aristocrat. This is practically necessary because the state needs some revenue to continue to provide basic services. But the practical outcome is a secondary concern to the Libertarian. The Libertarian does not so much care about any potential shortfall in government services caused by a lack of tax receipts.

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<sup>72</sup> Laurence M. Vance (2010). *A Libertarian View of the Estate Tax*. The Future of Freedom Institute *available at* <http://fff.org/explore-freedom/article/libertarian-view-estate-tax/>.

<sup>73</sup> Berkowitz at 1141.

Instead, the Libertarian is concerned with the exercise of power over the “lesser” beings that comprise society – that is to say the “lesser” beings must never take from the Nietzschean aristocracy. Such an outcome is the ultimate outrage in the mind of the Libertarian. This view is stated expressly by Rothbard (2006) as follows:

If the State is a group of plunderers, who then constitutes the State? Clearly, the ruling elite consists at any time of (a) the full-time apparatus—the kings, politicians, and bureaucrats who man and operate the State; and (b) the groups who have maneuvered to gain privileges, subsidies, and benefices from the State. The remainder of society constitutes the ruled. It was, again, John C. Calhoun who saw with crystal clarity that, no matter how small the power of government, no matter how low the tax burden or how equal its distribution, the very nature of government creates two unequal and inherently conflicting classes in society: those who, on net, pay the taxes (the “tax-payers”), and those who, on net, live off taxes (the tax-consumers’).<sup>74</sup>

The “lesser” beings must therefore contribute to society in the form of wage taxes – meaning the “lesser” beings must pay the aristocracy for the privilege of living in the state. This is the true Libertarian ideal. Here, Rothbard (2006) describes the status-quo in Nietzsche’s revolutionary terms, (i.e., the Libertarian “tax-payer” is dominated by the “tax-consumer” aristocrat). Of course, the opposite is true in modern society. Yet, the implication is an urging for the Libertarian to exercise the Will to Power against the “tax-consumer”. This is the rising up of the Libertarian against the moral standard comprised of the tax laws. However, as a jurisprudential matter, Epstein (1986) states the Libertarian call for a flat-tax based on a “tolerable match between the benefits and costs of government services.” This is referred to as a “proportional tax” most directly reflecting the Libertarian view of tax policy.<sup>75</sup> Schoenblum (1995) described this as based on the natural law views of Rawls, as follows:

Rawls endorses a proportional expenditure or consumption tax as superior to income taxation in that “it imposes a levy according to how much a person takes out of the common store of goods and not according to how much he contributes (assuming here that income is fairly earned).”<sup>76</sup>

In the current tax policy framework many different proposals are set forth reflecting the Libertarian view with unique incentives to tax the “lesser” beings. As the Libertarian worldview becomes more and more institutionalized within the tax code the Nihilism of the view becomes apparent and the Libertarian revolution thereby comes into

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<sup>74</sup> Rothbard (2006) at 41.

<sup>75</sup> *Supra* Notes 1 to 4; Joseph M. Dodge, Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles, 58 *Tax L. Rev.* 399 (2005).

<sup>76</sup> Schoenblum at 251-2.

contradiction to itself.<sup>77</sup> In practical terms this would occur by necessity where the “lesser” beings are “tapped-out” (i.e., when the Libertarians levy tax to the extent the disposable income is reduced to zero or below).

#### IV. WHAT IS THE ACCUMULATION OF MONEY?

*“The accounting questions that obsess welfare economists and theorists of justice, the debates over maximean, maximin and maximax, would no doubt have struck Nietzsche as symptoms of a shopkeeper’s morality.”* – Binder & Weisberg (1997)<sup>78</sup>

The “morality of the shopkeeper” reflects the use of money to induce economic behaviors in other people.<sup>79</sup> Therefore, the Will to Power could be merely the *will to money*. The shopkeeper exercises the Will to Money directly through the collection of money from others. The marketplace thus operates automatically to achieve “efficiency” and “fairness” in the eyes of the shopkeeper. This is the invisible hand.<sup>80</sup> Money is therefore the indirect control over others. In the accumulation of money the shopkeeper gains the ability to demand the control over others by spending the money. Perhaps then a few chosen shopkeepers *ought to* control society with a visible hand for the good of the many? Indeed, the accumulation of a great deal of money appears to me an unstated prerequisite for Libertarians to pursue public office in the United States. In that case, perhaps the shopkeeper that accumulates the most ought to automatically control society with a visible hand? Epstein (1985) derives such in regards to tax policy where he proposes that in a Lockean world “that the just tax should not alter the rank ordering by wealth of individuals within the society.”<sup>81</sup>

##### a. The Libertarian Ideal of “Rank by Money”.

In the Libertarian mind, money accumulation thus creates a “rank ordering” of persons by the amount of money or property accumulated. Therefore, progressive taxation could change the “rank”, thereby causing a person of lower “Rank by Money” status to be held in higher regard than otherwise deserved.<sup>82</sup> To the Libertarian this is a major problem. Unfortunately, such an idea is missing from Locke’s treatise and must therefore be inferred by Epstein in the construction of tax policy in the “Lockean world”. Therefore, Epstein determines progressive taxation to be immoral under *natural law* doctrine simply by a general description of Locke’s natural state of man. That is to say that somehow under the *natural law*, men are rank-ordered by the aggregate amount of money or

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<sup>77</sup> See, Richard A. Epstein, Taxation with Representation: Or, the Libertarian Dilemma, 18 Can. J. L. & Juris. 7 (2005).

<sup>78</sup> Binder & Weisberg at 1159.

<sup>79</sup> *Id.*

<sup>80</sup> Nozick at 18.

<sup>81</sup> Schoenblum at 245 *citing* Epstein (1986), *supra* Note 1.

<sup>82</sup> *Id.*

property accumulated. At the time of the drafting of the U.S. Constitution the relative wealth standings of the aristocrats was generally well known to all in land acreage or slave holdings because it was given as an absolute number. Here, the Libertarian would presumably enthusiastically use the power of the state to publish or enforce “Rank by Money” standings in order to recreate that ability to know exactly the relative wealth of others. This is implicit and fundamentally necessary to the Libertarian “Rank by Money” worldview. The unstated presumption is that the “Rank by Money” standings represent the right by the shopkeeper to exercise direct power (not indirect money power) over society without actually using the money.

“Rank by Money” is a very strange version of morality to say the least. In the first place, the shopkeeper trades labor for money. The shopkeeper then gains an indirect right under the *natural law* to demand labor or property from others with the money. It is not clear theoretically whether the “shop” or the “keeper” is the ultimate source of the money and should have the moral authority to dispense the proceeds. Nonetheless, the shopkeeper cannot actually use the money if he wants to maintain the “Rank by Money” order. To spend the money is to automatically lower his “Rank by Money” standing. Therefore, the shopkeeper can only spend the “liquid” portion of his assets that represent the differential between himself and the next on the “Rank by Money” order. Accordingly, the shopkeeper is cash poor because he possesses a lot of money but cannot actually spend it. In the eighteenth century world land and slave holdings automatically generated “spending money” for the nobility and there was no diminishment in wealth by the spending of these proceeds. In a fiat money world, spending does diminish wealth. This represents a major contradiction for Libertarians in applying the relative wealth standing value system of the eighteenth century to the modern state.

**b. “Rank by Money” and the Overcoming of Physical Death.**

The Will to Power by the Libertarian over physical death appears to require that the Libertarian achieve the highest “Rank by Money” status prior to death. The unstated idea is that the highest “Rank by Money” is the most likely to overcome physical death. In general, the question of how to deploy the money back to society at death is of secondary importance to most individual Libertarians, although Epstein mentions this in passing as “imperfect obligations”.<sup>83</sup> Similarly, the pharaoh of the ancient Egyptians would actually use wealth to construct pyramids and thereby overcome physical death via a more orderly transition to the afterlife. But the Egyptian view is different than the Libertarian view because the Egyptian pharaoh must actually translate money into the tangible construction of the pyramid *prior to death*, since the pyramid is part of the transition process to the afterlife. The Libertarian to the contrary operates on more

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<sup>83</sup> *Supra* Note 56.

abstract grounds and simply needs to hold fiat money in order to achieve the highest “Rank Money” possible prior to death.

**c. A Dialectic Response to the Libertarian Aesthetic of Tax Avoidance as the Overcoming of Death.**

Here then we engage the Libertarians on Nietzsche’s terms in the dialectic by challenging the basic presumptions of Libertarian thought on the basis of life and death generally. The logical proof is to disprove Nietzsche (or the Libertarian) by showing that the aristocrat is *not* the master. Accordingly, this is the third alternative in any response to a person seeking to exercise the Nietzschean Will to Power. The first option was to engage under the *natural law*, and the second was to disprove the application of *natural law* generally. The third response could take many forms but the author gives the following as perhaps a first attempt:

*Libertarian – Did you really think you could overcome death by avoiding taxes? You are not going to live forever! Money is not divine. When someday you acknowledge your own mortality, you should buy some art, possess it – but do you still think you can own art? Nay, you are already aesthetically dead. Look at all the people around you living and laughing. Are you jealous? If so, make them pay even more tax than! Wipe the smile off their young faces! Forget efficiency and act always as the embodiment of a defiant Scrooge. But, how is it possible such people pay exorbitant taxes on their wages while you pay nothing and yet they still laugh, while you cringe in fear of taxes and death! Who is the master?*

**V. NIETZSCHE’S “AESTHETIC” VERSUS THE LIBERTARIAN WILL TO TAX AVOIDANCE.**

*“The phenomenon ‘artist’ is the most transparent: - to see through it to the basic instincts of power, nature, etc.! Also those of religion and morality! An anti-metaphysical view of the world – yes, but an artistic one.” – Friedrich Nietzsche, Will to Power<sup>84</sup>*

A relatively new interpretation by Nehama (1985) suggested that Nietzsche posits life simply as the story of a literary text and life characters.<sup>85</sup> In lay terms, Nehama (1985) suggests life is a book and the individual writes the book (i.e. “Today represents a new chapter in my life.”). In philosophical terms, such an approach is referred to as pure “Aestheticism” representing the view of life as essentially an art (or literature) project. Although Nehama’s (1985) interpretation is properly rejected as a technical matter for various reasons, the philosophical observation that Nietzsche relates Aesthetics to life is fundamentally correct.<sup>86</sup> Nietzsche advocates the overcoming of Nihilism by the

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<sup>84</sup> Brian Leiter, *Nietzsche and Aestheticism*, 20 *Journal of the History of Philosophy* 275, 283 *citing* Nietzsche, *Will to Power* at 797, 1048.

<sup>85</sup> Alexander Nehama, *Nietzsche: Life as Literature* (Cambridge, MA: Harvard Univ. Press, 1985).

<sup>86</sup> Leiter at 280 (1992) (“[A]estheticism, I suggest, is actually *not* Nietzsche’s view... This is not to deny that Nietzsche thinks both art (though not particularly literature) and aesthetic value standards are

creativity of the human spirit. Yet, as Huigen (2003) explains, “If we abjure the certainties of transcendental reason and natural science but replace them with nothing, then we have done nothing more than hasten the slide toward nihilism that is implicit in the ascetic ideal.”<sup>87</sup>

Notably, perhaps because of the inherent controversy over his philosophy, Nietzsche’s proposal for the overcoming of Nihilism is often ignored. Yet, this is ostensibly the most important practical aspect of Nietzsche’s writings especially in the application to positive law. The more traditional interpretation of the overcoming of Nihilism by the human Aesthetic as presented in Nietzsche’s *Will to Power* is given by Leiter (1992) as follows:

[O]ne should evaluate the world aesthetically, that one should assess its value in broadly aesthetic terms.... [This assessment] fits Nietzsche’s rejection of ordinary moral categories as evaluative terms.... And second, it is compatible with the appealing suggestion that what Nietzsche values about the “higher men” (who are thwarted by morality) is best described aesthetically: that we do, as Philippa Foot has noted, “find patterns of reaction to exceptional men that would allow us to see here a valuing rather similar to valuing on aesthetic grounds.”<sup>88</sup>

Nietzsche also makes specific reference to Dionysis (the Greek and Roman God) as acceptance of the essence of that “god of love” (or pleasure, or wine). Ninet (1990) states as follows:

Nietzsche has found God in love, in the lack of godliness from which springs the longing for God: he "had to find a god who is all love, all capacity to love." Dionysus is "the great ambiguous one," the god who is the absence of God, godlessness, i.e., no God at all, "the god of seeking".<sup>89</sup>

From these descriptions, Nietzsche’s proposed resolution of the Nihilist paradox facing mankind after the destruction of all moral values is apparent. As Huigens (2003) says, “The good is that which pertains to this flourishing of human energy and activity.”<sup>90</sup> As such, the human overcoming of Nihilism is in the embrace of human activity generally. Even Nietzsche “the great annihilator” ultimately embraces humanity, even if after tearing apart its moral foundations.

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extremely important; it is to deny, however, that he holds the unusual view that the natural world and its occupants are best interpreted as though they shared the features of (indeterminate) literary texts and of literary characters.”).

<sup>87</sup> Huigen at 565.

<sup>88</sup> Leiter at 284.

<sup>89</sup> Nonet at 693-4 citing Nietzsche, *Beyond Good & Evil* at §269.

<sup>90</sup> Huigen at 564.

But, contrary to Nietzsche, the Libertarian does not embrace creative human activity. Tax avoidance is a creative nothing. Tax avoidance amounts to simply to an accounting entry that is reversed with the corresponding debit or credit.<sup>91</sup> It creates nothing *new*. It has been done before. Even the celebration of successful tax avoidance by the suicidal tax accountant is not creative. A great victory in tax avoidance is simply the celebration of absolute power over the herd in a democracy. That is, to make laws and then defy the very laws which one has created. But a victory over the herd in this manner is not worth celebrating. Nietzsche's aristocracy class defines itself as dominant over the serf classes. Neither is the accumulation of money generally a creative endeavor. The accumulation of money can never be the activity of Nietzsche's true aristocrat because money is only a secondary claim on the activity of others and not a direct creative action. This is nothing. Furthermore, the aristocracy already commands the herd!<sup>92</sup> Nothing more is required except to simply issue thy commands! Money as indirect power is quite redundant from a societal perspective. Linarelli (2004), explains as follows:

Noble morality is internal to the individual and has nothing to do with instrumental effects on others. In dealing with his famous distinction between herd or slave morality and noble morality, Nietzsche used the word "utility" to describe the usefulness of herd morality to the preservation of the herd.<sup>93</sup>

Even in the purported accumulation of money for the Will to Power over physical death the accumulation of fiat money is absolutely nothing. There is no tangible Aesthetic outcome – not even pyramids nor a collection of shiny gold to show for the effort. Death always wins. Indeed, the death of a great capital accumulator reverberates similarly to the death of a "hoarder" who dies in the collapse of a houseful of meaningless possessions. In Nietzschean terms, this represents a sad footnote to a wasted life. The celebration of tax avoidance by Libertarians therefore is an extraordinary aberration in the human endeavor. To put it most simply – nobody mourns the death of Scrooge. Scrooge denies life itself. To engage in a meaningful activity is to create something *new*. As Rahdert (2003) explains, [i]n order to create the new, [the artist] must transgress the old, breaking up its encrusted structures. In doing so, he reasserts life itself, for life is change and transformation--and laws must take its lead!<sup>94</sup>

Later generations may judge harshly the Libertarian Aesthetic of a primary goal in life to simply accumulate money. For example, it is impossible to explain why one should

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<sup>91</sup> Rahden at 732 ("Knowledge is the falsification of diversity and innumerability in that it renders them as identical, similar and countable.")

<sup>92</sup> Nonet at 677 ("The "history of morals" is the history of a slave rebellion against this imperative of life, the outcome of which is the degeneration of obedience into the "herd instinct," with the risk of a degeneration of man into a herd animal.")

<sup>93</sup> Linarelli at 436.

<sup>94</sup> Rahdert at 1143.

gather money and not buttons. The best answer might be given as “Locke told me to accumulate private property.” In that case, the “will” or “why” is simply received from Locke. To Nietzsche the apparent Libertarian confusion over the purpose of life may represent simply the becoming of mankind through trial and error; “Will to power is the struggle of humans over time to learn and develop norms of behavior through species preserving error.”<sup>95</sup> Nietzsche rejects all truth through insofar as, “knowledge is not rational, scientific, ahistorical or analytical.”<sup>96</sup> Mootz (2003) explains as follows:

[Any] theory must at least decide between itself and the many other interpretations available. The criteria for making such a decision, which Nietzsche cites again and again, are of a “physiological” nature: strength--weakness, health--sickness, as well as the related ideas of creativity--“ressentiment” and active-- reactive.<sup>97</sup>

Accordingly, if or when Libertarianism fails as a social movement this experiment will become part of the collective memory of mankind as to what is *not* true, or what *not* to do; “Likewise, to Nietzsche, logic originates in illogic.”<sup>98</sup>

## VI. THE DESIGN OF TAX LAWS.

*“The rational core of Nietzsche’s utopian vision reminds us that legislation must serve life, not stand in static opposition to it. Though it is equally true both of art and of law that they (should) stand ultimately in the service of life, we may still ask what life would be without art.”* – Wolfert von Rahden (2003)<sup>99</sup>

The combination of Nietzsche with the design of law itself is something of an anachronism. Accordingly, as Feldstein (1976) correctly says, we must design tax policy from where we are now, and not in reference to John Locke’s version of natural law.<sup>100</sup> Much of *Beyond Good & Evil* reflects Nietzsche’s disdain for law or rules generally. The danger is to see legal tradition as the becoming of a set of moral values to limit mankind in the future, which is similar to religion or moral values under Nietzsche’s conception. In other words, once the law is derived it then automatically operates as a limiting orthodoxy.<sup>101</sup> As explained by Nonet (1990):

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<sup>95</sup> Linarelli at 425.

<sup>96</sup> Linarelli at 439.

<sup>97</sup> Francis J. Mootz III, *Nietzschean Critique and Philosophical Hermeneutics*, 24 *Cardozo L. Rev.* 967, 1025 (2003).

<sup>98</sup> *Id.*

<sup>99</sup> Rahden at 737.

<sup>100</sup> Martin Feldstein, *On the Theory of Tax Reform*, 6 *J. Pub. Econ.* 77, 90-4 (1976).

