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Franz Kafka's Outsider Jurisprudence

Douglas E. Litowitz

FRANZ KAFKA. *The Trial*. Trans. Breon Mitchell. New York: Schocken Books, 1998. Pp. xx + 276. \$13.00, paper.

FRANZ KAFKA. *The Castle*. Trans. Mark Harmon. New York: Schocken Books, 1998. Pp. xvii + 328. \$14.00, paper.

FRANZ KAFKA. *The Metamorphosis and Other Stories*. Trans. Malcolm Pasley. New York: Penguin Books, 2000. Pp. 216. \$11.95, paper.

FRANZ KAFKA. *The Complete Stories*. Ed. Nahum Glatzer. New York: Schocken Books, 1995. Pp. vii + 486. \$15.00, paper.

KAFKA IS THE RAGE

"Kafka was the rage," proclaimed literary critic Anatole Broyard (1993) in his memoir of Greenwich Village during the 1950s. But perhaps Broyard was mistaken to speak in the past tense, considering that Kafka is more popular than ever. Over the last decade, an international collection of scholars has produced new translations of Kafka's writings (Harmon, p. xii), and Kafka has emerged as an important cultural icon. For example, underground artist Robert Crumb published an illustrated account of Kafka's life (Mairowitz and Crumb 2000), and Kafka was the subject of two feature films and an Oscar-winning short feature (Soderbergh 1992; Jones 1993; Capaldi 1995). More recently, theatrical versions of "The Metamorphosis" were staged in major cities (Christiansen 2000), and avant-garde composer Philip

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Glass produced an operatic version of "In the Penal Colony" (Akalaitis 2001). In Kafka's home town of Prague (where his books were banned for decades, first by the Nazis and then by the Communists), city leaders sought recently to capitalize on Kafka's growing popularity by naming a public square in his honor, only to withdraw the proposal after scholars insisted that Kafka would be aghast at the idea (Connolly 2000). Although Kafka has been dead for more than 75 years, he is widely recognized throughout Western culture as a "representative man" who captured the anxieties of the modern age (Karl 1991) and heralded the emergence of postmodernism (Lechte 1994).

Kafka holds a special fascination for legal scholars because he was a practicing lawyer who often wrote about law and legal systems. To be sure, Kafka is already safely ensconced in the "canon" of law and literature (Bell 1996, 11), but his work is also highly relevant for cutting-edge movements in legal studies due to his harrowing portraits of legal outsiders. Although Kafka was a lawyer who worked for a government agency and routinely appeared in courtrooms, he did not write a single story from the perspective of a legal insider such as a judge, prosecutor, or lawyer. Instead, he depicted law from the perspective of outsiders subject to an unknowable and alienating legal system composed of endless layers of petty officials. This posture is most visible in Kafka's best-known parable, "Before the Law" (Pasley, p. 148), where a man from the country dies of old age while awaiting permission from a doorkeeper to enter the law.

Kafka's ability to depict legal outsiders was the result of two factors. First, he was a multiple outsider in his personal life, since he was a German-educated and secular Jew in a Czech province of the Austro-Hungarian Empire. Kafka never qualified as truly German, Czech, or Jewish, and he remained forever an outsider to all three cultures. Second, he was an attorney for the state agency responsible for administering the workers' compensation scheme in Prague, a position where he represented injured Czech workers seeking protection under a complicated legal system conducted in German legalese, relegating the workers to a position of economic and linguistic subordination (Wagenbach 1993; Wolff and Rivkin 1998). Given Kafka's personal and professional life, it comes as no surprise that he produced an amazing body of stories that depict chronically alienated outsiders (Sokol 1999). Kafka's focus on outsiders makes his work especially relevant for contemporary legal theory, which has become increasingly preoccupied by "outsider jurisprudence" and the perspectives on law held by women and by minority group members including African Americans, gays, Asians, Hispanics, and Native Americans.¹

1. The term *outsider jurisprudence* is usually credited to Mari Matsuda (1989, 2323) ("There is an outsider's jurisprudence growing and thriving alongside mainstream jurisprudence in American law schools"). The term is often used synonymously with critical race

Yet Kafka adds an unusual twist in his depiction of outsiders: none of them are members of a minority group. Instead, their outsider status is a function of their position (their subordination) in relation to the dominant legal apparatus. Such people can be described as “situational outsiders,” because they are outsiders by virtue of their situation, apart from whether they are also outsiders for other reasons. And in a macabre twist on the literary cliché of the crusading outsider who struggles until her rights are vindicated, Kafka depicts outsiders who never win their battle for justice, instead remaining forever confused, paranoid, ignorant, submissive, alienated, and self-defeating.

By suggesting that outsider status may arise by virtue of one’s structural and relational posture vis-à-vis the dominant legal system (independently of whether a person is also an outsider due to membership in a minority group), Kafka adds an important new dimension to critical race theory, Lat-Crit theory, queer theory, feminist legal studies, and other movements within outsider jurisprudence. There has been an unspoken assumption within outsider jurisprudence that only minorities can claim to be outsiders, but Kafka’s fiction suggests a more expansive notion of outsider status based on position, raising the striking possibility that even a white male can be an outsider under certain circumstances (indeed, many of Kafka’s characters are white males). By focusing on situations and structural relationships, Kafka’s fiction comports with an important trend in sociolegal studies toward mapping conceptual frameworks shared by a cross-section of races, genders, and classes, as opposed to focusing solely on the view of law held by members of a particular group (Ewick and Silbey 1998).

Legal scholars who are interested in Kafka can select from a dizzying array of new translations and reissued volumes of Kafka’s writings. At the forefront of this effort is an international team of Kafka scholars who have been producing definitive editions of Kafka’s writings in German based on the restored original texts (Harmon, p. xii). A key player in this project is Oxford scholar Malcolm Pasley, who served as editor for the restored versions of *The Castle* and *The Trial*. His versions of these novels have now been translated into English (by Harmon and Mitchell, respectively), and he has brought forth a translation of the short stories published by Kafka during his lifetime, including such law-related gems as “In the Penal Colony,” “Before the Law,” and “The Stoker.” An alternative translation of these stories is now available (Kafka 2000), and a publisher in Kafka’s hometown of Prague has produced facsimile editions of the volumes authorized by Kafka during his lifetime (1996b, 1997, 1998). These recent

theory or the various new approaches that it has stimulated. For example, Torok (1999, 1026) uses the terms *outsider jurisprudence* and *perspective jurisprudence* synonymously as encompassing the various movements of critical race theory, LatCrit theory, feminist legal theory, and queer legal theory for their common goal of seeking justice by focusing “attention to the experiences and perspectives of subordinated persons, communities, and peoples.”

publications follow an already formidable corpus of English translations that have been available for more than 50 years. Virtually all of Kafka's fiction is now available in multiple translations, and the secondary literature on Kafka has become a cottage industry in its own right, easily doubling the ten thousand articles that were available in the 1970s (Nagel 1974, 7). This outpouring of literature, combined with the theatrical and film treatments of Kafka's work, raises afresh the question of his relevance for legal studies.

KAFKA'S LEGAL BACKGROUND AND WRITINGS ON LAW

Kafka once said that he could never escape his hometown of Prague because, "This little mother has claws" (Pawel 1984, 3). The same is obviously true of his love-hate relationship with the law. Like many characters in his stories, Kafka was drawn to the law yet found it perpetually disappointing. For example, he professed extreme boredom with legal doctrine to the point where he found it "disgusting" (Kafka 1953, 95), yet he spent a good portion of his spare time writing fiction about law and legal systems. He worked on a daily basis with legal regulations and court cases, yet his masterpiece, *The Trial*, was written from the perspective of an outsider denied access to an unknowable law. After graduating from law school he took a nonlegal job in an insurance company, proclaiming on his job application that he had no intention of practicing law, yet within months Kafka began a 14-year career enforcing workers' compensation laws.

Kafka's ambivalence about the law gets played out in his fiction, where the law vacillates between the sacred and profane. Most of Kafka's writings on the law—including the major novels *The Trial* and *The Castle*—are about victims who seek the law as if it were a symbol of protection, order, and acceptance. Yet Kafka's characters never reach the law, instead shuffling between doorkeepers and administrators, always desperately hoping that justice will somehow be found, and in the end it usually turns out that the law is a disappointing mess of elusive rules endlessly administered by petty bureaucrats. In extreme stories such as "The Problem of Our Laws" (Glatzer, p. 437) and "The Refusal" (Glatzer, p. 263), the search for law turns up nothing but empty rhetoric, but the more prevalent theme in Kafka's fiction is that the law involves an exhausting process of endless delay, typified in the haunting parable "Before the Law" (Pasley, p. 148), where the protagonist dies while awaiting permission to enter the law.

