

Essay

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Law's Lunacy: W.S. Gilbert and His *Deus ex Lege*¹

I can teach you with a quip, if I've a mind;
I can trick you into learning with a laugh;
Oh, winnow all my folly, and you'll find
A grain or two of truth among the chaff!

—W.S. Gilbert²

I

ENTER MR. GILBERT

Judges often use the phrase “Gilbert & Sullivan” as a pejorative,³ invoking the Englishmen’s names to characterize ad-

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¹ Readers will recognize this Latin phrase as a play on *deus ex machina* (literally “god out of the machine”): an auctorial device—now much despised—whereby a character is providentially, though not always convincingly, introduced near the end of a play or novel for the sole purpose of rescuing the hero. *Deus ex lege* would mean “god out of the law,” suggesting a plot contrivance that relies on a law, rather than a person, to extricate the work’s characters from their predicament. I am indebted to Professor Jane Stedman for this strikingly apt phrase, see JANE W. STEDMAN, *GILBERT BEFORE SULLIVAN* 33 (1967), though I have changed her *leges* to *lege* for grammatical reasons of interest only to Latinists.

² W.S. GILBERT, *The Yeomen of the Guard*, in *THE ANNOTATED GILBERT AND SULLIVAN* 411, 445 (Ian Bradley ed., 1982).

³ I do *not* refer here to instances where judges quote in their opinions specific passages from Gilbert and Sullivan operas. Rather, I am referring to instances where judges mention Gilbert and Sullivan as a class of operas dealing disparagingly with the law. For examples of opinions that *do* quote specific passages from Gilbert and Sullivan operas, see note 58, *infra*.

ministrative blunders,⁴ careless legal drafting,⁵ anomalous legal arguments,⁶ spurious pleadings,⁷ and the like. W.S. Gilbert, the verbal half of the Gilbert and Sullivan partnership, would not have been pleased by these invocations, for he was far less concerned with law's conspicuous failures than with its vaunted successes. He delighted in exposing the foolishness that arises when law does exactly what it is expected to do. To him, exceptional muddles were of less moment than the everyday legal "triumph," and he probably would have been much annoyed that these judges who invoked his name failed to see themselves in his work but instead saw only their erring brethren.

We tend to misprize Gilbert today as a lightweight humorist, but he was, in point of fact, a barrister, the author of many serious dramas in addition to his more famous comic operas,⁸ and himself a deeply serious person,⁹ blessed—or perhaps cursed—with a much more penetrating eye than most of his contemporaries. He possessed in particular an acute sense of the sublime madness of legal reasoning: not merely the inadequacy or artificiality of legal reasoning.¹⁰ The madness. Most of us cherish our "faith in the ability of reason and language to guide human af-

⁴ See *Woolsey v. Carney*, 378 P.2d 658, 659 (Mont. 1963).

⁵ See *United States v. Pegg*, 782 F.2d 1498, 1499 (9th Cir. 1986).

⁶ See *United States v. Cooper*, 222 F. Supp. 661, 663 (D.D.C. 1963).

⁷ See *Cass v. P. O'Neill & Sons Ltd.*, [English] Court of Appeal (1978 C No. 7532, June 9, 1980).

⁸ See *infra* note 17.

⁹ Gilbert was also keenly and resentfully aware of the restrictions his age imposed on the serious artist. "English dramatists are driven within the narrow limits of *bourgeois* thought imposed by the survival of Puritanical prejudice. The English dramatist dances his hornpipe in fetters." AUDREY WILLIAMSON, *GILBERT AND SULLIVAN OPERA* 278 (1982). In his statement, Gilbert may have been quoting unconsciously a remark of Nietzsche's about "dancing in chains," although the German philosopher used the phrase (admirably) in a discussion of artistic *form*, whereas Gilbert was speaking about *content*. See Jeffrey G. Sherman, *I Say It's Spinach: Charitable Trusts to Remedy Market Failures in the Performing Arts*, 71 *UMKC L. REV.* 809, 812-13 n.15 (2003).

¹⁰ The claim that legal reasoning is merely artificial—as opposed to insane—lacks sufficient novelty or danger to command the attention of today's readers. Indeed, no less venerable a figure than Sir Edward Coke made the "artificiality" point almost 400 years ago in a famous response to King James the First's claim to personally exercise jurisdiction over a particular legal matter:

[T]hen the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life . . . or fortunes of his subjects, are not to be decided by natural

fairs,”¹¹ and a postulate of that faith is our view of law as an “internally coherent phenomenon”:¹² a kind of qualitative mathematics. But madness, too, can possess an internal coherence. I am reminded of an old joke about two people sharing a seat on a New York City bus. One passenger is continually throwing crumpled-up newspapers out the window. Finally, the passenger on the aisle asks:

AISLE. Why do you keep throwing newspapers out the bus window?

WINDOW. To keep the elephants off Fifth Avenue.

AISLE. But there *are* no elephants on Fifth Avenue!

WINDOW. See what a good job I'm doing?

What distinguishes madness from law—or what *should* distinguish it—is not madness's lack of coherence but its lack of harmony with the world in which the believer truly lives and acts. And for Gilbert, the lack of harmony between the rules of law and the needs of human beings was the stuff of madness.¹³

But when I first used the word “madness” in this Essay, I coupled it with the word “sublime,” for Gilbert did not regard this kind of legal madness as entirely deplorable. He would, I think, locate this madness among other transcendental human faculties in a way that recalls Theseus's famous observation from *A Midsummer Night's Dream*:

The lunatic, the lover and the poet
Are of imagination all compact.¹⁴

reason but by the artificial reason and judgment of law, which . . . requires long study and experience
Prohibitions del Roy, 77 Eng. Rep. 1342, 1343 (K.B. 1608).

¹¹ Lyrissa Barnett Lidsky, *Defensor Fidei: The Travails of a Post-Realist Formalist*, 47 FLA. L. REV. 815, 815 (1995).

¹² Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 951 (1988).

¹³ See, e.g., text at note 70, *infra*. During the height of Gilbert's career, the Court of Appeals of New York, applying the time-honored “assumption of risk” doctrine, denied recovery to a 14-year-old child who was injured on the job. *Hickey v. Taaffe*, 105 N.Y. 26, 39 (1887). See also ALAN WATSON, *SOCIETY AND LEGAL CHANGE IX* (1977) (“The ability and readiness of society to tolerate inappropriate private law is truly remarkable.”).

¹⁴ WILLIAM SHAKESPEARE, *A MIDSUMMER NIGHT'S DREAM*, act 5, sc. 1. Gilbert would not be altogether pleased at having his name linked with Shakespeare's, for he was distinctly not an admirer of the earlier man's work. JANE W. STEDMAN, *W.S. GILBERT: A CLASSIC VICTORIAN & HIS THEATRE* 134 (1996). Still, he was sufficiently familiar with Shakespeare's work to enjoy surreptitiously quoting him. In *The Mikado*, we find “A thing of shreds and patches,” 1 GILBERT, *The Mikado*, in *THE ANNOTATED GILBERT AND SULLIVAN*, *supra* note 2, 255, 263 [hereinafter GIL-

Gilbert—a barrister before he became a dramatist—saw law not as the creation of man’s will or intellect but as the creation of man’s poetic imagination: an unavailing but not ignoble attempt to bridge the gap between the material world that we inhabit and the ideal world that we *might* inhabit.¹⁵ That the attempt was

BERT, *The Mikado*]: an obvious echo of Hamlet’s “A king of shreds and patches.” WILLIAM SHAKESPEARE, HAMLET act 3, sc. 4. In *Ruddigore*, we find “Alas, poor ghost!” 2 GILBERT, *Ruddigore*, in THE ANNOTATED GILBERT AND SULLIVAN, *supra* note 2, at 311, 383 [hereinafter GILBERT, *Ruddigore*], a direct quote from *Hamlet*. See WILLIAM SHAKESPEARE, HAMLET, act 1, sc. 5. In *Iolanthe*, we have “both your Houses,” 1 GILBERT, *Iolanthe*, in THE ANNOTATED GILBERT AND SULLIVAN, *supra* note 2, at 161, 213 [hereinafter GILBERT, *Iolanthe*], recalling Mercutio’s dying outburst, “A plague o’ both your houses.” See WILLIAM SHAKESPEARE, ROMEO AND JULIET act 3, sc. 1. And what is probably Gilbert’s most labored pun has a Shakespearian genesis. The second act of *Princess Ida* takes place in a women’s college from which all men are barred—even chessmen. Three princes invade the college campus disguised as women, but a student, and later her mother as well, discover the invaders’ true sex. The student warns the three men that her mother has found them out:

Oh, sir! you must away from this at once —
My mother guessed your sex! It was my fault —
I blushed and stammered so that she exclaimed,
“Can these be men?” Then, seeing this [cigar case], “Why, these—”
“*Are men*” she would have added, but “*are men*”
Stuck in her throat!

2 GILBERT, *Princess Ida*, in THE ANNOTATED GILBERT AND SULLIVAN, *supra* note 2, at 209, 269-71 [hereinafter GILBERT, *Princess Ida*]. The phrase “*are men*/Stuck in her throat” is a play on the words of a passage from *Macbeth*: “But wherefore could not I pronounce ‘Amen’? I had most need of blessing, and ‘Amen’ stuck in my throat.” WILLIAM SHAKESPEARE, MACBETH act 2, sc. 2.

¹⁵ See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 9-10 (1983). I am somewhat hesitant to cite the late Professor Cover’s article on this occasion, since it marshals abstractions in a style that Gilbert once parodied rather savagely. In *Princess Ida*, a “Professor of Abstract Science” sings:

Come, mighty Must!
Inevitable Shall!
In thee I trust.
Time weaves my coronal!
Go, mocking Is!
Go, disappointing Was!
That I am this
Ye are the cursèd cause!
Yet humble second shall be first,
I ween;
And dead and buried be the curst
Has Been!

GILBERT, *Princess Ida*, *supra* note 14, at 247-49. And just as life imitates art, Professor Cover wrote as follows: “To live in a legal world requires that one . . . integrate not only the ‘is’ and the ‘ought,’ but the ‘is,’ the ‘ought,’ and the ‘what might be.’” Cover, *supra*, at 10.

unavailing was clear to Gilbert. He might put self-assured, earnest-sounding words into the mouth of *Iolanthe*'s Lord Chancellor—

The Law is the true embodiment
Of everything that's excellent.
It has no kind of fault or flaw. . . .¹⁶

—but clearly he saw the words' folly as well as their appeal.¹⁷ Traditionally, in nineteenth-century England, the gap between the material and the ideal worlds had been bridged by religious

¹⁶ GILBERT, *Iolanthe*, *supra* note 14, at 181.

¹⁷ The mild word “folly” is the proper one here. Gilbert rarely wrote about things that outraged him; he preferred instead to “sport with human follies, not with crimes.” 1 BEN JOHNSON, *Every Man in His Humour*, in 1 THE COMPLETE PLAYS OF BEN JOHNSON 559, 560 (1950). Gilbert saw clearly the fatuities around him, but they merely made him merry or made him sad as the case might be; they did not arouse his righteous indignation. On those occasions when he *did* write about things that outraged him—religious bigotry and the sexual double standard for men and women, for example—his tone became so blunt and savage that he got into trouble with the critics. In his drama *Charity* (1872), he dared to write admiringly of a woman who had passed herself off as married even though she knew she was not married to the man with whom she had lived. When Gilbert allowed his play to end on a note of dignity and triumph for the woman in question, rather than on a note of penitence and grief, one drama critic of the time expressed regret “that Gilbert did not provide ‘a more satisfactory termination’ since the present ending was not in harmony with the spectators’ ‘notions of dramatic justice.’” See STEDMAN, *supra* note 14, at 117. Gilbert’s audience was prepared to pity a “fallen woman” but not to admire her.

When the critics and public objected, Gilbert generally retreated. He was uncomfortable in the role of embattled outsider, and in an age when the theater was regarded by polite society as not entirely respectable (“actress” was a euphemism for prostitute), he was determined to see dramatic literature given the same esteem as poetic and narrative literature. From this mixture of motives, he turned to writing about institutions that he regarded as fundamentally sound but possessed of flaws that he could perceive more clearly than most of his contemporaries. For example, he was a patriotic Englishman, yet he could see the absurdity of regarding one’s nationality as an achievement rather than an accident of birth:

He is an Englishman!
For he himself has said it,
And it's greatly to his credit,
That he is an Englishman! . . .
For he might have been a Roosian,
A French, or Turk, or Proosian,
Or perhaps Itali-an! . . .
But in spite of all temptations
To belong to other nations,
He remains an Englishman!

1 GILBERT, *H.M.S. Pinafore*, in THE ANNOTATED GILBERT AND SULLIVAN, *supra* note 2, at 11, 69. And composer Sullivan, always responsive to Gilbert’s humor, set these words to a gloriously pompous tune worthy of Thomas Arne (composer of *Rule, Britannia!*).

faith, but Darwin's scientific writings and the Industrial Revolution's technological innovations had made that bridge seem less sturdy.¹⁸

[T]he educated classes of the late Victorian era needed help in coming to terms with science's destruction of their cherished faith in a God who had given order and meaning to their lives. And Gilbert's comic method constituted a response to just this need: he offered his audiences imperfect human law as a replacement for a perfect Providence, yet simultaneously encouraged them to laugh at this substitute and thus purge [themselves of] their reservations about its adequacy.¹⁹

Gilbert offered them, in other words, a *deus ex lege* literally: a god out of the law.²⁰

The delicacy of this double-barreled project—simultaneously celebrating law as a deliverer and exposing law's inadequacies as a deliverer—is well exemplified in a passage from *Iolanthe* in which it is not easy to tell whether Gilbert is mocking primarily the lawyer's learned parochialism or the layman's sentimental naivete. Strephon, an Arcadian shepherd, has become engaged to Phyllis, a shepherdess. But inasmuch as she is a ward of the Court of Chancery, such an engagement requires the consent of the Lord Chancellor. When the Lord Chancellor learns that his authority has been flouted in this matter, he demands an explanation.