<sup>101</sup> Nonet at 688 (“Here Nietzsche foresees that his writing has articulated thoughts that are about to become the unthought orthodoxy of generations to come: Positive law is destined to be the rule of a

From the beginning, Nietzsche conceives nihilism as an essentially destructive movement, the unfolding of a will to the nothing by way of a devaluation of values. In the completion or fulfillment of this destruction, however, Nietzsche envisions the possibility of a creative transformation: that the will may free itself to posit new values. Is positive law so conceived truly free of destructiveness, so that it may indeed be regarded as an overcoming of nihilism?<sup>102</sup>

The Libertarian philosophers take the U.S. Constitution as the enshrinement of Libertarian values and therefore the basis to command society.<sup>103</sup> To Epstein and Nozick, the U.S. Constitution “appear[s] as a beautiful semblance, one with the power to awe and to seduce man to its authority.”<sup>104</sup> As Nonet (1990) explains: “Positive law itself is man's creative affirmation of the full creative power of human thought. If thought is creation, beings – what thinking thinks – are creatures of thought.”<sup>105</sup> The U.S. Constitution as positive law thereby becomes something of a work of art or creative project. Positive law itself may be a creative project for mankind. As explained by Rahden (2003): “The artist, as the prototype of a totally and comprehensively creative individual, sets the paradigm for the legislator to come. He is productive, creative and innovative; he modifies the environment as well as himself.”<sup>106</sup>

But, the Libertarian stands in awe of the U.S. Constitution. The Will to Power as command requires the Libertarian aristocracy to tear down any law that limits the self-fulfillment of the Libertarian aristocrat through tax avoidance.<sup>107</sup> Any Libertarian tax system is thereby inherently self-destructive.<sup>108</sup> One is tempted to interpret Nietzsche into the tax law as requiring Jean-Baptiste Colbert’s “plucking the most feathers with the least amount of squawking.” One can imagine the “plucking” of the wage laborer as involving the least squawking. The Libertarian overlord will inevitably derive laws that prove the wage laborer ought to be plucked as a form of punishment by taxation for the

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godless humanity. Nietzsche's own art, which celebrated the supreme value of creative art, has itself only yielded a truth, that is, a dead thought, a thought held without question, uncreatively, thoughtlessly....”).

<sup>102</sup> Nonet at 680.

<sup>103</sup> Richard Weisberg, *It's a Positivist, It's a Pragmatist, It's a Codifier! Reflections on Nietzsche and Stendahl* 18 *Cardozo L. Rev.* 85, 92 (1996) (“The most decisive move, however, made by the higher power against the predominance of grudge and spite, is the establishment of the law, the imperial elucidation of what counts in [the codifier's] eyes as permitted, as just, and what counts as forbidden and unjust. . . . From then on, the eye will seek an increasingly impersonal evaluation of the deed, even the eye of the victim itself, although this will be the last to do so.”)

<sup>104</sup> Berkowitz at 1136.

<sup>105</sup> Nonet at 682.

<sup>106</sup> Rahden at 736.

<sup>107</sup> Nonet at 668 (“As the command of a will, positive law is the actuality (*Wirklichkeit*) and effectiveness (*Wirksamkeit*) of the commanding power of the will.”).

<sup>108</sup> See, Schoenblum at 271 (“The argument has been made here that no persuasive theory has been developed to date to justify substantially unequal taxation among persons in a liberal society. Taxation is a necessary, but coercive, act by the state.”).

failure to accumulate money in sufficient quantity.<sup>109</sup> But the aristocracy itself may find it necessary to contribute at least something to the common coffers either directly or indirectly. And it goes without saying that some Libertarians would be willing to destroy the U.S. Constitution in the furtherance of tax avoidance.<sup>110</sup> Accordingly, any tax assessment on the aristocrat is simply the embodiment of Nietzsche's Nihilist contradiction. As explained by Nonet (1990):

Positive law, the self-affirming power of the will to set values, already rules supreme in the understanding by which the collapse of the realm of spirit takes on the character of a devaluation of values. From within this understanding, the debasement of spirit accomplished by positive law cannot itself be recognized as nihilism. Thus positive law blinds itself to its own destructiveness, and falls under the illusion that it will overcome all nihilism.<sup>111</sup>

Therefore, tax laws stand in partial opposition to the U.S. Constitution itself in the conception of the Libertarian philosopher. Berkowitz (2003) explains:

The legislator, like the priest, must be an artist, skilled in artifice – the art of transforming semblance into truth. The “art of legislation” is the art of the Holy Lie, the creative act through which the legislator positively erects his will as the truth for a people. To say that priestly legislation is an art is to say that legislation is a means to the creation of truth.<sup>112</sup>

Yet progressive tax laws persist in spite of such implied resistance. Indeed, progressive tiered tax rate structures are part of U.S. income tax law.<sup>113</sup> Thus, as we look upon modern society one might expect to see in it a reflection of Libertarian values. One might expect to see tax laws that find some balance or compromise to the competing aims of Libertarianism and the revenue needs of the state. Accordingly, within U.S. tax law not only do we find tiered tax rate structures, but also the individual corporate and “alternative minimum tax” rules, along with the concept of accumulated earnings taxation.<sup>114</sup> Oh, how the Libertarian howls at the thought of a “minimum tax”! The very

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<sup>109</sup> Huigens at 581-2 (“These efforts on the part of the moral aristocracy turn punishment into the opposite of revenge—into an impersonal matter of retribution in which descriptions of “just” and “unjust” exist after the creation of a legal system, and not before it.”).

<sup>110</sup> See, Eric Rakowski, *Transferring Wealth Liberally*, 51 Tax L. Rev. 419 (1995) citing T.M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 655 (1975) (“The fact that someone would be willing to forego a decent diet in order to build a monument to his god does not mean that his claim on others for aid in his project has the same strength as a claim for aid in obtaining enough to eat (even assuming that the sacrifice required of others would be the same).”).

<sup>111</sup> Nonet at 680.

<sup>112</sup> Berkowitz at 1136.

<sup>113</sup> 26 U.S.C. §1.

<sup>114</sup> 26 U.S.C. §55; §531, et. al.

thought of it stands against all that is good and holy. But, it is the inherent tax avoidance contradiction of Libertarianism itself that gives rise to the need for the “minimum tax”.

One primary thesis of this article is that the tax laws of the United States as derived from and through the democratic process reflect an accommodation to the Libertarian psychology. Contrary to the Libertarian howling, the tax laws are currently reflective of Libertarian values. But, Libertarian values are inherently contradictory.<sup>115</sup> The Will to Power through tax avoidance requires the existence of taxation and the means to avoid it through complex tax planning techniques, even though some revenue must be collected. Yet, the Libertarian is not self-conscious of the impact of his or her own ideology. As explained in Nietzschean terms by Binder & Weisberg (1996):

The point of this self-consciousness is to place in question not the truth of what we see, but the value of that way of seeing. If one comes to see one's own sensibility as impoverished or boorish, the appropriate response is to change the way one lives. Thus, philosophy is used not to escape the perspectival limits inherent in living, but to enhance our capacity to choose the limits within which we will live, and our responsibility for that choice. It is this self-shaping capacity that Nietzsche refers to as power.<sup>116</sup>

The lesson for the appropriate design of tax laws taking into account Libertarian ideology is that the “alternative minimum tax” itself represents an equitable resolution of the Libertarian Nihilist contradiction. Insofar as the Libertarian philosopher is not aware of the inherent contradictions this is to be expected. As explained by Nonet (1990):

Thus positive law here again seals itself from the possibility of recognizing its destructiveness. The same denial – that there is nothing outside the will – even enables positive law to proclaim itself the savior of being: since the being of beings is nothing but the actuality of the creative will, the self-affirmation of that will suffices to secure being from the destruction that a “will to the nothing” threatened to bring.<sup>117</sup>

The Libertarian must therefore accept the minimum tax or suffer the Nietzschean destruction of its own positivist law value system. In lay terms, the “alternative minimum tax” practically reaches the goal of taxing a Libertarian who would rather die than pay taxes.

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<sup>115</sup> Weisberg (1996) at 92 (“The most decisive move, however, made by the higher power against the predomination of grudge and spite, is the establishment of the law, the imperial elucidation of what counts in [the codifier's] eyes as permitted, as just, and what counts as forbidden and unjust. . . . From then on, the eye will seek an increasingly impersonal evaluation of the deed, even the eye of the victim itself, although this will be the last to do so.”).

<sup>116</sup> Binder & Weisberg at 1156-7.

<sup>117</sup> Nonet at 682.

## VII. CONCLUSION

*"Life must rise against morality and law wherever morality and law are opposed to life, for the law towers where life has turned to stone."* – Wolfert von Rahden (2003)<sup>118</sup>

The remainder of this article is directed toward the wage-earning “lesser” taxpayer as viewed in the eyes of the Libertarian who holds the whip. This is perhaps the most important segment of the article given the current sharp regressivity of the United States tax system.<sup>119</sup> We take for granted here that Libertarians view other taxpayers as “lesser” beings consistent with Nietzsche’s view of the lower castes in society.<sup>120</sup> We also take for granted that the tax avoidance motivations of the Libertarian are successfully translated into the power of the state at some level (as is currently the case). Nonet (1990) describes the rising of the Will to Power to command as follows:

Almost everything we call 'higher culture' rests upon the spiritualization and deepening of cruelty – this is my thesis; the 'savage animal' has not been mortified, it lives, it flourishes, it has only – deified itself.<sup>121</sup>

Nietzsche’s Will to Power is institutionalized within economics through “optimal tax” doctrines that generally conclude *only* wage-earners should pay taxes.<sup>122</sup> Accordingly, here we assume the government actualizes a quasi-caste system in the tax law consistent with Nietzschean and Libertarian ideology. This represents the rejection of the alternative view that taxpayers that work for a living and earn a wage make a co-equal contribution to society.<sup>123</sup> Libertarians will at every turn deny this is true and treat the “lesser” beings with contempt as “failed” accumulators. Therefore, the fundamental issue here is how to relate to Nietzsche or Libertarian as lawgiver.

The general attitude of the Libertarian toward the “lesser” taxpayer is reflected in an outright rejection of the “ability to pay” principle. In other words, the respective tax base ought not to be applied against a concept of income and should instead be a reflection of some other conception of *natural law* to be defined by the Libertarian lawgiver. Such a concept will inevitably result in a regressive form of taxation designed to punish the

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<sup>118</sup> Rahden at 735.

<sup>119</sup> Bret N. Bogenschneider, *The Effective Tax Rates of U.S. Persons by Income Level*, 145 TAX NOTES 117 (Oct. 6, 2014).

<sup>120</sup> Roger Berkowitz, Friedrich Nietzsche, *The Code of Manu, and the Art of Legislation*, 24 CARDOZO L. REV. 1131 (2003) (explaining that Nietzsche was certainly inspired by Manu ideas, perhaps as representative of the ideal hierarchical society).

<sup>121</sup> Nonet at 678.

<sup>122</sup> See, N. Gregory Mankiw, Matthew Weinzierl & Danny Yagan (2009), *Optimal Taxation in Theory and Practice*, 23:4 J. of Econ. Perspectives 147.

<sup>123</sup> See, Nozick at 246-50

“lesser” taxpayer whose income is derived primarily from wages. The precept to this Libertarian view was articulated by Schoenblum (1995) as follows:

Ability to pay is not an entirely distinct alternative to benefit theory. Any number of benefit theorists have justified differentials in taxation founded on benefit theory by reference to ability to pay. Underlying this notion seems to be the fallacious premise that those who are better able to pay must have received more benefit from the government. In this way a proportional or progressive rate of taxation is justified.<sup>124</sup>

If the tax laws are to be designed to punish the wage-earning taxpayer without progressivity in any form, then this may result in the overall suffering of a major segment of society who must bear the full weight of the tax system. But, that is not unique. The suffering of the wage laborer is a fundamental aspect of modern society. Nonet (1990) described the situation of the suffering within society from a Nietzschean perspective:

[M]an was surrounded by an enormous void -- he did not know how to justify, explain, affirm himself, he suffered from the problem of his sense. He also suffered otherwise, . . . but his problem was not suffering itself, but that there lacked an answer to the crying question "to what end do I suffer?"<sup>125</sup>

The conclusion of this paper must therefore be to provide some means for the “lesser” being to self-actualize while subject to the harsh and incessant Libertarian whip applied via a regressive tax system. We have in mind here the young professional members of society toiling with 80-100 hour weeks in law and accounting firms, the blue-color laborer asked to work for below living wage, the single-mother seeking to go to school while working part-time, each with effective tax rates far in excess of the Libertarian aristocrat.<sup>126</sup> For these persons it is impossible to satisfy the Libertarian Will to Power. One must therefore *become* Fleischman’s “whipping boy”.<sup>127</sup> As stated in philosophical terms by Linarelli:

To be incapable of taking one's enemies... seriously for very long--that is the sign of strong, full natures in whom there is an excess of the power to form, to mold, to recuperate and to forget .... Such a man shakes off with a single shrug many vermin that eat deep into others; here alone genuine “love of one's enemies” is possible--supposing it to be possible at all on earth. How much

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<sup>124</sup> Schoenblum at 233-4 (citations omitted).

<sup>125</sup> Nonet at 676 *citing* Nietzsche, *On the Genealogy of Morals*, Part III (New York: Random House, 1967).

<sup>126</sup> *Supra* Note 119.

<sup>127</sup> Sid Fleischman, *The Whipping Boy* (Greenwillow Books, 1986)

reverence has a noble man for his enemies—and such reverence is a bridge to love.<sup>128</sup>

Therefore, the devastating yet whimsical existential response to the *Libertarian*-Nietzsche is given simply as: "Ain't I already been whipped twice today? Gaw! What's the prince done now?"<sup>129</sup>

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<sup>128</sup> Linarelli at 429.

<sup>129</sup> Fleischman at 2; *see also*: John Finnis, *Retribution: Punishment's Formative Aim*, 44 Am. J. Juris. 91 (1999).

**A COMPARATIVE APPRAISAL OF 'VALUE' IN  
CONVENTIONAL AND ISLAMIC JURISPRUDENCE**

Dawood Adesola Hamzah\*

**Abstract**

No meaning can be assigned to any part of law and apply it to specific cases without taking into cognizance the purpose (or purposes) which that part of the law is designed to serve; that purpose constitutes the value (or values) reflected in the law. 'Value' is theoretically and arguably similar within the framework of both conventional and Islamic jurisprudence. It is inspired by fairness and conscience authorizing departure from a rule of positive law when its enforcement leads to unfair results. Values are discoverable through the use of reason. Under Islamic law however, they are discovered through revelation and reason.

**Keywords:** Values, *Maqasid al-Shari'ah*, conventional and Islamic Jurisprudence, reason and revelation and communality of purpose.

**Introduction**

From perspective of social and psychological notion, moral values have two elements, namely, virtue and guilt. They are characterized by positive and negative attributes respectively.<sup>1</sup> These values mark a significant distinction between the Western and Islamic legal cultures. Western jurisprudence recognizes reason; Islamic jurisprudence recognizes both revelation and reason. Every system or community has a range of values that consist of principles and ideas about the way people should live, conduct themselves and mutually deal with each other. It is the function of the law to both reflect and reinforce these values.<sup>2</sup> Therefore, value, in legal sense concerns the operational mechanism of laws in society. 'Value-judgment', it is argued, symbolizes the choice of a particular benchmark of assessment as well as the result of appraising and determining interests with reference to the chosen value.<sup>3</sup> When a case arises with entirely a new fact that goes beyond the ambit of the existing legal order, the elucidation has to be sought from external sources. In the process of analyzing or taking decision on cases, jurists and judges operate within certain legal parameters, namely, statutory rules, customs, precedents and of course interpretation. The legal luminaries develop ideas to explicate their thoughts and chart path toward arriving at decisions on the basis of those

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<sup>1</sup> Shavell, S., Law versus Morality as Regulators of Conduct, *American Law and Economic Review*, Vol. 4 No. 2 (2002), p. 230.

<sup>2</sup> <http://lawgovpol.com/how-values-shape-our-laws/> (accessed 29<sup>th</sup> October, 2014).

<sup>3</sup> Dias, R.W.M., *Jurisprudence*, (5<sup>th</sup> ed.), Butterworth London, (1985), p. 196.

parameters. It has been argued that valid rules do not necessarily decide cases or disputes.<sup>4</sup> In other words, and as Lord Reid observes, ‘legal principles cannot solve the problem’.<sup>5</sup> Lord Macmillan also notes that ‘in almost every case, except the very plainest, it would be possible to decide the issue either way with reasonable legal justification’.<sup>6</sup> Dias notes that ‘the judicial oath does not enjoin a judge simply to do justice, nor simply to apply law; it requires him to do justice according to law.’<sup>7</sup> Therefore, the driving spirit behind ‘justice according to law’ is provided by *values* described as ‘the inarticulate major premise of judicial reasoning.’<sup>8</sup>

If values serve as operational mechanism of laws in society, it follows that law has to be studied with reference to cases which emanate with new elements or facts otherwise there will be need to introduce variation to an existing legal norm. Here lies the importance of analyzing the philosophy of legal value.

It is argued that the *Maqasid al-Shari’ah* is conceptually entrenched in the basic sources of Islamic law – the *Qur’an* and *Sunnah*. Its philosophical importance goes beyond the purview of literal understanding of the textual injunctions. It rather takes into cognizance the general philosophy and objectives of these injunctions. It has been described as ‘beyond the specialties of the text.’<sup>9</sup> The emphasis is not essentially on the literal expressions of the texts rather, it is on the ultimate objectives aimed at achieving through legislative and judicial mechanisms. Thus, this concept is not burdened with methodological technicality and literalist reading of the text.<sup>10</sup> It aims at providing answers to basic fundamental questions of living and of course mutuality in this living; for example, the link between the texts and modern notions of human rights, ‘development’ and civility.<sup>11</sup>

This paper aims at exploring the concepts of legal values under the conventional legal norms which is translated to *Maqasid al-Shari’ah* under Islamic jurisprudence. It is intended to do a comparative analysis of the concept and determine the communalism of the concept within the frameworks of the two legal systems.

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<sup>4</sup> Dias, R.W.M., *ibid* at p. 194.

<sup>5</sup> *British Railways Board v Herrington*, [1972] AC, 877 at 897; [1972], 1 All ER, 749 at 756

<sup>6</sup> See generally, Macmillan, Lord, *Law and Other Things*, Cambridge University Press, (1938).

<sup>7</sup> Dias, R.W.M., *supra*.

<sup>8</sup> Holmes J. in *Lochner v US*, (1905), 118 US 45 at 74.

<sup>9</sup> Kamali, M.H., *Maqasid al-Shari’ah Made Simple*, *International Institute of Advance Islamic Studies (LAIS)*, Malaysia, [http://i-epistemology.net/attachments/-01\\_Maqasid\\_Shariah%20-%20hashim%20kamali.pdf](http://i-epistemology.net/attachments/-01_Maqasid_Shariah%20-%20hashim%20kamali.pdf) (accessed 23<sup>rd</sup> October, 2014).

<sup>10</sup> *Ibid*.

<sup>11</sup> Auda, J., *Maqasid Al-Shariah, as Philosophy of Islamic Law – a Systems Approach*, The International Institute of Islamic Thought, USA and UK, (2008), p. 1.