Kafka's relentless portrayal of the outsider perspective sets him apart from contemporary lawyer-authors such as Scott Turow and John Grisham, who write novels from the perspective of a character who understands the law and can maneuver his or her way through the legal system. Unlike Kafka, Turow and Grisham bring nonlawyers safely inside the law and

reveal the hidden workings that outsiders usually do not see; their fiction sends the comforting message that the rule of law still exists even though it occasionally gets corrupted. This stands in stark contrast to Kafka's frightening suggestion that there is no clear rule of law and that what we call "the law" is merely a series of doorkeepers taking shelter behind rationalizations. Consider how Scott Turow begins a recent book that—just like *The Trial*—starts with two officials paying a visit to the home of the defendant:

This is a lawyer's story, the kind attorneys like to hear and tell. About a case. About a client. His name was Robert Feaver. . . . Last night two Special Agents of the Internal Revenue Service's Criminal Division had visited him at home. They had handed him a grand jury subpoena for all of his partnership's financial records and tried to ask Robert questions about his income tax returns. They knew. They knew what Robert and his law partner, Morton Dinnerstein, had been up to. (1999, 3)

Notice how the characters have full names, and how the plot is framed as a lawyer's story, which brings the reader within the normally closed circle of insiders. How different all of this seems from Kafka's *The Trial*, which also begins when two men arrest the defendant Josef K.:

Someone must have slandered Josef K., for one morning, without having done anything truly wrong, he was arrested. . . . What sort of men were they? What were they talking about? What office did they represent? (Mitchell, p. 3)

By the end of the novel, K. is no closer to understanding the law, and his lawyer has proven completely useless.

Kafka's legal fiction is also distinguished by his refusal to provide a crusading protagonist who achieves justice by wielding the sword of the law to strike down oppression. Whereas popular novels like Harper Lee's *To Kill a Mockingbird* and John Grisham's *A Time to Kill* tell the story of an outsider who is unjustly accused of a crime and somehow manages to find an ally within the legal system, Kafka's outsiders never find a champion—instead, they internalize their subjugation to the point where they expect and even learn to enjoy having their claims denied. Kafka suggests a dark world where injustice not only remains unchallenged but is also actively experienced as normal. This sentiment is expressed brilliantly in the short story "The Refusal" (Glatzer, p. 263), where the townspeople breathe a sigh of relief when their demands are refused by the lowly official who governs the town. Such characters have only an inchoate and vague sense of their own exploitation, and they seem doomed by an inability to challenge the system in which they are caught up, a state of mind that Kafka illustrates in the final act of

The Trial, where the central character leads his executioners to the place where he will be slaughtered.

On the surface, Kafka's writings on law appear to be situated in a world far removed from our highly rationalized legal system, a place riddled with absurdity, surrealism, madness, and fantasy. Yet Kafka is a realist in his depiction of the legal system, not in the sense that he faithfully records the injustices of the legal system along the lines of Dickens's indictment of the Chancery Court in *Bleak House*, but rather because he provides realistic depictions of how the legal system *feels* to outsiders. This aspect of Kafka's work has escaped some of the more literary-minded legal scholars, but it was picked up by at least one major insider, namely Justice Anthony Kennedy, who insists that Kafka should be required reading for all lawyers: "*The Trial* is actually closer to reality than fantasy as far as the client's perception of the system. It's supposed to be fantastic allegory, but it's reality. It's very important that lawyers read it and understand this" (Carter 1993).

KAFKA'S LEGAL EDUCATION AND PRACTICE

Kafka studied law from 1901 to 1906 at the German Karl-Ferdinand University in Prague, obtaining a doctorate in law by pursuing a course of study that was more rigorous than an American law degree but less formidable than a full-blown doctorate. Still, Kafka was a "doctor of jurisprudence," which meant that others referred to him as *Dr. Kafka*, a term that garnered immediate respect. The university where Kafka earned his law degree was located in Prague and was divided into German and Czech divisions, although the German unit that Kafka attended was more prestigious since German was the language of the cultural and commercial elite in Prague. Kafka's program of study included a good dose of Roman law and legal history, plus canon law, as well as typical courses in criminal law, commercial law, administrative law, and international law (Wagenbach 1984). To earn the degree, Kafka had to pass three state examinations administered by professors at the university, and he wrote a thesis titled, "German and Austrian State Law, Common Law, and Political Economy" (Mailloux 1989, 100).

Kafka made no secret of his distaste for law school. He called Roman law "disgusting" and "meaningless" (Kafka 1953, 95), and he said that the study of law involved chewing ideas that countless students had already chewed (Kafka 1966, 95). Law was actually Kafka's second choice at the university—he originally picked chemistry but was deterred by the laboratory work. In explaining this move, he professed an indifference to all of the subjects taught at the university, or as he would later describe the decision, "[I]t was a matter of finding a profession that would be most likely to allow me to indulge this indifference without injuring my vanity too much. Law

was the obvious choice" (Kafka 1966, 95). In any event, Kafka's studies led him to spend several summers at sanatoria recuperating from the study of law! Yet despite Kafka's professed boredom and disinterest in law, there is no question that his legal background affected his fiction. Most notably, Kafka's terse and formal style bears a strong resemblance to legalese, and his stories and letters are peppered with legal terms, at times referring to his childhood as a trial (1966, 29) and to his broken engagement as a court proceeding (Canetti 1974, 58).

Kafka's first years of legal education were uneventful, but he finally got a taste of private practice during his last year of law school when he took a part-time position as a law clerk in a local law office. Little is known of this internship, but it seems that Kafka performed routine tasks such as drafting pleadings in civil matters. When his third and final state examination was completed in 1906, he decided to spend the following year in a clerkship in the civil and criminal courts of Prague. Upon completion of the clerkship in 1907, Kafka was ready for full-time employment. With the help of an uncle, Kafka found a position at an insurance agency, the *Assicurazioni Generali*, where he worked long hours. His job application has been preserved to this day, and it includes a statement that he never intended to remain in the legal profession (Brod 1960, 249). In any event, Kafka disliked the insurance position in large part because of the difficult hours, which prevented him from writing at night. At this juncture in his life, Kafka had been writing for his own enjoyment and for a small circle of friends, but he was becoming increasingly serious about writing for a public audience, and it was during his time at the insurance agency that he authorized his first publications. Kafka knew that he could not make a living as a writer, so he was resigned to spending the remainder of his working life in a regimen of working by day and writing by night, which was the only time that offered sufficient solitude.

When it became clear that the insurance job left Kafka very little time for writing, he immediately plotted an escape by taking courses at Prague Commercial College in the newly emerging field of workers' compensation insurance, in anticipation of applying to the Worker's Accident Insurance Institute for the Kingdom of Bohemia in Prague. Kafka was hired at the Institute in 1908, and he would stay there until his retirement in 1922 when he was permanently disabled from tuberculosis (he died in 1924, one month before his forty-first birthday). All told, Kafka was employed at the Institute in a legal capacity for 14 years.

Perhaps a few words are in order about the Institute, as this was the place where Kafka spent the vast majority of his professional life. The Institute was a bureaucratic arm of the Austro-Hungarian Empire, created at the turn of the century to administer the workers' compensation scheme. The Institute was *semigovernmental* in the sense that the government chartered

it, yet it was funded as a private concern based on contributions from private employers. In its formative years (just before Kafka's arrival) the Institute ran at a severe deficit because employers' contributions were based solely on the number of employees, a figure that they would drastically underestimate; later, contributions were also keyed to classification of businesses according to risk factors, resulting in a higher rate of contributions (in other words, the Institute became increasingly viable during Kafka's tenure). Kafka's duties at the Institute included tasks that we would normally associate with a lawyer who works for a state workers' compensation agency, including "classifying businesses according to their risk quotient," "organizing inspections," "[drafting] appeals against the companies' objections," and represent[ing] the Institute in court" (Wagenbach 1993, 79). In addition to his work in Prague, Kafka was assigned a territory of Northern Bohemia where he inspected factories and determined the risk quotient for workers. On these trips, much of his time was spent wandering around the industrial towns and observing how the workers lived, material that would later surface in Kafka's fiction. At one point, Kafka wrote to his best friend Max Brod about the endless industrial accidents that filled his files at work:

In my four districts—apart from all my other jobs—people fall off the scaffolds as if they were drunk, or fall into the machines, all the beams topple, all embankments give way, all ladders slide, whatever people carry up falls down, whatever they hand down they stumble over. And I have a headache from all these girls in porcelain factories who incessantly throw themselves down the stairs with mounds of dishware. (Karl 1991, 237)

Many commentators have made the obvious point that this line of work affected Kafka's fiction, both in his depiction of alienated outsiders and in the formal legal style of his fiction. Interestingly, some of Kafka's writings from the Institute have been preserved, and they show a marked similarity to his fiction. Consider for example the following passage from an Institute report, where Kafka described a dangerous wood-carving machine:

Not only all precautionary measures but all safety devices as well have failed in the face of this danger, either because they have proved to be totally insufficient, or because they have on the one hand lessened the danger (by securing the blade-slot with automatic blade-guards or by a diminution in the size of the blade-slot itself) but on the other hand actually increasing it by not leaving enough space for the wood shavings to fall through, so that the blade-slot becomes clogged and the plane operator frequently incurs an injury to his fingers when he attempts to free the slot of the shavings. (Wagenbach 1984, 212)

Now compare this with his description of an execution machine in his short story “In The Penal Colony”:

It was a large structure. The bed and the designer were of the same size and looked like two dark chests. The designer was mounted some two meters above the bed; both were joined at the corners by four brass rods that almost flashed in the sunlight. Between the two chests, suspended on a steel belt, was the harrow. . . . Both the bed and the designer have their own electric battery; the bed needs one for itself and the designer one for the harrow. As soon as the man is strapped down, the bed is set in motion. It quivers, with the smallest and most rapid of vibrations, both from side to side and up and down. (Pasley, p. 114)

Perhaps the institute most affected Kafka in terms of how the injured workers accepted their injuries as inevitable, something that Kafka conveyed to friend Max Brod: “How modest these men are; instead of storming the Institute and smashing it to little pieces, they come and beg” (Brod 1960, 82). In any event, Kafka spent his entire adult life working at the Institute, his only other work experience being the previous position in an insurance company and brief tenures at his father’s “fancy goods” store, not to mention a brief stint managing an asbestos factory in an ill-fated family venture into which Kafka was drafted. The crucial point with respect to Kafka’s experience as an attorney is that the Institute shaped his view of the law by exposing him to injured workers lost in a bureaucratic maze.