STREPHON. My Lord, I know no Courts of Chancery; I go by Nature's Acts of Parliament. The bees—the breeze—the seas—the rooks—the brooks—the gales—the vales—the fountains and the mountains cry, "You love this maiden—take her, we command you!" 'Tis writ in heaven by the bright barbèd dart that leaps forth into lurid light from each grim

¹⁸ Gilbert was certainly aware of Darwin's writings, and as an ironic response to those who saw the theory of evolution as an affront to man's nobility, he offered his audience the example of the snobbish Pooh-Bah, who regards *his* descent from "lower forms" as a point of pride: "I am, in point of fact, a particularly haughty and exclusive person, of pre-Adamite ancestral descent. You will understand this when I tell you that I can trace my ancestry back to a protoplasmal primordial atomic globule. Consequently, my family pride is something inconceivable." GILBERT, *The Mikado*, *supra* note 14, at 269; while in *Princess Ida*, a faculty member at a women's university suggests that if the theory of evolution *is* insulting, human males deserve the insult:

While a man, however well-behaved,
At best is only a monkey shaved!

GILBERT, *Princess Ida*, *supra* note 14, at 263.

¹⁹ ALAN FISCHLER, MODIFIED RAPTURE 51 (1991).

²⁰ *See supra* note 1.

thundercloud. The very rain pours forth her sad and sodden sympathy! When chorused Nature bids me take my love, shall I reply, "Nay, but a certain Chancellor forbids it?" Sir, you are England's Lord High Chancellor, but are you Chancellor of birds and trees, King of the winds and Prince of Thunderclouds?

LORD CHANCELLOR. No. It's a nice point. I don't know that I ever met it before. But my difficulty is that at present there's no evidence before the Court that chorused Nature has interested herself in the matter.

STREPHON. No evidence! You have my word for it. I tell you that she bade me take my love.

LORD CHANCELLOR. Ah! but my good sir, you mustn't tell us what she told you—it's not evidence. Now an affidavit from a thunderstorm, or a few words on oath from a heavy shower, would meet with all the attention they deserve.²¹

In traditional comedy, "human considerations always triumph over law."²² Law is an obstacle to be overcome so that the young lovers can prevail and a new order take shape around them and the progeny their union promises. In the world of Gilbertian comedy, however, law not only generates the problem but provides the solution. (There's that *deus ex lege* again.) Marriage in Gilbert's world does not betoken the triumph of our humane impulses. Indeed, for some of the individual characters, it represents the triumph of duplicity and selfishness;²³ and for the men's and women's choruses, the very arbitrariness of their marriages at the end of the operas is itself a parody of the conventions of comedy.²⁴

Whereas Theseus conjoins "the lunatic, the lover, and the poet," Gilbert would render it "the lunatic, the lawyer, and the poet." Love occupies an entirely subordinate place in the Gilbertian universe, inasmuch as love represents a threat to law's comic centrality.²⁵ Indeed, Gilbert often uses the language or

²¹ GILBERT, *Iolanthe*, *supra* note 14, at 191-93.

²² MAURICE CHARNEY, *COMEDY HIGH AND LOW* 78 (1978).

²³ In *The Mikado*, for instance, Ko-Ko proposes to (and marries) Katisha to avoid capital punishment (it's a long story). And in *The Yeomen of the Guard*, Sergeant Meryll proposes to Dame Carruthers to buy her silence regarding his participation in a plot to free a condemned prisoner.

²⁴ In fact, Victorian farce frequently boasted arbitrary resolutions—"the forced ending being part of the fun." STEDMAN, *supra* note 1, at 18.

²⁵ Gilbert's disinclination to deal warmly with romantic love in his dramatic works invites considerable psychological speculation, but I shall not accept that invitation, in part because so many legends have grown up about Gilbert's life that it is often difficult to separate fact from fiction. For example, according to one biographer, Gilbert, during a financial quarrel with Sullivan and their producer, called them

style of law to subvert the conventions of romance.²⁶ For instance, in the play *The Palace of Truth*, Princess Zeolide, though betrothed to a handsome and accomplished prince, doesn't seem to be so enthusiastic in expressing her love as her mother could wish. When her mother reproves Zeolide for not responding to the prince's recent serenade, the princess replies with a circum-spect literalness suggestive of a well-coached witness.

ZEOLIDE. I heard his song—'twas very sweetly sung,
It told of love—it called for no reply.

ALTEMIRE. A song of love that called for no reply?

ZEOLIDE. It asked no question, mother.²⁷

In another play, *Engaged*, the heroine says to her beloved: "I love you madly, passionately; I care to live but in your heart, I

"bloody sheenies." ALAN JAMES, GILBERT & SULLIVAN 162 (1989). It turns out, however, that this ugly incident was a complete invention on the part of one of Gilbert's earliest biographers, Hesketh Pearson. See STEDMAN, *supra* note 14, at 270. Another biographer, quoting one of the original Gilbert and Sullivan star performers, states that Gilbert insisted that the male choristers in *Iolanthe* shave off their moustaches and that he fired the one chorister who refused to shave, LESLIE BAILY, THE GILBERT AND SULLIVAN BOOK 232-34 (rev. ed. 1956); while a different biographer states that Gilbert fired an *Iolanthe* chorister because the chorister *did* shave off his moustache. DIANA BELL, THE COMPLETE GILBERT AND SULLIVAN 50 (1989). (Personally, I find the former account more plausible.) In this article, I shall deal only with Gilbert's works, not his personal life.

²⁶ Gilbert also enjoyed annihilating the clichés of love and beauty by having a character give voice to the cliché in its most flowery and elevated form and then bring it crashing back to earth with an anticlimactic absurdity. In *The Mikado*, for instance, the lovelorn Katisha responds with the following rebuke to a taunt about her physical appearance: "You hold that I am not beautiful because my face is plain. But you know nothing . . . [I]t is not in the face alone that beauty is to be sought. My face is unattractive! . . . But I have a left shoulder-blade that is a miracle of loveliness." GILBERT, *The Mikado*, *supra* note 14, at 331-33.

He turned romantic, outlaw types into prosaic businessmen: pirates have apprentices (*The Pirates of Penzance*), a sorcerer is a lower middle class tradesman (*The Sorcerer*), a sixteenth century jailer/torturer sports the professional title "head jailer and assistant tormentor" (*The Yeomen of the Guard*), and a "brigand" is "highly respectable and old-established[, carrying] on an extensive practice in the mountains around Cordova." 1 GILBERT, *The Gondoliers*, in THE ANNOTATED GILBERT AND SULLIVAN, *supra* note 2, at 355, 389 [hereinafter GILBERT, *The Gondoliers*]. In an early short story, "The Burglar's Story," a young man becomes an article clerk to a professional burglar. W.S. GILBERT, *The Burglar's Story*, in THE LOST SHORT STORIES OF W.S. GILBERT 199 (Peter Haining ed., 1982). And in an early poem, an ardent troubadour, upon learning that the woman he has been serenading is currently serving a prison sentence, suddenly remembers "He'd business at the Bank." W.S. GILBERT, *The Troubadour*, in THE BAB BALLADS 30, 31 (1968) [hereinafter GILBERT, *The Troubadour*].

²⁷ W.S. Gilbert, *The Palace of Truth*, in PLAYS BY W.S. GILBERT 27, 33 (George Rowell ed., 1982).

breathe but for your love; yet . . . you must give me some definite idea of your pecuniary position . . . business is business.”²⁸ And conversely, Gilbert can use the language of the arts to undercut *law*'s touted dignity. In the opera *Iolanthe*, the Lord Chancellor's colleagues find him in a melancholy mood, and one of them remarks:

This is very sad. His Lordship is constitutionally blithe as a bird—he trills upon the bench like a thing of song and gladness. His series of judgements in F sharp minor, given *andante* in six-eight time, are among the most remarkable effects ever produced in a Court of Chancery. He is, perhaps, the only living instance of a judge whose decrees have received the honour of a double *encore*.²⁹

Gilbert's view of law as the fruit of man's poetic imagination gave him an outsider's perspective, but his training as a barrister gave him an insider's knowledge. *The Pirates of Penzance*, for instance, contains an obscure legal pun that even a trained estates lawyer might overlook. It is a truism of Anglo-American property law that title to land may be acquired in one of two mutually exclusive ways: “by descent” or “by purchase.”³⁰ Yet Gilbert managed to conjoin this disjunction. As the curtain rises on Act Two, Major-General Stanley is discovered sitting despondently in a ruined chapel on his estate, where he has come to humble himself before the graves of his ancestors for having told a base lie in Act One. His daughter's fiancé, Frederic, remonstrates that Stanley has only just bought the estate, so the persons buried long ago in the chapel are hardly his ancestors. Stanley replies:

²⁸ W.S. Gilbert, *Engaged*, in LONDON ASSURANCE AND OTHER VICTORIAN COMEDIES, 145, 150-51 (Klaus Stierstorfer et al. eds., 2001). Later in the same play, we encounter another young lady, who has suddenly discovered that she married someone three months ago: someone whose name she doesn't know and whom she hasn't seen since. (Don't ask!) With a clearheaded thoroughness that a trained matrimonial lawyer might envy, she ponders her awkward situation.

Am I single? Am I married? Am I a widow? Can I marry? . . . If I am a widow, how came I to be a widow . . . ? What did he die *of*? Did he leave me anything? If anything, how much, and is it saddled with conditions? Can I marry again without forfeiting it?

Id. at 167. For another example of this comic deflation, see text at note 21, *supra*.

²⁹ GILBERT, *Iolanthe*, *supra* note 14, at 239.

³⁰ *Harris v. Bittikofer*, 541 S.W.2d 372 (Tenn. 1976). “Broadly speaking, title to real estate may be acquired either by descent or by purchase. Title by descent is based on inheritance as an heir, or on escheat. Every other acquisition is by purchase, whether it be by gift, conveyance or devise.” *Id.* at 381.

Frederic, in this chapel are ancestors: you cannot deny that. With the estate, I bought the chapel and its contents. I don't know whose ancestors they *were*, but I know whose ancestors they *are*, and I shudder to think that their *descendant by purchase* (if I may so describe myself) should have brought disgrace upon [them].³¹

But this insider's knowledge was more a barrister's knowledge than a solicitor's. That is to say, Gilbert was content to be slipshod about factual details as long as they produced the desired effect. For example, *The Sorcerer* concerns a love-at-first-sight potion that wreaks havoc in an English country village.³² The title character, John Wellington Wells, explains to a purchaser exactly how the potion works: "Whoever drinks of it loses consciousness for [twelve hours], and on waking falls in love, as a matter of course, with the first [person of the opposite sex] he meets who has also tasted it, and his affection is at once returned."³³ Yet later in the play, Lady Sangazure, who has tasted the potion, glimpses Wells and immediately falls madly in love with him, even though he has *not* tasted it. No doubt the encounter drew laughs in performance, owing in part to differences in the two characters' social stations, so this flaw in the plotting was overlooked. But it was a flaw for all that.³⁴

³¹ 1 GILBERT, *The Pirates of Penzance*, in THE ANNOTATED GILBERT AND SULLIVAN, *supra* note 2, at 83, 127 (third emphasis added).

³² Opera fans may think they have detected a similarity between Gilbert's opera and Donizetti's *L'Elisir d'amore*; but while Donizetti's "sorcerer" is a charlatan and his elixir a sham, Gilbert's sorcerer is the genuine article and so is his potion. In Gilbert's *Iolanthe* the fairies are *real* fairies; in his *Ruddigore* the ghosts are *real* ghosts. This authenticity enhances the fun, since magic and logic are thereby forced to coexist.

³³ 2 GILBERT, *The Sorcerer* in THE ANNOTATED GILBERT AND SULLIVAN, *supra* note 2, at 49, 83. Significantly, Gilbert later refers to the potion's operation as "law":

You bade me drink—with trembling awe
I drank, and, by the potion's law,
I loved the very first I saw!

Id. at 113.

³⁴ Also overlooked later in the opera is the potion's property of inducing unconsciousness for twelve hours. When the entire chorus unknowingly drinks the potion at a noontime picnic at the end of Act One, their sudden collapse makes a fine tableau for the Act's final curtain, and Act Two conveniently begins twelve hours later. But when two of the principal characters drink the potion near the end of Act Two, there's just no time for twelve hours of unconsciousness, so Gilbert has the potion work immediately.

At the end of Act One of *The Yeomen of the Guard*, Wilfred Shadbolt is arrested and condemned to death. GILBERT, *The Yeomen of the Guard*, *supra* note 2, at 467. Yet the beginning of Act Two finds him free as a bird, *id.* at 473, with no explanation

This Essay will analyze Gilbert's comic critique of the law, with special reference to four developments that particularly concerned and amused him: lawyers' overreliance on mere language; laypersons' overreliance on law; the reification of social labels; and the convergence of law and gamesmanship.