### Definition and Theory of 'Value'

Literally, values are those things considered by men while shaping "vision of social life."<sup>12</sup> 'Interests', as synonyms of 'values' had been defined as "all things that man holds dear and all ideals which guide man's life."<sup>13</sup> Some notable characteristics of values include *inter alia*, equality, autonomy, dignity, respecting and venerating one's parents, self-reliance, honesty, security, self-contentment, ownership, freedom, solidarity, personal responsibility, not obstructing the path of the blind, and self-preservation.<sup>14</sup>

In jurisprudence, law consists of some basic elements, namely, norms and values. No meaning can be assigned to any part of law and apply it to specific cases without taking into cognizance the purpose (or purposes) which that part of the law is designed to serve; that purpose constitutes the value (or values) reflected in the law. For example, the fundamental purpose of prohibiting murder is to safeguard human life. In translating this value into law, it is referred to as 'sanctity of human life.'<sup>15</sup> Also, the prohibition of theft is aimed at protecting right of ownership to property.<sup>16</sup> It has been argued that laws can be constitutive of values, and thus no one can hold values as separate from the law in the same way he can hold the goal of reaching a destination as separate from the route he chooses to drive. Similarly, it is may not be possible to separate the ideals about equality from the treatment of equality in the law.<sup>17</sup> One cannot also maintain an insular position from the community that has been structured through the law. Legal rules do not simply serve values but help define them and bring values into our lives.<sup>18</sup>

As far back as 1965, Felix Cohen had argued that:

When we recognize that legal rules are simply formulae describing uniformities of judicial decision, that legal concepts likewise are patterns or functions of judicial decisions, that decisions themselves are not products of logical parthenogenesis born of pre-existing legal principles but are social events with social causes and consequences, then we are ready for the serious business of appraising law and legal institutions in terms of some standard of human values.<sup>19</sup>

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<sup>12</sup> Singer, J., *The Player and the Cards: Nihilism and Legal Theory*, 94 *Yale Law Journal* 1, (1984), p. 11.

<sup>13</sup> See generally Heck, P., *The Jurisprudence of Interests: An Outline*, in *The Jurisprudence of Interests: Selected Writings of Max Rümelin, Philipp Heck, Paul Oertmann, Heinrich Stoll, Julius Binder and Hermann Isay* 29, 33 (M. Magdalena Schoch ed. & trans., (1948).

<sup>14</sup> Shiffrin, J.B., *A Practical Jurisprudence of Values: Re-Writing Lechmere, Inc. v. NLRB*, *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 41 (2006), p. 188.

<sup>15</sup> Dror, Y., *Values and the Law*, *The Antioch Review*, Vol. 17, No. 4 (1957), pp. 442.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Cohen, F., *Transcendental Nonsense and the Functional Approach*, 35, *Columbia Law Review*, Vol. 35, No. 6, p. 847.

Duncan Kennedy has also noted with emphasis that: ‘we used to understand law in a different way than we do today. At the turn of the last century, legal doctrine was understood as implicitly true, entirely knowable, and intrinsically just. We understood rules, and their application to particular cases was to follow deductively from abstract categories such as contract, property, and tort.’<sup>20</sup> He further argued that ‘a judge’s role in deciding a case was to engage in an “objective, quasi-scientific” technique of applying legal doctrine to the facts of a case and rule on the case accordingly, regardless of what justice may otherwise seem to require.’<sup>21</sup> This mode of thinking could be described as “classical legal thought,” popularly called “formalism” which had been critically criticized by both the legal realism and legal studies movement.<sup>22</sup>

Legal realists contend that judges are not sheer passive contraptions who merely apply legal concepts, but rather are actors who shape legal rules on the basis of “justice and policy.”<sup>23</sup> They are not mere neutral arbitrators of disputes but architects of the rules of society.<sup>24</sup> This goes to confirm the contention that judges would always tilt their creative legal thought towards assessing in ethical terms the social values at stake where there is choice between two precedents.<sup>25</sup> Critical Legal Studies group share this view holding that fundamentally contradictory values lie at the center of human experience.<sup>26</sup> It is further argued that ‘law is politics, and politics is a self-contradictory mess that cannot be resolved with scientific, or pseudo-scientific, means... Rather than worry about nihilism, we should embrace the different possibilities for communal life that law as politics provides.’<sup>27</sup>

Joseph Singer notes in this regard that ‘We should no longer view the project of giving a “rational foundation” for law as a worthwhile endeavor. If morality and law are matters of conviction rather than logic, we have no reason to be ashamed that our deeply felt beliefs have no “basis” that can be demonstrated through a rational decision procedure or that we cannot prove them to be “true” or “right.”’<sup>28</sup>

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<sup>20</sup> Kennedy, D., *The Rise and Fall of Classical Legal Thought*, at Vol. 8 (reformatted 1998), (1975) (unpublished manuscript, available at [http://www.duncankennedy.net/legal\\_history/essays.html](http://www.duncankennedy.net/legal_history/essays.html)) p. 34 or <http://www.duncankennedy.net/topics/index.html> (accessed 31st October, 2014).

<sup>21</sup> Ibid.

<sup>22</sup> Shiffrin, J.B., *supra* note 14 at p. 181.

<sup>23</sup> Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16 (1913), p. 59.

<sup>24</sup> Cohen, F., *supra* note 12.

<sup>25</sup> Ibid at p. 833.

<sup>26</sup> See generally Unger, R.M., *The Critical Legal Studies Movement*, Harvard University Press, Cambridge, Massachusetts, and London, England, (1986).

<sup>27</sup> Shiffrin, J.B., *supra* note 15 at p. 182.

<sup>28</sup> Singer, J., *The Player and the Cards: Nihilism and Legal Theory*, 94 *Yale Law Journal* 1, (1984), p. 38.

In the light of the above basic analysis of ‘value,’ law, arguably is part of the ethical venture of building a social world structure according to the good life, and “the instrumental value of law is simply its value in promoting the good life of those whom it affects.”<sup>29</sup> However, this social world structure is composed of copious values which by the way are irreconcilable, eluding standardization. Shiffrin notes that ‘we create them, define them, and refine them to express what is important to us. We give meaning to them through law, which, in turn, structures our understanding of them. There is no neutral place from which we can judge these values and the way we order society; we are inescapably situated in this world, in our lives. Given this background, we turn to our central question: what does a jurisprudence of value look like?’<sup>30</sup>

### ‘Value’ as *Ratio* in Judicial Decision

The arguments about ‘value’ had been put to judicial tests in a number of cases. Judicial pronouncements in these cases unreservedly admit and recognize a contest between contradicting social values. For example, in the American case of *State v. Shack*,<sup>31</sup> two men entered private land in order to aid migrant farmworkers. The owner asked them to leave, but they refused. The men were charged with trespass. The rule is that trespass does not include a situation where representatives of recognized charitable groups enter private land in order to provide government aid to those workers that need it. The question before the court was whether trespass on real property includes the right to bar access to governmental services available to migrant workers? The court held that title to real property does not include control over the destiny of people the owner permits to come onto his premises. Their well-being is the paramount concern of the law.<sup>32</sup> There is no need for a farmer to deny his worker the chance to receive aid from government services or charity groups, so representatives from those groups may enter the land and see the worker in his living place. Though an employer of migrant farm workers may reasonably require the visitors of his employees to identify themselves, the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens.<sup>33</sup>

In other words, “a decision in non-constitutional terms is more satisfactory, because the interests of migrant workers are more expansively served in that way than they would be if they had no more freedom than these constitutional concepts could be found to mandate if indeed they apply at all.”<sup>34</sup> Hinging its argument on the issue of values

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<sup>29</sup> Cohen, F. S., *Ethical systems and legal ideals : an essay on the foundations of legal criticism* (1933). (Reprint ed.), Westport, Conn.: Greenwood Press, at p. 42 as quoted by Shiffrin, J.B., supra note 14 at p. 198.

<sup>30</sup> Shiffrin, J.B., supra note 14 at p. 199.

<sup>31</sup> 58 N.J. 297, 277 A.2d 369, (1971), N.J. 77 L.R.R.M. 2408.

<sup>32</sup><http://www.casebriefs.com/blog/law/property/property-law-keyed-to-singer/trespass-and-public-rights-of-access-to-property/state-v-shack-2/2/> (accessed 31<sup>st</sup> October, 2014).

<sup>33</sup> Ibid.

<sup>34</sup> 277 A.2d 369 (N.J. 1971) at p. 372.

protected by the laws of property, the court noted that “[t]itle to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises.”<sup>35</sup>

*United States of America v. Progressive, Inc.*<sup>36</sup> is another celebrated case in which a lawsuit was brought against *The Progressive* magazine by the United States Department of Energy (DOE) in 1979 for an injunction to prevent the publication of an article by activist Howard Morland that purported to reveal the "secret" of the hydrogen bomb. Though the information had been compiled from publicly available sources, the DOE claimed that it fell under the "born secret" clause of the Atomic Energy Act of 1954. This application for an injunction was granted by the court. Due to the sensitive nature of information at stake in the trial, two separate hearings were conducted, one in public, and the other in camera. The defendants, Morland and the editors of *The Progressive*, would not accept security clearances, which would put restraints on their free speech, and so were not present at the *in camera* hearings. Their lawyers did obtain clearances so that they could participate, but were forbidden from conveying anything they heard there to their clients.

The court found that *Pentagon Papers* did not compel a conclusion, and therefore addressed the “basic confrontation between the First Amendment right to freedom of the press and national security.”<sup>37</sup> In considering the particular interests that had been asserted by the parties, the court tried to make sense of the relationship between national security interests and the freedom of the press in the “hierarchy of values” that is attached to our “panoply of basic rights.”<sup>38</sup> The court was seriously challenged by the significant nature of the competing values at stake and seriously considered the magnitude of the conflicting interests presented by the case.<sup>39</sup>

The article was eventually published after the government lawyers dropped their case during the appeals process, calling it moot after other information was independently published. The court’s decision in this case failed to address the issue of ‘value’. Shiffrin notes that ‘although these cases are examples of value talk in judicial opinions, I would contend that they are anomalous. Rather than explicitly confronting difficult choices, or acknowledging the values at stake in a particular decision, opinions often dismiss value decisions or gloss over their implications.’<sup>40</sup> This case has been described as

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<sup>35</sup> Shiffrin notes that “property rights serve human values. They are recognized to that end, and are limited by it” Shiffrin, J.B., *supra* note 14 at p. 199 footnote no. 90.

<sup>36</sup> 467 F. Supp. 990 (W.D. Wis. 1979),

<sup>37</sup> 467 F. Supp. 990, 995 (W.D. Wis. 1979).

<sup>38</sup> *Ibid.*

<sup>39</sup> Shiffrin, J.B., *supra* note 14 at p. 200.

<sup>40</sup> *Ibid.*

hypothetically designed to test the limits of the presumption of unconstitutionality attached to prior restraints,<sup>41</sup> and of course, the issue of conflicting 'values' and 'interests'.

*Lechmere, Inc. v. National Labor Relations Board*<sup>42</sup> is a landmark US Supreme Court case which although, does not confront the complicated nature of the conflicting values under consideration, it however heavily relied on its superficial doctrinal structure for its decision.<sup>43</sup> In this case, Lechmere, Inc. owned a retail store in a shopping plaza in Newington, Connecticut and also was part owner of the plaza's parking lot. Employees of Lechmere, Inc. who drove to work used this lot to park their vehicles during their shifts. This parking lot was separated from a public highway by a strip of land which was almost entirely public property. Local union organizers, not employees of Lechmere, Inc., attempted to organize Lechmere employees by placing promotional handbills on the windshields of cars parked in the employee area of the lot. After this, Lechmere denied the organizers access to the lot. This act caused the organizers to instead distribute their handbills from the aforementioned strip of public land between the lot and the highway.

Local 919 of the United Food and Commercial Workers instituted an action claiming that Lechmere had violated Section 7 of the National Labor Relations Act (NLRA) by barring them access to the parking lot. The NLRB affirmed the union's grievance, and the Court of Appeals enforced the NLRB's decision. Reversing the appeal court's decision, the Supreme Court held, *inter alia*, that the NLRA "confers rights only on employees, not on unions or their nonemployee organizers." They reasoned that the NLRA, while guaranteeing that employees would be free to organize if those so chose, the employer is not obligated to allow nonemployee union representatives access to their private property. Secondly, section 7 of the NLRA does not apply to nonemployee union organizers except when, "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." The Court reasoned it was improper to even begin a balancing test with regards to the provision under section 7 and private property rights unless "reasonable access to employees is infeasible."

Commenting on this decision as relates to conflict of values, Singer observes: 'my opinion treats values as contested, conflicting things. The goal of this exercise was to dispel the illusion that cultural harmony exists and dispense with the notion that courts

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<sup>41</sup> Doug, L., "Prior Restraints and the Presumption of Unconstitutionality", University of Missouri-Kansas City Law School. (2012), <http://law2.umkc.edu/faculty/projects/frtrial/conlaw/priorrestraints.htm> (accessed 3rd November, 2014).

<sup>42</sup> 502 U.S. 527 (1992).

<sup>43</sup> Shiffrin, J.B., *supra* note 14 at p. 201.

have special insight regarding the way that our world works that authorizes them to pronounce the values that “everybody knows.” The goal was to show what makes these decisions difficult. I perhaps did not state the conflict as strongly as I could have. The difficulty was that ultimately, a decision was necessary. The decision was not arbitrary. It was based on a weighing of the values and my understanding of the situation. The opinion was also meant to persuade others that this was a correct, but not neutral, decision. I have in mind Walzer’s<sup>44</sup> method of making philosophical argument — “to interpret to one’s fellow citizens of the world of meanings that we share” — hoping that, if my interpretation is apt, then my decision will be accepted.<sup>45</sup>

Shiffrin concludes by noting that a jurisprudence of values that answers the judgment is possible and that the plea is to make the value choices underlying the law explicit so that we can approach them responsibly and perhaps make better choices.<sup>46</sup>

### **Dias’ Postulates of ‘Values’**

Dias has written extensively on ultimate value of the law as identified in the conventional Western jurisprudence. According to him, the principal yardsticks by which conflicting interests and values are measured may tentatively be listed under nine principal headings.<sup>47</sup> They include the following:

- i) *Sanctity of the person*; in *Sommersett’s Case*<sup>48</sup>, the claim of ownership by a slave-owner over his slave was rejected by the court. Lord Mansfield declared that ‘slavery was so repugnant to English ideas that *Sommersett* should go free.<sup>49</sup> Similarly, in *Horwood v. Millar’s Timber and Trading Co., Ltd.*<sup>50</sup> the court rejected as unreasonable a contract which would have reduced a person to a condition of virtual slavery.<sup>51</sup>
- ii) *Sanctity of property* - respect for property has given rise to the rule that there should be no deprivation without compensation.<sup>52</sup> In *Attorney General v. De Keyser’s Royal Hotel, Ltd.*<sup>53</sup>

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<sup>44</sup> Walzer, M., *Spheres of Justice: A Defense of Pluralism and Equality*, New York: Basic Books, Inc., (1983), at p. 97.

<sup>45</sup> Singer, J., W., *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1, 38 (1984), p. 20; Shiffrin, J.B., *supra* note 14 at p. 212.

<sup>46</sup> Shiffrin, J.B., *supra* note 14 at p. 217.

<sup>47</sup> Dias, R.W.M., *Jurisprudence*, (3<sup>rd</sup> ed.) London, Butterworths, (1970), p. 166.

<sup>48</sup> (1772), 20 State Tr. 1; see also *Chamberline v. Harvey* (1696), 5 Mod. 186; *Forbes v. Cochrane* (1824), B. & C. 448.

<sup>49</sup> Dias, R.W.M., *supra* note 47 at 167.

<sup>50</sup> [1917] 1 K.B. 305.

<sup>51</sup> Dias, R.W.M., *supra* note 47 at p. 167. See also a more recently decided case of *Eastham v. Newcastle United Football Club, Ltd.* [1964] Ch. 413; [1963] 3 All E.R. 139 where the court invalidated a contract whereby it was sought to operate the retention and transfer system of engaging professional footballers on grounds of unreasonable restraint of trade.

<sup>52</sup> Dias, R.W.M., *supra* note 47 at 169.

the court held that a prerogative power in the Crown to expropriate private property without compensation has to give way to a statutory power of expropriation subject to compensation.<sup>54</sup>

iii) *National and social safety* - both sanctity of the person and of property give way when the safety of the nation or of society is at stake.<sup>55</sup> In *Liversidge v. Anderson*<sup>56</sup> the statutory provision that empowered the Home Secretary to incarcerate *Liversidge* under the belief that the safety of nation was at stake was given a subjective interpretation by the majority of the House of Lord and thus validated.<sup>57</sup>

iv) *Social welfare*; - in *Edgington, Bishop and Withy v. Swindon Borough Council*,<sup>58</sup> it has been held that the utility of a public shelter outweighed the degree of interference with private rights that it caused.

v) *Equality* – the popular notion of “justice” is based, however vaguely, on a sense of equality, either distributive or corrective.<sup>59</sup> Lord Hewart, C.J. in *R. V. Sussex JJ., Ex parte McCarthy* said that: “Justice should not only be done, but should manifestly and undoubtedly be seen to be done”.

vi) *Consistency and fidelity to rules, principles, doctrine and tradition* – this is considered to be conformity with existing rules and conformity with principles.<sup>60</sup> The value of consistency means that a judge usually prefers to translate the facts of the instant case into an existing type-situation rather than play a new variation, and the question for simple reasons that people often regulate their conduct with reference to existing rules, and it is important that judges should keep to them.<sup>61</sup> Similarly, innovations can be unsettling and lead to a loss of confidence.<sup>62</sup> Due to apathy, human inclination usually prefers control and guidance to taking personal decision which sometimes may be painful.<sup>63</sup>

vii) *Morality* – moral considerations do influence rules of law.<sup>64</sup> Allen observes that: “our judges have always kept their fingers delicately but firmly upon the pulse of the accepted

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<sup>53</sup> [1920] A.C. 508; see also *Re Petition of Right*, [1915] 3 K.B. 649; *Universities of Oxford and Cambridge v. Eyre & Spottiswood*, [1964] Ch. 736; [1963] 3 All E.R. 289; *Minister of Housing and Local Government v. Hartnell*, [1965] A.C. 1134; [1965] 1 All E.R. 490.

<sup>54</sup> Dias, R.W.M., *supra* note 47 at 169.

<sup>55</sup> Dias, R.W.M., *ibid*.

<sup>56</sup> [1942] A.C. 206 ; [1941] 3 All E.R. 338.

<sup>57</sup> Dias, R.W.M., *ibid*; but this decision was contrasted by the case of *Roberts v. Hopwood*, [1925] A.C. 578.

<sup>58</sup> [1939] 1 K.B. 86; [1938] 4 All E.R. 57; see also *Oakes v. Minister of War Transport* (1944), 60 T.L.R. 319; *Ching Garage, Ltd. V. Chingford Corporation*, [1961] 1 All E.R. 671; [1961] 1 W.L.R. 470.

<sup>59</sup> Dias, R.W.M., *supra* note 47 at p. 180.

<sup>60</sup> *Ibid* at p. 189.