Kafka’s view of law was also shaped significantly by his immersion in a civil law tradition. During law school Kafka studied canon law and Roman law, two subjects that are not taught in common law countries.² In typical civil law fashion, his stories refer to the law as a secret *code* (Glatzer, p. 437), and he affords an active role to examining magistrates (Weisberg 1976). The influence of canon law can be found in the reverential, almost mystical status afforded to the law, which is described as “radiant” in “Before the Law” and is ministered by a priest in *The Trial*. None of this diminishes Kafka’s relevance for those of us in the common law tradition. Despite the differences between Kafka’s legal system and our own, his popularity in the

2. At the time Kafka wrote, Prague and the Kingdom of Bohemia were subject to the Austrian Civil Code of 1811, known as the General Citizens Code of the German Hereditary Territories of the Hapsburgs. The law was administered in German, which was the official language of the courts and the administrative state, despite the fact that only a small minority of Czechs spoke German. Perhaps this explains why Kafka’s writing on law is flavored with colonialism and diaspora, since the native Czechs were subject to a German law imposed from Vienna, meaning that the law was a secret code in the eyes of the Czechs without training in German (Vondracek 1988, xx). Deleuze and Guattari (1986) draw strong conclusions from the fact that Kafka wrote in the dry and formal German of the bureaucracy, claiming that Kafka exaggerated this language to the point of absurdity, creating a subversive “minor” literature in opposition to the “major” literary world of German arts and letters.

English-speaking world is a sufficient indication that his message about law is equally relevant to our own system.

Kafka's work also reflects the shifting political landscape of his day, since his stories always involve tenuous political systems that are constantly threatened with disintegration, leaving the citizens in exile and diaspora. During Kafka's formative years, his hometown of Prague was in the Kingdom of Bohemia in the Austro-Hungarian Empire, but the Czechs refused to acknowledge the legitimacy of the Empire and they bristled at the Germans who held all of the important posts in Prague. The central government in Vienna abolished the Kingdom of Bohemia in 1913, and in the years following World War I the Republic of Czechoslovakia was created. Jews like Kafka were caught in the middle of a fight between Czech nationalists (who disliked the Jews) and the Germans (who also disliked, but tolerated, the educated Jews). Although Kafka was not overtly religious, he was unquestionably a person of Jewish identity, and he was clearly caught in the matrix of anti-Semitism among the Czechs and Germans.³ On several occasions, Kafka watched as the capital in Vienna sent troops to Prague to quell anti-Semitic riots spurred by Czech nationalists, once complaining to his Czech translator and love interest Milena Jesenska that staying in Prague was tantamount to acting like a cockroach that refuses to be driven from the bathroom (Sokol 1999). The legal system of Kafka's day was a civil law system based on Austrian codes, written in the dry and officious German that prevailed in the high culture of Prague. Most Jews (like Kafka) spoke the official German, plus Czech, and some Yiddish. This shifting melange of language reflected the unstable identities of Prague Jews. In any event, Kafka was fluent in both Czech and German, but he wrote in German, and it was Milena Jesenska, not Kafka himself, who translated his work into Czech.

Kafka's writings on law reflect all of the background factors listed above—the influence of the civil law tradition, the shifting political instabilities in Prague, the use of formal German while living in a Czech

3. Kafka famously questioned his own Jewishness: "What have I in common with the Jews? I have hardly anything in common with myself and should stand very quietly in a corner, content that I can breathe" (Kafka 1975, 252). Despite such doubts, Kafka was undeniably Jewish, having been raised in a semi-observant Jewish home, lived his entire life in the Old City surrounding the former Jewish ghetto in Prague, and was a token Jew at his workplace. Although not a religious person in the traditional sense, Kafka went through the bar mitzvah ceremony, expressed an interest in Palestine, and even learned Hebrew prior to his death. Apart from how Kafka viewed himself, he was Jewish in the eyes of others, especially in an environment of rampant anti-Semitism from both the Czech and German fronts. Kafka's confusion was nicely summarized by biographer Ronald Hayman: "What he felt was an extreme form of what most Prague Jews felt, knowing themselves to be aliens among the Czechs both as Jews and Germans, and to be better off, financially, socially and culturally" (1982, 13). Some critics, such as Clement Greenberg (1955) and Walter Sokel (1999) have made much of Kafka's Jewishness, claiming that it emerges in his fiction, which on the surface is noteworthy for the absence of any explicit mention of Jews.

environment, as well as Kafka's tortured psychological condition and his profound ambivalence toward law. Kafka's fiction should not be reduced to any single one of these factors, yet unfortunately this sometimes occurs in the secondary literature appearing in law journals, where four caricatures of Kafka have emerged—Kafka as legal historian, Kafka as psychologist, Kafka as postmodernist, and Kafka as critic of bureaucracy.⁴

First, Kafka is sometimes interpreted as a historian who chronicled the legal system in Austro-Hungary during the first few decades of the twentieth century (Robinson 1982; Kirchberger 1986). Some critics have gone so far as to see *The Trial* as primarily a commentary on Austrian criminal law and procedure (Ziolkowski 1997, 224). Most commonly, those who interpret Kafka in a historical perspective claim that he was prescient in foreshadowing a nascent European totalitarianism later exemplified by the Nazis and the Stalinist purges (Stern 1976).

Second, Kafka is sometimes seen as a psychologist who offers profound insights about alienation, irrationality, and suffering. Kafka's psychological portraits were the focal point of a noteworthy exchange between Judge Richard Posner and Professor Robin West in the pages of the *Harvard Law Review* (West 1985; Posner 1986; West 1986). West fired the first salvo by claiming that the irrational and self-defeating behavior exhibited by Kafka's characters refutes Posner's conception of legal subjects as rational utility maximizers. Posner responded by arguing that Kafka's works are largely psychological dramas with little to say about law and its influence on behavior. This exchange was formative in that it was the first extended treatment of Kafka's fiction in a prestigious law journal, but it had the unfortunate side effect of devoting disproportionate attention to Kafka's psychological works

4. The approaches that legal scholars bring to Kafka must be situated alongside the interpretive schools within the larger academic community. Goodden (1977, 4) mentions seven distinct readings of Kafka by academicians: "magic-religious, existentialist, ontological, psychoanalytic, social critical/Marxist, literary, and literary-historical." On my reading, the secondary literature on Kafka divides fairly neatly into five approaches. First, a *psychoanalytic* approach views Kafka's fiction as a working through of an Oedipal struggle with his father, a struggle explicitly acknowledged by Kafka in the harrowing *Letter to His Father*, where Kafka wrote, "My writing was all about you; all I did then, after all, was to bemoan what I could not bemoan upon your breast" (1966, 87; Sokel 1976). Second, a *religious* interpretation sees Kafka's fiction as a depiction of modern man's struggle to establish a relationship with a distant God (Brod 1960, 3). This is the interpretation favored by Willa and Edwin Muir, the Scottish couple who were the first major translators of Kafka for the English-speaking world (see Muir 1946, asserting that for Kafka, "a man's true place in the community is finally determined not by secular, but by divine, law"). This position has been rejected as overly simplistic by the recent translators of Kafka's work (Harmon p. xiv) and by Czech writer and critic Milan Kundera (1995, 41). Third, a *Marxist* approach sees Kafka's fiction as depicting the conflicted internal world of bureaucrats caught in an irrational capitalist system (Hughes 1981; Lukacs 1980). Fourth, an *existentialist* reading of Kafka focuses on his portrayal of the isolated individual who must create her own rules in a universe unanchored by God, tradition, or objective meaning (Camus 1955). Finally, recent scholarship has favored a *postmodern* approach that focuses on Kafka's deconstruction of hierarchies and power relations (Deleuze and Guattari 1986; Derrida 1992).

(such as “A Hunger Artist” and “The Metamorphosis”) at the expense of his texts on law and politics. Subsequent to the West-Posner debate, legal scholars began to mine Kafka’s work for insights into psychological matters such as family relations (Weisbrod 1993), mental destabilization (Cleland 1989), and the horrors of capital punishment (Dragich 1998).

Third, Kafka is sometimes seen as a postmodernist who depicts the law as an indeterminate text shaped by power relations (Horn 1996; Lechte 1994). This reading of Kafka by legal scholars draws heavily from prestigious postmodern thinkers who have written on Kafka (Deleuze and Guattari 1986; Lyotard 1999; Derrida 1992; Cixous 2000). For these thinkers, Kafka is essentially a demystifier of the liberal rule of law, showing that “the Law” is not a ready-made set of rules but an empty signifier that is actively constructed in a symbolic struggle between social forces vying to establish a fixed, state-sanctioned interpretation of a fluid text (Minkinen 1994).

Finally, a fourth approach involves using the term *Kafkaesque* to describe the legal problems of bureaucracy and hyper-rationalization (Dehavenon 1989; Tickin 1984; Harrington 1995). Sometimes appellate courts will cite Kafka in a similar way, hoping to emphasize the perils of bureaucracy or the dangers of detainment without due process of law (Finet 1988). Obviously, this approach does not involve a close textual reading of Kafka’s writings, although it gives some indication of Kafka’s meaning for the public at large.