II

THE INDETERMINACY OF LANGUAGE

Of *that* there is no manner of doubt—
No probable, possible shadow of doubt —
No possible doubt whatever.³⁵

Like all good barristers and all good poets, Gilbert was singularly attuned to the nuances of language. Indeed, language enthralled him, and he filled his works not only with elaborate puns but also with extended passages in Latin (*The Mountebanks*), French (*The Grand Duke*), Italian (*The Gondoliers*), Japanese (*The Mikado*), and even an invented lingo as the supposed native language of a South Pacific island (*Utopia, Limited*).³⁶ For the English language he had an almost proprietary love, and when an otherwise laudatory critic chided him for his use of the word “coyfully” in *The Gondoliers*, Gilbert did not suffer even this mild reproof to go unanswered:

I think I may be allowed to defend my word “coyfully.” Your critic takes exception to it because one cannot be full of “coy.” That is quite true; but is it a conclusive argument against the use of the word? We use the word “manfully”, though one cannot be full of “man”. We use the word “bashfully”, though one cannot—at least I don't think one can—be full of

of how he came to be reprieved and released. Since Wilfred's continued presence on stage permits him to join in two excellent comic duets, audiences invariably overlook Gilbert's lapse.

³⁵ GILBERT, *The Gondoliers*, *supra* note 26, at 387.

³⁶ One of Gilbert's most ingenious devices involving language brightens his otherwise dreary opera *The Grand Duke*. The opera takes place in a German-speaking duchy, yet naturally, like Shakespeare's Danes in *Hamlet* and Shaw's Frenchmen in *Saint Joan*, Gilbert's Germans all speak English. But unlike the playwrights who ask us to suspend disbelief as to their characters' spoken language, Gilbert actually calls our attention to the illusion: In the role of a British character who complains in the play about the difficulties of speaking German, he cast a German actress. See BAILY, *supra* note 25, at 388. Thus, the German characters in Gilbert's production spoke English with no accent, while the one English character in the play—the one character who admits to having difficulty with the language she is speaking—spoke English with a German accent.

“bash”.³⁷

Linguistic affectation always enraged him. In *Patience*, he parodied the jargon of the acolytes of the mid-nineteenth-century Aesthetic movement. When the Aesthetic ladies Angela and Saphir come upon three military men who, though previously contemptuous of Aestheticism, are now dressed in Pre-Raphaelite garb and standing in “Aesthetic” attitudes, the ladies are overwhelmed with relief and gratitude:

ANGELA. Oh, Saphir—see—see! The immortal fire has descended on them, and they are of the Inner Brotherhood—perceptively intense and consummately utter.

SAPHIR. (*in admiration*) How Botticellian! How Fra Angelican! Oh, Art, we thank thee for this boon.

COLONEL. (*apologetically*) I’m afraid we’re not quite right.

ANGELA. Not supremely, perhaps, but oh, so all-but! (*To SAPHIR*) Oh, Saphir, are they not quite too all-but?³⁸

Of course, the law is not without jargon of its own, such as the syntactical oddity “actionable.” But at least “actionable” conveys a definite meaning that no other single English word can, and it therefore permits the lawyer to express herself more lucidly and concisely than she could without it. “[Good] legalese [does not] wander[] verbosely round the point but [rather] goes straight there.”³⁹ The same cannot be said of much “postmodern” legal scholarship, with its fondness for pompous excrescences—*e.g.*, “modality,” “hegemonic,” “narrativity,” “encoded,” “immanence”—calculated more to impress than to illuminate.⁴⁰ Even as skillful a parodist as Gilbert would have been hard-pressed to improve upon titles like *The Epistemic Contract of Bisexual Erasure*⁴¹ or sentences like:

[T]o situate one’s self *outside* the thought to be inquired into is in effect to stabilize a naïve subject-object relation whereby the subject (here, you and I) eclipses from consideration and critical inquiry what we, as authors and readers, have already contributed in the construction, in the formulation of the ob-

³⁷ See *id.* at 346.

³⁸ 2 GILBERT, *Patience*, in THE ANNOTATED GILBERT AND SULLIVAN, *supra* note 2, at 121, 191.

³⁹ H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 411 (Sir Ernest Gowers ed., 2d ed. 1965).

⁴⁰ I must plead guilty to having used “other” (as a noun) and “reification” in this Essay. I do want to get published, after all.

⁴¹ Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

ject of inquiry.⁴²

But along with Gilbert's love for language came a profound sense of its inadequacy as a regulator of human affairs.⁴³ To imagine that the language of a constitution or statute has a "plain meaning" as to which there can be no reasonable disagreement was, to Gilbert, the height of folly, and he took particular delight in demonstrating language's indeterminacy by fashioning ingenious examples of amphibology. A personal favorite of mine appears in the second act of *Iolanthe*, when the dim-witted Lord Mountararat pompously observes: "It so happens that if there is an institution in Great Britain which is not susceptible of any improvement at all, it is the House of Peers!"⁴⁴ The speaker undoubtedly intends to praise the House of Peers as the best of all possible institutions, yet his words could also mean that the institution is so worthless as to be irremediable. And later in the same work, Gilbert demonstrates the instability of even a simple phrase like "help yourself." The female chorus of Fairies has just gone off and married the male chorus of Peers. "It's our fault," says the smug Mountararat. "They couldn't help themselves." The Fairy Queen replies drily, "It seems they *have* helped themselves, and pretty freely, too!"⁴⁵

⁴² Pierre J. Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 834 (1991).

⁴³ See Lidsky, *supra* note 11, at 834.

⁴⁴ GILBERT, *Iolanthe*, *supra* note 14, at 223.

⁴⁵ *Id.* at 249. Gilbert also uses this occasion to invert Victorian notions of gender, a favorite object of his satire. See STEDMAN, *supra* note 14, at 118. While the traditional Victorian assumed that it should be the man who takes the initiative in matrimonial matters—see BAILY, *supra* note 25, at 295 (quoting a Victorian newspaper whose periphrasis for "men" is "[t]he sterner and less mealy-mouthed sex"); see also *Bradwell v. Illinois*, 83 U.S. (1 Wall.) 130, 141 (1872) (Bradley, J., concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.")—the Fairy Queen's line clearly suggests that it was the Fairies who took the initiative in this instance. On another occasion (*H.M.S. Pinafore*) Gilbert's satire on gender personae is to be found in a stage direction. As the suicidal hero puts a loaded pistol to his head, "All the sailors [but not, evidently, the ladies, who are also on stage] stop their ears." GILBERT, *supra* note 17, at 47. Indeed, the very name "Pinafore" for a naval vessel is comically subversive of traditional gender notions of male military valor, since a pinafore is a kind of apron worn by young girls as an overdress (John Tenniel's drawings for *Alice's Adventures in Wonderland* portray Alice wearing a pinafore).

Gilbert was not always able to rise above his contemporaries' gender prejudices. In the final act of *Princess Ida*, as the female students and faculty of a women's university prepare to do battle with an invading male army, they admit, in an unforgivable passage, that their anticipatory saber-rattling ("Death to the invader!") is but empty show:

Gilbert would have been particularly contemptuous of judges who regard the dictionary as a proper foundation for judicial decision-making. A splendid example of this lamentable technique is *Smith v. United States*,⁴⁶ where the United States Supreme Court saw fit to affirm a harsh criminal penalty through mere recourse to a dictionary to determine the meaning of the word “use” in a federal statute. The statute mandated enhanced punishments for anyone who, “during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm.”⁴⁷ The defendant, John Smith, had offered to trade a machine gun for some cocaine. Although he had not used the gun as a weapon, a majority of the Court, after consulting two dictionaries to determine the “everyday meaning” of “use,”⁴⁸ affirmed Smith’s conviction and enhanced sentence, since he had indeed “employed” the gun, albeit only as an item of barter. It is hard to imagine that Congress regarded bartering a gun for drugs as a more serious crime than bartering, say, an automobile for drugs, but the majority of the Court were content to let their decision rest on the dictionary and affirm a harsher sentence for the gun-swapper than they would have for the car-swapper.⁴⁹

MELISSA. Thus our courage, all untarnished
 We’re instructed to display:
 But to tell the truth unvarnished,
 We are more inclined to say,
 “Please you, do not hurt us,”
 CHORUS. “Do not hurt us, if it please you!”
 MELISSA. “Please you let us be.”
 CHORUS. “Let us be—let us be!”
 MELISSA. “Soldiers disconcert us.”
 CHORUS. “Disconcert us, if it please you!”
 MELISSA. “Frightened maids are we.”
 CHORUS. “Maids are we—maids are we!”

GILBERT, *Princess Ida*, *supra* note 14, at 287.

⁴⁶ 508 U.S. 223 (1993).

⁴⁷ 18 U.S.C. § 924(c)(1) (2000).

⁴⁸ *Smith*, 508 U.S. at 228-29.

⁴⁹ Interestingly enough, Justice Scalia, often regarded as the most forceful and consistent proponent of the “plain meaning” approach to statutory construction, dissented. *See, e.g.*, William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 650-56 (1990).

Only after more than two decades of unsatisfactory attempts to clarify the meaning of ERISA’s federal preemption provision by referring to the dictionary definition of the statutory term “relate to” did the United States Supreme Court finally realize, “We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute.” *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*,

Gilbert parodied this slavish, acontextual reliance on dictionary meaning in the 1879 *The Pirates of Penzance*.⁵⁰ Young Frederic was apprenticed to a band of pirates until he reached twenty-one. As he is celebrating the end of his indentures and his imminent return to law-abiding society, the Pirate King reminds him that he (Frederic) was born on February 29 in a leap year and that his articles of apprenticeship end his indentures not in Frederic's twenty-first year but rather on Frederic's twenty-first *birthday*. Since that twenty-first February 29 will not arrive until 1940, Frederic has many decades of apprenticeship before him.⁵¹

A serious international incident arose because of the failure of the London correspondent of the Paris newspaper *Le Figaro* to learn Gilbert's lesson about the importance of context.⁵² The *casus belli* was a song in his opera *Ruddigore*, sung by a conceited British sailor. The song lyric needs to be quoted in full.

I shipped, d'ye see, in a Revenue sloop.
And, off Cape Finistere,
A merchantman we see,
A Frenchman going free,
So we made for the bold Mounseer,
D'ye see?
We made for the bold Mounseer.
But she proved to be a Frigate—and she up with her ports,
And fires with a thirty-two!

514 U.S. 645, 656 (1995). See Jeffrey G. Sherman, *Domestic Partnership and ERISA Preemption*, 76 TUL. L. REV. 373, 404-06, 422-23 (2001).

⁵⁰ Significantly, the opera's subtitle is "The Slave of Duty."

⁵¹ Gilbert, *The Pirates of Penzance*, *supra* note 31, at 135-41. Gilbert had employed a similar (but much less neat) device in an earlier musical play: *Our Island Home*. The dutiful Captain Bang, a lad who was, through error, apprenticed to a pirate until the age of 21, is about to kill his own mother and father because that is what the pirate code demands. Bang tells us that he will reach the age of 21 (and thus be free of his piratical chains) at 4:45 A.M. "tomorrow morning." We learn, however, that he was born at Greenwich. Since the action takes place at "longitude 50 east of Greenwich" (think Madagascar or the Caspian Sea), the characters are all relieved to learn that he "came of age twenty minutes ago," and therefore need no longer kill his parents. Gilbert, *Our Island Home*, in STEDMAN, *supra* note 1, at 107, 127. In order for Gilbert's joke to work, however, 4:45 a.m. must occur at Greenwich before it occurs at the scene of the action. And in order for that to be the case, the play's action would have to take place *west* of Greenwich, not east. So here we have another example of Gilbert's carelessness about details, *see* text at note 32, *supra*, only in this case the carelessness cannot be excused by the exigencies of plot; Gilbert could just as well have laid the action in Brazil (longitude 50 west of Greenwich).

⁵² For an account of this incident, see JAMES, *supra* note 25, at 115; STEDMAN, *supra* note 14, at 243.

It come uncommon near,
But we answered with a cheer,
Which paralysed the Parley-voo!
D'ye see?
Which paralysed the Parley-voo!
...
Then our Captain he up and he says, says he,
"That chap we need not fear,—
We can take her, if we like,
She is [certain] for to strike,
For she's only a darned Mounseer,
D'ye see?
She's only a darned Mounseer!
But to fight a French fal-lal—it's like hittin' of a gal—
It's a lubberly thing for to do;
For we, with all our faults,
Why, we're sturdy British salts,
While she's only a Parley-voo,
D'ye see?
While she's only a poor parley-voo!"
...
So we up with our helm, and we scuds before the breeze
As we gives a compassionating cheer;
Froggee answers with a shout
As he sees us go about,
Which was grateful of the poor Mounseer,
D'ye see?
Which was grateful of the poor Mounseer!
And I'll wager in their joy they kissed each other's cheek
(Which is what them [foreigners] do),
And they blessed their lucky stars
We were hardy British tars
Who had pity on a poor Parley-voo,
D'ye see?
Who had pity on a poor Parley-voo!⁵³

The French, no doubt responding acontextually to epithets like "Froggee" and to the singer's disparagement of French sailors' virility, took this song as an insult. In fact, however, Gilbert's target in the song was *British* military braggadocio, as anyone who troubles to consider the song's narrative should realize:⁵⁴

⁵³ Gilbert, *Ruddigore*, *supra* note 14, at 331-35.

⁵⁴ Daina C. Chiu displays a similar imperviousness to Gilbert's irony in her article *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994). In it, she correctly observes that Western culture has constructed an image of "ultrafemininity" around the young Asian woman: child-like, obedient, and grateful to be able to serve her man. *Id.* at 1119. But as an example of Western narrative works that present Asian women in this light, she cites, among others, Gilbert and Sullivan (presumably *The Mikado*). *Id.* at 1119 n. 416. Even the most cursory reading of *The Mikado* reveals that Gilbert had no

The crew of a British coastal patrol boat spies what it thinks is an unarmed French merchant vessel and moves aggressively in her direction. But when the French vessel turns out to be not only fully armed but possessed of some very accurate gunners, the British boat turns tail and flees.⁵⁵ And the British sailor who sings the song tries, through xenophobia and macho bluster, to present this example of British cravenness as an illustration of superior British military valor.