<sup>61</sup> *Ibid* at p. 190.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid*.

morality of the day.”<sup>65</sup> Lord Mansfield went a step further stated with emphasis that “the law of England prohibits everything which is contra *bonos mores*”<sup>66</sup>

viii) *Administrative convenience* – convenience may form a major factor in determining how to interpret a particular rule.<sup>67</sup> It may also assist in deciding an issue.<sup>68</sup>

ix) *International comity* – the question of interdependence has made it imperative for nation states to wish to maintain friendly relations with each other especially now that the world has become a global village. This has gone a long way in shaping a number of domestic rules. For instance, statutes will be constructed in such a way to avoid conflict with international order.<sup>69</sup> In the absence of any statutory or common law rule, a court may adopt a rule of international law.<sup>70</sup>

### ***Ijtihad*: Path to discovering ‘Value’**

The process that makes Islamic law dynamic is its evolution in the changing circumstances possible, results from a particular type of academic research and intellectual effort which, is known in legal terminology as *Ijtihad*.<sup>71</sup> *Al-Shafi’i* remarked that “*Qiyas* and *Ijtihad* represent the intellectual process whereby a finite body of revealed texts may be rendered relevant to the infinite complexity of human events. Every event that befalls a Muslim has its necessary religious value (*hukm lazim*), and there is evidence as to the true path in that matter. It is incumbent on the Muslim if there is a specific ruling on a matter to follow it. If there is no specific ruling then evidence as to the true path must be sought by *Ijtihad*.”<sup>72</sup>

Literally *Ijtihad* means ‘the expending of maximum effort in performance of an act’<sup>73</sup> or ‘the expending of effort and the exhaustion of all power.’<sup>74</sup> In technical sense however, it means ‘the expenditure of effort in seeking and arriving at rules from the various sources of law’,<sup>75</sup> or the effort made by the *Mujtahid* in seeking knowledge of the *abkam* (rules) of

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<sup>65</sup> Allen, C.K., *Legal Duties and Other Essays in Jurisprudence*, Oxford: The Clarendon Press (1931), p. 201.

<sup>66</sup> *Jones v. Randall* (1774), 1 Cop. 17, at p. 39; see also *R. V. Delaval* (1763), 3 Burr. 1434, at pp. 1438-1439.

<sup>67</sup> See *Fry v. Inland Revenue Commissioners*, [1959] Ch. 86; [1958] 3 All E.R. 90; *Gatehouse v. Vise (Inspector of Taxes)*, [1956] 3 All E.R. 772, at pp. 776-777.

<sup>68</sup> *Adams v. National Bank of Greece S.A.*, [1961] A.C. 255, at p. 276; [1960] 2 All E.R. 421, at p. 426.

<sup>69</sup> *Dias*, R.W.M., note 47 at p. 40.

<sup>70</sup> *Ibid* at pp. 40-42.

<sup>71</sup> Maududi, S.A.A., *The Islamic Law and Constitution*, Taj Company, New Delhi, (1986), p. 76.

<sup>72</sup> Calder, N., *Interpretation and Jurisprudence in Medieval Islam*, (ed. By Mojaddedi, J. and Rippin, A.) Ashgate Variorum, (2006), pp. 61-2.

<sup>73</sup> *Ibid* at p. 263.

<sup>74</sup> Mahmassani, S., *Falsafah al-Tashri’ fi al-Islam – The Philosophy of Jurisprudence in Islam*, Penerbitan Hizb, Malaysia, (1987), p. 92.

<sup>75</sup> *Ibid*.

the *Shari'ah* through interpretation.<sup>76</sup> It is defined as the total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of *Shari'ah* from their detailed evidence in the sources.<sup>77</sup> It is also defined as the application by a jurist of all his faculties either in inferring the rules of *Shari'ah* from their sources, or in implementing such rules and applying them to particular issues.<sup>78</sup>

### ***'Closure' of the Door of Ijtihad***

In the early period of 'Abbasid dynasty the schools of Islamic law had emerged. Not only that, Islamic law itself had approached the end of its formative phase. And, with active patronage of the government, the whole sphere of law had been brought to its horizon.<sup>79</sup> It was shortly after lapse of that formative period that the question of *Ijtihad* and who was capable or qualified to exercising it was raised.<sup>80</sup> By the early part of the fourth century of the *Hijra* (about A.D. 900), Islamic law had attained a pinnacle of development. During this formative period, the first two and a half centuries of Islam (or until about the middle of the ninth century A.D.), scholars or specialists of law had unfettered right and freedom to explore Islamic law to solving legal issues.<sup>81</sup>

Shortly afterward, the administration of the state and religious law drew apart again.<sup>82</sup> Similarly, scholars of all schools felt that all essential questions had been thoroughly examined and conclusively determined. Consequently, unanimity unwittingly emerged to the effect that henceforth, no one might be eligible to form independent legal opinion – implying that all subsequent activity would have to be strictly restricted to the explanation, application, and, at the most, interpretation of the doctrine that had been laid down once and for all.<sup>83</sup> This marked the beginning of the notion of the 'closure of the door of *Ijtihad*' and again implying asking for the adoption of *taklid*. *Taklid* itself is a term which had originally denoted the kind of reference to Companions of the Prophet that had been customary in the ancient schools of law, and which now came to mean the unquestioning acceptance of the doctrines of established schools and authorities.<sup>84</sup>

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<sup>76</sup> Nyazee, I.A.K., *Islamic Jurisprudence, (Usul al-Fiqh)*, the Other Press, The Institute of Islamic Thought, and Islamic Research Institute, Islamabad, Pakistan, (2000), at p. 263.

<sup>77</sup> Amidi, S. D. A. M., *al-Ihkam fi Usul al-Ahkam*, vol. IV, Beirut: al-Maktab al-Islami, (1402/1982), p. 162; Kamali, M.H., *Principles of Islamic Jurisprudence*, The Islamic Texts Society, Cambridge, (2003), p. 469.

<sup>78</sup> Abu Zahrah, M., *Usul al-Fiqh*, Cairo: Dar al-Fikr al-'Arabi, (1973), p. 301; Kamali, M.H., *ibid*.

<sup>79</sup> Schacht, J., *An Introduction to Islamic Law*, Clarendon Press, Oxford, (1982), p. 69.

<sup>80</sup> *Ibid* at p. 70.

<sup>81</sup> *Ibid*.

<sup>82</sup> Schacht, J., *supra* note 79 at p. 70

<sup>83</sup> Hallaq, W.B., *Was The Gate of Ijtihad Closed?* *International Journal of Middle East Studies*, Cambridge University Press, 16 (1984), p. 3.

<sup>84</sup> *Ibid*.

Schacht argues that the first indications of an attitude which denied to contemporary scholars the same liberty of reasoning as their predecessors had enjoyed are noticeable in *Shafi'i*, and from about the middle of the third century of the *Hijrah* (ninth century A.D.) the idea began to gain ground that only the great scholars of the past who could not be equaled, and not the epigones, had right to 'independent reasoning'.<sup>85</sup> J. N. D. Anderson, like many others, contended that about the end of the third/ninth century it was commonly accepted that the gate of *Ijtihad* had become closed.<sup>86</sup> And to confirm this assertion, H. A. R. Gibb argued that the early Muslim scholars held that the gate "*was closed, never again to be reopened.*"<sup>87</sup> W. M. Watt doubted the accuracies in the standard account about this subject without suggesting an alternative view.<sup>88</sup> Some historical accounts relate the subject in explaining the immunity of the *Shari'ah* against the government interference, and others use it to establish a link between the problem of decadence in Islamic institutions and culture.<sup>89</sup>

Against what appears to be the general and traditional position however, Wael, B. Hallaq, argues that a systematic and chronological study of the original legal sources reveals that these views on the history of *Ijtihad* after the second/eighth century are entirely baseless and inaccurate.<sup>90</sup> He contended further that the gate of *Ijtihad* was not closed in theory nor in practice. According to him, *Ijtihad* was indispensable in legal theory because it constituted the only means by which jurists were able to reach the judicial judgments decreed by God. In order to regulate the practice of *Ijtihad* a set of conditions were required to be met by any jurist who wished to embark on such activity. All these put together serve as evidence to disprove the argument of closure of the door of *Ijtihad*.<sup>91</sup> He argued further that the idea of closing the gate of *Ijtihad* or the notion of the extinction of *Mujtahids* did not appear during the first five Islamic centuries. According to him, this is entirely in consonance with the fact that the practical and theoretical importance of *Ijtihad* had not declined throughout this period: *Ijtihad* and *Mujtahids* were

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<sup>85</sup> Schacht, J., *supra* note 79 at p. 70.

<sup>86</sup> Anderson, N. D., *Law Reform in the Muslim World* (London, 1976), p. 7. See also M. Khadduri, "From Religious to National Law," in J. H. Thompson and R. D. Reischauer, eds., *Modernization of the Arab World* (Toronto, 1966), p. 41; F. Rahman, *Islam* (Chicago, 1966), pp. 77-78; H. A. R. Gibb, *Mohammedanism* (New York, 1962), p. 104; A. S. Triton, *Materials on Muslim Education in the Middle Ages* (London, 1957), p. 163; N. J. Coulson, *A History of Islamic Law* (Edinburgh, 1964), p. 81. See also the introduction of G. L. Lewis to *Katib Chelebi's The Balance of Truth* (London, 1957), pp. 18-19. For additional citations on this, see notes 6 and 7 below.

<sup>87</sup> Gibb, H. A. R., *Modern Trends in Islam* (Chicago, 1947), p. 13; *idem.*, *Mohammedanism*, p. 98.

<sup>88</sup> Watt, W. M., "The Closing of the Door of *Ijtihad*," *Orientalia Hispanica*, I (Leiden, 1974), 675-678.

<sup>89</sup> Watt, W. M., *Islam and the Integration of Society* (Evanston, 1961), pp. 206-207, 242-243; H. Liebesny, "Stability and Change in Islamic Law," *Middle East Journal*, 21 (1967), 19; Coulson, *History*, pp. 80-81; Schacht, *supra* note 79 at, p. 75; Rahman, *Islam*, pp. 77-78.

<sup>90</sup> Hallaq, W.B., *supra* note no. 83 at p. 4.

<sup>91</sup> *Ibid.*

employed in the domain of law and were required in the higher ranks of government.<sup>92</sup> That *Ijtihad* constituted the backbone of the Sunni legal doctrine was manifest in the exclusion from *Sunnism* of all groups that spurned this legal principle.<sup>93</sup>

Wael Hallaq's argument that the '*gate of Ijtihad was not closed in theory nor in practice. ...Ijtihad was indispensable in legal theory because it constituted the only means by which jurists were able to reach the judicial judgments decreed by God*' is correct against the background of the historical challenges Islamic law had encountered and survived.

Benjamin Jokisch holds similar view. He first noted that Western accounts of Islamic law is that 'door of *Ijtihad*' was closed in about the fourth/tenth century and since then, *Shari'ah* has been unable to take account of changes through time because it has lost its flexibility.<sup>94</sup> Contrary to this traditional view and agreeing with recent research,<sup>95</sup> he explains that *Ijtihad* in reality continued to exist after the fourth/tenth century.<sup>96</sup>

Be that as it may, the fact remains that Islamic law, which until the early 'Abbasid period, had been adaptable and growing, from then onwards, became subjected to rigidity and put in a final mold.<sup>97</sup> This stagnating position of the law has remained till the present time. This is very obvious in a comparative assessment of Islamic law with other modern legal systems. Schacht maintained in this regard that taken as a whole, Islamic law reflects and fits the social and economic conditions of the early 'Abbasid period, but has grown more and more out of touch with later developments of state and society.<sup>98</sup> Muhammad Hashim Kamali reached the same conclusion.<sup>99</sup>

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<sup>92</sup> Ibid at p. 33.

<sup>93</sup> Ibid.

<sup>94</sup> Goldziher, I., 'Muhammedanisches Recht in Theorie und Wirklichkeit, *Zeitschrift für vergleichende Rechtswissenschaft*, 8, (1989), pp. 406-23, esp. 409; Bousquet, G., *Du droit musulman et de son application effective dans le monde*, Algiers, (1949), p. 7; Coulson, N., *A History of Islamic Law*, Edinburgh, (1964), p. 2; *ibid* 'Doctrine and Practice in Islamic Law', *BSOAS* 18, (1984), p. 69; Crone, P., *Roman Provincial and Islamic Law*, Cambridge, (1987), p. 18; Sjukijajnan, I., *Musuljanskoe Pravo*, Moskau, (1986), p. 97.

<sup>95</sup> Hallaq, W., *Usul al-Fiqh: Beyond Tradition*, *Journal of Islamic Studies*, 3 (1992), pp. 172-202, esp. 182; Krawietz, B., *Die Hurma, Schariatrechtlicher Schutz vor Eingriffen in die korpeliche Unverschrtheit nach arabischen Fatwas des 20. Jahrhunderts*, Berlin, (1991), p. 323; North, A., 'Die Scharia, das religiöse Gesetz des Islam Wandlungsmöglichkeiten, Anwendung und Winkung', in Fikentstcher, Frank and Kohler eds, *Entstehung und Wandel rechtlicher Traditionen*, Freiburg/München, (1980), pp. 415-37 esp. 429; Johansen, B., *The Islamic Law on Land Tax and Rent*, London, (1988), p. 21; Hallaq, W., *Usul al-Fiqh: Beyond Tradition*, *Journal of Islamic Studies*, 3 (1992), pp. 172-202, esp. 182.

<sup>96</sup> Jokisch, B., *Ijtihad in Ibn Taymiyya's fatawa* in 'Islamic Law, Theory and Practice, ed. by Gleave, R., and Kermili, E., I.B. Tauris Publishers, London and New York, (2001), p. 119.

<sup>97</sup> Schacht, J., *supra* note no. 79 at p. 75.

<sup>98</sup> Ibid.

<sup>99</sup> Kamali, H.M., *supra* note no.77 at pp. 494-95.

Al-Tamawi has expressed similar view when he stated that Ijtihad by individuals in the manner that was practiced by the *fuqaha* of the past is no longer suitable to modern conditions. He then recommended the setting up of a council of qualified *Mujtabidun* to advice in the preparation and approval of statutory law so as to ensure it harmony with *Shari'ah* principles.<sup>100</sup>

Abdur Rahman I. Doi, also held the same view when he observed that: '*if the process of Ijma, Qiyas, Masalih al-Mursalab, Istislah and Istidlal are properly made to work, the Shari'ah will meet the challenges and the necessities of the modern life.*'<sup>101</sup>

The decline in the growth of Islamic law becomes more manifested in the subject of *Ijma*. Under classical theory, *Ijma* had been subjected to conditions that virtually consigned it to the realm of utopia.<sup>102</sup> Hashim Kamali noted that the unreality of the classical formulations of *Ijma* is reflected in modern times in the experience of Muslim nations and their efforts to reform certain areas of the *Shari'ah* through the medium of statutory legislation. He further observed that: 'the classical definitions of *Ijtihad* and *Ijma* might, at one time, have served the purpose of discouraging excessive diversity which was felt to threaten the very existence and integrity of the *Shari'ah*. But there is no compelling reason to justify the continued domination of a practice that was designed to bring *Ijtihad* to a close.'<sup>103</sup>

As earlier stated, there is element of accuracy in the assertion of Wael Hallaq.<sup>104</sup> This assertion will however, be put into further test when the issue of law-making in a Muslim majority state like Saudi Arabia is considered. It is intended to examine a number of local legislations of Saudi Arabia (the bastion of *Sunni*) against the argument of the classical essentialist school which vehemently opposed interpretation and reinterpretation of Islamic law.

### ***Ijtihad and Modern Legislation***

As could be seen from the above, *Ijtihad* is primarily a practical tool for legislation. *Ijtihad* had effectively played this role in the course of historical development of Islamic law. However, when legislation became a monopoly of the state, any rule emanating from *Ijtihad* made by later days *Mujtabidun* are no long relevant except it is accepted by the state and converted into law through legislation.<sup>105</sup> In the same vein, an *Ijtihad* ruling may be accorded judicial recognition by the state judiciary. The *Mujtabid* in such a case would

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<sup>100</sup> Al-Tamawi, S.M., Al-Sultatt al-Thalath fi'l-Dasatir al-'Arabiyyah wa fi'l-Fikr al-Sihasi al-Islami, 2<sup>nd</sup> ed. Cairo: Dar al-Fikr al-'Arabi, (1973), p. 307; Kamil, H.M., *ibid*.

<sup>101</sup> Doi, A. R., Basis of *Shari'ah* (Islamic Law), Gaskiya Corporation, Zaria, Nigeria, (1983), p. 635.

<sup>102</sup> Kamali, H.M., *supra* note no. 77 at p. 259.

<sup>103</sup> *Ibid*.

<sup>104</sup> *Supra*

<sup>105</sup> Nyazee, I.A.K., *supra* note no. 76 at p. 272.

be the state through its legal or judicial apparatus and not the individual.<sup>106</sup> The trend in Muslim majority states of the present is that various councils or commissions of scholars are created and financed by the states under an officially appointed *Mufti* who in most instances may not be officially recognized as a qualified *Mujtahid* in the traditional Islamic scholarship. Their opinions on issues are, in most cases, advisory and sometimes recommendatory, since those Councils or Commissions are part and parcel of the state. At international levels, there are a number of such bodies like, the Muslim World League, the Islamic *Fiqh* Academy of the Organization of Islamic Co-operation whose opinions are mere advisory and recommendatory. Their opinions on issues may not enjoy official enforcement and sanction.<sup>107</sup>

### ***Maqasid al-Shari'ah*: Literalism versus Empiricism**

As stated in the previous paragraph, the importance of *Ijtihad* in the development of Islamic law cannot be overemphasized. The theory of *maqasid* is an independent theme of the *Shari'ah*, it however has direct connection to *Ijtihad* even though the *maqâsid* have not been treated as such in the conventional theoretical analysis of *Ijtihâd*. Perhaps the reason being that Islamic legal thought is, broadly speaking, preoccupied with concerns over conformity to the letter of the divine text, and the legal theory of *Usûl al-Fiqh* has advanced that purpose to a large extent.<sup>108</sup>

This traditional attitude of the juristic thought was generally more pronounced among the *traditionist* or *literalists* (the *Ahl al-Hadîth*) than that of the Rationalists or liberalists (the *Ahl al-Ray*). The literalists were inclined to view the *Shari'ah* as a set of rules, commands and prohibitions that were addressed to the competent individual *mukallaf* and all that the latter was obliged to strictly comply with to its dictates.<sup>109</sup>

In the first three centuries of Islam, the literalists tradition attitude was not much interested in the theory of *maqâsid al-Shari'ah* and it was not until the time of *al-Ghazâlî* (d. 505/1111) and then *al-Shâtibi* (d. 790/1388) that significant developments were made in the formulation of the theory of *maqâsid*.

One of the main goals of Islamic Jurisprudence is to provide a set of guidelines with a view to ensuring that *ra'y* (reason) plays a supportive role to the values of *wahy* (revelation).<sup>110</sup> In other words, it works towards achieving harmony and communality

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<sup>106</sup> Ibid at p. 273.

<sup>107</sup> Ibid.