Recent scholarship in the area of outsider jurisprudence suggests a new way of looking at Kafka’s writings on law, distinct from the four interpretive strategies listed above. Viewed through the lens of outsider jurisprudence, Kafka’s fiction is an extended meditation on the position and perspective of the legal outsider. The depth of Kafka’s preoccupation with the outsider perspective is best measured by the pervasiveness of this theme in his entire corpus of writings on law, to which I will now turn before focusing more specifically on the structural and psychological features of the outsiders depicted by Kafka.⁵

5. Frederick DeCoste (1994) is one of the few legal theorists who has attempted to sketch a general account of Kafka’s treatment of law. For DeCoste, Kafka depicts law as inherently dystopic. That is, law always creates an insular cadre of insiders and a larger class of alienated outsiders, and this phenomenon is an inherent and inescapable feature of all modern legal systems. As he puts it, “Kafkian jurisprudence is a jurisprudence of despair . . . [T]here is no possibility of a coherent future, and no opportunity to reshape our moral and communal lives and commitments” (1994, 170). DeCoste provides a subtle reading of Kafka, yet he misses the emancipatory undercurrent in Kafka’s work, the sense in which Kafka’s negativity should be read as social criticism instead of nihilism. After all, Kafka went to work every day with the hope of improving the law for injured workers, a position that he would not have pursued if he truly believed that outsiders could never secure protection from insiders.

KAFKA'S KEY WRITINGS ON LAW

In considering Kafka's writings on law, a threshold question is the relative weight to afford Kafka's published and unpublished texts. The problem is particularly acute because Kafka authorized the publication of only seven slim volumes during his lifetime, approximately 40 pieces in total, many of which are shorter than a single page. His entire authorized output is well under 400 pages of text, and "The Metamorphosis" is perhaps the longest work, a mere 50 pages. The stories specifically approved by Kafka during his lifetime were as follows: the short stories in a volume titled *Meditations* (originally published in 1912), the story "The Stoker" (1913), the story "The Metamorphosis" (1915), the story "The Judgment" (1916), the story "In the Penal Colony" (1919), the short stories in a volume titled *A Country Doctor* (1920), and the stories posthumously appearing in the Kafka-approved volume titled *A Hunger Artist* (1924). None of Kafka's three novels (*Amerika*, *The Trial*, and *The Castle*) were approved for publication during his lifetime, and only two of his approved stories deal with law ("Before the Law" and "The New Advocate"). After Kafka's death in 1924, his close friend and executor Max Brod reconstructed all of the unpublished texts (including the novels, the unpublished stories, the diaries, and the letters) in strict violation of Kafka's written injunction that his work should be burned:

Dearest Max, my last request: Everything I leave behind me . . . in the way of diaries, manuscripts, letters (my own and others'), sketches, and so on, to be burned unread; also all writings and sketches which you or others may possess; and ask those others for them in my name. Letters which they do not want to hand over to you, they should at least promise faithfully to burn themselves. Yours, Franz Kafka. (Kafka 1956, 328)

Kafka had given similar instructions to Brod verbally three years prior to Kafka's death, but Brod made clear to Kafka that the instructions would not be followed. Kafka's request raises important questions about how much weight to afford the unpublished works. And yet as a purely practical matter, we simply could not engage in a detailed discussion about Kafka's treatment of law if we restricted our vision to the texts approved by Kafka.

Luckily, scholars have good reasons for granting equal status to Kafka's unpublished texts. For one thing, Kafka was extremely reticent about granting permission for publication, so his unpublished work is not noticeably inferior to his published writings. Secondly, Kafka probably had an inkling that Brod would bring forth the unpublished material posthumously, so there is a sense in which Kafka tacitly approved the posthumous publications. To this we might add the fact that Kafka died at a young age, without

having the chance to reconsider publication of the pieces withheld from publication when he was a younger man.

From the entire corpus of published and unpublished works, the following texts deal with law, courts, lawyers, or quasi-legal proceedings: the entire novel *The Trial* (including the short parable in the penultimate chapter, "Before the Law") and the short stories "The Problem of Our Laws," "In the Penal Colony," "The Refusal," "The New Advocate," "The Knock at the Manor Gate," and "The Stoker." These works represent the core of Kafka's thinking about law. Another cluster of stories deal with political arrangements in a broader sense without directly referring to law, including the short stories "An Old Manuscript," "The Great Wall of China," "The Emperor," "Couriers," and "The Conscription of Troops." At an even further remove, Kafka wrote a series of texts bearing on themes that are tangentially related to law, such as the struggle with bureaucracy in the novel *The Castle*, the theme of punishment in "The Judgment," and the power struggles in "Jackals and Arabs" and "The Helmsman." The remainder of Kafka's fiction is not at all concerned with law as a social institution. This includes some of his best known work, including the short stories "The Metamorphosis," "The Hunger Artist," "The Burrow," "Josephine the Singer," and all other works not mentioned above.

Legal scholars can choose from many different translations and packages of Kafka's writings, but the best place to begin is with the materials assembled and translated by Oxford Germanist Malcolm Pasley, who is perhaps the leading English-language authority on Kafka. The recent editions of *The Castle* (translated by Harmon) and *The Trial* (translated by Mitchell) are based on Pasley's reconstruction of the original texts, and his translation of Kafka's stories is excellent. Pasley's reconstruction of the original German texts corrects Max Brod's ill-advised alterations, such as inserting punctuation where Kafka never intended and overriding Kafka's midsentence ending to *The Castle* (Harmon, p. xi). The Pasley editions do a nice job of reconstructing Kafka's original texts, and for this reason they have been generally well received (Smith 1998; Alter 1998), although some critics have argued that the translations are insufficiently "Kafkaesque" owing to the use of informal phrases and colloquialisms (Ozick 1999; Adler 1998). The only major gap in the recent wave of translations is the absence of a fresh translation of Kafka's unpublished short stories, many of which have to do with law and legal systems; for these stories, we must resort to older translations (Glatzer 1995).

The overall picture of law emerging from Kafka is horribly bleak. In story after story, Kafka paints a portrait of complete alienation, where everyday life takes on an absurd quality due to the absence of a recognizable legal structure: the law is nonexistent or unintelligible, and the court system is unreachable. This pattern is treated at length in *The Trial* and *The Castle*,

where the protagonist (named “K.” in both novels) searches in vain for a meeting with the authorities who control his fate. Josef K. in *The Trial* never gets to appear before a judge, and K. never gets an audience with the higher-ups in the Castle who purportedly run the village where he is stuck. The same themes occur in condensed form in short stories such as “The Refusal” and “The Problem of Our Laws,” where the law is kept secret to the point that doubts arise about whether the law exists at all. In all of the major works concerning law there is a frightening diffusion of political and legal power, sometimes with the suggestion that no single person or group exercises decisive control, leaving only an endless maze of bureaucrats guarding an empty edifice.⁶ The end result is a negative utopia, a nightmarish world where each person fears that he might be violating some unknowable law, creating a paradoxical condition where people cannot know the law but constantly fear that they have violated it. For Kafka, this is how the legal system *appears* to those who are caught up in it.

***The Trial* and “Before the Law”**

The Trial is often considered Kafka’s masterpiece and the starting point for his position on law. Nominally it is the story of the arrest, trial, and execution of Josef K., the chief clerk of a large bank, who never learns the nature of the charges leveled against him nor the identity of the accusatory body. The story begins when K. is awakened on the morning of his thirtieth birthday by two guards who inform him that he is under arrest and prepare him for an impromptu interrogation that will take place in his apartment building. The arrest comes without warning and without specific charges being brought. K. is shocked as the guards proceed to eat his breakfast and try to trick him into parting with his high-quality clothes, insinuating that K. is already guilty. At this point, K. can only guess as to the mysterious forces that commanded such guards: “What office did they represent? After all, K. lived in a state governed by law, there was universal peace, all statutes were in force; who dared assault him in his own premises?” (p. 5). Presently an impromptu hearing is assembled as the neighbors watch through the windows. The guards instruct K. to wear black for what turns out to be a tense but uninformative interrogation by an examining magistrate, who merely informs K. that he is under arrest, but not in the typical sense: “You

6. Kafka’s characterization of the political and legal system as an empty edifice held in place by a collective delusion is played out most forcefully in the short parable “Couriers”: “They were offered the choice between becoming kings or the couriers of kings. The way children would, they all wanted to be couriers. Therefore there are only couriers who hurry about the world, shouting to each other—since there are no kings—messages that have become meaningless. They would like to put an end to this miserable life of theirs but they dare not because of their oaths of service” (Kafka 1971, 185).

are under arrest, certainly, but that's not meant to keep you from carrying on your profession" (p. 17).