The habit of acontextual interpretation often bespeaks the absence of a sense of irony, and without a sense of irony an adjudicator is likely to make deeply flawed judgments. When Justice Felix Frankfurter circulated a mock opinion in a movie censorship case, Justice Whittaker failed to see the joke and sent him a note joining in the opinion. Frankfurter, lamely, had to inform Whittaker, "This was intended as a joke." The late Professor Bernard Schwartz relates this incident in a book chapter entitled the "Ten Worst Supreme Court Justices," and he relates it to explain in part why he includes Justice Whittaker among the ten.⁵⁶

III

LAW'S PROPER SPHERE

YUM-YUM. [W]e must obey the law.
NANKI-POO. Deuce take the law!
YUM-YUM. I wish it would, but it won't.⁵⁷

The Gilbert and Sullivan passage most frequently quoted in federal appellate court opinions is "let the punishment fit the crime."⁵⁸ These courts' citations are all devout and literal; they

intention of portraying "real" Japanese; the object of his satire was the English. Moreover, the heroine of *The Mikado* (her name is Yum-Yum(!)) is anything but obedient.

⁵⁵ See MARTYN GREEN, TREASURY OF GILBERT & SULLIVAN 508 (1961).

⁵⁶ BERNARD SCHWARTZ, A BOOK OF LEGAL LISTS 30-32 (1997). Justice Frankfurter's mock opinion was as follows:

The Court of Appeals in this case sustained the censorship, under an Illinois statute, of a motion picture entitled, "The Game of Love." The theme of the film as far as it has one, is the same as that in Benjamin Franklin's famous letter to his son, to the effect that the most easing way for an adolescent to learn the facts of life is under the tutelage of an older woman. A judgment that the manner in which this theme was conveyed by this film exceeded the bounds of free expression protected by the Fourteenth Amendment can only serve as confirmation of the saying, "*Honi soit qui mal y pense*" [i.e., "evil be to him who thinks evil of this"].

⁵⁷ GILBERT, *The Mikado*, *supra* note 14, at 287.

⁵⁸ *Id.* at 325. See *Ward v. Brown*, 22 F.3d 516, 517 (2d Cir. 1994) (concurring

quote the line as they would a straightforward formulation of a noble principle.⁵⁹ Indeed, the author of one opinion quotes it to illustrate how “deeply etched in the public mind [is] the notion that punishment should fit the crime,”⁶⁰ as if he imagined *Mikado* audiences nodding reverently whenever the line is sung.⁶¹ But Gilbert, in this song, was not urging decency and moderation upon our system of justice. Rather, he was giving voice to our frustration with the law’s inability to reach many of the most troublesome and offensive acts that blight modern life. The song is a litany of obnoxious but legal acts—the idle chatter of “Society” bores and the “vocal villainies” of “amateur tenors” (today it would be the dinnertime intrusions of telemarketers and the overloud nattering of cell-phone users⁶²)—coupled with the gro-

opinion); *United States v. Weaver*, 1992 U.S. App. LEXIS 14552 (4th Cir. 1992) (dissenting opinion); *United States v. Dunson*, 940 F.2d 989, 995 (6th Cir. 1991) (slightly misquoting Gilbert’s words); *United States v. Barker*, 771 F.2d 1362, 1365 (9th Cir. 1985); *United States v. Barnes*, 604 F.2d 121, 154 (2d Cir. 1979).

⁵⁹ Such a principle does exist, of course: *In quo quis delinquit, in eo de jure est puniendus*. BLACK’S LAW DICTIONARY 900 (rev. 4th ed. 1968).

⁶⁰ *Barker*, 771 F.2d at 1365. In point of fact, our criminal justice system seems to be moving away from fitting punishment to the crime and toward fitting it to the offender. See *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding a sentence of twenty-five years to life for a man convicted of stealing video tapes worth less than \$200 because the petty theft represented the offender’s third strike under California’s “three strikes” law). And perhaps fitting the punishment to the offender is not altogether new. Gilbert was certainly aware of the favoritism shown to the rich under the British criminal justice system when he wrote sarcastically:

No tolerance we show to undeserving rank and splendour;

For the higher his position is, the greater the offender.

W.S. GILBERT, *Utopia, Limited*, in THE COMPLETE PLAYS OF GILBERT AND SULLIVAN 583, 629 (1938). But he was also aware of the tendency to romanticize (and patronize) the poor with sentimental nonsense about their supposed superior virtue, and in *Iolanthe* he expressed his impatience with that sort of cant:

Hearts just as pure and fair
May beat in Belgrave Square
As in the lowly air
Of Seven Dials!

GILBERT, *Iolanthe*, *supra* note 14, at 189. Cf. RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 292 (1963) (“[I]n the 1930s a number of American writers gave way to the fatally maudlin notion that the sufferings and the ‘historic mission’ of the working class endow it with an immense inherent moral superiority over middle-class intellectuals.”).

⁶¹ State courts, too, quote the line in this flat-footed, literal way. See, e.g., *Sandvik v. State*, 564 P.2d 20 (Alaska 1977); *Commonwealth v. Reneer*, 734 S.W.2d 794 (Ky. 1987).

⁶² Amtrak has designated the first coach car on many of its Northeast Corridor trains as a “quiet car,” in which cell phones and loud conversations are forbidden. Bob Levey, *Amtrak’s Quiet Car—Heaven on Earth*, WASH. POST, May 21, 2003, at

tesque but “fitting” punishments that only an absolute monarch like the Mikado, untrammled by our Constitution’s Eighth Amendment, could impose:

The amateur tenor, whose vocal villainies
All desire to shirk,
Shall, during off-hours
Exhibit his powers
To Madame Tussaud’s waxwork.⁶³

The song is purgative. We share Gilbert’s glee at the thought of ridding the world of these pests,⁶⁴ but the very outlandishness of his devised punishments warns us that we should not look to the law for relief from every irritant. He would have had little sympathy with lawsuits complaining that a fast-food company’s meals make children obese⁶⁵ or that a public bus company’s decision to transmit radio broadcasts through loudspeakers on its buses violates the United States Constitution.⁶⁶

To employ the law to resolve *emotional* disputes also struck Gilbert as wrong-headed. In *Utopia, Limited*, he satirized such a deployment of the law (and also satirized Englishmen’s supposedly unemotional approach to matters of the heart) by imagining a statute aimed at rivals in love. Scaphio and Phantis, two royal counselors, have both fallen in love with Princess Zara, and they come upon her walking with the man *she* loves, Captain Fitzbat-

C14. The enforcement mechanism seems to be passenger complaints to the offender.

⁶³ GILBERT, *The Mikado*, *supra* note 14, at 325. The senior George Bush tried to follow the Mikado’s example. In an interview with the American Broadcasting Company, he offered this suggestion as a way to punish the so-called American Taliban, John Walker Lindh: “I thought of a unique penalty: Make him leave his hair the way it is, and his face as dirty as it is, and let him go wandering around this country and see what kind of sympathy he would get.” Helen Kennedy, *No Lawyer for Taliban Yank*, N.Y. DAILY NEWS, Dec. 20, 2001. How shoddy compared with the fruit of Gilbert’s imagination!

⁶⁴ Another song in *The Mikado* also prescribes punishment for a list of “society offenders” whose misconduct is yet within the law: *e.g.*, “people who have flabby hands and irritating laughs.” GILBERT, *The Mikado*, *supra* note 14, at 275. Since *this* song is sung by the Lord High Executioner, the imposed punishment for those on his list is evidently decapitation.

⁶⁵ See *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

⁶⁶ See *Pub. Utils. Comm. of D.C. v. Pollak*, 343 U.S. 451 (1952). Although Gilbert might not be sympathetic, *I* am. Indeed, Justice Frankfurter was *so* sympathetic that he recused himself: “My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it.” *Id.* at 467.

tleaxe, an officer of the Household Cavalry. When the counselors violently profess their love to Zara, Fitzbattleaxe intervenes.

FITZBATTLEAXE. It's a common situation. Why not settle it in the English fashion? . . . In England, when two gentlemen are in love with the same lady, and until it is settled which gentleman is to blow out the brains of the other, it is provided, by the Rival Admirers' Clauses Consolidation Act, that the lady shall be entrusted to an officer of Household Cavalry as stakeholder, who is bound to hand her over to the survivor . . . in a good condition of substantial and decorative repair.

SCAPHIO. Reasonable wear and tear and damages by fire excepted?

FITZBATTLEAXE. Exactly.⁶⁷

Of course, the Rival Admirers' Clauses Consolidation Act is a complete invention even in the context of the opera: an invention obviously concocted by Fitzbattleaxe at the spur of the moment.⁶⁸ But actions for breach of promise of marriage are a very real example of the deployment of law to resolve emotional battles, and Gilbert devoted an entire opera—albeit a one-act opera (*Trial by Jury*)—to the examination of just such an action.

Breach of promise is a problem that, by its very nature, leads to incongruities—Gilbert might prefer the word “madness”—when law's blunt, authoritarian instruments are deployed to resolve it. The cause of action for breach of promise is, in its essence, a prayer for damages for the pain of rejection, and what could be more incongruous?⁶⁹ Law's intrusion into this situation illustrates clearly the gap that Gilbert observed between the workings of the law and the needs of human beings.⁷⁰ If the

⁶⁷ GILBERT, *supra* note 60, at 611.

⁶⁸ Reality provides some equally outlandish instances of the deployment of law to regulate romantic conduct, such as the provision in a prenuptial contract imposing on the wife in the event of divorce a \$1,000 penalty for every pound she had gained. See Brigid McMenamin, *Til Divorce Do Us Part*, FORBES, Oct. 14, 1996, at 52, 58. One website avers that an Idaho statute makes it “[i]llegal for a man to give his sweetheart a box of candy weighing less than fifty pounds,” though I have been unable to find such a statute myself. See <http://www.dumblaws.com> (last visited Dec. 15, 2004).

⁶⁹ See Nathan P. Feinsinger, *Legislative Attack on “Heart Balm,”* 33 MICH. L. REV. 979, 979 (1935). But see Rosemary J. Coombe, *“The Most Disgusting, Disgraceful and Inequitous Proceeding in Our Law”: The Action for Breach of Promise of Marriage in Nineteenth-Century Ontario*, 38 U. TORONTO L.J. 64, 98 (1988) (noting that supporters of legislation aimed at barring such actions “placed so much emphasis on the absurdity of giving money to women to compensate them for wounded feelings . . . that the real social and economic injuries suffered by women were obscured”).

⁷⁰ See *supra* text at note 13. Indeed, Gilbert filled his works with rules (some-

threat of litigation leads manufacturers to take greater care in producing their products, that greater care benefits society. But if a person honors a marriage proposal he now regrets only because he wishes to avoid litigation, that “forced” marriage is decidedly unwise, and it will owe its anguished existence to an anomalous intrusion by the law into a universe that really is beyond its competence.⁷¹

The cause of action for breach of promise was largely abolished under English and American law during the twentieth century,⁷² but its opponents relied less on arguments about the action’s incongruity than on arguments about the likelihood of “strike” suits by unscrupulous goldiggers.⁷³ As Professor Feinsinger remarked, writing when the abolition movement had only just begun, this fear was not wholly unwarranted: “The very rules of law themselves delineate every defendant as *prima facie* a scoundrel and every plaintiff as a person of refined sensibilities and irreproachable character.”⁷⁴

When Gilbert chose to write a satiric opera dealing entirely with a lawsuit, therefore, it should not surprise us that he chose breach of promise of marriage as the driving cause of action. In

times social, sometimes juristic) that seem to defy the reality of human experience. The title character in *The Mikado* decrees that flirting is a capital crime. The title character in *Princess Ida* founds a women’s college from which even chessmen and male poultry are barred, and any human male found within its walls is to be put to death. The title character in *Patience* has been told that love must be unselfish if it is to be true love, and she decides accordingly that it is wrong to love anyone who is not conspicuously imperfect. As to this last, particularly, Gilbert may have had in mind the over-lofty standards with which Victorian children were often burdened: “[Victorian children] were brought up to hear such constant emphasis on duty and self-sacrifice, on benevolence and sympathy . . . that they were under the necessity not only of being actuated by noble motives but of *not* being actuated by any which were selfish, mean, or destructive.” WALTER E. HOUGHTON, *THE VICTORIAN FRAME OF MIND* 410 (1957).

⁷¹ This comparison between products liability suits and breach of promise suits is, I must admit, somewhat facile. Unlike the law permitting suits for breach of promise, the law allowing products liability suits is intended to solve collective action problems (among manufacturers), and the solution of collective action problems is among the least controversial uses of law. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031, 2051 (1996).

⁷² See Jeremy D. Weinstein, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 223 nn.207, 208 (1986).

⁷³ See Jane E. Larson, “Women Understand So Little, They Call My Good Nature ‘Deceit’”: A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 394-95 (1993).

⁷⁴ Feinsinger, *supra* note 69, at 984.

Trial By Jury,⁷⁵ perhaps his most cunningly sustained flight of fancy, Gilbert anticipated by sixty years Professor Feinsinger’s remarks about the presumed culpability of the defendant and the presumed blamelessness of the plaintiff. In the opera’s first solo number, the Usher, amid his repeated hollow admonitions that the jury remain impartial throughout the trial, sees fit to poison the jurymen’s minds:

Oh, listen to the plaintiff’s case:
Observe the features of her face—
The broken-hearted bride.
Condole with her distress of mind:
. . .
And when amid the plaintiff’s shrieks,
The ruffianly defendant speaks—
Upon the other side;
What *he* may say you needn’t mind.⁷⁶

The Plaintiff, presumably to lend further poignancy to her situation, enters the courtroom in her now-pointless bridal finery, attended by a full complement of bridesmaids. By contrast, the Defendant enters alone, and his arrival provokes the jurymen to exclaim:

Monster, dread our damages.
We’re the jury,
Dread our fury!⁷⁷

But the climax of the legal madness comes near the end of the opera when each of the two parties must act against his or her own personal interests in the interests of getting a more favorable verdict. The plaintiff, in a surprisingly candid effort to inflate her damages, rapturously professes immoderate love for her antagonist:

I love him—I love him —with fervour unceasing,

⁷⁵ 2 GILBERT, *Trial By Jury*, in THE ANNOTATED GILBERT AND SULLIVAN, *supra* note 2, at 9. The work represented Gilbert and Sullivan’s first success and is, in two respects, unique in the G&S canon. First, the work is entirely sung; there is no spoken dialogue. And second, the work is a short curtainraiser: barely forty minutes in performance.