<sup>108</sup> Kamali, H.M., <http://www.sunniforum.com/forum/showthread.php?6176-Maqasid-al-Shariah-The-Objectives-of-Islamic-Law> (accessed 17/03/2012). See also Kamali, H.M., *Maqasid al-Shari'ah Made Simple*, International Institute of Advanced Islamif Studies (IIAIS), (2009).

<sup>109</sup> Ibid

<sup>110</sup> Kamali, H.M., *supra* note no. 77 at p. 513.

between revelation and reason in the interest of mankind. *Shari'ah* is fundamentally assertive of the benefits of the individual and that of the community. Rules under its system are thus, designed so as to protect these benefits with a view to facilitate improvement and perfection of the conditions of human life on earth.<sup>111</sup> Thus, the Qur'an, though, through a process of induction (*istiqrā'*) rather than through deduction,<sup>112</sup> is expressive of this as well when it singles out the most important purpose of the Prophethood of Muhammad in such terms as: "We have not sent you but a mercy to the world".<sup>113</sup> This is also affirmed perhaps when the *Qur'an's* characterizes itself as: "a healing to the (spiritual) ailment of the hearts, guidance and mercy for the believers" (and mankind)."<sup>114</sup>

Principally, the inner dynamics of the Qur'an and *Sunnah* can be figured out in their assertion on principles of justice and equity, equality and truth, on commanding good and forbidding evil, on the promotion of benefit and prevention of harm, on charity and compassion, on fraternity and co-operation among ethnic, tribal groups and nations of the world community, on consultation and government under the rule of law, mutual respect and observance of rights of all.<sup>115</sup> Details of their guidelines expressed as *Shari'ah* are geared towards achieving these objectives.

Generally speaking, theoretical methodology of Islamic law is explicit. But, it is devoid of meaning if it lacks human face. In other word, its literal rules have to be given practical expression to serve as truly social engineering which is fundamentally meant to be. This explains the paradigm shift in modern time from the structures of literalism towards empirical attainment of the goals set, *ab initio*, by the Law-giver.

Al-Ghazali in one of his testamentary legal theories emphasized the importance of the *Maqasid al-Shari'ah* and the need to consider the texts collectively to benefit from the spirit of the law.<sup>116</sup> By this Al-Ghazali opened a new field for scholars to explore. Thus, those who followed him in this subject occupied themselves with the refinement of the *maqasid*.<sup>117</sup> Al-Razi was one of them. Similarly, *Sadr al-Shari'ah*, in his *al-Tawdih fi Hall al-Ghawamid al-Tanqih*, was fascinated with this theory and tried to assess the Hanafi position with respect to the *maqasid*.<sup>118</sup> It was however, *al-Shatibi*, a Maliki jurist who built his extensive study on rules of interpretation around the principle of *maqasid al-*

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<sup>111</sup> Ibid.

<sup>112</sup> Al-Shatibi, al-Muwafaqat, vol. 2, p. 7.

<sup>113</sup> Qur'an 21: 107.

<sup>114</sup> Qur'an10: 57.

<sup>115</sup> Kamali, H.M., supra note no. 77 at p. 513.

<sup>116</sup> Nyazee, I.A.K., Theories of Islamic Law, Islamic Research Institute, International Islamic University, Islamabad, Pakistan, (2009), p. 225.

<sup>117</sup> Ibid.

<sup>118</sup> See Al Sadr al-*Shari'ah*, U.A.M.M., al-Tawdih fi Hall al-Ghawamid al-Tanqih, Cairo: Dar al-'Ahd al-Jadid li'l-Taba'ah, (1377/1957); Nyazee, I.A.K., ibid.

*Shari'ah*.<sup>119</sup> The combined effect of these juristic efforts had come a long way in the refining the understanding of the *maqâsid al-Shari'ah* and also revealed their significance for Islamic community as a whole.<sup>120</sup>

The term '*maqâsid*' was first used in the early fourth century and appeared in the juristic autography of Abû 'Abd Allâh al-Tirmidhî al-Hakîm (d. 320/932) and it was regularly referred to in the works of Imâm al-Haramayn al-Juwaynî (d. 478/1085) who was said probably the first to have classified the *maqâsid al-Shari'ah* into the three categories of essential, complementary and desirable (*darûriyyât, hâjjiyyât, tahsîniyyât*).<sup>121</sup> His classification enjoyed general recognition ever since. Abu Hamid al-Ghazali, a student of al-Juwaynî later developed his idea and wrote in details on public interest (*maslahah*) and ratiocination (*ta'lîl*) in his works, *Shifâ' al-Ghalîl* and *al-Mustasfâ*.<sup>122</sup>

Ghazâlî was prepared to recognize *maslahah* if it was to promote the *maqâsid* of the *Shari'ah*. That explained why he was categorical in his treaty on the subject contending that the *Shari'ah* pursued five values, namely, faith, life, intellect, lineage and wealth or property all of which were to be protected as a matter of absolute priority.<sup>123</sup> It was at a later stage that a number of leading jurists began to contribute in expanding the scope of the theory. For instance, Sayf al-Dîn al-Âmidî (d. 631/1233) identified the *maqâsid* as criteria of preference *al-tarjîh* among conflicting analogies and elaborated on an internal order of priorities among the various classes of *maqâsid*.<sup>124</sup> He also restricted the essential *maqâsid* to only five.<sup>125</sup>

The Mâlikî jurist, Shihab al-Din al-Qarâfî (d. 684/1285) added a sixth to the existing list, namely the protection of honor (*al-'ird*)<sup>126</sup> and this was endorsed by Taj al-Din 'Abd al-Wahhab ibn al-Subki (d. 771/1370) and later by Muhammad ibn 'Alî al-Shawkânî (d. 1250/1834). The list of five essential values was evidently based on a reading of the relevant parts of the *Qur'an* and the *Sunnah* on the prescribed penalties (*hudud*). The value that each of these penalties sought to vindicate and defend was consequently identified as an essential value. The latest addition (i.e. *al-'ird*) was initially thought to have been covered under lineage (*al-nasl*, also *al-nasab*), but the proponents of this addition relied on the fact that the *Shari'ah* had enacted a separate *hadd* punishment for slanderous

<sup>119</sup> See Al-Shatibi, A.I.I., *al-Muwafaqat fi Usul al-Ahkam*, ed Muhammad Hasnayn Makhluḥ, Cairo: al-Matba'ah al-Salafiyyah (1341 A.H.); Nyazee I.A.K., *ibid*.

<sup>120</sup> Nyazee, I.A.K., *supra* note 116 at p. 225

<sup>121</sup> Kamali, H.M., *supra* note no. 77 at p. 513.

<sup>122</sup> Al-Ghazali, A.H. M.M., *Shifâ' al-Ghalîl fi Bayan al-Shabah wa-al-Mukhil wa Masalik al-Talîl*, Baghdad, (1971).

<sup>123</sup> *Ibid*.

<sup>124</sup> See Al-Amidi, S. D. A. M., *al-Ihkam fi Usul al-Ahkam*, 4 vols., ed. 'Abd al-Razzaq 'Affi, 2<sup>nd</sup> edn. Beirut: al-Maktab al-Islami, (1402/1982).

<sup>125</sup> *Ibid*.

<sup>126</sup> Al-Qarafi, S.D.A., *Sharh Tanqil al-Fusul fi Ikhtisar al-Mahsul fi al-Usul*. Cairo, (1393/1973).

accusation (*al-qadhif*), which justified the addition. ‘Izz al-Dîn ‘Abd al-Salâm al-Sulami’s (d. 660/1262) renowned work, *Qawa’id al-Ahkam*, was in his own characterization a work on ‘*maqasid al-ahkam*’ and addressed the various aspects of the *maqasid* especially in relationship to ‘*illah*’ (effective cause) and *maslahah* (public interest) in greater detail. Thus he wrote at the outset of his work that "the greatest of all the objectives of the *Qur’ân* is to facilitate benefits (*masâlih*) and the means that secure them and that the realization of benefit also included the prevention of evil." Sulamî added that all the obligations of the *Shari’ah* (*al-takalif*) were predicated on securing benefits for the people in this world and the next. For God Most High is Himself in no need of benefit nor is He in need of the obedience of His servants. He is above all this and cannot be harmed by the disobedience of transgressors, nor benefit from the obedience of the righteous. The *Shari’ah* is, in other words, concerned, from the beginning to the end, with the benefits of God’s creatures.

Taqi al-Din ibn Taymiyyah (d. 728/1328) was probably the first scholar to depart from the notion of confining the *maqasid* to a specific number and added, to the existing list of the *maqasid*, such things as fulfillment of contracts, preservation of the ties of kinship, honoring the rights of one’s neighbor, in so far as the affairs of this world are concerned, and the love of God, sincerity, trustworthiness, and moral purity, in relationship to the hereafter. Ibn Taymiyyah thus revised the scope of the *maqasid* from a designated and specified list into an open-ended list of values, and his approach is now generally accepted by contemporary commentators, including Ahmad al-Raysuni, Yusuf al-Qaradawi and others. Qaradawi has further extended the list of the *maqasid* to include social welfare and support (*al-takaful*), freedom, human dignity and human fraternity, among the higher objectives and *maqasid* of the *Shari’ah*. These are undoubtedly upheld by both the detailed and the general weight of evidence in the *Qur’an* and the *Sunnah*

### ***Classification of Maqasid***

The values or objectives of law as specified by Al-Ghazali with approval of majority of jurists including al-Shatibi, are first of two types, namely, *dini* or values of the Hereafter and *dunyawi* or values pertaining to this world.<sup>127</sup> The worldly values (*dunyawi*) are further classified into four, namely, the preservation of *nafs* (life), the preservations of *nasl* (progeny), the preservation of ‘*aql*’ (intellect), and the preservation of *mal* (wealth or property).<sup>128</sup> The totality of these classifications yield five ultimate values of the law, namely, *din* (religion), life, progeny, intellect, and wealth or property.<sup>129</sup> The entire range is thus classified into three in order of importance - the essential (*daruriyyat*), followed by the complementary benefits (*hajiyyat*), and then the embellishment (*tahsiniiyyat*).<sup>130</sup> The first

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<sup>127</sup> Nyazee, I.A.K., supra note 116 at p. 231.

<sup>128</sup> Nyazee, I.A.K., *ibid*.

<sup>129</sup> Nyazee, I.A.K., *ibid*.

<sup>130</sup> See Al-Shatibi, A.I.I., *ibid*, ii, pp. 8-13; Kamali, H.M., <http://www.sunniforum.com/forum/>, *ibid*.

category is that of the necessities (*darurat*), which jurists believe have been maintained by all societies and without which existence of any kind of society is difficult.<sup>131</sup> This category is considered the primary *maqasid* and thus, the jurists pay particular attention on all the units of this category.<sup>132</sup> The remaining two categories play supportive role to this major category.

*The Essentials (daruriyyat)*: The essential interests are classified into five, namely, faith, life, lineage, intellect and property. These are, by definition, essential to normal order in society as well as to the survival and spiritual well-being of individuals, so much so that their destruction and collapse will precipitate chaos and collapse of normal order in society.<sup>133</sup> The *Shari'ah* seeks to protect and promote these values and validates measures for their preservation and advancement.<sup>134</sup> *Jihad* has thus been endorsed and authorized with a view to protect religion, and so is just retaliation (*qisas*) which is designed to protect life.<sup>135</sup> The *Shari'ah* takes affirmative and also punitive measures to protect and promote these values. Theft, adultery and wine-drinking are punishable offences as they pose a threat to the protection of private property, the well-being of the family, and the integrity of human intellect respectively. In an affirmative sense again, but at a different level, the *Shari'ah* encourages work and trading activity in order to enable the individual to earn a living, and it takes elaborate measures to ensure the smooth flow of commercial transactions in the market-place.<sup>136</sup> The family laws of the *Shari'ah* are likewise an embodiment largely of guidelines and measures that seek to make the family a safe refuge for all of its members. The *Shari'ah* also encourages pursuit of knowledge and education to ensure the intellectual well-being of the people and the advancement of arts and civilization. The essential *masalih*, in other words, constitute an all-encompassing theme of the *Shari'ah* as all of its laws are in one way or another related to the protection of these benefits. These benefits are an embodiment, in the meantime, of the primary and overriding objectives of the *Shari'ah*.<sup>137</sup>

The essentials or necessities (*daruriyyat*) are followed by other categories under the *maqasid al-Shari'ah*. These fall under the heading of needs (*hajjiyyat*). They are not regarded as indispensable necessities; they are needed for maintaining an orderly society and for laying the grounds to achieving the successful implementation of *daruriyyat*.<sup>138</sup> *Hajjiyyat*, or complementary interests, are not an independent category as they also seek to protect

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<sup>131</sup> Nyazee, I.A.K., supra note 116 at p. 236.

<sup>132</sup> Ibid

<sup>133</sup> Hallaq, W.B., *Shari'a, Theory, Practice and Transformations*, Cambridge University Press, (2009), p. 104.

<sup>134</sup> Kamali, H.M., supra note no. 77 at p. 513.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Hallaq, W.B., supra note no. 133.

and promote the essential interests, albeit in a secondary capacity.<sup>139</sup> These are defined as benefits, which seek to remove severity and hardship that do not pose a threat to the very survival of normal order. *Hajjiyyat* are illustrated in the area of criminal justice where a *hadith* is said to proclaim that "prescribed penalties are suspended in all cases of doubt". The rule in this *hadith* protects a secondary interest in that it regulates the manner in which punishments are enforced. These punishments are in turn designed to protect the essential interests through judicial action.<sup>140</sup> In the sphere of *mu'amalat*, the *Shari'ah* validated certain contracts, such as the sale of *salam*, and also that of lease and hire (*ijarah*) because of the people's need for them notwithstanding a certain anomaly that is attendant in both.<sup>141</sup>

The third categories are those known as embellishments, adornment, improvements or desirabilities (*tahsinīyyat*). They are those that include legal elements related to issues not directly connected with the *necessary* and *needed* goals of the law.<sup>142</sup> *Tahsinīyyat* seek to attain refinement and perfection in the customs and conduct of people at all levels of achievement.<sup>143</sup> For example, the *Shari'ah* encourages gentleness (*rifq*), pleasant speech and manner (*husn al-kehulq*) and fair dealing (*ihsan*). The judge and the head of state are similarly counseled not to be too eager in the enforcement of penalties, such a course being considered a desirable one to take.<sup>144</sup> Attainment of beauty and perfection in all spheres of human conduct are the primary objectives of *tahsinīyyat*.

Illustrating the practicality and applicability of the *maqasid* to general welfare of man, Muhammad Hashim Kamali has this to say:

*It should be obvious, then, that the classification of masalih need not be confined to the ahkam of the Shari'ah or to religious matters alone as it is basically a rational construct that applies to customary, social, political, economic and cultural affairs and so forth. To build the first hospital in a town is likely to be necessary and essential, but to build a second and third may be only complementary and desirable. And then to equip each one with the latest and most efficient health care facilities may fall under the category either of the second or the third classes of interests, depending, of course, on the general conditions of each locality.*

### ***Maqasid: Between Textualists and Rationalists***

In the course of exercising *Ijtihad* to identify the goals (*maqasid*) of the law, two camps, along the line emerged, namely, the classical/textualists and the liberalists. In this regard,

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<sup>139</sup> Kamali, H.M., supra note 134.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> Hallaq, W.B., supra no. 133.

<sup>143</sup> Kamali, H.M., supra note 134.

<sup>144</sup> Ibid.

the *Zahiri* jurists maintain the position of textualists approach while the majority of jurists maintain the liberalist position.<sup>145</sup>

The textualists' approach restricts the identification of the *maqasid* to the clear texts, commands and prohibitions, which in their argument are the conveyers and bearers of the *maqasid*.<sup>146</sup> According to them, *maqasid* have no separate existence outside the textual framework. They further argue that provided that a command is explicit and normative, it conveys the objective intended by the Law-giver in the affirmative sense, while prohibitions are indicative of the intended goals of the Law-giver in the negative sense in that the purpose of a prohibitive injunction is to suppress and avert the evil that the text in question has contemplated.<sup>147</sup>

The majority of jurists on the other hand takes into consideration both the text and the underlying *'illah* and rationale of the text.<sup>148</sup> For instance, the chief exponent of the *maqasid*, *Shatibi*, has spoken affirmatively of the need to observe and respect the explicit injunctions, but then he added that adherence to the obvious text should not be so rigid as to alienate the rationale and purpose of the text from its words and sentences.<sup>149</sup> He contended further that rigidity of this kind was itself contrary to the objective (*maqsud*) of the Lawgiver, just as would be the case with regard to neglecting the clear text itself.<sup>150</sup> According to him, when the text, whether in form of a command or a prohibition, is read together with its objective and rationale, it certainly bears greater harmony with the intention of the Lawgiver.<sup>151</sup> He then classified the *maqasid* into two main categories, namely, primary (*asliyyah*) and secondary (*tab'iyyah*). The former are the essential *maqasid* or *daruriyyat* which the *mukallaf* must observe and protect regardless of personal predilections, whereas the supplementary *maqasid -hajiyat-* are those which leave the *mukallaf* with some flexibility and choice.<sup>152</sup>

According to *Shatibi*, induction is the main methodology of identifying the *maqasid* from the texts. As an example, the notion of *maqasid* and classification into three are based on induction since there is no direct authority to that effect from the text.<sup>153</sup>

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<sup>145</sup> Al-Shatibi, A.I.I., *al-Muwafaqat fi Usul al-Shari'ah*, ed. Shaykh 'Abd Allah Diraz, Cairo, al-Maktabah al-Tijariyyah, al-Kubra, (n.d.) 2:393; Kamali, H.M., *Ibid*.

<sup>146</sup> Kamali, M.H., *supra* note 116 at p. 513.

<sup>147</sup> *Ibid*.

<sup>148</sup> *Ibid*.

<sup>149</sup> *Ibid*.

<sup>150</sup> Al-Shatibi, A.I.I., *supra* note 145; see also Kamali, H.M., *ibid*.

<sup>151</sup> Kamali, H.M., *supra* note 116 at p. 9.

<sup>152</sup> *Ibid*.

<sup>153</sup> *Ibid* at p. 11.

### *Maqasid and Ijtihad – Any Connecting Nexus?*

As stated earlier, only people with pre-requisite qualifications can engage in the exercise of *Ijtihad*. There is no gainsaying that a nexus exists between the concept of *Maqasid* and *Ijtihad*. Ordinarily, *Maqasid* should have been taken as a by-product of *Ijtihad*. Shatibi instead, espoused the knowledge of the *maqasid* as a pre-requisite of attainment to the rank of *Mujtabid*. He argued that those who disregard the necessity of knowledge of *maqasid* may be liable to fall into error while engaging in the exercise of *Ijtihad*. For instance, jurists have expressed different views on the question as to whether the *zakah* on commodities such rice, corn, or dates could be given in kind or whether they could be given in their monetary value. Jurists of Hanafi School approved giving out *zakah* in monetary value, while the *Shafi'i* held contrary view. *Hanafi's* ratio for this view was based on the notion of *maqasid* to the extent that the purpose of *zakah* is to meet the need of the poor and this can also be attained by paying the monetary value of grains and other valuable materials required to be paid as *zakah*.<sup>154</sup> Supporting this view, Ibn Qayyim al-Jawziyyah contended that the common purpose in this regard was to satisfy the need of the poor rather than to restrict its payment to a particular commodity.<sup>155</sup> This is a practical illustration of the importance of knowledge of *maqasid* before dabbling into the exercise of *Ijtihad*.