K. is soon informed by a phone call that his case will be heard on a Sunday in a distant suburb. The address provided over the phone is for a large apartment complex, and K. cannot find the courtroom. Since he is too ashamed to ask for directions, he makes up a story that he is looking for a carpenter who lives there. The residents of this particular building can discern that K. is a defendant and they point him toward the courtroom, in the top floor (the attic) of the dingy apartment complex. This theme recurs throughout the book, namely that defendants have a special "look" that others can discern, and that "the law is attracted by guilt" (p. 9). K. ultimately finds the attic courtroom, and after introducing himself to the prosecutor he is informed that he is late, despite never having received a formal time for the hearing. The hearing begins comically, as the prosecutor asks, "So you are a house painter?" to which K. replies, "No, I'm the chief financial officer of a large bank" (p. 47). This confusion propels K. into a long soliloquy on the incompetence of the court and its insidious role as an "extensive institution" for "arresting innocent people" and "instituting senseless proceedings," comments which cause half the people in the courtroom to cheer him repeatedly while the other half stand idly. The proceeding is disrupted when a man begins to violently kiss a washerwoman in the back of the courtroom, and when K. runs to break up their embrace, he notices that *all* the men in the crowd are wearing badges indicating their allegiance to the court, even those men who were seemingly cheering his attacks on the court. K. is then informed by the prosecutor that his behavior has destroyed any advantage that K. might have gained from an interrogation. K. leaves in a huff, only to return the following Sunday in the vague hope of furthering his case. On this day he finds the courtroom is empty, and when he examines the law books on the prosecutor's table he finds sexual drawings and comic book images. K. then has an intimate conversation with the court washerwoman whom he had earlier tried to protect, and he even entertains the thought of taking her away from her miserable life, when a law student comes up, physically removes her, and begins kissing her before taking her to his superior, the examining magistrate. K. cannot tell if she is being taken against her will or by consent, but her husband soon arrives and tells K. that the washerwoman is consensually involved with the court officials. All of this nonsense is too much for K., and he has a panic attack, loses his breath, and has to be forcibly removed from the premises.

At this point the novel becomes even more surreal. K. is at working late one night at the bank and hears groans coming from behind a supply room at the bank. When he opens the door he finds that the two guards who arrested him are being whipped by a flogger for their callous behavior in connection with K.'s arrest. K. tries to bribe the flogger to prevent the

beating: "I don't even consider them guilty; it's the organization that's guilty" (p. 83). The bribe is refused, and K. shuts the door to muffle the wailing. One week later the entire scene is repeated.

Soon afterward, K.'s uncle hears about the trial and finds a renowned lawyer named Huld to represent K. A meeting is held at Huld's house (he works from home, or rather from a bed in his home) among K., his uncle, Huld, and the chief clerk of the court, who happened to be visiting. K. is distracted by Huld's maid, and he leaves the meeting in order to begin a sexual affair with her. By the time he returns to the meeting, the clerk has already left, causing embarrassment to Huld and to K.'s uncle and hurting his case.

In subsequent visits to Huld, K. begins to realize that he is dealing with a strange court of ambiguous jurisdiction. Everything about the court is secret, including its records, its proceedings, and the identity of the judges. Further, the court does not read the petitions placed before it, nor does it require accused persons to defend themselves (though the court will tolerate a defense). Finally, the structure of the court is so complicated that nobody really understands its many levels, and nobody has a complete picture of the tortured life of a single case. Faced with this, litigants are initially obsessed with their cases, but over time they settle into passivity.

At the suggestion of a client from the bank, K. visits the court's official painter, Titorelli, who lives in a remote attic connected to a court building. Titorelli comes from a long line of court painters and is responsible for producing portraits of the judges, although he is presently preoccupied with an abstract depiction of Justice that resembles the goddess of the hunt (which seems appropriate given K.'s status as a hunted man). The painter informs K. that "the High Court is totally inaccessible to you and me and everyone else" (p. 159) and that K. faces one of three possible outcomes: actual acquittal (this is the best result, but one that is never granted); apparent acquittal (this option is occasionally granted but it allows the possibility of re-arrest and re-trial); and protraction (where the case lasts indefinitely).

In frustration that his case is not being resolved, K. meets with Huld for the purposes of dismissing him. At Huld's house, K. is introduced to Block, a formerly successful merchant who has lost his savings and now lives with Huld so that he can devote himself exclusively to preparing his case for trial. When K. insinuates that Huld is powerless within the court system, Huld responds by calling the merchant Block into the room and humiliating him with the news that despite the passage of five years his trial has not yet even begun, a revelation that crushes the old man.

In the penultimate scene of the novel, K. is given the task of entertaining a bank client by providing a tour of a cathedral, but when the client fails to arrive at the church, K. is left alone with an unnamed priest, who turns out to be the prison chaplain. The priest not only knows about K.'s case, but

cryptically suggests that he arranged for K. to be brought to the chapel. When the priest informs K. that the trial is going badly, K. says that he trusts the priest, to which the priest responds with a parable about deception. This parable, published by Kafka separately during his lifetime as "Before the Law," is undoubtedly one of the most interesting and perplexing texts of the twentieth century.⁷ To summarize, a man from the country seeks admission to the law, but finds a doorkeeper who says that admission cannot be granted now. When the man asks about future admission the doorkeeper says that it is possible, but cannot happen now. The man tries to peer through the door, but the doorkeeper informs him that the law is protected by a series of doorkeepers, each more powerful than the next, such that this lowly doorkeeper cannot even bear to look at the third doorkeeper. This news frustrates the man from the country who feels that the law should be accessible to everyone. So the man sits for years at the door to the law, engaging the doorkeeper in banal conversations and trying to offer bribes, which are accepted only to appease the man from the country. Eventually the man is ready to die, and he sees a radiance coming from the law. He has the strength to ask one more question, so he asks the doorkeeper why nobody else has sought admission through this door when everyone strives to find the law. The doorkeeper realizes that the man is dying and he explains, "No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it" (p. 217).

This parable is followed by a dialogue in which the priest and K. struggle with various interpretations that can be brought to bear on the parable. K. reaches the initial conclusion that the doorkeeper deceived the man by not telling him straightaway that entry would be impossible. The priest counters this interpretation by insisting that the doorkeeper told the truth, namely, that the man could not enter at this time, and there was nothing to indicate that the ban was permanent. Far from being a despicable figure, the doorman may have exceeded his strict duty as a doorkeeper by engaging the man in idle conversation and other activities not required of his post. The priest then offers an interpretation that reverses K's initial stance, by claiming that the doorkeeper is the one who is deceived because his knowledge is limited to the exterior of the law and he cannot enter the law nor abandon his post, making him truly inferior in terms of knowledge and options, since at least the man from the country has the power to walk away. Based on this reading, K then concludes that *both* the doorkeeper and the man were deceived, a plausible interpretation. But the priest suggests that we cannot reproach the doorkeeper since he serves the law, and we cannot doubt the law. K. rightly objects to this admonition, because if the doorkeeper is

7. Kafka referred to the parable as "the Legend," and it was one of the few stories that he felt strongly about and which he approved for publication during his lifetime (Kafka 1975, 321).

placed beyond the pale of doubt, we must submissively take everything that the doorkeeper says as true, even if it is not. The priest responds, "You don't have to consider everything true, you only have to consider it necessary" (p. 223). Yet for K. this is a depressing opinion, as it elevates lying into a universally accepted practice. The discussion ends without resolution, but with the sense that the priest (who belongs to the court) is himself implicated in the parable as the latest in a long line of doorkeepers preventing K. from reaching the law.

The final chapter begins one year after the ordeal began: K. is taken from his apartment by two fat, pale men in top hats. K. understands why they have been sent, and he openly pokes fun at their appearance. They stand on either side of him as they walk him through the streets, letting K. direct their route. Three men locked together shoulder-to-shoulder make for an odd grouping, but when they pass a policeman K. makes no effort to attract his attention. They arrive at a quarry, and the two men remove K.'s shirt and hold him down while passing a knife back and forth over his body, waiting for K. to grab the knife and kill himself. When K. refuses to act, one of the men sticks the knife through K.'s heart, and the book closes with the famous line: "Like a dog!" he said; it seemed as though the shame was to outlive him" (p. 231).

"The Problem of Our Laws"

Many of the themes played out in *The Trial* are distilled in the short story, "The Problem of Our Laws" (Glatzer, p. 437), which was likely written while Kafka was working on *The Castle*, Kafka's final novel about a man named K. who wanders into a village promoting himself as a land surveyor summoned by the Castle, who spends the entire novel shuffling among townspeople and trying to get situated, always seeking but never obtaining an audience with the higher authorities in the Castle who preside over the village. "The Problem of Our Laws" is likely Kafka's most concise and pure statement about the law, setting forth the familiar Kafkaesque scenario of confused people who are incapable of discovering the laws to which they are subjected. The two-page story concerns a secret legal system described by an unnamed narrator, who tells us that the people are ruled by laws made by the nobles, who stand above the law. Kafka then adds a remarkable twist—the narrator and the other people are unsure of whether the law exists at all or is merely a fiction concocted by the nobles. As for this question of whether the law exists, two schools of thought have arisen among the people. First, the popular tradition holds that the law exists as a secret code fine-tuned over time by the nobles, holding out the possibility that this fine-tuned law will be entrusted to the people some day. Opposing this view, a smaller group has adopted the nihilistic position that the law does not exist

and that the term *law* is simply a buzzword for whatever the nobles happen to do (in other words, the nobles do whatever they want and then christen it *law*), which means that the law can *never* be turned over to the people since it does not exist in the strict sense. Both schools of thought concede that the commoners live in total ignorance about the law.