⁷⁶ *Id.* at 15-17. Although Gilbert often professed to have no ear at all for music (“I know only two tunes . . . One is ‘God Save the Queen’ and the other isn’t.” See BAILY, *supra* note 25, at 115), he had in fact a delicate sense of the kind of words that could readily be sung, and Sullivan often remarked gratefully how Gilbert’s lyrics seemed almost *made* for music. In this instance, however, Gilbert’s phrase “plaintiff’s shrieks” is likely to defeat even the most nimble singer’s attempts at enunciation.

⁷⁷ GILBERT, *supra* note 75, at 17.

I worship and madly adore;
My blind adoration is always increasing,
My loss I shall ever deplore.
Oh, see what a blessing, what love and caressing
I've lost, and remember it, pray,
When you I'm addressing, are busy assessing
The damages Edwin must pay!⁷⁸

The defendant, catching the scent of the wind, then seeks to minimize the damages by cataloguing his deficiencies as a prospective husband:

I smoke like a furnace—I'm always in liquor,
A ruffian—a bully—a sot;
I'm sure I should thrash her, perhaps I should kick her,
I am such a very bad lot!
I'm not prepossessing, as you may be guessing,
She couldn't endure me a day;
Recall my professing, when you are assessing
The damages Edwin must pay!⁷⁹

After the commotion caused by these two outbursts, the parties' difficulties are abruptly but decidedly put to rest by the Learned Judge, functioning as an unexpected *deus ex lege*⁸⁰—

Put your briefs upon the shelf,
I will marry her myself!⁸¹

⁷⁸ *Id.* at 41.

⁷⁹ *Id.* at 43. Of course, the fact that a breach of promise action might require a party to defame himself to gain an advantage does not prove that the action is uniquely outlandish. An accused criminal might portray himself as insane to escape the ultimate punishment. A defendant might portray himself as incompetent to avoid being held to a contract. But these other examples, though they exist, are relatively few.

Gilbert's ingenious septuple rhyme in this duet ("blessing", "caressing", "assessing", etc.) may strike the reader as mere ostentatious cleverness, but in performance the words roar along breathlessly, and the characters' fusillade of sibilants aptly suggests two snakes hissing away at each other.

⁸⁰ See *supra* note 1.

⁸¹ GILBERT, *supra* note 75, at 45. Gilbert had earlier compounded *Trial by Jury*'s madness by having the judge inform us, in an impenitently autobiographical song, that he (the judge) acquired his authority and prestige by indulging in a pretty brazen bit of "breach of promise" himself:

. . . I was, as many young barristers are,
An impecunious party.
. . .
But I soon got tired of third-class journeys,
And dinners of bread and water;
So I fell in love with a rich attorney's
Elderly, ugly daughter.
. . .
At length I became as rich as the Gurneys—

—proving that just as the solution to repugnant speech is “more speech,”⁸² so the solution to law’s madness is sometimes more madness.⁸³

Modern legal scholars might take a more tolerant view than Gilbert with respect to actions for breach of promise. Law is said to serve not merely an instrumental function but an expressive one as well,⁸⁴ and the trial of a breach of promise action can serve as a rite whereby the community asserts and celebrates its commitment to domestic fidelity.⁸⁵ But Gilbert, like most of his contemporaries, saw law not as a source of values but simply as a system of incentives.⁸⁶ Even when one of his legal inventions—the Mikado’s decree outlawing flirtation—smacks decidedly of expressive purposes, Gilbert is careful to give the decree a functional grounding: to stabilize young men.⁸⁷

An incubus then I thought her,
So I threw over that rich attorney’s
Elderly, ugly daughter.

Id. at 23-25.

⁸² See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

⁸³ Perhaps Gilbert’s most extreme example of law’s madness—the most extreme example of law’s disregard of human needs—is the Mikado’s decree making flirting a capital crime punishable by decapitation. To evade the rigors of this mad law, the citizens of Titipu hit upon an ingenious, and equally mad, solution. They let out on bail the first man to be convicted under the law, and they appoint him Lord High Executioner. Consequently, if another man is convicted under the law, the Lord High Executioner, since he was convicted first, will have to decapitate himself first, an impossibility that prevents the law from ever being—you should pardon the expression—executed. GILBERT, *The Mikado*, *supra* note 14, at 265-67. See generally Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936 (1991).

⁸⁴ See, e.g., Sunstein, *supra* note 71.

⁸⁵ Cf. THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935).

[T]he only function which the criminal trial can perform is to express currently held ideals about crime and about trials. It can act as a brake against a popular hysteria which insists upon following any one of the ideals to its logical conclusion. . . . Without the drama of the criminal trial, it is difficult to imagine on just what institution we would hang our conflicting ideals of public morality.

Id. at 147-48.

⁸⁶ See DUNCAN KENNEDY, *SEXY DRESSING ETC.* 134 (1993).

⁸⁷ See *supra* note 83.

Our great Mikado, virtuous man
When he to rule our land began,
Resolved to try
A plan whereby
Young men might best be steadied.
So he decreed, in words succinct,
That all who flirted, leered or winked

IV
ROLES, REALITIES, AND HYPOCRISIES

A charitable action I can skillfully dissect;
And interested motives I'm delighted to detect.⁸⁸

The rationally “interested” man, an invention of early capitalist society, supplanted the “virtuous” man in much of the Utilitarian thinking of the nineteenth century,⁸⁹ and England’s upwardly-mobile middle class—struggling for respectability and self-justification—found in the ideas of Utilitarianism “a philosophical cloak to throw over their naked pursuit of self-interest.”⁹⁰ Gilbert’s nose for hypocrisy was unusually keen, and his dislike of cant was boundless. Knowing that his audience was drawn largely from that same upwardly-mobile middle class, he delighted in tweaking his audience’s nose by putting into his characters’ mouths the very things his audience thought but camouflaged with conventional pieties.

One of Gilbert’s bluntest satires of the smugness and convenient amnesia of the rising middle class occurs early in *Trial by Jury*. The defendant in this action for breach of promise of marriage has just explained to the jury that although he once loved the plaintiff, he has grown bored with her and transferred his affections to another; whereupon the jurymen, who seem to think they can conceal their earlier profligacy by being particularly harsh now, confess:

Oh, I was like that when a lad!
A shocking young scamp of a rover,
I behaved like a regular cad;
But that sort of thing is all over.
I am now a respectable chap
And shine with a virtue resplendent,
And, therefore, I haven’t a scrap

(Unless connubially linked),
Should forthwith be beheaded.

GILBERT, *The Mikado*, *supra* note 14, at 265.

⁸⁸ GILBERT, *Princess Ida*, *supra* note 14, at 227. Cf. *In re Estate of Robbins*, 371 P.2d 573, 576 (Cal. 1962) (“It is the purpose for which the property is to be used . . . not the motives of the [donor] that determines whether a trust is a valid charitable trust.”).

⁸⁹ Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149, 1160 (1997) (citing ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* 32 (1977)).

⁹⁰ FISCHLER, *supra* note 19, at 11-12.

Of sympathy with the defendant.⁹¹

These words came to mind whenever I heard the twice-divorced, thrice-married Congressman (now former Congressman) Bob Barr of Georgia sermonize about “family values” and how allowing same-sex unions will destroy the sanctity of marriage.⁹²

Anticipating by almost a century Tom Wolfe’s *Radical Chic*,⁹³ Gilbert suspected that the vaunted egalitarianism of many wealthy individuals is more self-congratulation than conviction, and he accordingly put into his characters’ mouths words that expose their truly class-conscious sentiments. In *H.M.S. Pinafore*, for example, the First Lord of the Admiralty, Sir Joseph Porter, piously proclaims that “a British sailor is any man’s equal,” but when a common sailor takes Sir Joseph at his word and claps him on the shoulder, Sir Joseph freezes and immediately qualifies his statement with words that normally would go unspoken: “excepting mine.”⁹⁴

Alexis, the romantic hero of *The Sorcerer*, maintains a belief in the power of connubial love to transcend class distinctions (indeed, *all* distinctions): “Oh, that the world would break down the artificial barriers of rank, wealth, education, age, beauty, habits, taste, and temper, and recognize the glorious principle, that in marriage alone is to be found the panacea for every ill!”⁹⁵ He

⁹¹ GILBERT, *supra* note 75, at 19-21.

⁹² See, e.g., J. R. Moehringer, *Rep. Barr Inspires Loyalty, Loathing in Home District*, L.A. TIMES, Jan. 19, 1999, at A15; Richard Jones, *Georgia Congressman Seen as Hero for Anti-Clinton Stance*, PHILA. INQUIRER, Oct. 29, 1998; see also Naftali Bendavid, *Bush Calls for Law Defining Marriage*, CHI. TRIB., Jul. 31, 2003, at C1. *Trial by Jury*’s judge, too, is inclined to be self-impeachingly candid, when he admits in an autobiographical song that *pro bono* services were not to his taste:

All thieves who could my fees afford
Relied on my orations,
And many a burglar I’ve restored
To his friends and his relations.

GILBERT, *supra* note 75, at 25.

⁹³ TOM WOLFE, *RADICAL CHIC & MAU-MAUING THE FLAK CATCHERS* (1970) (scathingly describing a party at the home of Leonard Bernstein at which he and his rich and elegant guests fawned over members of the Black Panther Party).

⁹⁴ GILBERT, *H.M.S. Pinafore*, *supra* note 17, at 39. Gilbert’s script does not indicate any pause between the words “any man’s equal” and the words “excepting mine,” but traditional stage business has always had a sailor clap Sir Joseph on the shoulder as if he was invited to do so by Sir Joseph’s “any man’s equal,” and Sir Joseph’s ensuing “excepting mine” is his warning response to the sailor’s gesture.

⁹⁵ GILBERT, *supra* note 33, at 73. Gilbert compounds Alexis’s foolishness by having him include in his list dissimilarities that jolly well *should* be barriers to matrimony: e.g., differences in habits and temper. The careful reader will have noted a glaring redundancy in Alexis’s speech—“a panacea for every ill” (the word “pan-

resolves to distribute a magic love-at-first-sight potion throughout the village “so there will not be an adult in the place who will not have learnt the secret of pure and lasting happiness.”⁹⁶ Yet he proves to be a thoroughgoing snob:

Sir, you acted with discrimination
And shown more delicate appreciation
Than we expect in persons of your station.⁹⁷

and when the potion precipitates a love-match between his baronet father and a common pew-opener, he admits candidly, “It is not quite what I could have wished.”⁹⁸

Gilbert was generally dubious about egalitarian impulses. He seems to have believed that the human animal is by nature hierarchical and that egalitarian experiments are bound to fail.⁹⁹ People need someone to feel superior to;¹⁰⁰ their very identity is shaped by the satisfaction of knowing that there is someone fur-

acea” means a remedy for every ill)—and perhaps assumed that Gilbert deliberately put that blunder into the character’s mouth as yet another way of signaling Alexis’s intellectual deficiencies. Unfortunately, the blunder seems to have been Gilbert’s own; in a later opera he wrote “Old wine is a true panacea / For ev’ry conceivable ill.” W.S. GILBERT, *The Grand Duke*, in THE COMPLETE PLAYS OF GILBERT AND SULLIVAN *supra* note 60, at 647, 703 (1938).

Today’s reader might have another reaction to Alexis’s speech: gagging. Yet the speech Gilbert wrote for Alexis seems no more nauseating than a paean to marriage written only ten years earlier by an American court:

[Marriage] is induced by the strongest passion of the human soul, love. It is the most endeared relation which nature makes, or society forms. When lusts entice, or wealth prompts the relation, it may prove a curse when the one is satiated and the other wasted; but when love, virtuous and disinterested, ardent and mutual, prompts the relation, it is incomparable. Such is the relation as it exists with us. It is formed in perfect freedom. There are no constraints of parents, of custom, or of laws; nor any influences but such as are conducive to its happiness.

Collins v. Collins, 62 N.C. 153, 155 (1867).

⁹⁶ GILBERT, *supra* note 33, at 73.

⁹⁷ *Id.* at 93.

⁹⁸ *Id.* at 103.

⁹⁹ See Ray Quintanilla, *New Neighbors Draw the Line at Cabrini; Fence Now Divides Blended Complex*, CHI. TRIB., July 31, 2003, at 1:

It was billed as the future of public housing—clean and modern dwellings where former Cabrini-Green [a high-rise public housing complex tenanted by some of Chicago’s poorest] residents would live side by side with those who could afford expensive condominiums. But only two years since people from Cabrini-Green began moving into the Orchard Park [townhouse] development on the trendy Near North Side, 7-foot iron fencing now separates many of the low-income residents from their more affluent neighbors.

¹⁰⁰ This human need helps to explain the support, among poor whites in the antebellum South, for the institution of black chattel slavery, even though the poor whites must have known that the institution deprived them of paying jobs and that

ther down in the hierarchy.¹⁰¹ Phil Ponce, a Chicago television news reporter, described a race-relations workshop in which he participated while a student at a Catholic high school.