Shatibi's proposition therefore, implies that the concept of *maqasid* which should have been considered as a product of *Ijtihad*, itself is one of the basic requirements that a *mujtabid* should possess before embarking on *Ijtihad*. That explains why a *Mujtabid* is also required, while exercising *Ijtihad* to pay particular attention to the end result and consequence of his ruling on a particular matter.<sup>156</sup> This is where a nexus between *Ijtihad* and *Maqasid* is established.

### **Legal Value: A Comparative Analysis**

The questions of good and evil, right and wrong which are basically issues of morality mark a distinction between the value systems of both Western and Islamic Jurisprudence. In the Western jurisprudence, all these values are discoverable through the use of reason. Under Islamic jurisprudence, majority of Muslim jurists held that the guide for right and wrong is the *Shari'ah* and reason alone is not sufficient and thus, not a

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<sup>154</sup> Kamali, H.M., *ibid* at p. 16.

<sup>155</sup> Ibn Qayyim, A.M.A.J., *I'lam al-Muwaqqi'in 'an Rabb al-'Alamin*. Ed. Muhammad Munir al-Dimashqi, Cairo: Idarah al-Tiba'ah al-Muniriyyah, vol 3 (n.d.), p. 12, Raysuni, *Nazariyyat al-Maqasid*, 336; Kamali, H.M., *ibid* at p. 16.

<sup>156</sup> One of the examples usually quoted in support of this requirement is contained in *Sahih al-Bukhari*, *Kitab al-Manaqib*, *Ban Ma Yunha min Da'wah 'l-Jahiliyyah*, where the Prophet was reported to have the knowledge of the subversive activities of the hypocrites but he did not pursue them for reasons, as he stated himself, that: "I fear people might say that Muhammad kills his own Companions".

reliable guide.<sup>157</sup> It follows that the values asserted under Western jurisprudence are based on human reason; while under Islamic jurisprudence the value systems upheld by the *Shari'ah* have been defined and divinely ordained by the Law-giver.<sup>158</sup>

The value systems under Western Jurisprudence as identified by Dias are, to some extent, identical to the five goals of law under Islamic jurisprudence. It shows the possibility of harmony between revelation and reason. Secondly, it is also interesting to note that their use is also similar and so is the methodology.<sup>159</sup> This confirms the dynamic nature of Islamic law. It debunks argument of the literalist jurists that since Islamic law is fundamentally divine; any attempt towards its interpretation or re-interpretation would be contrary to the spirit and letter of the law. It also confirms the argument that under the Western jurisprudence values systems are discoverable through the use of reason, whereas under Islamic jurisprudence the guide for right and wrong is determined by the *Shari'ah* value; thus, reason alone is not sufficient and thus, not a reliable guide.

Therefore, the point of convergence between the two legal systems in this regard is that the value system under the Western jurisprudence and *Maqasid al-Shari'ah* under *Usul al-Fiqh* of Islam were developed through the mechanism of reason and *Ijtihad* respectively. Both Dias and other jurists in this camp evolved the idea through reason based on empirical phenomena of their society. Al-Ghazali and Shatibi the pioneering jurists of *Maqasid* also developed their notion by exercising *Ijtihad*. The point of divergence however, is that, while the Western jurists based their own idea on personal reasoning, their counterparts in the Islamic jurisprudence based their notion on the *Shari'ah* values that are divine and transcendental, namely, the *Qur'an* and *Sunnah*.

In a nutshell, the brief comparison is a proof that there are quite similarities in both Islamic and Western jurisprudence and there as well several critical differences too. However, there are points of convergence between the two legal systems.

## Conclusion

It can be concluded from this analysis that law may be meaningless when it comes to a straight-jacket application of its rules to cases without taking into account the underlined value or values within which such legal rules or principles exist. This reality is acknowledged by jurists of both the conventional and Islamic jurisprudence. The concept of value is inspired by fairness and conscience authorizing departure from a rule of positive law when its enforcement may likely lead to unfair results. However, under

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<sup>157</sup> Nyazee, I.A.K., *Theories of Islamic Law*, Islamic Research Institute, International Islamic University, Islamabad, Pakistan, (2009), pp. 314-4.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

the conventional legal norm, values are discoverable through the use of reason; while under Islamic system they are discovered through revelation and reason. The two are communally unanimous in their desire to achieve the ultimate justice.

## Gilbert and Sullivan for Lawyers

Stephen Kruger\*

### Abstract

Usual practice, in present-day performances of operas of Gilbert and Sullivan, is to freshen songs through substitution of current references for original references. The aim of a freshening is to perform a song for the benefit of contemporary audiences.

Example 1 (from *The Mikado*): “Then the idiot who praises, with enthusiastic tone, / All centuries but this, and every country but his own,” can be understood readily.

Example 2 (also from *The Mikado*): There is no present humor in the reference to “Parliamentary trains,” a Victorian railways term.

This essay offers a freshening of “I Am the Very Model of a Modern General,” from *The Pirates of Penzance*. Revised legal references, such as to court-packing (*Legal Tender Cases*; President Roosevelt), should be, but aren’t, teachable moments.

One of the songs in *The Mikado* is “As Some Day It May Happen That a Victim Must be Found.” In the song, Ko-Ko, the Lord High Executioner, offers his list of Victorian “society offenders . . . who never would be missed.” Among the revised legal references in the freshening is, “And law profs who convey as truth the lies of *Marbury*.” Other legal references aren’t better.

## INTRODUCTION

### *Gilbert and Sullivan*

William S. Gilbert (1836–1911) and Arthur Sullivan (1842–1900) created fourteen comic operas. Gilbert, a barrister, wrote the words and the lyrics. Sullivan, a musician, wrote the music. The best, and the most popular, among them are *Trial by Jury* (1875), *H.M.S. Pinafore* (1878), *The Pirates of Penzance* (1879 and 1880), *The Mikado* (1885), and *The Yeomen of the Guard* (1888).

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There is an abundance of G&S resources<sup>1</sup> and spoofs.<sup>2</sup>

*Carte*

The success of Gilbert and Sullivan required Richard D'Oyly Carte (1844–1901), the impresario, as the catalyst. Equal in importance to the success of Gilbert and Sullivan was Carte's second wife, Susan Black (1852–1913), whose stage name was Helen Lenoir.<sup>3</sup>

Ultimately, Gilbert and Sullivan aced the test of time, due to their transcendent creativity. Vocabular genius, lyrical genius, and musical genius are inexplicable, except as gifts of God.

*Comic operas*

Gilbert and Sullivan used the term “comic operas” to describe their productions. “They are certainly not mere ‘light’ operas, which are soft-centered romantic offerings; nor are they ‘operettas’, which are frilly, frothy affairs, devoid of any shade of the dark side.”<sup>4</sup>

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<sup>1</sup> Recommendations:

Biographies: Michael Ainger, *Gilbert and Sullivan[;] A Dual Biography* (Oxford: Oxford University Press, 2002); Andrew Crowther, *Gilbert of Gilbert & Sullivan* (Stroud, Glos.: The History Press, 2011); Arthur Jacobs, *Arthur Sullivan: A Victorian Musician* (Aldershot, Hants.: Scolar Press, 2nd ed. 1992).

Guides: Leslie Baily, *The Gilbert and Sullivan Book* (London: Cassell, 1952); David Eden and Meinhard Saremba, *The Cambridge Companion to Gilbert & Sullivan* (Cambridge: Cambridge University Press, 2009); Ed Glinert (ed.), *The Complete Gilbert & Sullivan* (London: Penguin Books, 2006) (hereinafter “Complete G&S”); Stanley Sadie (ed.), *The New Grove Dictionary of Opera* (London: Macmillan Press, 1992) (hereinafter “Grove”).

Librettos: Ian Bradley (ed.), *The Complete Annotated Gilbert and Sullivan* (New York: Oxford University Press, 1996); Martyn Green (ed.), *Martyn Green's Treasury of Gilbert & Sullivan* (New York: Simon & Schuster, 1985).

Online: “The Gilbert and Sullivan Archive at Boise State University” (n.d.), available at <http://math.boisestate.edu/gas> (accessed 8/2/2014) (main page); John Kenrick, “Gilbert & Sullivan 101” (2003), available at <http://www.musicals101.com/g&s101.htm> (accessed 8/2/2014).

<sup>2</sup> E.g., Anna Russell, “How to Write Your Own Gilbert and Sullivan Opera,” on *Anna Russell Sings! Again?* (Columbia Masterworks, Mono LP, ML4594/ML4733, 1953); Anna Russell, *The Anna Russell Songbook* (New York: Citadel Press, 1960).

<sup>3</sup> Philip H. Dillard, *Sir Arthur Sullivan[;] A Resource Book 119* (Lanham, Md.: Scarecrow Press, 1996); 1 *Grove*, supra, n. 1, at 745 (“Carte, Richard D'Oyly”); Geoffrey Smith, *The Savoy Operas 39-40* (London: Robert Hale, 1993).

<sup>4</sup> *Complete G&S*, supra, n. 1, at x.

In the comic operas, a spotlight is focused on Victorian society, and the spotlight simultaneously illuminates human nature.

### *Word and lyrics*

Gilbert's words and lyrics are exceptionally-versatile applications of the versatile English language. Even approximation of Gilbert's facility with words is a challenge.

Although *The Mikado* is performed in various foreign languages (French,<sup>5</sup> German,<sup>6</sup> and Yiddish,<sup>7</sup> and possibly others), the value of any foreign-language performance is dubious. Gilbert's wordsmithery is above and beyond foreign-language equivalence.

One wonders what foreign-language audiences hear. It is impossible to translate Gilbert's words and lyrics, and there is no way to transmute cultural essences.

Furthermore, it is hardly likely that a language other than English can match its happy amalgamation of grammar, vocabulary, and syntax. The German dialects brought to Britain by Angles, Saxons, and Jutes were transmuted into Old English, and the latter developed into Middle English and then became Modern English, in part through copious takings in of Norman French, Latin, and Greek words, and in part through an admixture of Dutch (freebooter; landscape; skipper), Irish (bog; keening; whiskey), and Old Norse (awkward; kindle; raft) words, and in part by way of a drizzle of Hindi (avatar; guru; loot), Spanish (alligator; canyon; renegade), and Yiddish (chutzpah; glitch; nudnik) words, and so on.

### *Music*

Sullivan's music is catchy, adaptable, and eminently musical. There is utility, in varied contexts, in re-use of Sullivan's music.

Act II of *The Pirates of Penzance* has:

Come, friends, who plough the sea,

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<sup>5</sup> actions pédagogiques, "Le Mikado (adaptation), Gilbert & Sullivan" (n.d.), available at [http://www.operafuoco.fr/fr/fiche-action\\_pedagogique-le\\_mikado\\_\(ou\\_la\\_ville\\_de\\_ttipu\)\\_gilbert\\_&\\_sullivan-34.html](http://www.operafuoco.fr/fr/fiche-action_pedagogique-le_mikado_(ou_la_ville_de_ttipu)_gilbert_&_sullivan-34.html) (accessed 8/22/2014).

<sup>6</sup> *Der Mikado; oder, Ein toller Tag in Titipu* (Köln [Cologne, Germany]: Bosworth, 1959).

<sup>7</sup> Gilbert & Sullivan Yiddish Light Opera Company, available at <http://www.gsyiddish.com> (accessed 8/22/2014) (main page).

Truce to navigation;  
Take another station;  
Let's vary piracee  
With a little burglaree!

That led to:

Hail, hail, the gang's all here,  
What the heck do we care,  
What the heck do we care,  
Hail, hail, the gang's all here,  
What the heck do we care now.<sup>8</sup>

Which became:

Hail, hail, the Celts are here,  
What the hell do we care,  
What the hell do we care,  
Hail, hail, the Celts are here,  
What the hell do we care now.<sup>9</sup>

Lawyers, solicitors, and barristers whose singing voices don't frighten children may sing the following:

Hail, hail, almighty judge,  
Sees to restitution;  
Metes out retribution;  
Varies severitee  
With a little equitee!

And:

Come, friends, lawyers like me,  
Stop representation;  
Find your true vocation;

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<sup>8</sup> Wikipedia, "Hail, Hail, the Gang's All Here" (n.d.), available at [http://en.wikipedia.org/wiki/Hail,\\_Hail,\\_the\\_Gang%27s\\_All\\_Here](http://en.wikipedia.org/wiki/Hail,_Hail,_the_Gang%27s_All_Here) (accessed 8/10/2014).

<sup>9</sup> Celtic Wiki, "Songs – History of Hail Hail and The Celtic Song" (n.d.), available at <http://www.thecelticwiki.com/page/Songs+-+History+of+Hail+Hail+and+The+Celtic+Song> (accessed 8/10/2014).

We'll live good lives when we  
Quit the lawsuit industree!

*Patter songs and list songs*

The comic operas of Gilbert and Sullivan have both patter songs and list songs.<sup>10</sup>

A patter song is characterized by light, quick music. Words are difficult to sing, because of numerous syllables, or alliterations, or similar consonants, or similar vowels, or a combination of these.

The quintessential patter song is “I Am the Very Model of a Modern General,” sung by Major-General Stanley in *The Pirates of Penzance*. It is presented in Act I of this essay, below.

In Act II of *Ruddigore*, by Gilbert and Sullivan, Robin, Despard, and Margaret sing “My Eyes Are Fully Open to My Awful Situation,” which is a patter song. The “awful situation” is Robin’s intended defiance of his ancestors; the penalty for defiance is death.

In part:

DEP. . . . .

This particularly rapid, unintelligible patter  
Isn’t generally heard, and if it is it doesn’t matter!

ROB. If it is it doesn’t matter –

MAR. If it is it doesn’t matter –

ALL. If it is it doesn’t matter, matter, matter, matter, matter.<sup>11</sup>

An in-joke, perhaps. Intelligibility as well as speed are vital for a quality performance of a patter song. The art of a patter song is to sing the words rapidly *and* clearly.

A list song is characterized by a theme. “As Someday It May Happen,” sung by Ko-Ko in *The Mikado*, is the quintessential list song. The theme is “society offenders . . . who never would be missed.” It is presented in Act II of this essay, below.

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<sup>10</sup> James Anderson, *The Complete Dictionary of Opera & Operetta* 436 (New York: Wings Books, 1993); Tvtrapes.org, “List song” (n.d.), available at <http://tvtrapes.org/pmwiki/pmwiki.php/Main/ListSong> (accessed 8/19/2014).

<sup>11</sup> Complete G&S, *supra*, n. 1, at 478.

Therein, at p. 840, footnote 41 reads: “*PATTER-TRIO*: Humorous song for three, where a large number of words are [*sic* (should be ‘is’)] sung rapidly to a few notes.”

*Copyright – United Kingdom*

Copyright law effective 1842: The copyright term of a dramatic work or of a musical composition was the longer of (a) the life of the author, plus a period of seven years after his death, and (b) 42 years from the first date of publication.<sup>12</sup>

Copyright law effective 1911: The copyright term of a dramatic work or of a musical composition was the life of the author, plus a period of 50 years after his death.<sup>13</sup>

Copyright law effective 1956: As with the copyright law which became effective in 1911, the copyright term of a dramatic work or of a musical composition was the life of the author, plus a period of 50 years after his death.<sup>14</sup>

Gilbert and Sullivan died in 1911 and 1900, respectively. Accordingly:

Gilbert's copyrights of the Gilbert and Sullivan comic operas expired in 1961.

Sullivan's copyrights of the Gilbert and Sullivan comic operas expired in 1950.

Under the copyright law of the United Kingdom, no permission is needed for use in this essay of "I Am the Very Model of a Modern Major-General" and of "As Someday It May Happen."

*Copyright – United States*

An American copyright for any Gilbert and Sullivan comic opera falls into the copyright category of literary works first registered or first published in the United States prior to 1923. It follows that, in the United States, every Gilbert and Sullivan comic opera is in the public domain.<sup>15</sup>

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<sup>12</sup> An Act to Amend the Law of Copyright, 5 & 6 Vict., c. 45, § III (copyright provisions for books), § XX (copyright provisions for books extended to dramatic works and musical compositions) (U.K.).

<sup>13</sup> Copyright Act 1911, 1911 c. 46, 1 & 2 Geo. 5, § 3, 1st para. (U.K.).

<sup>14</sup> Copyright Act 1956, 1956 c. 74, 4 & 5 Eliz. 2, § 2(3), 1st sent. (U.K.).

<sup>15</sup> Cornell Copyright Information Center, "Copyright Term and the Public Domain in the United States 1 January 2014" (n.d.), available at <http://copyright.cornell.edu/resources/publicdomain.cfm> (accessed 8/12/2014) (heading: Works Registered or First Published in the U.S.; column: Date of Publication; row: Before 1923).

Under the copyright law of the United States, use in this essay of “I Am the Very Model of a Modern Major-General,” and the companion use of “As Someday It May Happen,” without the copyright-law equivalent of *May It?*, are allowed.

*Freshening – the span of decades*

Traditionalist cannot deny that a passé person or a displaced archetype lacks entertainment value. Consider some significant events:

The Liverpool and Manchester Railway, the first inter-urban passenger-and-freight railroad, commenced operations in 1830. The two tracks of the L&MR were of standard gauge.<sup>16</sup>

The reign of Queen Victoria began in 1837.

*Trial by Jury* was first performed in 1875, when Ulysses S. Grant was President.

*The Pirates of Penzance* was first performed in 1879 (in Devon and New York) and in 1880 (in London), when Rutherford B. Hayes was President.

*The Mikado* was first performed in 1885, when Grover Cleveland was President.

The reign of Queen Victoria ended with her death in 1901.

It is a century after the start of World War I.

It is 72 years after the Atomic Age began, with the first controlled, self-sustaining, nuclear-fission chain reaction.

Necessarily, objects of humor changed since *Trial by Jury* opened, since *The Pirates of Penzance* opened, and since *The Mikado* opened.

*Freshening – place and time*

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<sup>16</sup> Wikipedia, “Liverpool and Manchester Railway” (n.d.), available at [http://en.wikipedia.org/wiki/Liverpool\\_%26\\_Manchester\\_Railway](http://en.wikipedia.org/wiki/Liverpool_%26_Manchester_Railway) (accessed 8/15/2014).