A paralyzing submission and resignation characterizes both attitudes toward the law. Rather than blame the nobles for keeping the law a secret, the people blame themselves for being unworthy of having a system of law entrusted to them. Oddly, each person would be willing to join a movement that repudiated the nobility and established a universal set of laws, yet nobody has the bravery to step forward and be the first one to attack the nobility. The failure of the people to take revolutionary action is grounded in the fear of having to create a new legal system, and the narrator informs us that one writer has phrased the predicament as follows: "The sole invisible and indubitable law that is imposed upon us is the nobility, and must we deprive ourselves of that one law?" (Glatzer, p. 438).⁸ It turns out, then, that the people would rather accept their subjugation as if it were a necessary law than to strike out on their own.

"In the Penal Colony"

The short story "In the Penal Colony" (Pasley, p. 111) was published as a separate volume during Kafka's lifetime and is one of his more graphic and disturbing pieces. It is the story of a man known only as "the explorer," who travels to a tropical penal colony at the invitation of a New Commandant to witness the execution of a man pursuant to a methodology designed by the Old Commandant. The execution is conducted through an apparatus, a death machine consisting of three pieces, namely a "bed" of cotton onto which the gagged victim is strapped, a "designer" containing a complicated writing mechanism, and a "harrow" of long needles—which will be driven into the body of the victim, physically engraving the sentence onto the body, causing a slow death (after which the lifeless body will be lifted and tossed into a nearby pit). The accused never knows the sentence in advance, but rather "gets to know it in the flesh" (p. 115). This punishment is administered by a man known only as "the officer," who acts simultaneous as judge and executioner under a primitive logic: "My guiding principle is this: Guilt is never to be doubted." The 12-hour procedure engraves the punishment in writing on the body of the condemned man, somehow enabling the man to discern the sentence after 6 hours of torture (presumably

8. According to Frederick Karl (1991, 645), "That 'writer' is clearly Kafka stating one of his paradoxes: that in the absence of control, we wander aimlessly; so we choose authority whose validity we must seriously question. Whether meaningful or not, the law is all we have. Should we repudiate what gives us direction, even if the direction is not what we want?"

by feeling the impression of the letters). The officer is such a true believer in the process that he tells the explorer, foreshadowing the story's conclusion, that the sight of enlightenment on the face of the victim "might tempt one to lay oneself down under the harrow" (p. 120). The officer is charged with explaining and justifying the apparatus to the explorer, but all that he can offer is some illegible written instructions from the Old Commandant and tales of a former era when the spectacle of punishment was a community event. The story draws tension from the difference in attitude between the officer and the explorer: the officer is deeply committed to retaining the apparatus as a method of punishment, yet the explorer rightly feels that the procedure is barbaric and outmoded.

In the execution to be witnessed by the explorer on behalf of the New Commandant, the condemned man is being inscribed with the words, "Honor Thy Superiors." His crime: falling asleep on duty, to the neglect of his assigned task of standing outside the captain's door and rising every hour to salute the door. The condemned man is submissive and passive as he is strapped to the bed of the apparatus. The officer inserts a disgusting old mouthpiece, which induces the victim to vomit. At this point the officer senses the explorer's growing revulsion, so in a radical move to demonstrate the efficacy of the apparatus, the officer frees the condemned man and places himself within the apparatus, changing the sentence to "Be Just." The machine springs to life but something goes terribly wrong: the machine does not write smoothly but simply stabs away at the body of the officer, ultimately spiking him in the forehead and killing him, at which point the dead body has to be removed from the needles by the explorer. After this fiasco, the explorer arranges to leave the island and discovers that the Old Commandant (the designer of the apparatus) has been discredited on the island, to the point where his grave lies ignobly beneath a table in a tea room. To summarize, the story chronicles the fate of a true believer in a primitive method of punishment who is ultimately "hoisted on his own petard."⁹

"The Refusal"

"The Refusal" (Glatzer, p. 263), unpublished in Kafka's lifetime, is less graphic than "In the Penal Colony" and *The Trial*. It is closer to "The Problem of Our Laws" in tone and in themes, which include the inability of ordinary people to understand the laws by which they are governed, the vast distance separating insiders from outsiders, and the paralyzing submission of

9. The story can be read as a critique of fundamentalist thinkers such as the Old Commandant, who treat the law as if it were a machine, which brings to mind Justice Douglas's famous quote: "The law is not a series of calculating machines where definitions and answers come tumbling out when the right levers are pushed" (1948, 105).

the powerless. The narrator in "The Refusal" is an unnamed "civilian" located in a small village far removed from both the frontier and the capital. In this village the citizens are passively subservient to the lone government representative in their midst, a colonel who happens to be the chief tax collector. This man has not been elected to his post, nor is there any clue about how he was invested with power in the first place: "This colonel, then, commands the town. I don't think that he has ever produced a document entitling him to this position; very likely he does not possess such a thing" (p. 264). The colonel lives in a home overlooking the market square, where the citizens ritually assemble to present their requests, which (as the title indicates) are summarily refused. The colonel presides at such meetings by holding two bamboo poles, an ancient custom to imply that he supports the law and is supported by law. In front of this lowly but powerful representative from the capital, the citizens submit modest requests (such as requests for a tax exemption or a reduced price for timber). The colonel never addresses the citizens directly, and he only grants requests that are *de minimis*, always refusing the meaningful requests. Typically, he whispers into the ear of an official who announces, "The petition has been denied," which has the unexpected result of making the citizens feel relief instead of frustration: "[T]he citizens can always count on a refusal. And now the strange fact is that without this refusal one simply can't get along" (p. 267). This process is not a mere formality, according to the narrator, who tells us that the people make requests in good faith only to be met with refusal every time. This arrangement is satisfactory to most of the citizens, except the young people, who (according to the narrator) are foolish enough to entertain thoughts of rebellion while not being able to foresee the consequences of such action.

"The Refusal" bears a striking resemblance to "The Great Wall of China," a longer, unpublished piece (Glatzer p. 235). In "The Great Wall of China," the narrator and his community are cut off from access to the government, to the point where they do not know who is ruling the country: "[W]e think only about the emperor. But not about the present one; or rather we would think about the present one if we knew who he was or knew anything definite about him" (p. 247). Operating under a lack of information, the local citizens can only speculate on why they have been ordered to build a Great Wall (which is being built in sections that now stand isolated and useless). The people, then, do not know who is ruling them nor the laws under which they are ruled, nor why they are building a Great Wall. Despite the lack of information, life is basically ordered along traditional lines. The narrator, however, recognizes that the people lack imagination and cannot govern themselves autonomously. The very thought of questioning the existing arrangement is too threatening to the narrator himself, so he cuts off the inquiry: "To set about establishing a fundamental defect here would mean undermining not only our consciousness, but, what

is far worse, our feet. And for that reason I shall not proceed any farther at this stage of my inquiries into these questions” (p. 247). The similarity between this story and “The Refusal” is obvious—both stories involve citizens who are politically alienated yet who accept their subjugation and cannot entertain rebellious thoughts of setting up an alternative system.

“The New Advocate”

“The New Advocate” (Pasley, p. 137) is a two-paragraph parable published during Kafka’s lifetime, and it stands as Kafka’s only whimsical treatment of a law-related theme. The parable deals with the conversion of Alexander the Great’s horse, Bucephalus, into a bar-licensed attorney. Bucephalus has received the approval of the organized bar and has received a friendly reception in the legal community: the legendary battle-charger is now turning the pages of law books in the library. The narrator concludes that this is as it should be, since nowadays “there is no Alexander the Great” (p. 137). Kafka’s intention here is to show how the grandeur and sweeping drama of former times has been transformed into timid rule following. Although there is an undeniable brutality to figures like Alexander the Great and his legendary horse, Kafka seems to associate them with a certain “will to power” in the Nietzschean sense of taking responsibility for creating values and establishing a unique moral and political vision. By contrast, lawyers are organizational men who work within a framework created by others, and they think in an instrumental fashion. The message of this fable is reminiscent of Max Weber’s claim that the modern era suffers from “disenchantment” (1946, 139), namely, the loss of the magical/religious/substantive in favor of rational calculation and formal procedure. In this regard we should keep in mind that Kafka’s doctoral advisor was Alfred Weber, brother of Max Weber. A similar demystification can be found in Kafka’s modernist renderings of Greek myths, such as his rendering of “Poseidon,” where the Greek god spends his days sitting at a desk going over figures and tending to the endless administration of the oceans (Glatzer, p. 434). Beneath the humor of these stories is a critique of modernity, namely that we have lost the romance, danger, daring, and destructive power of the explorer/conqueror who has the capacity to think beyond the present system and create another system. The implication, of course, is that a person can become a member of the bar only by narrowing her vision.¹⁰

10. “The New Advocate” should not be confused with the similarly titled “Advocates,” a brief, nightmarish first-person tale where the narrator (again nameless) finds himself trapped in a large building where the corridors are filled with people dressed in huge striped aprons (Glatzer, p. 449). The narrator believes that the building is a law court on account of the endless droning noise. He is looking for advocates because they are needed everywhere. Although the story is very brief and cuts off abruptly, it contains an interesting passage reminiscent of *The Trial*, in which the narrator says that one cannot doubt that the law is being

“The Knock at the Manor Gate”

The “Knock at the Manor Gate” (Glatzer, p. 418) is a nightmarish two-page story in which an innocent man is unjustly imprisoned. The narrator (nameless again) is walking with his sister in the country, when the sister does something construed as objectionable, although the narrator cannot recall the actual event; it seems that the sister either impulsively knocked at the gate of a manor or merely waved her fist at the gate. News of this insubordination reverberates through the neighborhood, and the townsfolk inform the narrator that he and his sister will be answerable for the incident (although the nature of the crime, if any, remains uncertain). While the sister goes home to change clothes, the narrator is corralled before a judge and his assistant who take him into a farmhouse that morphs into a prison cell. The story ends with the query, “Could I still endure any other air than prison air? That is the question, or rather it would be if I still had any prospect of release” (p. 419).