An African-American girl I had never really spoken to before looked at me and said, "I'm embarrassed to tell you this but I always thought that no matter how bad things were going for blacks, at least we could always look down on the Mexicans." My facial reaction gave me away; I had obviously thought the same thing about blacks.¹⁰²

Of course, social costs await those in our society who candidly admit to relishing their superior status,¹⁰³ which is why Gilbert delighted in putting such candid admissions into his characters' mouths:

When every one is somebod[y],
Then no one's anybody.¹⁰⁴

Although "[t]he satisfaction a man derives from the possession of a given income depends [in part] . . . on the relation subsisting between it and the incomes of other people,"¹⁰⁵ the person at the top of the economic pyramid is loath to incite the envy (or worse) of others. Consequently, he is inclined to ward off resentment by telling us that "wealth does not bring happiness" or, even more hypocritically, "wealth is a curse."¹⁰⁶ Similar hypocrisy can be observed in the good-looking who assure us that beauty is a curse.¹⁰⁷ Indeed, a hyperventilating tabloid headline in an article about the United Kingdom's Prince William combines the two curses and a few more: "Looks, Glamour, Wealth

they would never be slaveowners themselves. See HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 56 (1980).

¹⁰¹ See Thomas Ashby Wills, *Downward Comparison Principles in Social Psychology*, 90 *PSYCHOL. BULL.* 245 (1981). See generally Richard H. McAdams, *Relative Preferences*, 102 *YALE L.J.* 1 (1992).

¹⁰² Phil Ponce, *Look at Who's Snubbing Whom*, *CHI. TRIB.*, Mar. 3, 1997, at 15.

¹⁰³ McAdams, *supra* note 101, at 79.

¹⁰⁴ GILBERT, *The Gondoliers*, *supra* note 26, at 433.

¹⁰⁵ A.C. PIGOU, *A STUDY IN PUBLIC FINANCE* 91 (3d rev. ed. 1952).

¹⁰⁶ See, e.g., Mark L. Ascher, *Curtailing Inherited Wealth*, 89 *MICH. L. REV.* 69, 99 (1990) (quoting Andrew Carnegie); see also Berry Tramel, *Ladies First in Promoting Good Values*, *DAILY OKLAHOMAN*, Mar. 10, 2003, at 1-B, where a professional woman basketball player expresses doubts that the "money curse" of men's basketball (e.g., shoe-endorsement contracts) will ever "strike" her sport.

¹⁰⁷ See, e.g., Jenny Peters, *I've a Face Like an Irish Pudding. But the Surgeon's Knife? Hey, Ask Me Again When I'm 50*, *SUNDAY MIRROR* (London), Aug. 15, 1999, at 7 (reporting actor Pierce Brosnan's lament that his "good looks" have cost him coveted roles).

and the Curse of Fame . . . Di's Bittersweet Legacy."¹⁰⁸

The obvious answer to these disingenuous complaints is: "If wealth is a curse, give away your wealth. If beauty is a curse, make yourself ugly."¹⁰⁹ Gilbert deftly exploded the "curse of beauty" myth and, characteristically, did so by using the language of the law.

GROSVENOR. Gifted as I am with a beauty which probably has not its rival on earth, I am, nevertheless, utterly and completely miserable.

PATIENCE. Oh—but why?

GROSVENOR. My [childhood love] for you has never faded. Conceive, then, the horror of my situation when I tell you that it is my hideous destiny to be madly loved at first sight by every woman I come across.

PATIENCE. But why do you make yourself so picturesque? Why not disguise yourself, disfigure yourself, anything to escape this persecution?

GROSVENOR. No, Patience, that may not be. These gifts—irksome as they are—were given to me for the enjoyment and delectation of my fellow-creatures. I am a trustee for Beauty, and it is my duty to see that the conditions of my trust are faithfully discharged.¹¹⁰

For Grosvenor, an assumed legal role—that of trustee—serves as a blind behind which he can conceal his devotion to self-interest (remaining attractive to women). For Justice Frankfurter, his role as a high-minded recusant justice allowed him to express his personal antipathies for the record in a manner that he could not have done were he sitting in judgment.¹¹¹ The Lord Chancellor in Gilbert's *Iolanthe* is in love with his own ward, Phyllis, but at least initially he sees his legal position not as a convenient blind but as a barrier to his self-interest. But characteristically in the Gilbertian universe, it is not primarily ethical considerations that keep the Lord Chancellor from proposing to her, but rather the difficulty of threading his way through a technical maze of legal roles:

¹⁰⁸ Selina Scott, *Looks, Glamour, Wealth and the Curse of Fame . . . Di's Bittersweet Legacy*, SUNDAY MAIL (Scotland), Jun. 22, 2003, at 19.

¹⁰⁹ William Butler Yeats, addressing himself to a woman who feared that it was only her appearance and not her self that attracted men's admiration, upbraided her: "[O]nly God, my dear,/Could love you for yourself alone/And not your yellow hair." W.B. Yeats, *For Anne Gregory*, in THE COLLECTED POEMS OF W.B. YEATS 245 (Richard J. Finneran ed., 1989).

¹¹⁰ GILBERT, *supra* note 38, at 157.

¹¹¹ See *supra* note 66.

The feelings of a Lord Chancellor who is in love with a Ward of [the] Court [of Chancery] are not to be envied Can he give his own consent to his own marriage with his own Ward? Can he marry his own Ward without his own consent? And if he marries his own Ward without his own consent, can he commit himself for contempt of his own Court? And if he commit himself for contempt of his own Court, can he appear by counsel before himself to move for arrest of his own judgement?¹¹²

Gilbert saw that our legal roles and our natural selves tend to merge, and he took delight in showing characters who allow their roles to define reality. In *The Mikado*, Ko-Ko asks Pooh-Bah for advice regarding the expenses of the former's wedding. Ko-Ko is Lord High Executioner, while Pooh-Bah is Lord High Everything Else: mayor, archbishop, first lord of the treasury, you name it. And Pooh-Bah's advice to Ko-Ko varies dramatically with the role he is asked to play.

As First Lord of the Treasury, I could propose a special vote that would cover all expenses, if it were not that, as Leader of the Opposition, it would be my duty to resist it, tooth and nail. Or, as Paymaster-General, I could so cook the accounts that, as Lord High Auditor, I should never discover the fraud. But then, as Archbishop of Titipu, it would be my duty to denounce my dishonesty and give myself into my own custody as First Commissioner of Police.¹¹³

In an early poem of Gilbert's, "Damon v. Pythias," two life-long best friends sue each other. But since Damon is litigating in his role as trustee and Pythias is doing so in his role as executor, the lawsuit has no effect on their purses and therefore no effect on their friendship. By contrast, their two young lawyers, each of

¹¹² Gilbert, *Iolanthe*, *supra* note 14, at 183. Near the end of the opera, the Lord Chancellor allows himself to play the double role of petitioner and judge, and through that dodge he achieves his goal:

Victory! Victory! Success has crowned my efforts, and I may consider myself engaged to Phyllis! At first I wouldn't hear of it—it was out of the question. But I took heart. I pointed out to myself that I was no stranger to myself; that, in point of fact, I had been personally acquainted with myself for some years. This had its effect. I admitted that I had watched my professional advancement with considerable interest, and I handsomely added that I yielded to no one in admiration for my private and professional virtues. This was a great point gained. I then endeavoured to work upon my feelings. Conceive my joy when I distinctly perceived a tear glistening in my own eye! Eventually, after a severe struggle with myself, I reluctantly—most reluctantly—consented.

Id. at 245-47.

¹¹³ GILBERT, *The Mikado*, *supra* note 14, at 277.

whom wants desperately to win since this would be his first victory, become so bitter over their courtroom struggle that they end up killing each other!¹¹⁴ Of course, few litigants are as indifferent to success as Damon and Pythias. Gilbert no doubt regarded as hypocritical the lay public's frequent charge that lawyers are merely rapacious, heartless hired guns, since that is precisely the role that a lay person wants her lawyer to play whenever she feels aggrieved and in need of representation. The facetious tone with which Gilbert begins his poem "Barnes Carew, Gentleman" leads the reader to expect little more than conventional anti-lawyer sarcasm:

Of all the good attorneys who
Have placed their names upon the roll,
But few could equal Baines Carew
For tender-heartedness and soul.
Whene'er he heard a tale of woe
From client A or client B,
His grief would overcome him so,
He'd scarce have strength to take his fee.¹¹⁵

But Gilbert has a surprise in store, for Carew's tender-heartedness—whether real or spurious—costs him a client (one Captain Bagg):

"Oh dear," said weeping Barnes Carew,
"This is the direst case I know"—
"I'm grieved," said Bagg, "at paining you;
To Cobb and Polterthwaite I'll go.
"To Cobb's cold calculating ear
My gruesome sorrows I'll impart"—
"No; stop," said Barnes, "I'll dry my tear
And steel my sympathetic heart!"
...
But Barnes lay flat upon the floor,
Convulsed with sympathetic sob—
The Captain toddled off next door,
And gave the case to Mr. Cobb.¹¹⁶

Sometimes the law requires a litigant to assume a certain role in order to gain a desired legal outcome. In *Trial by Jury*, the plaintiff must play the role of "woman still desperately in love," while the defendant must play the role of "bad rubbish" meriting "good riddance." The Social Security Act requires a person

¹¹⁴ GILBERT, *Damon v. Pythias*, in *THE BAB BALLADS*, *supra* note 26, at 363.

¹¹⁵ GILBERT, *Baines Carew, Gentleman*, in *THE BAB BALLADS*, *supra* note 26, at 125.

¹¹⁶ *Id.*

seeking “disability” benefits under the Social Security Disability Insurance (SSDI) program to play the role of “person completely unable to work,”¹¹⁷ while the Americans With Disabilities Act (ADA) requires a discharged employee seeking damages from her former employer on account of “disability” discrimination to play the role of “person who *would be* able to work with reasonable accommodation.”¹¹⁸ Many courts interpreting the ADA have become so focused on the categorical nature of these roles that they mistake them for the essential reality of the plaintiffs’ circumstances and for the statutory touchstone that Congress contemplated. Specifically, these courts have concluded that since one cannot *in logic* be simultaneously “a person completely unable to work” and “a person who would be able to work with reasonable accommodation,” a person who has once claimed SSDI benefits is thereupon barred—under a theory of “judicial estoppel”—from pursuing a discrimination claim under the ADA.¹¹⁹

Not only is this logic heartless,¹²⁰ it is completely wrong-headed. A determination of disability for SSDI purposes does not take account of the possibility of accommodation.¹²¹ If a person is confined to a wheelchair and no places of employment are in fact wheelchair-accessible, then that person is in fact unable to work under present conditions.¹²² The ADA, however, does not

¹¹⁷ Specifically, she must represent that she is “unable to do [her] previous work” and “cannot . . . engage in any other kind of substantial gainful work which exists in the national economy.” 42 U.S.C. § 423(d)(2)(A) (2000).

¹¹⁸ A plaintiff must prove that “with . . . reasonable accommodation” she could “perform the essential functions” of her job. 42 U.S.C. § 12111(8) (2000).

¹¹⁹ *E.g.*, McNemar v. Disney Store, Inc., 91 F.3d 610 (3d Cir. 1996); Cline v. Western Horseman, Inc., 922 F. Supp. 442 (D. Colo. 1996).

¹²⁰ See Robert L. Burgdorf Jr., “*Substantially Limited*” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 551-52 (1997).

¹²¹ Samuel R. Bagenstos, *The Americans With Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 940 (2003). True, the SSDI program was put in place long before the ADA (with its concept of “reasonable accommodation”) was enacted. But even after the enactment of the ADA, the Social Security Administration rejected a proposal to incorporate in the SSDI definition of “disability” a requirement that the claimant be unable to work even *with* reasonable accommodation; and it rejected the proposal because (apparently) the inclusion of such a requirement in the SSDI definition would be tantamount to presuming that all employers were in fact complying with the ADA and making reasonable accommodations. Burgdorf, *supra* note 120, at 504 n.498.

¹²² To say, as some courts do, that claiming (in an ADA proceeding) that one could work with accommodation after claiming (in an SSDI application) that one is completely unable to work amounts to a “fraud” on the court, *Harris v. Marathon*

take “present conditions” as an unalterable given. Rather, it presumes that everyone is potentially capable of performing the “essential functions” of a job, and it insists that employers make “reasonable accommodations” so that present conditions will allow the disabled to continue being part of the labor force.¹²³

Anti-discrimination laws both reflect and turn upon the social categories that we have constructed. Although Gilbert would not have understood terms like “essentialism” and “social construction,” he was acutely aware of the existence of social categories and of our misplaced confidence in their legitimacy and coherence. In *The Pirates of Penzance*, for example, Major-General Stanley objects to his daughters’ marrying pirates, but upon learning that the pirates “are all noblemen who have gone wrong,” he drops his objections at once,¹²⁴ even though the pirates are no less criminal after that revelation than they were before.

Gilbert’s most pointed mockery of our belief in the reifying power of social labels provides the mad denouement of *H.M.S. Pinafore*. The daughter of the aristocratic Captain Corcoran, Josephine, and the low-born sailor, Ralph, love each other passionately, but because of the disparity in their ranks Corcoran opposes their marriage. Corcoran himself is in love with the low-

Oil Co., 948 F. Supp. 27, 29 (W.D. Tex. 1996), reflects a sorry lack of understanding and sympathy.

[B]ased upon his or her experiences with a recalcitrant employer and other employers in the industry or field, the former worker with a disability may believe it unrealistic to expect that future employers will comply with their legal obligations to afford reasonable accommodations. Thus, the individual may quite honestly, and often correctly, believe that he or she was ‘qualified’ [an ADA term] to do the former job (if only the employer would have made reasonable accommodations) and yet will not be able to find another job.