Standard gauge is 4 feet, 8½ inches between the inner sides of the heads of the two rails which constitute a track. Broad gauge is wider than standard gauge. Medium gauge, narrow gauge, and minimum gauge are narrower than standard gauge. Wikipedia, “Track gauge” (n.d.), available at [http://en.wikipedia.org/wiki/Track\\_gauge](http://en.wikipedia.org/wiki/Track_gauge) (accessed 8/17/2014). George Stephenson (1781–1848) pioneered standard gauge. Wikipedia, “George Stephenson” (n.d.), available at [http://en.wikipedia.org/wiki/George\\_Stephenson](http://en.wikipedia.org/wiki/George_Stephenson) (accessed 8/17/2014).

English references and Victorian references in the comic operas are indicative of the place and of the time in which the comic operas were written. Some references survived performances outside of England, and some references survived the succession of generations; others did not.

Examples:

- “Then the idiot who praises, with enthusiastic tone, / All centuries but this, and every country but his own” (*The Mikado*, Act I) can be understood by everyone.
- “And the lady from the provinces, who dresses like a guy, / And who ‘doesn’t think she dances, but would rather like to try’” (*The Mikado*, Act I) is not obvious to Americans.
- “And that singular anomaly, the lady novelist —” (*The Mikado*, Act I) is past its use-by date.
- There will be no ripple of amusement upon learning that dull people, “Who chatter and bleat and bore, / Are sent to hear sermons / From mystical Germans / Who preach from ten till four.” (*The Mikado*, Act II.)
- Puzzlement will be evoked by the requirement that certain railway-carriage idiots are “To ride on a buffer / In Parliamentary trains.”<sup>17</sup> (*The Mikado*, Act II.)

*Freshening – changes of taste*

Societal tolerance enlarges and diminishes that which may be staged.

Unacceptable words become acceptable. Think of public use, in the present, debased decade, of curse words, vulgar words, and scatological words. Bad, for men. Worse, for women. Worst, for children. Twenty-first century technology is coeval with twenty-first century libertinage.

Acceptable words become unacceptable:

In the song “As some day it may happen”, sung by Ko-Ko in Act I, the character goes through a “little list” of “society offenders” who, if executed, “would not be missed”. One of these is “the nigger serenader and the others of his race”.

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<sup>17</sup> Michael Williams, “The hunt for Britain’s ghost trains” (*The Independent*, 12/19/2011), available at <http://www.independent.co.uk/news/uk/this-britain/the-hunt-for-britains-ghost-trains-6279103.html> (accessed 8/29/2014).

Gilbert's reference was to blackface minstrels who were white entertainers in makeup, not to dark skinned people. Also included in the list are "the lady novelist", referring to a particular type of novelist earlier lampooned by George Eliot, and "the lady from the provinces who dresses like a guy", where *guy* refers to the dummy that is part of Guy Fawkes Night celebrations, hence a tasteless woman who dresses like a scarecrow.

To avoid distracting the audience with references that have become offensive over time, the lyrics are almost invariably modified in modern productions; universally, the word "nigger" is changed. Other changes are made to the opera to take advantage of opportunities for topical jokes; the "Little List" song is often significantly rewritten. The precedent for such updating was set by Gilbert himself in the 1908 Savoy revival, with his additions to the Lord High Executioner's list of "The lovely suffragist" and "The red-hot Socialist". Richard Suart, a singer well known in the role of Ko-Ko, published a book containing a history of rewrites of the song, including many of his own. Another frequent alteration is to Pooh-Bah's list of titles, which must be kept largely the same due to later plot references, but may be added to with modern, topical positions. The Mikado's list of punishments and crimes in "A more humane Mikado", is also sometimes rewritten to include modern infractions.<sup>18</sup>

#### *Freshening – Pooh-Bah's titles*

In Act I, Pooh-Bah reveals that he "First Lord of the Treasury, Lord Chief justice, Commander-in-Chief, Lord High Admiral, . . . Archbishop of Titipu, and Lord Mayor,..." The office of Archbishop of Titipu cannot be taken away from Pooh-Bah, because he is authorized, as archbishop, to officiate at marriages. In Act II, Pooh-Bah is directed by Ko-Ko to officiate at the marriage of Nanki-Poo and Yum-Yum.

There may be a contemporary addition to a necessary title, to suit. Examples: "Lord High Admiral, Marshal of the Air Force, . . ."; "Archbishop of Titipu, Chief Rabbi, . . ."

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<sup>18</sup> Wikipedia, "The Mikado" (subheading: "Analysis and reception"; sub-subheading: "Modernised words and phrases") (n.d.), available at [http://en.wikipedia.org/wiki/The\\_Mikado](http://en.wikipedia.org/wiki/The_Mikado) (accessed 8/8/2014) (footnotes omitted).

## OVERTURE

### *Trial by Jury*

This comic opera is a one-act spoof of the British courtroom. A jilted woman sues her former fiancé. Her claim sounds in breach of promise to marry. At trial, romantic love takes a distant third to greed and lust.

Fourth Common-Law Principle of Litigation: No matter that a client swears up and down that his case is not about the money, but is about his expressed principle, it's about the money.

The setting of the trial is the Court of the Exchequer. Presumably, Angelina, the complainant, filed a bill of complaint against Edwin, the defendant, and pleaded that he breached his promise to marry her, and pleaded further that she is entitled to damages.

The judge (“And a good Judge too!”) does not recuse himself, although, prior to his elevation to the bench, he jilted a woman. When Angelina enters the court room, the judge takes a fancy to her. The judge does not recuse himself for that, either.

Edwin, who represents himself, has a current love. It is conceded by Edwin that he breached his promise, but he offers an affirmative defense. Angelina became, to him, a “bore intense.”

*Cherchez l'argent* in a court room, as everywhere else. Angelina contends that she loves Edwin exceedingly. “My loss I shall ever deplore.” The jury should award appropriate large damages to her.

Edwin reveals his shortcomings: “I smoke like a furnace – I’m always in liquor, / A ruffian – a bully – a sot.” The jury should award appropriate small damages against him.

A settlement suggested by Edwin is that he marry both Angelina and his current love. The suggested settlement is found by Angelina’s counsel and the judge to be precluded by law, which prohibits burglary. (They confuse burglary and bigamy.)

The legal dilemma which Edwin faces is clear to all. Edwin not marrying Angelina will be held by the jury to be a breach of his promise to marry her. Edwin marrying both Angelina and his current love will subject him to an accusation of burglary.

Another shortcoming revealed by Edwin is that, were he in liquor, he would thrash, perhaps kick, Angelina. “I am such a very bad lot!”

To the jury, it seems that this shortcoming would support an abatement of damages. The judge suggests that Edwin should be made tipsy, to see whether, in that condition, he would, in fact, thrash and kick Angelina.

Angelina’s counsel: “With all respect I do object.” Angelina: “I do object.” Edwin: “I don’t object.”

The judge is in a hurry to get away, so he cannot be in court all day. He gets annoyed that no resolution of the dispute is possible. Thereon, the judge (whose “law is fudge, Yet of beauty I’m a judge”) offers to resolve the dispute by marrying Angelina himself.

Angelina accepts. There is “joy unbounded.”

As of January 1, 1971, in England and Wales, an agreement to marry is not a contract. No cause of action arises from a breach of a promise to marry.<sup>19</sup>

## ACT I

### *THE PIRATES OF PENZANCE*

#### *Introduction*

The fifth of the fourteen comic operas by Gilbert and Sullivan is *The Pirates of Penzance*. This Act offers a freshening of “I Am the Very Model of a Modern General.”

#### *Settings*

Cornwall. Act I: A rocky sea-shore of Cornwall.<sup>20</sup> Act II: A ruined chapel by moonlight.

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<sup>19</sup> 9(1) Halsbury’s Laws of England ¶ 742 (p. 486) (4th ed. 1998). Accord, e.g., Family Law Act, 1981 (Ire.) § 2(1) (agreement to marry is not a contract; no civil action for breach of agreement to marry may be maintained); N.Y. Civ. Rts. L. § 80-A (abolition of civil action for breach of contract to marry), § 80-B (permits civil action to recover transferred money and property, or to recover the value of transferred property, when a marriage which did not occur was the sole consideration for the transfer) (2014); Action for Breach of Promise of Marriage (Abolition) Act 1971 (South Aust.) § 2(1) (prohibition of civil action to recover damages for failure to fulfill promise to marry), § 3 (civil action to recover gift given in contemplation of marriage may be maintained).

*Main characters*

Major-General Stanley.

The Pirate King.

Frederic, the pirate apprentice.

Major-General Stanley's daughters, including Mabel.

Ruth, the pirates' maid-of-all-work.

*Legal elements*

Ruth was instructed by Frederic's father to apprentice Frederic to pilots (*i.e.*, ship pilots), so that he would learn to be a pilot. Ruth misheard the instruction, and she apprenticed Frederic to the pirates. He learned to be a pirate. The agency-law issue is whether the contract (the articles of apprenticeship) is voidable by the principal (Frederic's father) because of the serious mistake of his agent (Ruth).

Frederic thought that he was apprenticed to the pirates until he reached his twenty-first *year*. The Pirate King pointed out to Frederic that, according to a term of the articles of apprenticeship, Frederic was apprenticed to the pirates until his twenty-first *birthday*. The distinction between year and birthday is critical, because Frederic was born on February 29. Counting birthdays, Frederic is only five and a quarter. Frederic's strong sense of duty leads him to conclude that he is contractually obligated to be a pirate apprentice until his twenty-first birthday, which will occur when he is really old. The contract-law issue is whether the parties to the articles of apprenticeship intended "twenty-first birthday" literally or figuratively.

The daughters of Major-General Stanley are described as "Wards in Chancery." The equity issue is why that should be so. The daughters' mother was not in the picture, but their father was. A minor with one parent is not an orphan, so there is no ground for a wardship under the supervision of the Chancery Court.

An objection is raised by Major-General Stanley to pirates as sons-in-law. The Pirate King rejoined, "We object to Major-Generals as fathers-in-law. But we waive that point. We do not press it. We look over it." The family-law issue is whether the defect (Major-General Stanley's rank) may be waived by the pirates.

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<sup>20</sup> In the original, "A rocky sea-shore on the coast of Cornwall." *Id.* at 146.

"[O]n the coast" causes an unfortunate tautology. A sea-shore is located only on a coast.

Major-General Stanley describes the tombs situated on his real property as “the tombs of my ancestors.” Frederic reminds him that the real property was bought only a year before, “and the stucco on your baronial castle is scarcely dry.” Major-General Stanley counters that the bodies buried there are indeed those of his ancestors. “I bought the chapel and its contents. I don’t know whose ancestors they *were*, but I know whose ancestors they *are*.” The contract-law and family-law issue is whether Major-General Stanley is the “descendant by purchase” of those deceased people.

*The song*

Major-General Stanley displays his erudition through “I Am the Very Model of a Modern Major-General.” Some vacuous references contradict the impression of a good education. Also, Major-General Stanley’s military knowledge “Has only been brought down to the beginning of the century.”

*Synopsis*

**Act I.** The pirates celebrate the completion by Frederic of his piracy apprenticeship, and his rise to the status of pirate.

Frederic, who has a strong sense of duty, does not join the celebration. After he completes his apprenticeship, it will be his duty to fight the pirates. Not as persons, but as pirates, because they commit piracy.

The pirates are asked by Frederic to give up piracy. The Pirate King responds that, compared with respectability, piracy is honest.

The trade of piracy is unsuitable for the pirates. They are tender-hearted, so they don’t attack weaker people. When they attack stronger people, they lose.

Also, the pirates are orphans, so they don’t attack other orphans. Frederic calls attention to the consequence of the policy. “Every one we capture says he’s an orphan. The last three ships we took proved to be manned entirely by orphans, and so we had to let them go. One would think that Great Britain’s mercantile navy was recruited solely from her orphan asylums – which we know is not the case.”

After Ruth made her serious mistake of apprenticing Frederic to the pirates, she did not want to break the news to Frederic’s father. Instead, Ruth became a maid-of-all-work of the pirates.

The only woman ever seen by Frederick is Ruth, so Frederic believes that Ruth is beautiful. The pirates, who know better, suggest that Frederic take Ruth with him when he returns to civilization.

After the pirates depart, Frederic sees a group of beautiful young women approaching the pirate lair. He realizes that Ruth lied to him about her looks, so he sends her away.

The young women, who are Major-General Stanley's daughters, come into sight. Frederic, who hid from them, reveals himself, and he asks them to help him reform. Mabel, one of Major-General Stanley's daughters, responds to Frederic's request, and she chides her sisters for their lack of charity.

Frederic and Mabel fall in love. The others among Major-General Stanley's daughters wonder whether they should eavesdrop, or leave the couple alone. They decide to "talk about the weather," while stealing glances at Frederic and Mabel.

A warning about the pirates is given by Frederic to Major-General Stanley's daughters. Before they can flee, the pirates show up. They capture Major-General Stanley's daughters, and intend to marry them.

The pirates are cautioned, "we are Wards in Chancery, And father is a Major-General!" by Mabel. Major-General Stanley arrives, and he appeals to the pirates not to take his daughters, "the sole remaining props of my old age." It is known to Major-General Stanley that the pirates are sympathetic to orphans, so he (Major-General Stanley) buttresses his appeal by asserting falsely that he is an orphan. Thereon, the pirates release Major-General Stanley's daughters.

**Act II.** Major-General Stanley sits in the ruined chapel which is on his estate, surrounded by his daughters. His conscience is bothered by his false assertion, to the pirates, about being an orphan.

Frederic is to lead the police to the pirates, but the Pirate King informs Frederic that his (Frederic's) apprenticeship binds him until his twenty-first birthday, not until he reaches the age of twenty-one. Therefore, Frederic is still an apprentice pirate. Frederic acts on his duty, as an apprentice pirate, and makes known to the Pirate King that Major-General Stanley lied about being an orphan. The pirates vow to take revenge.

Mabel pleads with Frederic to stay with her. He responds that he must fulfill his duty. Mabel agrees to wait the long years until Frederic is no longer an apprentice pirate.

The police appear at the ruined chapel, and they are ready to arrest the pirates. Admiration is expressed by Major-General Stanley's daughters for the bravery of the

police to face fierce and merciless pirates, and possibly to die. The police are unnerved, but they stay, and hide.

Upon the arrival of the pirates at the ruined chapel, the police and the pirates meet. Major-General Stanley is seized by the pirates, and the pirates get the better of the police.

Then, the tables are turned on the pirates. “We charge you yield,” the police demand of the pirates, “In Queen Victoria’s name!”

The demand is obeyed, because the pirates love their Queen.

Ruth discloses that the pirates are not common criminals. They are “noblemen who have gone wrong.”

Nobility removes Major-General Stanley’s objection to the marriages of his daughters to the pirates.

Piracy is given up by the pirates, who will take their seats in the House of Lords. Presumably, the giving up of piracy terminates Frederic’s apprenticeship, and Frederic can marry Mabel soon, rather than wait until his twenty-first birthday to do so.

All ends happily.

*“I Am the Very Model of a Modern Major-General”*

GEN.: I am the very model of a modern Major-General,  
I’ve information vegetable, animal and mineral,  
I know the kings of England, and I quote the fights historical  
From Marathon to Waterloo, in order categorical;  
I’m very well acquainted too with matters mathematical,  
I understand equations, both the simple and quadratical,  
About binomial theorem I’m teeming with a lot o’ news –  
With many cheerful facts about the square of the hypotenuse.

ALL: With many cheerful facts, etc.

GEN.: I’m very good at integral and differential calculus,  
I know the scientific names of beings animalculous,  
In short, in matters vegetable, animal and mineral,  
I am the very model of a modern Major-General.

ALL: In short, in matters vegetable, animal and mineral,  
He is the very model of a modern Major-General.

GEN.: I know our mythic history, King Arthur's and Sir Caradoc's,  
I answer hard acrostics, I've a pretty taste for paradox,  
I quote in elegiacs all the crimes of Heliogabalus,  
In conics I can floor peculiarities parabolous.  
I can tell undoubted Raphaels from Gerard Dows and Zoffanias,  
I know the croaking chorus from the *Frogs* of Aristophanes,  
Then I can hum a fugue of which I've heard the music's din afore,  
And whistle all the airs from that infernal nonsense *Pinafore*.

ALL: And whistle all the airs, etc.

GEN.: Then I can write a washing bill in Babylonian cuneiform,  
And tell you every detail of Caractacus's uniform:  
In short, in matters vegetable, animal and mineral,  
I am the very model of a modern Major-General.

ALL: In short, in matters vegetable, animal and mineral,  
He is the very model of a modern Major-General.

GEN.: In fact, when I know what is meant by "mamelon" and "ravelin",  
When I can tell at sight a Mauser rifle from a javelin,  
When such affairs as sorties and surprises I'm more wary at,  
And when I know precisely what is meant by "commissariat",  
When I have learnt what progress has been made in modern gunnery,  
When I know more of tactics than a novice in a nunnery;  
In short, when I've a smattering of elemental strategy,  
You'll say a better Major-General has never *sat* a gee –

ALL: You'll say a better Major-General, etc.

GEN.: For my military knowledge, though I'm plucky and adventury,  
Has only been brought down to the beginning of the century;  
But still, in matters vegetable, animal and mineral,  
I am the very model of a modern Major-General.

ALL: But still, in matters vegetable, animal and mineral,

He is the very model of a modern Major-General.<sup>21</sup>

*Freshening of "I Am the Very Model of a Modern General"*

GEN.: I am the very model of a modern lawyer practical,  
I've information mineral, vegetable, and animal,  
I know the Magna Carta, and I quote the courts historical  
From the Exchequer to Queen's Bench, in order categorical;  
I'm very well acquainted, too, with matters litigational,  
I settle quarrels which are *bona-fide* labyrinthinal,  
Of equity applied in court I'm teeming with a lot o' news –  
And I have tidings of a landmark law case which I did not lose.

ALL: And I have tidings, etc.

GEN.: I hold my own at con law, and construction law I can discuss;  
My 9-zip win from the Supremes was a success miraculous:  
In short, in matters mineral, vegetable, and animal,  
I am the very model of a modern lawyer practical.

ALL: In short, in matters mineral, vegetable, and animal,  
He is the very model of a modern lawyer practical.

GEN.: I know our legal history, not all of which is positive,  
The Framers gave us passive courts, but judges are dispositive.  
*Dred Scott*<sup>22</sup> kicked darkies off the bus, and *Plessy*<sup>23</sup> furthered race disdain,  
The court was packed to *aye* greenbacks,<sup>24</sup> and Franklin would have packed again.<sup>25</sup>  
Kill fetuses<sup>26</sup> and burn the flag,<sup>27</sup> but pervies get immunity,<sup>28</sup>  
In place of liberty and law there is imperialism.  
A judge says this, a judge says that, opinions of whole cloth are made,

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<sup>21</sup> Complete G&S, *supra*, n. 1, at 163-64 (footnotes omitted).

<sup>22</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>23</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>24</sup> *Hepburn v. Griswold*, 75 U.S. 603 (1870); *Knox v. Lee*, 79 U.S. 457 (1871); *Juilliard v. Greenman*, 110 U.S. 421 (1884).