“The Stoker”

“The Stoker” (from Pasley’s collection) was an early short story published by Kafka as a separate volume during his lifetime. It was later incorporated into his first (unpublished) novel, *Amerika* (1996a) (originally titled *The Man Who Disappeared*), the story of Karl Rossmann, a 16-year-old boy who is exiled to America by his parents for impregnating an older servant woman. The novel is generally considered Kafka’s weakest in terms of structure and psychological intensity, not to mention that Kafka had never been to America and could not write about it with credibility. The novel adopts a highly artificial Dickensian adventure format that is clearly ill-suited to Kafka’s temperament; and Kafka was clearly better at depicting the claustrophobia of Europe than the wide vistas of America. Among Kafka scholars, “The Stoker” and *Amerika* are not afforded the respect shown to Kafka’s later works, and indeed most commentators focus exclusively on stories written after Kafka’s breakthrough story “The Judgment,” which signaled the beginning of a darker, surreal style.

“The Stoker” does not deal with law *per se*, but it contains a scene with a quasi-judicial proceeding. The proceeding is held on board the German ship that Karl Rossmann has taken to New York. The complainant in the

administered fairly because life would be impossible if one doubted the law. This echoes the statement by the priest in *The Trial* to the effect that one need not consider the law as true but rather as necessary, and it also echoes the scene in “The Refusal” where the narrator says that without the refusals issued by the authorities, the villagers simply could not get along. Apart from these parallels, “Advocates” is a bit too sketchy to offer major insights into Kafka’s view of the law.

hearing is the Stoker, a burly man who works in the engine room of the ship. He is upset about receiving harsh treatment at the hands of his petty and vindictive superior, a Romanian. Karl decides to accompany the Stoker to the ship's command center to press the Stoker's case before the Captain and the other officers. Since Karl is more erudite than the Stoker, he begins by making the case for the Stoker, but when the Stoker is asked to come forward to articulate his grievances, he stutters and babbles incoherently, then grows enraged when Karl tries to help. The story does not advance toward a meaningful resolution since the dramatic tension is broken by an artificial literary device—Karl discovers that a man in the room is his successful uncle, the very person whom Karl was supposed to meet in America, so Karl is whisked away from the hearing. However, the story is noteworthy for capturing the emotional confusion felt by litigants who burn with outrage and demand to have their cases heard, yet suffer paralysis when given the chance to speak.

Summary of Kafka's Legal Fiction

Such are Kafka's novels, stories, and fragments about law. The most striking feature of these works is their relentless outsider perspective and the continual struggle of nameless narrators to find some point of connection with the legal system. Kafka's characters do not respond to victimization with outrage and revolutionary fervor, but instead accept their fate, and it is only at the very end of the stories that we find an inkling of protest. For example, at the conclusion of "The Refusal" we learn that the young people are dissatisfied with the constant process of seeking redress from the authorities only to be denied; at the end of *The Trial*, Josef K. finally supposes that the shame of the incident will outlive him (perhaps as a warning to others); at the end of "The Problem of Our Laws," we find that the general population would support a new legal system if someone only had the courage to step forward and denounce the nobles who keep the law secret; and at the end of "The Great Wall of China," the narrator finally comes around to the entertaining possibility of critiquing the social arrangement. These stories provide a wealth of material on legal outsiders, allowing us to focus on the symptoms of outsider status, the psychology of the outsider, and the critical insights that the outsider can offer.

KAFKA AND THE SITUATIONAL OUTSIDER

Kafka makes an important contribution to outsider jurisprudence and its related movements because his fiction suggests that outsider status is not determined solely by noticeable features such as race, religion, gender, or

class, but also by one's position in relation to the dominant legal apparatus. That is, Kafka adds a new vector of analysis for determining how an individual becomes an outsider, since the situational outsiders that he depicts are no less outsiders than the members of minority groups. Indeed, Kafka's fiction is distinguished by its focus on *situations* instead of *characters*, and his characters are thinly sketched to avoid references to race, religion, class, and sometimes gender as well (although most of his characters are male). Perhaps this explains why the noted poet and critic W. H. Auden said, "Sometimes in real life one meets a character and thinks, 'This man comes straight out of Shakespeare or Dickens,' but nobody ever met a Kafka character. On the other hand, one can have experiences which one recognizes as Kafkaesque, while one would never call an experience of one's own Dickensian or Shakespearian" (1956, 160).

Outsider jurisprudence has not devoted much attention to the possibility of a situational outsider. To the contrary, it has assigned outsider status to members of out-groups on the basis of noticeable traits such as race, gender, or sexual preference. In keeping with this, outsider jurisprudence has focused on minority groups such as African Americans (Delgado 1995, xiii), Latinos (Valdes 1997), Asian Americans (Chang 1993), gays (Eskridge 1996), and Native Americans (Torres and Milun 1990), and it also tends to assume that nonminorities see the world through the lens of a "white male hegemony" (Johnson 1991; Halewood 1995).

By telling stories about outsiders who do not belong to a recognizable minority group, Kafka suggests that outsider status can be determined on a case-by-case basis, such that not all outsiders will be minorities, and vice versa (for example, White House counsel Alex Gonzales belongs to a minority group that has typically stood outside the dominant culture, yet he is more of an insider than most white males, and the same can be said about other insiders such as Justice Thomas and former attorney general Janet Reno). This notion that the categories of insiders and outsiders are flexible and shifting has been forcefully articulated by sociologist Robert Merton in a groundbreaking essay on insiders and outsiders:

I adopt a structural conception of Insiders and Outsiders. In this conception, Insiders are the members of specified groups and collectives or occupants of specified social statuses; Outsiders are the nonmembers. . . . We no longer ask whether it is the Insider *or* the Outsider who has monopolistic or privileged access to social knowledge; instead, we begin to consider their distinctive and interactive roles in the process of seeking truth. (1996, 261)

This implies that we are all outsiders with respect to some matters and insiders with respect to others, a point captured humorously in Erving Goffman's quip that: "In an important sense there is only one complete unblushing

male in America: a young, married, white, urban, northern, heterosexual Protestant father of college education, fully employed, of good complexion, weight and height, and a recent record in sports" (1963, 128). Kafka's writing suggests that outsider status can occur along a variety of fronts, and his fiction depicts the characteristics (or symptoms) exhibited by a person who is an outsider with respect to the legal system.

First and most fundamentally, the outsider lacks knowledge of the law. She is typically ignorant of both the substance of the law and the procedural process to which she will be subjected. This theme runs through nearly all of Kafka's stories. In *The Trial*, K. is ignorant of the charges leveled against him, and he is informed that nobody understands the court structure; in "The Problem of Our Laws," the narrator can only speculate whether there is a legal system at all; and in "Before the Law," the protagonist waits at the entrance of the law until he dies.

Second, the outsider cannot distinguish law from brute force—he lives like a colonized person subject to imperial rule. This is brought out in "In The Penal Colony" and "The Knock at the Manor Gate," which tell the story of makeshift judges who punish victims without informing them of the charges, and where the victim sees the law as brute force imposed despotically, not as a system of rules with legitimacy. This may seem like an extreme way to look at the law, but it is common among outsiders. Consider how Eldridge Cleaver, the former Black Panther, described the attitude of black prisoners during the turbulent 1960s:

One thing that the judges, policemen, and administrators of prisons seem never to have understood, and for which they certainly do not make any allowances, is that Negro convicts, basically, rather than see themselves as criminals and perpetrators of misdeeds, look upon themselves as prisoners of war, the victims of a vicious dog-eat-dog social system that is so heinous as to cancel out their own malefactions. (1968, 58)

Because the outsider sees a constant legitimation crisis, he feels like a prisoner of war in his own country, adopting the nihilistic belief that the law is always drafted in favor of elites and interpreted in their favor.

A third remarkable feature of outsider status is self-contempt and numb submission to authority. This is counterintuitive. After all, we expect an outsider to harbor righteous indignation against the legal apparatus that has ensnared him. Yet Kafka's characters accept their fate as natural and inevitable: they have become adroit at "lumping it" (Galanter 1974, 124). This phenomenon reaches degree zero in "The Problem of Our Laws," where the common people have no knowledge and no access to the law, yet they tolerate this depressing state of affairs because it is the one constant thing in

their lives, so they dare not upset it with revolutionary action.¹¹ At one point the narrator says that the people do not hate their leaders for keeping the laws secret, but instead hate themselves for not being worthy of receiving the law. In "The Great Wall of China," the narrator depicts a political system in which the people don't even know who is running the country or whether the rulers have been duly appointed, yet he ends by suggesting that critical thoughts are dangerous since they are likely to undercut one's security. The same attitude surfaces in "The Refusal," where the citizens are relieved when the petty official who runs the town routinely denies their requests without being able to justify his position. This theme runs through Kafka's nonlegal fiction as well, most notably in the story "The Hunger Artist," where the lead character starves himself to death because he cannot find anything suitable to eat.