Burgdorf, *supra* note 120, at 504-05.

¹²³ In 1999, the United States Supreme Court held that the “pursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim.” *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 797 (1999). But the Court coupled that holding with a caveat that appears, by focusing on that hobgoblin consistency, to take back much that the Court had given.

Nonetheless, an ADA plaintiff cannot simply ignore her SSDI contention that she was too disabled to work. To survive a defendant’s motion for summary judgment, she must explain why that SSDI contention is consistent with her ADA claim that she could “perform the essential functions” of her previous job, at least with “reasonable accommodation.”

Id. at 798. Because of that caveat, *Cleveland* has made little difference to ADA plaintiffs. Bagenstos, *supra* note 121, at 943-47.

¹²⁴ GILBERT, *supra* note 31, at 157.

born Little Buttercup but likewise holds himself aloof because of the issue of social station. Near the end of the opera, when Corcoran and Ralph are offstage, Little Buttercup announces that many years ago she was a nurse charged with the care of two infants: one high-born, one low-born. She mistakenly switched the two babies, and the baby born an aristocrat grew up to be Ralph, while the low-born baby grew up to be—you guessed it!—Captain Corcoran. Buttercup's revelation is wildly implausible, of course. Ralph and Josephine are the same age, so how could Josephine's father have been a baby at the same time as Ralph? Corcoran and Buttercup are the same age, so how could Buttercup have nursed Corcoran in infancy? But these improbabilities are blithely brushed aside as social roles trump reality. Corcoran and Ralph return to the stage having exchanged costumes (how they learned of Buttercup's revelation is anybody's guess) and accents (Corcoran now speaks like a Cockney and Ralph like an Oxonian). The now-humble Corcoran is happy to marry the equally humble Buttercup and drops all his objections to his daughter's marrying "upward" with Ralph. (The now-aristocratic Ralph is evidently less concerned about caste than Corcoran was.) And an unwelcome, high-born suitor of Josephine's, less democratically inclined than Ralph, abandons his initial claim and finds consolation in the arms of his cousin.¹²⁵

As long as we continue to use labels to construct *others*, anti-discrimination laws will have a place in our statute books. But although the act of categorizing is risky and potentially depreciating, it is also central to inductive legal reasoning. We process data and formulate ideas by means of categorization, systematizing observed similarities and differences.¹²⁶ An inability to recognize relevant patterns is a serious impediment to doing justice. Captain Corcoran, earlier in *H.M.S. Pinafore*, demonstrates a sad ineptitude in this respect. Little Buttercup tries to warn him that a surprising change in circumstances awaits him:

Black sheep dwell in every fold;
All that glitters is not gold;
Storks turn out to be but logs;
Bulls are but inflated frogs.¹²⁷

¹²⁵ GILBERT, *supra* note 17, at 75-79.

¹²⁶ See Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 45 (1998).

¹²⁷ GILBERT, *supra* note 17, at 55.

Buttercup's words are a series of proverbs, all having the same meaning: things are not always what they seem. Captain Corcoran, however, fails to see the pattern in Buttercup's song. He thinks she is merely citing miscellaneous proverbs, so he joins in what he mistakenly believes is her quotation game:

Once a cat was killed by care;
Only brave deserve the fair.
...
Wink is often good as nod;
Spoils the child who spares the rod.¹²⁸

The Court of Appeals of Wisconsin displayed a similar difficulty with pattern-recognition. In *Phillips v. Wisconsin Personnel Commission*,¹²⁹ a lesbian employee of the Wisconsin Department of Health and Social Services (DHSS) was denied medical coverage for her domestic partner even though her employer did provide such coverage for employees' husbands and wives. The plaintiff claimed that this denial violated Wisconsin laws prohibiting employment discrimination on the basis of sexual orientation and on the basis of marital status, but the court of appeals affirmed the dismissal of both claims.¹³⁰ The "sexual orientation" claim was dismissed on the basis of a discredited argument: that the nondiscrimination norm is satisfied by mere formal parity that disregards the experiential reality behind the categories. The DHSS's denial of medical coverage, said the court, did not constitute "sexual orientation" discrimination because the denial extended to the domestic partners of heterosexual employees as well as to the domestic partners of homosexual employees. This analysis is uncomfortably reminiscent of the argument upholding anti-miscegenation laws on the ground that they prohibited both black and whites from marrying "outside the race":¹³¹ an argument that the United States Supreme Court explicitly repudiated, albeit some eight decades after adopting it.¹³²

But it was in disposing of the "marital discrimination" claim that the *Phillips* court mishandled issues of category in a manner that seems almost a parody of legal reasoning. The plaintiff claimed that because DHSS provided medical benefits to the

¹²⁸ *Id.* at 57.

¹²⁹ 482 N.W.2d 121 (Wis. App. 1992).

¹³⁰ The plaintiff also made a claim based on gender discrimination, which was likewise dismissed.

¹³¹ See *Pace v. Alabama*, 106 U.S. 583, 585 (1883).

¹³² See *Loving v. Virginia*, 388 U.S. 1 (1967).

partners of married employees but not to the partners of unmarried employees, the Department had discriminated on the basis of marital status, in contravention of Wisconsin law. Inasmuch as the court had just rejected the sexual orientation claim on the ground that plaintiff and her partner were denied the benefit not because they were lesbians but because they were “merely” domestic partners, one would have thought that plaintiff’s marital status claim was a sure winner. But the court rejected this claim as well. First, it stated the obvious: that disparate treatment constitutes unlawful employer behavior only “where *similarly situated* persons are treated differently.”¹³³ Then it entered the world of either bootstrap logic or result-driven hypocritical reasoning. It asserted that the unmarried plaintiff and her partner were not situated similarly to a married employee and her partner, inasmuch as plaintiff and her partner were not legally compelled to support each other whereas a married employee and her partner *were* compelled.¹³⁴ The assertion is true, of course, but the reason why plaintiff and her mate were not legally compelled to support each other is that they were not married. The employer clearly discriminated on the basis of marital status, just as it would have if it had granted benefits only to those employees who were permitted to file federal joint income tax returns.¹³⁵ *Phillips*’s illogic lends unfortunate credence to the popular impression of lawyers as manipulators of the truth, and it calls to mind the words Gilbert used in *Utopia, Limited* to introduce a British barrister:

He’s a great Arithmetician who can demonstrate with ease
That two and two are three, or five, or anything you please;
An eminent Logician who can make it clear to you
That black is white—when looked at from the proper point of
view;
A marvellous Philologist who’ll undertake to show
That “yes” is but another and a neater form of “no.”¹³⁶

¹³³ *Phillips*, 482 N.W.2d at 126 (emphasis added).

¹³⁴ *Id.*

¹³⁵ Only a husband and wife may file a federal joint income tax return. See BORIS I. BITTKER ET AL., FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 44.02[2][a], 44-21 (3d ed. 2002).

¹³⁶ GILBERT, *supra* note 60, at 616-17.

V

PLAYING THE GAME OF LAW

[W]hether you're an honest man or whether you're a thief
Depends on whose solicitor has given me my brief.¹³⁷

Children's first exposure to laws in their lives tends to occur in the context of games: an Ace beats a King; a Rook may move vertically or horizontally but not diagonally; only the Goalie may touch the soccer ball with his hands. Some laws are constitutive of the game itself (three strikes and you're out); others serve merely to prevent abuse (a batter who is hit by a pitch may take first base). But all of these laws operate in an environment with no larger purpose than pleasure: a playful competition to see who can do the most with his or her mind or body. And this attitude about games often seems to carry over into law: a competition with no larger purpose than winning a favorable outcome.¹³⁸ Like the world of sport, law has both constitutive rules (the jury, not the court, finds the facts) and anti-abuse rules (the jury may not consider evidence obtained by means of an unreasonable search). Law's elaborate rituals of counterfeit courtesy (referring to opposing counsel as "my learned friend") likewise find their analog in sport (the boxers' preliminary handshake). In both sport and law, we speak of a "home court advantage" (sometimes obtained through forum-shopping). And, perhaps most significantly, we use the phrase "gaming the system" to characterize the unprincipled cleverness of attorneys and their clients.¹³⁹

A pilot named Vernice Kuglin wrote letters to the Internal Revenue Service asking the agency to identify the particular section of the Internal Revenue Code that made her liable for income tax and the section that required her to file the Form 1040 tax return. She never received a response, and, having directed her employer on IRS Form W-4 to withhold no taxes from her

¹³⁷ *Id.* at 617. See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). "[T]he limits of [legal] craft are so broad that in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants." *Id.* at 819.

¹³⁸ The practice of gerrymandering—more politely known as redistricting—is a fine example of the nexus between games and law.

¹³⁹ See, e.g., *Andantech L.L.C. v. Comm'r*, 331 F.3d 972, 980 (D.C. Cir. 2003) (tax avoidance); *United States v. Delgado-Nuñez*, 295 F.3d 494, 497 (5th Cir. 2002) (criminal appeals); *Johnson & Johnson Assocs. v. R.E. Serv. Co.*, 285 F.3d 1046, 1060 (Fed. Cir. 2002) (patent registration) (concurrency).

salary, she evidently paid no income taxes from 1996 through 2001. She was indicted on a charge of criminal tax evasion, but the jury acquitted her, perhaps because it thought she had made a good-faith effort to learn the statutory basis of tax liability and therefore lacked the requisite criminal intent.¹⁴⁰ (She was still liable for the taxes themselves, of course.) And as she savored her victory, she used language normally associated with sporting matches: “We had a good, clean case.”¹⁴¹

The availability of “state of mind” defenses, like Ms. Kuglin’s, can sometimes arouse the game-player in all of us. Rock guitarist Pete Townshend admitted to viewing child pornography on the Internet but avoided prosecution with his claim that he was merely doing “research for an autobiography that would chronicle his suspected abuse when he was a child.”¹⁴² Actress Winona Ryder, when collared by a store detective on suspicion of shoplifting, maintained that she was merely “‘doing what her director had told her to do in preparation for her role as a shop-lifter.’”¹⁴³ Gilbert included in *The Mikado* some transparent game-playing along these lines, as lovers Yum-Yum and Nanki-Poo try to evade the restrictions of the new law criminalizing flir-

¹⁴⁰ David Cay Johnston, *Jury Acquits Pilot Who Questioned Liability for Income Tax*, N.Y. TIMES, Aug. 12, 2003, at C3.

Section 7201 of the Internal Revenue Code of 1986 provides that “any person who willfully attempts in any manner to evade or defeat any tax” is guilty of a felony. To prove that the evasion was “willful” within the meaning of the statute, the government must show that the defendant’s conduct amounted to “a voluntary, intentional violation of a known legal duty.” *United States v. Pomponio*, 429 U.S. 10, 12 (1976). Thus, ignorance of the law *is* an excuse. *Cheek v. United States*, 498 U.S. 192, 202 (1991). It seems unlikely that Ms. Kuglin was genuinely ignorant of the fact that some law somewhere required her to pay federal income taxes to the Internal Revenue Service. The jury’s acquittal was more likely a form of jury nullification prompted by its frustration with the agency’s nonresponsiveness.

¹⁴¹ Johnston, *supra* note 140. Judge Posner regards federal tax practice as perhaps the very model of legal gamesmanship:

Highly intelligent lawyers may create intricate doctrinal structures that, while ingenious, . . . have no social utility. For example, brilliant lawyers create, discover, and enlarge tax loopholes. This activity is purely redistributive; there is no social gain. In fact there is a net social loss, not only because lawyers’ time has an opportunity cost but also because their beaver-like activities require more carefully drafted and complex tax codes. Social welfare might increase if the IQs of all tax lawyers could be reduced by 10 percent.

Richard A. Posner, *Overcoming Law* 54 (1995).

¹⁴² Warren Hoge, *British Rock Star Receives Lesser Punishment in Internet Case*, N.Y. TIMES, May 8, 2003, at A7.

¹⁴³ David Pannick, *Loos, Goats & Rock Stars . . .*, THE TIMES (London), Dec. 17, 2002, at 2, 22.

tation by purporting merely to illustrate prohibited conduct for each others' edification:

NANKI-POO. If it were not for the law, we should now be sitting side by side, like that. (*Sits by her.*)

YUM-YUM. Instead of being obliged to sit half a mile off, like that. (*Crosses and sits at other side of stage.*)

NANKI-POO. We should be gazing into each other's eyes, like that. (*Gazing at her sentimentally.*)

YUM-YUM. Breathing sighs of unutterable love—like that. (*Sighing and gazing lovingly at him.*)

NANKI-POO. With our arms round each other's waists, like that. (*Embracing her.*)

YUM-YUM. Yes, if it wasn't for the law.

NANKI-POO. If it wasn't for the law.

YUM-YUM. As it is, of course we couldn't do anything of the kind.

NANKI-POO. Not for worlds!¹⁴⁴

Gilbert often relied on the *deus ex lege* device to satirize both the practice of legal gamesmanship itself and our inclination to regard law as a kind of game. As in traditional comedy, some law or authority disturbs the equilibrium with which a Gilbertian play begins (a *diabolus ex lege*, if you will), but then equilibrium is restored (or a new equilibrium established) not by love or compromise or common sense but by still more law applied still more ingeniously.

Ruddigore provides an excellent example. The law that disturbs that community's equilibrium is a supernatural one: a witch's curse that requires each Baronet of Ruddigore, once he succeeds to the title, to commit one crime each day or die an agonizing death. Many accursed baronets have preceded the current holder of the title (Robin Oakapple), and each one of them eventually refused to commit his daily crime and thereupon died. When Robin, too, determines to violate the terms of the curse, the ghosts of all his accursed predecessors step down from the frames in which their portraits hang, and they threaten him with death unless he relents and embraces a life of crime. In a subsequent scene, the most recently deceased baronet, Sir Roderic Murgatroyd, happens upon the still-living Dame Hannah, his former sweetheart. As the two of them are renewing their avowals, a jubilant Robin unceremoniously interrupts their tête-à-tête:

ROBIN. I can't stop to apologize—an idea has just occurred to

¹⁴⁴ GILBERT, *The Mikado*, *supra* note 14, at 287.

me. A Baronet of Ruddigore can only die through refusing to commit his daily crime.