<sup>25</sup> Wikipedia, "Judicial Procedures Reform Bill of 1937" (n.d.), available at

[http://en.wikipedia.org/wiki/Judicial\\_Procedures\\_Reform\\_Bill\\_of\\_1937](http://en.wikipedia.org/wiki/Judicial_Procedures_Reform_Bill_of_1937) (accessed 8/13/2014).

<sup>26</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>27</sup> *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>28</sup> *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 570 U.S. \_\_\_\_ (2013).

All courts have FORCE, all courts have WILL,<sup>29</sup> neutrality's a masquerade.

ALL: All courts have FORCE, etc.

GEN.: I do my work proficiently, though law will ne'er be what it should,  
My wife and child come always first, career is means not central good.  
That's how in matters mineral, vegetable, and animal,  
I am the very model of a modern lawyer practical.

ALL: That's how in matters mineral, vegetable, and animal,  
He is the very model of a modern lawyer practical.

GEN.: Beyond the law my knowledge thins, though I retain a smattering  
Of facts accrued when I was young, and had the time for studying.  
It's good that other lawyers know much less, and some don't know a thing,  
Among the blind, Erasmus wisely said, the one-eyed man is king.<sup>30</sup>  
Yet I do know from Antonin, the Framers wrote just what they mean,<sup>31</sup>  
And thus, for text-denying change, a judge should not be keen; but seen  
By justices, the Constitution is whatever *they* may say,  
The Framers' words are merely principles, which just get in the way.

ALL: The Framers' words, etc.

GEN.: The second-rate wordsmithery in this pastiche is my best bid,  
There's nothing which I write to hold a candle to what Gilbert did.  
Elseways, in matters mineral, vegetable, and animal,  
I am the very model of a modern lawyer practical.

ALL: Elseways, in matters mineral, vegetable, and animal,

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<sup>29</sup> Contra, Yale Law School, The Avalon Project, The Federalist Papers, No. 78 (n.d.), available at [http://avalon.law.yale.edu/18th\\_century/fed78.asp](http://avalon.law.yale.edu/18th_century/fed78.asp) (accessed 8/11/2014).

<sup>30</sup> Oxford Dictionary of Quotations 316 (Oxford: Oxford University Press, 7th ed. 2009).

<sup>31</sup> E.g., Antonin Scalia, "Remarks at the Woodrow Wilson International Center for Scholars in Washington, D.C." (3/14/2005), available at [http://www.cfif.org/htdocs/freedomline/current/guest\\_commentary/scalia-constitutional-speech.htm](http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm) (accessed 8/12/2014); Antonin Scalia, "Originalism: The Lesser Evil," Univ. Cincinnati L. Rev. 57 (1989). Accord, C-Span, Associate Justice Clarence Thomas, "U.S. Constitution and Role of Government" (10/16/2008) (video), available at <http://www.c-spanvideo.org/program/SConstitut> (accessed 8/12/2014); The Federalist Society, "The Great Debate" (11/1/1986) (speech by Edwin Meese III, 7/9/1985), available at <http://www.fed-soc.org/publications/detail/the-great-debate-attorney-general-ed-meese-iii-july-9-1985> (accessed 9/2/2014).

He is the very model of a modern lawyer practical.

## ENTR'ACTE

My object all sublime

I work on all the time –

To individuate law and crime –  
dividuate law and crime;

But government has bad laws,

Opinions always have flaws,

So law is crime, but without good cause!

Crime without good cause!<sup>32</sup>

## ACT II

### *THE MIKADO*

#### *Introduction*

*The Mikado* is the ninth of the fourteen comic operas by Gilbert and Sullivan. This Act offers a freshening of “As Some Day It May Happen.”

#### *Settings*

Japan. Act I. Courtyard of Ko-Ko's official residence. Act II. Ko-Ko's garden.

#### *Main characters*

Ko-Ko, the Lord High Executioner of Titipu, who is a jumped-up cheap tailor.

Nanki-Poo, the son of the Mikado, disguised as a wandering minstrel.

Pooh-Bah, the Lord High Everything Else.

Yum-Yum, a beautiful young woman.

Katisha, an elderly lady.

The Mikado.

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<sup>32</sup> See *The Mikado*, Act II, Song – Mikado and Chorus, in Complete G&S, supra, n. 1, at 406.

*Legal elements*

A law against flirting, leering, or winking, “unless connubially linked,” which is the only crime punishable by decapitation.

A law which makes suicide a capital offense.

A contract between Nanki-Poo and Ko-Ko.

A law that, when a married man is beheaded, his wife is to be buried alive.

A false affidavit.

A false certificate of death.

A law against “compassing the death of the Heir Apparent.”

A legal fiction.

*Synopsis*

**Act I.** Nanki-Poo, the son of the Mikado, fled the imperial palace to avoid the amorous intentions of Katisha, an elderly lady. He (Nanki-Poo) assumed the guise of a wandering minstrel. While Nanki-Poo was in Titipu for a performance, he met, and fell in love with, Yum-Yum. She is a ward of Ko-Ko, as are her two sisters, Pitti-Sing and Peep-Bo. Yum-Yum is betrothed to Ko-Ko.

For flirting, Ko-Ko, a cheap tailor by trade, was condemned to death by beheading. Nanki-Poo hears of it, and returns to Titipu to find Yum-Yum. Pish-Tush, a noble lord, informs Nanki-Poo that Ko-Ko was reprieved, and was raised to the rank of Lord High Executioner.

The goal of raising Ko-Ko to that rank was to stymie the harsh penalty for flirting. Ko-Ko was to be executed for flirting. Beheadings must be done sequentially, so Ko-Ko’s first job as Lord High Executioner will be to behead himself. That is the prerequisite to his beheading of someone else.

Young ladies, Yum-Yum, Pitti-Sing, and Peep-Bo among them, are school-leavers, and are on their way home. Nanki-Poo is informed by Pooh-Bah, Lord High Everything Else (such as First Lord of the Treasury, Lord Chief Justice, Lord High Admiral, Archbishop of Titipu, and Lord Mayor, “both acting and elect, all rolled into one”), that Yum-Yum will wed Ko-Ko that afternoon.

Yum-Yum appears. She greets Ko-Ko reluctantly, and she greets Nanki-Poo enthusiastically. Nanki-Poo declares his love for Yum-Yum, with whom he shares the secret of his identity.

Ko-Ko receives a letter from the Mikado, who is concerned that, for the previous year, there were no beheadings in Titipu. The Mikado threatens abolition of the position of

Lord High Executioner, and reduction of the town of Titipu to the rank of village, if no one were to be beheaded within a month.

It is impossible for Ko-Ko to behead himself. Aside from that, suicide is a capital offense. Nanki-Poo wants to kill himself, rather than face life without Yum-Yum.

Thereon, Nanki-Poo and Ko-Ko enter into a contract. Nanki-Poo will marry Yum-Yum the following day. After one month, Ko-Ko will behead Nanki-Poo, and Ko-Ko will marry Yum-Yum, Nanki-Poo's widow.

**Act II.** Yum-Yum gets ready for her wedding. She is saddened by the prospective brevity of the marriage.

Nanki-Poo tries to cheer up Yum-Yum, but a catch is discovered. When a married man is beheaded, his wife must be buried alive. Yum-Yum's enthusiasm for the marriage diminishes.

To spare Yum-Yum her grim fate, Nanki-Poo decides to kill himself at once. That, however, would leave Ko-Ko with nobody to behead.

Nanki-Poo offers himself for immediate beheading. Ko-Ko accepted the post of Lord High Executioner, thinking its duties "purely nominal." In lieu of a beheading, Ko-Ko swears falsely to an affidavit that Nanki-Poo was beheaded by him.

Ko-Ko arranges for Nanki-Poo and Yum-Yum to be married, and to leave Titipu immediately. If Nanki-Poo were to remain, Ko-Ko would be seen by the Mikado, contrary to the affidavit, as not having beheaded Nanki-Poo.

The Mikado enters Titipu. He sings of his criminal-law policy:

My object all sublime  
I shall achieve in time –  
To let the punishment fit the crime –  
The punishment fit the crime;  
And make each prisoner pent  
Unwillingly represent  
A source of innocent merriment!  
Of innocent merriment!<sup>33</sup>

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<sup>33</sup> Complete G&S, *supra*, n. 1, at 406. See Poul Anderson, "My Object All Sublime" (*Galaxy*, June, 1961). (2014) J. JURIS. 393

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Ko-Ko, Pooh-Bah, and Pitti-Sing advise the Mikado that an execution took place, and show him a certificate of death. The Mikado reads only the initial part of the certificate of death, so he does not read the name of the beheaded person. A creative description of the beheading is provided to the Mikado by Ko-Ko, Pooh-Bah, and Pitti-Sing.

The Mikado is glad to learn that someone was beheaded, but he (the Mikado) is in Titipu to learn of the whereabouts of his son. From the certificate of death, Katisha imparts that the wandering minstrel, Nanki-Poo, the Mikado's son, was beheaded.

A ghastly death is prescribed for "compassing the death of the Heir Apparent." The presumed execution of Nanki-Poo is understood by the Mikado to have been a mistake, which arose from Nanki-Poo disguising himself as a wandering minstrel, but the law does not provide an exception for a mistake. Ko-Ko, Pooh-Bah, and Pitti-Sing are scheduled to die after luncheon.

The seeming way out is for Ko-Ko to produce Nanki-Poo alive and well. Per contra, Nanki-Poo already married Yum-Yum, so he is no longer free to marry Katisha. Were Nanki-Poo to reveal that he is married, Katisha would insist that he (Nanki-Poo) be executed for jilting her. Then, Yum-Yum would have to be buried alive.

The resolution is for Ko-Ko to marry Katisha. In that event, Katisha would have no claim on Nanki-Poo, and no cause to seek his execution. Consequently, Yum-Yum would not have to be buried alive.

Ever so reluctantly, Ko-Ko woos and wins Katisha. They get married.

Nanki-Poo shows up, and introduces his wife, Yum-Yum, the Mikado's daughter-in-law, to the Mikado. A legal fiction saves Ko-Ko, Pooh-Bah, and Pitti-Sing. Ko-Ko explains that his affidavit averred permissibly that Nanki-Poo had been executed, because, when the Mikado orders that a man is to be beheaded, it is the equivalent of it having been done. The man is as good as dead, so saying that he's dead, although he's still alive, is acceptable.

All ends happily.

*The term "Pooh-Bah"*

In Act I, Pish-Tush informs Nanki-Poo that Ko-Ko was reprieved, and was raised to the rank of Lord High Executioner. For a citizen, that is the highest rank. Pooh-Bah adds, "Our logical Mikado, seeing no moral difference between the dignified judge who

condemns a criminal to die, and the industrious mechanic who carries out the sentence, has rolled the two offices into one, and every judge is now his own executioner.”

Other officials refused to be subordinate to an ex tailor, so Pooh-Bah became the Lord High Everything Else. He holds all public posts other than that of Lord High Executioner, and he collects all salaries for all public posts which he holds.

Through *The Mikado*, Gilbert and Sullivan added the term “Pooh-Bah” to the English language. “**Pooh-Bah**. n. (also **pooh-bah**) **1** a holder of many public offices at once. **2** A pompous self-important person.”<sup>34</sup>

### *No difficulty*

Prior to the song, Ko-Ko reports to the nobles that “there will be no difficulty in finding plenty of people whose loss will be a distinct gain to society at large.” Certainly. Other people who won’t be missed are:

1. Lawyers, solicitors, and barristers who never learned to be decent people.
2. Judges who would have their nether anatomies osculated by practicing lawyers and barristers who appear before them.
3. The legislators and the executives of the states and of the United States, each government of which is a government of those who govern, by those who govern, for those who govern.<sup>35</sup>
4. Leftists of all stripes: liberals, left-liberals, socialists, progressives, and communists.
5. Civil-law writers, for their support, in criminal cases, of prosecutorial appeals of verdicts and judgments, and of prosecutorial appeals of punishments.
6. Advocates of big government, generally. In particular, advocates of a big United States government.<sup>36</sup>
7. Proponents of high taxes, and opponents of low-tax jurisdictions.

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<sup>34</sup> Judy Pearsall and Bill Trumble (eds.), *The Oxford English Reference Dictionary* 1125 (Oxford: Oxford University Press, 2nd ed. 1996) (modified).

<sup>35</sup> Cf. “. . . and that government of the people, by the people, for the people, shall not perish from the earth.” Abraham Lincoln Online, *Speeches & Writings*, “The Gettysburg Address” (n.d.), available at <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm> (accessed 8/11/2014).

The Gettysburg Address is a speech given by President Lincoln on November 19, 1863, at the dedication of the Soldiers’ National Cemetery in Gettysburg, Pennsylvania.

<sup>36</sup> Contra, U.S. Const. art. I, § 8 (delegated powers), amends. I-X (Bill of Rights).

“As Some Day It May Happen”

KO-KO: As some day it may happen that a victim must be found,  
I’ve got a little list<sup>[37]</sup> – I’ve got a little list  
Of society offenders who might well be underground,  
And who never would be missed – who never would be missed!  
There’s the pestilential nuisances who write for autographs –  
All people who have flabby hands and irritating laughs –  
All children who are up in dates, and floor you with ’em flat –  
All persons who in shaking hands, shake hands with you like *that* –  
And all third persons who on spoiling *tête-à-têtes* insist –  
They’d none of ’em be missed – they’d none of ’em be missed!

CHORUS: He’s got ’em on the list – he’s got ’em on the list;  
And they’ll none of ’em be missed – they’ll none of ’em be missed.

KO-KO: There’s the nigger serenader,<sup>[38]</sup> and the others of his race,  
And the piano-organist – I’ve got him on the list!  
And the people who eat peppermint and puff it in your face,  
They never would be missed – they never would be missed!  
Then the idiot who praises, with enthusiastic tone,  
All centuries but this, and every country but his own;  
And the lady from the provinces, who dresses like a guy,  
And who ‘doesn’t think she waltzes, but would rather like to try’;  
And that singular anomaly, the lady novelist –  
I don’t think she’d be missed – I’m *sure* she’d not be missed!

CHORUS: He’s got her on the list – he’s got her on the list;  
And I don’t think she’ll be missed – I’m *sure* she’ll not be missed!

KO-KO: And that *Nisi Prius*<sup>[39]</sup> nuisance, who just now is rather rife,  
The Judicial humorist – I’ve got *him* on the list!

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<sup>37</sup> In the Complete G&S, supra, n. 1, at 831, footnote 15 reads in part: “*I’ve got a little list*: There have been innumerable pastiches of this piece, mostly attuned to events and mores with which the audience would be familiar.”

<sup>38</sup> In the Complete G&S, supra, n. 1, at 831, footnote 16 reads in part: “*nigger serenader*: The text was changed to ‘banjo serenader’ in 1948 after American audiences found it offensive.”

<sup>39</sup> In the Complete G&S, supra, n. 1, at 831, footnote 17 reads: “*Nisi Prius*: A term in English law, based on the Latin ‘unless before’, i.e. ‘unless heard before’, to denote cases tried in the Assize Court which should have been civil cases.”

All funny fellows, comic men, and clowns of private life –  
They'd none of 'em be missed – they'd none of 'em be missed.  
And apologetic statesmen<sup>[40]</sup> of a compromising kind,  
Such as – What d'ye call him – Thing'em-bob, and likewise – Never-mind,  
And 'St-'st-'st – and What's-his-name, and also You-know-who –  
The task of filling up the blanks I'd rather leave to *you*.  
But it really doesn't matter whom you put upon the list,  
For they'd none of 'em be missed – they'd none of 'em be missed!

CHORUS: You may put 'em on the list – you may put 'em on the list;  
And they'll none of 'em be missed – they'll none of 'em be missed.<sup>41</sup>

*Freshening of "As Some Day It May Happen"*

KO-KO: As some day it may happen that a victim must be found,  
I've got a little list – I've got a little list  
Of society offenders who might well be underground,  
And who never would be missed – who never would be missed!  
There's the justices who twist the law to make it what they please –  
All politicians who have brought the country to its knees –  
All newsmen who make propaganda into daily news –  
All camel jockeys and their friends who live to kill the Jews –  
And traitors who on Europeanizing us insist –  
They'd none of 'em be missed – they'd none of 'em be missed!

CHORUS: He's got 'em on the list – he's got 'em on the list;  
And they'll none of 'em be missed – they'll none of 'em be missed.

KO-KO: There's the economists who preach free trade for the economy,  
Hollywood celebrities – I've got them on the list!  
And law profs who convey as truth the lies of *Marbury*,<sup>42</sup>  
They never would be missed – they never would be missed!  
Then the idiot who praises, with enthusiastic tone,  
All governments but ours, and every system but our own;  
And lawyer know-it-alls who say that *Lochner*<sup>43</sup> went astray,

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<sup>40</sup> In the Complete G&S, *supra*, n. 1, at 831, footnote 18 explains a few mockings of Victorian politicians and of contemporary politicians.

<sup>41</sup> Complete G&S, *supra*, n. 1, at 373-75 (footnotes omitted).

<sup>42</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>43</sup> *Lochner v. New York*, 198 U.S. 45 (1905).



It is intellectual kludge.<sup>45</sup>

On this subject I ask you to think –  
    Think – think!  
And to be with the Framers in sync –  
    Sync – sync!  
    The Framers were sages,  
    They wrote for the ages,  
A “living” charter is Leftists’ sludge.

The Framers’ charter has to be,  
The only canonicity  
Of government in Washington –  
Preserve it for posterity!

Then let good laws,  
Our lives advance,  
With firm regard,  
For Framers’ stance.

With fewer *leges scriptae*<sup>46</sup> we

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<sup>45</sup> “**kludge** \* \* \* ‘An ill-assorted collection of poorly-matching parts, forming a distressing whole’ (Granholm); esp. in *Computing*, a machine, system, or program that has been improvised or ‘bodged’ together; a hastily improvised and poorly thought-out solution to a fault or ‘bug.’” VIII Oxford English Dictionary 479 (2nd ed. 1989).

<sup>46</sup> Latin: lex, legis. *Lex* is nominative feminine singular. *Lex scripta* (sing.), *leges scriptae* (pl.).

“**Lex scripta:** Law authorized or created by statute rather than custom or usage.” Black’s Law Dictionary 924 (St. Paul, Minn.: West Publishing Co., 7th ed. 1999) (modified).

“**Lex non scripta:** Common law, including customs and local laws, as distinguished from statutory law.” *Id.* at 923 (modified).

The earliest Britons and Gallic Druids were unlettered. They committed their learning, including their laws, to memory, and they had an oral tradition of laws and customs.

But, with us at present, the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However I therefore style these parts of our laws *leges non scriptae*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.

<sup>1</sup> Blackstone, Commentaries \*63-\*64 (1765). See Wayne Morrison (ed.), *I Blackstone’s Commentaries on the Laws of England* 47 (Abingdon, Oxford: Routledge-Cavendish, 2001).

Will have authentic liberty!<sup>47</sup>

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<sup>47</sup> See *The Mikado*, Act II, Finale, in *Complete G&S*, *supra*, n. 1, at 422.