The nihilistic attitude of submission reaches an apex in those stories where the central character is an outsider who believes that there is *no one* on the inside, that the legal system is nothing more than concentric circles of outsiders surrounding an empty core, where life is a shuffling among doorkeepers who purport to represent the inside but who are not insiders themselves. At one point in "The Refusal," the narrator entertains this very thought with regard to the colonel who commands the town: "Behind him is nothingness, one imagines hearing voices whispering in the background, but this is probably a delusion; after all, he represents the end of all things, at least for us" (Glatzer, p. 264). The theme of a seeming insider who is really an outsider recurs in many of Kafka's stories, from the Doorkeeper in "Before the Law" who guards the outermost gate of the law but is afraid to look at the inner doorkeepers, to the stalling lawyer Huld in *The Trial* who never leaves his bed, to the messengers in "Couriers" who carry messages from dead kings. Perhaps Kafka was painfully aware that he was a doorkeeper of sorts in his professional life—a bureaucrat standing between the injured workers and the possibility of remedy for their industrial accidents.¹²

Finally, there is a linguistic component to outsider status. The outsider lacks not only a forum for articulating his grievances, but he also lacks the proper language to present his claim. This comes out in "The Refusal," where the townspeople never have a direct conversation with the official who runs the town, and in "The Stoker," where the plaintiff stammers when given the opportunity to speak. And of course, Kafka was painfully aware of

11. Martin Luther King Jr. made a similar observation about the African American community in the South, who "accepted [segregation] without apparent protest. . . . Their minds and souls were so conditioned to the system of segregation that they submissively adjusted themselves to things as they were" (1964, 21).

12. We might go so far as to wonder whether a judge—the ultimate insider—would feel himself an outsider if drawn into the legal process as a party. In this regard we can recall Judge Learned Hand's confession that, "I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death" (Shapiro 1993, 304).

the relationship between language and power, since he represented Czech-speaking workers who found themselves caught up in a German-language legal system. Some critics have made the claim that Kafka's bizarre writing style (giant paragraphs unbroken with punctuation, worded in terse legality) is a political statement about the officious and lifeless German language by which the Austrian government exerted control over the Czechs (Deleuze and Guattari 1986).

By portraying situational outsiders, Kafka decouples outsider status from membership in a minority group. This allows him to avoid the constraints of particularism in favor of articulating a set of experiences common to members of diverse groups who find themselves in the same structural-relational position with respect to the dominant legal apparatus. This has a parallel in the work of sociolegal scholars who seek to identify structural and positional components of inequality, an approach that can be traced at least as far back as Marc Galanter's groundbreaking article on why the "haves" come out ahead of the "have-nots" in litigation (1974). Galanter sets forth a number of structural factors that marginalize the have-nots over and apart from whether they are members of a minority group. For example, haves occupy a position of superiority in terms of information, resources, risk taking, ability to withstand delay, and repeated experience in the same forum: these are structural and relational advantages that do not always correlate with membership in a particular race, gender, or class. Accordingly, Galanter does not automatically consign all minorities to the have-nots category, nor does he assign all white males to the haves category, but instead recognizes that diverse people can occupy shifting places along the spectrum separating the haves from the have-nots. More recently, Ewick and Silbey (1998) pass beyond particularism to identify three conceptual frameworks through which lay persons understand the law, which they term *before the law*, *with the law*, and *against the law* (the "before the law" category was named after Kafka's famous parable). These forms of legal consciousness are "situation specific" (1998, 50) in that a single person may shift frameworks depending on her situation. By "employ[ing] an analytical language of relationships rather than one of persons" (1998, 50), Ewick and Silbey dissolve the question of whether such forms of legal consciousness are irrevocably tied to race, gender, and class. This has the obvious advantage of identifying large-scale relationships and structures that are common among members of diverse groups, something that cannot be discerned when the focus is placed upon a single minority group. I would suggest that Kafka makes a similar move by depicting situational outsiders who are subordinated due to their position of structural inferiority. From the middle-class figure of Josef K. in *The Trial*, to the commoners in "The Refusal" and "The Great Wall of China," to the man from the country who pleads for admittance to the law in "Before the Law," Kafka gives us characters who hunger for the law yet

remain forever outside it. These people are consummate outsiders, yet none of them belong to a racial, ethnic, or gender minority. This demonstrates, I think, that outsider status is not always a function of membership in a minority group, but can arise independently by virtue of an individual's relationship to the legal system. This is not to deny that external characteristics such as race and gender often correlate with outsider status, but the disjunction is sufficiently large to suggest that legal scholars should not always equate the two.

VIRTUES OF THE OUTSIDER PERSPECTIVE

There is a longstanding tendency in academic circles (including legal studies) to valorize the outsider perspective as morally and epistemically superior, while dismissing the insider perspective as a distorted rationalization (see Litowitz 1998). The outsider is often depicted romantically as a person of integrity and uniqueness who refuses to engage in the empty rituals of mass society and who understands social practices better than the participants precisely because of her disengagement. For example, the best-selling scholarly book on outsiders in probably Colin Wilson's *The Outsider* (1987), which examines outsiders such as Nietzsche, Van Gogh, Camus, and Sartre, all of whom were talented, literate, and accomplished in their field. Kafka's fiction, however, presents a less flattering—but perhaps more accurate—view of the outsider. For Kafka, the outsider is confused and alienated. She understands what it is like to be crushed under the wheels of an unfathomable legal system, but she typically has very little constructive criticism to offer for the very reason that she does not understand the internal workings of the system that is crushing her. Kafka makes a bold move by refusing to ennoble the outsider perspective, suggesting instead that the outsider perspective has a limited role to play because it can sometimes illuminate aspects of the legal system that are not visible to insiders. For example, legal insiders such as prosecutors who read *The Trial* may emerge with a better understanding of how defendants respond to the endless delays, interrogations, and procedures of criminal law. But outsider status is not a guarantee of critical insight. In stories such as “The Refusal” and “The Problem of Our Laws,” Kafka depicts narrators that are so far removed from the political-legal system that they are not sure whether there is any law at all, so they have nothing substantive to say about the internal workings of the law.

Kafka's message would seem to be that both insider and outsider perspectives have an important role to play in any comprehensive account of law, which is precisely why law professors (who are insiders) need to study the work of outsiders, whether they be members of minority groups or situational outsiders of the type described by Kafka. To put the point differently,

outsider and insider perspectives can mediate each other, a point made nicely by Jurgen Habermas:

The tension between normative [insider] approaches, which are constantly in danger of losing contact with social reality, and objectivist [outsider] approaches, which screen out all normative aspects, can be taken as a caveat against fixating on one disciplinary point of view. Rather, one must remain open to different methodological standpoints (participant versus observer), different theoretical objectives (interpretive explication and conceptual analysis versus description and empirical explanation), the perspectives of different roles (judge, politician, legislator, client, and citizen), and different pragmatic attitudes of research (hermeneutical, critical, analytical, etc.). (1996, 6–7)

The goal is to play multiple perspectives against each other in a kind of hermeneutic conversation, and while we cannot reach Borges's *Aleph*, "the place where, without any possible confusion, all the places in the world are found, seen from every angle" (1967, 147), we can nevertheless achieve a modest balancing of perspectives.

Kafka's life can be described as a struggle to negotiate insider and outsider perspectives on the legal system. He was a legal insider (essentially, a government lawyer) who represented outsiders (injured workers), giving them a voice in his fiction that they did not have within the legal system. Kafka's concern with the fate of working people was evidenced by the notebooks which he left behind containing a draft charter for a workingman's association that placed limits on the working day and provided minimum wages and mandatory insurance, all of which were radical ideas in Kafka's day (Brod 1960, 84). In his professional and literary life, Kafka showed that insiders can understand the outsider perspective and vice versa, which opens the possibility of mediating the two perspectives instead of forcing an artificial dilemma where legal scholars are asked to choose one perspective or another.

CONCLUSION: KAFKA'S CONTINUING RELEVANCE

The ultimate political message of Kafka's work is highly ambiguous. Some critics have seen his work as a flatly bourgeois depiction of middle-class despair (Lukacs 1980). Others are inclined to see him as a budding socialist (Baxandall 1977, 121). Still others have complained that Kafka is essentially apolitical (Posner 1998; Klima 1994). There is some indication that Kafka attended lectures and meetings of anarchists, socialists, and Zionists, yet he never settled on a political vision, sometimes falling into a lamentable solipsism reflected in bizarre diary entries such as "Germany has declared war on Russia—Swimming in the afternoon" (Kafka 1975, 301).

Seen in a charitable light, his contribution was more akin to a “negative theology” (Goodden 1977, 102), consistent with his self-assessment that, “Everything negative in my time, which is very near to me, and which I can never defeat, but have a right to a degree to represent—I have forcefully taken over” (Baxandall 1977, 121).

In works such as *The Trial*, *The Castle*, and “The Problem of Our Laws,” Kafka depicts a nightmarish world where insiders are cut off from outsiders like two opposing circles in a Venn diagram. The insiders don’t know (and don’t care) what the outsiders think, and the outsiders become dehumanized, like an insect (as in “The Metamorphosis”) or a dog (as in “Investigations of a Dog”). By depicting situational outsiders in great detail, Kafka’s work holds two important lessons for legal scholars. First, the class of outsiders is fluid and diversified. And second, the outsider perspective is important for obtaining critical distance, but it should not be fetishized. These are refreshing and relevant messages which should resonate with legal scholars interested in outsider jurisprudence.

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