SIR RODERIC. No doubt.

ROBIN. Therefore, to refuse to commit a daily crime is tantamount to suicide! [You can see where this is heading.]

SIR RODERIC. It would seem so.

ROBIN. But suicide is, itself, a crime—and so, by your own showing, you ought never to have died at all!

SIR RODERIC. I see—I understand! Then I'm practically alive!¹⁴⁵

Roderic embraces Hannah, the now-uncursed Robin embraces *his* ladylove, and the curtain falls amid general matrimonial rejoicing.¹⁴⁶

At least *Ruddigore*'s denouement possesses a certain mad logic; throughout it we remain in the familiar, if somewhat distorted, world of syllogistic reasoning. *Iolanthe*'s *deus ex lege*, on the other hand, operates with no restraint at all. Fairy law provides: "[E]very fairy must die who marries a mortal!"¹⁴⁷ When the Fairy Queen discovers that all the fairies in her realm have in fact married mortals, she is faced with a dilemma. "I can't slaughter the whole company! And yet (*unfolding a scroll*) the law is clear!"¹⁴⁸ The Lord Chancellor, "as an old Equity draftsman," comes to the rescue. Assuring the Queen that "The subtleties of the legal mind are equal to the emergency," he suggests simply inserting the word "doesn't," so that fairy law would prescribe death for every fairy who *doesn't* marry a mortal.¹⁴⁹ The Fairy Queen seems to have no illusions about the analytic rigor

¹⁴⁵ GILBERT, *Ruddigore*, *supra* note 14, at 405.

¹⁴⁶ At the first performances of *Ruddigore*, all the ancestral ghosts came back to life and paired up connubially with the members of the ladies' chorus. This was too much for Victorian audiences to swallow, so after a few performances Gilbert altered the ending to leave Sir Roderic on stage as the only resurrected baronet. *See id.* at 404. Why Victorian audiences found *this* ending any less ghoulish I cannot imagine.

¹⁴⁷ GILBERT, *Iolanthe*, *supra* note 14, at 249. The Oxford English dictionary indicates that the word "fairy" had become a pejorative term for homosexual male as early as 1895. Although he wrote *Iolanthe* only thirteen years earlier, it is highly improbable that Gilbert even knew that the word possessed such an additional meaning. He used the word so frequently as a complimentary term for young women—*see, e.g.*, GILBERT, *supra* note 60, at 601—that he surely would have used another term had "fairy" possessed homosexual overtones for him.

¹⁴⁸ GILBERT, *Iolanthe*, *supra* note 14, at 249.

¹⁴⁹ *Id.* American legislatures have also been known to dismantle statutory regimes by the addition of a single word. In 1933, the legislature of the State of New Mexico, without fanfare, effectively made New Mexico the first American jurisdiction to provide for no-fault divorce, and it did so not by completely revising the divorce statute but simply by adding the word "incompatibility" to the existing list of

of the Lord Chancellor's solution—she characterizes it as “humour”—but inasmuch as she has had her eye on one Private Willis for some time, she alters the manuscript, proposes to Willis, contrives to plant wings on all the mortals present, and invites the entire cast to fly away with her happily to Fairyland.

Legal fictions fascinated Gilbert.¹⁵⁰ Among laypeople, legal fictions are regarded as among the worst examples of law's humbuggery; Jeremy Bentham went so far as to liken them to syphilis!¹⁵¹ But for Gilbert they exemplified both law's inspired madness and its game-like disengagement. In baseball, the infield fly rule is a legal fiction that serves as an anti-abuse rule.¹⁵² In the card game of Euchre, the promotion of an ordinary Jack to “Left Bauer” is a constitutive legal fiction.¹⁵³ Indeed, card games furnished Gilbert with an idea for his most extended legal fiction: the “statutory duel” in *The Grand Duke*. In an effort to stem the flow of blood spilled in the course of actual duels with swords, an earlier ruler of the duchy where the opera's action is laid devised a bloodless statutory substitute:

By this ingenious law,
If any two shall quarrel, . . .
[E]ach a card shall draw,
And he who draws the lowest
Shall (so 'twas said)
Be thenceforth dead—
In fact, a legal “ghoest.”¹⁵⁴

statutory grounds. See J. Herbie DiFonzo, *Alternatives to Marital Fault: Legislative and Judicial Experiments in Cultural Change*, 34 IDAHO L. REV. 1, 30-31 (1997).

¹⁵⁰ “Ah, I don't think we can go into that. It is a legal fiction, and legal fictions are solemn things.” GILBERT, *supra* note 26, at 417.

¹⁵¹ “[I]n English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness.” 5 JEREMY BENTHAM, *The Elements of the Art of Packing, As Applied to Special Juries, Particularly in Cases of Libel Law*, in WORKS OF JEREMY BENTHAM 92 (J. Bowring ed. 1843) (quoted in LON FULLER, *LEGAL FICTIONS* 2-3 (1967)).

¹⁵² For a discussion of the purpose and workings of the infield fly rule, see Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975).

¹⁵³ In Euchre, the highest card in the trump suit is the Jack, known as the “Right Bauer.” The second highest trump, or “Left Bauer,” is the Jack of the same color as the trump suit. Thus, if spades are trump, the Jack of Clubs is treated as the second highest spade. If a player leads a club, playing the Jack of Clubs will not constitute following suit. The second player must play some other club if she has one. Similarly, if a player leads a spade, playing the Jack of Clubs will constitute following suit. See ALBERT H. MOREHEAD ET AL., *THE NEW COMPLETE HOYLE* 232 (1964).

¹⁵⁴ GILBERT, *The Grand Duke*, *supra* note 95, at 663.

“Civil death” is a very real legal fiction,¹⁵⁵ but the characters in *The Grand Duke* go considerably beyond what the fiction requires and scream in affected terror whenever they behold the “dead” loser of a statutory duel. To resolve the multiplicity of confusions caused by the two statutory duels fought in the course of the opera, Gilbert once again invokes a *deus ex lege*: one of his most anemic, unfortunately. It turns out that in statutory duels, the Ace counts as lowest, not highest, so the results of both duels are immediately undone, and the curtain falls.

In *The Gondoliers*, Gilbert presents us with a legal fiction involving personhood itself, not entirely unlike the infamous three-fifths compromise in the United States Constitution, whereby five slaves were counted as three free people for purposes of federal representation.¹⁵⁶ In Gilbert’s opera, the identity of the rightful King of Barataria has been narrowed down to either Marco or Giuseppe, and until it can be determined which of the two is the rightful heir, the two have been authorized to reign jointly, as one individual. The courtiers take this legal fiction to its logical conclusion and provide the two putative monarchs with only enough food for one. When the famished Giuseppe remonstrates that the situation has become “a legal fiction carried a little too far,” one of the courtiers considers the matter with mad, juridical gravity.

It’s rather a nice point. I don’t like to express an opinion off-

¹⁵⁵ For a discussion of the few remaining American civil death statutes, see Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 869-71 (1993).

A less extreme and far more common variant of this fiction is the rule, found in virtually all American disclaimer statutes, that if a legatee disclaims her bequest, the testator’s property passes as if the disclaimant had predeceased the testator. See, e.g., 755 ILL. COMP. STATS. 5/2-7(d)(1) (1993); N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(d) (McKinney 1998).

In *Russell v. Dir., Office of Workers’ Comp. Programs*, 829 F.2d 615 (7th Cir. 1987), the surviving divorced wife of a deceased miner argued unsuccessfully that the miner should be deemed to have died on the date he was declared mentally incompetent rather than on the later date of his physical death. Under the Black Lung Benefits Act, 30 U.S.C. §§ 901-62 (2000), the plaintiff would be entitled to certain benefits if the deceased miner had been furnishing more than half of her support at the time of his death. Although he was furnishing more than half of her support at the time he was declared incompetent, he was not doing so at the time of his death. Therefore, in order to qualify for the benefits, the plaintiff had to argue that “the time of his death” meant the date he was declared barred from making contracts.

¹⁵⁶ See Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145, 1155 n.53 (2002).

hand. Suppose we reserve it for argument before the full Court? . . . [And in the meantime,] I think we may make an interim order for double rations on their Majesties entering into the usual undertaking to indemnify in the event of an adverse decision[.]¹⁵⁷

Perhaps the best-known legal fiction in American law is that a corporation is a “person” for purposes of the Equal Protection Clause.¹⁵⁸ Three years after this pronouncement, and anticipating by many decades the advent of professional and personal service corporations,¹⁵⁹ Gilbert, in *The Gondoliers*, envisioned a Spanish nobleman turning himself into a corporation—the Duke of Plaza-Toro, Ltd.—the better to market his services as an endorser of dubious goods. Indeed, Gilbert found the whole notion of corporate identity and limited liability somewhat anomalous, and in *Utopia, Limited* he gave would-be capitalists some advice as to how much they should state their capital to be:

I should put it rather low;
The good sense of doing so
Will be evident at once to any debtor.
When it's left to you to say
What amount you mean to pay,
Why the lower you can put it at, the better.¹⁶⁰

¹⁵⁷ GILBERT, *supra* note 26, at 417.

¹⁵⁸ *Santa Clara County v. S. Pac. R.R.*, 118 U.S. 394 (1886).

¹⁵⁹ See, e.g., *Sargent v. Commissioner*, 929 F.2d 1252 (8th Cir. 1991) involving a professional hockey player who formed a wholly-owned corporation, Chiefy-Cat, Inc., to which he contracted to render hockey-playing services, the understanding being that the corporation would then, by further contract with the Minnesota North Stars (the very professional hockey team for which he had been playing), provide to the North Stars Mr. Sargent's hockey-playing services.

¹⁶⁰ GILBERT, *supra* note 60, at 620. The Joint Stock Companies Act of 1862 limited the liability of the shareholders . . . in joint stock companies, i.e., companies set up with more than one shareholder. The Act established that the liability of each shareholder in the event of insolvency was limited to the nominal or face value of the shares that he held. So a shareholder with two shares had twice the liability as a shareholder with one share (and also twice the dividends and votes, etc.). Also, the liability was no greater than this. Before the Act or . . . where a stock company was not registered under this regulation, there could be unlimited liability in the event of insolvency[,] and the division of liabilities between different shareholders was not clear.

LONDON ASSURANCE AND OTHER VICTORIAN COMEDIES, *supra* note 28, at 323 n.177.

A more pernicious legal fiction whereby one can simultaneously have wealth and not have it, to the frustration of one's creditors, is all that sustains the “spendthrift trust” device. The beneficiary of such a trust can live comfortably off the trust's income secure in the knowledge that the source of her income, unlike that of a wage-earner, is immune from garnishment by her creditors. See GEORGE G. BO-

Gilbert’s most extreme example of a legal fiction brings the plot of *The Mikado* to an abrupt finish. The Mikado had ordered that the Town of Titipu execute someone—anyone. The Lord-High Executioner has no stomach for killing,¹⁶¹ so he simply presents the Mikado with a sworn affidavit that one Nanki-Poo has been executed. When the Mikado finds out that Nanki-Poo still lives, he demands to know why the executioner had gone to such perjurious lengths. The executioner argues that the affidavit was not perjurious at all:

It’s like this: When your Majesty says, “Let a thing be done,” it’s as good as done—practically it *is* done—because your Majesty’s will is law. Your Majesty says, “Kill a gentleman,” and a gentleman is told off to be killed. Consequently, that gentleman is as good as dead—practically, he *is* dead—and if he is dead, why not say so?¹⁶²

And isn’t that what legal positivism is all about?

AN UNEXPECTEDLY SERIOUS CONCLUSION

When they’re offered to the world in merry guise,
Unpleasant truths are swallowed with a will—
For he who’d make his fellow-creatures wise
Should always gild the philosophic pill!¹⁶³

With results that still resonate with us today, Gilbert turned his penetrating, jaundiced eye on the law and found it sublimely mad. But though his muse was comic, Gilbert, like John Webster before him, “saw the skull beneath the skin.”¹⁶⁴ Of the fourteen comic operas he wrote with Sullivan, eleven play out under the explicit threat of death or imprisonment. He might have written the late Professor Cover’s unwelcome words himself: “The practice of constitutional interpretation is . . . inextricably bound up

GERT & GEORGE T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* §§ 226-27 (rev. 2d ed. 1992 & Supp. 2003). The great American legal scholar John Chipman Gray, almost an exact contemporary of Gilbert’s, vigorously condemned the institution of spendthrift trusts: “The general introduction of spendthrift trusts would be to form a privileged class, who could indulge in every speculation, could practice every fraud, and, provided they kept on the safe side of the criminal law, could yet roll in wealth.” JOHN CHIPMAN GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY* § 262, at 174 (1883).

¹⁶¹ See *supra* note 83.

¹⁶² GILBERT, *The Mikado*, *supra* note 14, at 351.

¹⁶³ GILBERT, *supra* note 2, at 445.

¹⁶⁴ 1 A *TREASURY OF THE THEATRE* 324 (John Gassner ed., 1967) (quoting T.S. Eliot, *Whispers of Immortality*).

with the real threat or practice of violent deeds.”¹⁶⁵ Law is ultimately coercive, not sportive, and Gilbert’s comic revelations of law’s absurdities are not too far removed from calls to action.

¹⁶⁵ Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 816 (1986).

