

THE DECONSTRUCTION AND REIFICATION OF LAW IN FRANZ KAFKA'S "BEFORE THE LAW" AND *THE TRIAL*

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*Reading a text is never a scholarly exercise in search of what is signified,
still less a highly textual exercise in search of a signifier. Rather, it is a
productive use of the literary machine, a montage of desiring machines, a
schizoid exercise that extracts from the text its revolutionary force.*

- Gilles Deleuze and Felix Guattari, *Anti-Oedipus*

I. INTRODUCTION

W.H. Auden once observed that Franz Kafka is to the twentieth century what Dante, Shakespeare, and Goethe were to their respective centuries.¹ Commensurate with such a designation, Kafka's work has long been an object of scholarship in both literary and philosophical circles. Yet it has only been relatively recently that his work has received prolonged treatment within the legal academy. This is not to say that the recognition of the confluence of law and literature is new, for the modern discipline of "law and literature" has antecedents dating back to the nineteenth century.² Kafka, along with such writers as Herman Melville and Charles Dickens, was also central to the development of the study of law and literature in the latter part of the twentieth century. But it was only after a series of articles was published in the *Harvard Law Review* between December 1985 and May 1986 that Kafka emerged as a subject of legal scholarship generally. This series of articles, a colloquy between Professor Robin West and Judge Richard Posner, marked the first prolonged treatment of Kafka's work concerning its applicability to legal reality. Due to the importance of this colloquy to the evolution of "law and literature," and because it highlights

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¹ RONALD GRAY, *FRANZ KAFKA* 1 (1973).

² See Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1352 (1986) [hereinafter *Law and Literature*] (noting works by English lawyers on Shakespeare (CUSHMAN K. DAVIS, *THE LAW IN SHAKESPEARE* (1883)), Dickens (James Fitzjames Stephen, *The License of Modern Novelists*, 106 EDINBURGH REV. 124 (1857)) and others).

two diametrically opposed views as to the scope of application of this field, the West-Posner exchange warrants brief consideration at this juncture.

West began the exchange with an article questioning the role of consent in wealth-maximizing transfers.³ Posner had argued that all wealth-maximizing transfers were consensual, thus providing a moral foundation for judges to utilize the principle of wealth maximization as a normative goal in judicial decision-making.⁴ Most importantly, the notion of consent that underlies Posner's theory is one premised on ideals of autonomy, and it is ultimately this autonomy that lends the consent its moral grounding.⁵ West used Kafka as an illustration, arguing, contrary to Posner's position,⁶ that even if consent is to be presumed, autonomy on the part of the individual cannot be presumed. Authority is the pervasive presence in the worlds Kafka creates, and within those worlds the consent of the characters is not based on autonomy, but on a compulsion to legitimate the will of that authority.⁶ Thus, "in Kafka's psychologically complex world, unlike Posner's, nothing of moral significance follows from the bare fact that a citizen would, if asked, consent to the imposition upon him of any of the many legal imperatives that he dutifully obeys."⁷ Because of the complexity of human action it is impossible to define the experience of morality solely by reference to consent.⁸ As this is the case, there is then a disjunction between the subjective experience of individuals in economic transactions and the external description attributed to those transactions by outside sources.⁹

Posner responded and argued that the focus of Kafka's fiction was inward, on the mental state of the author.¹⁰ Although this fact doesn't deprive his work of universality, it does "mark it as a literature of private feeling rather than of comment on specific social and political institutions."¹¹ After addressing the explicit illustrations West had advanced as evidence of the disjunction between subjective experience and objective characterization, Posner states, "To complain that economics does not paint a realistic picture of the conscious mind is to miss the point of economics, just as to treat Kafka as a realist is to miss the point of Kafka."¹² The basic point of Posner's response is that Kafka's world is far removed from any world that we could be said to live in. It is a world premised on the confines and recesses of Kafka's own mind, whose characters and situations are refracted through that singular vision. Although there is fertile ground for Kafka scholarship across a range of disciplines, "politics

³ Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

⁴ *Id.* at 388. See generally RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (1973).

⁵ From the menagerie of characters and situations offered by Kafka, West draws her central thesis: even if consent is presumed, morality depends on more than that bare fact—the divergence in reasons why consent is given is more important than the sole fact "consent" was given. West, *supra* note 3, at 428.

⁶ *Id.* at 425.

⁷ *Id.* at 417.

⁸ *Id.* at 428.

⁹ *Id.* at 427.

¹⁰ Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431, 1433 (1986) [hereinafter *Ethical Significance*].

¹¹ *Id.*

¹² *Id.* at 1439.

and economics . . . have to be brought in from the outside, by the tendentious reader.”¹³ Posner’s conclusion is that no matter what worth Kafka may have in other disciplines, he has no practical significance within the study of law as such.¹⁴

West had the last word in a rejoinder to Posner’s response.¹⁵ She notes Posner’s contention that even if Kafka does deal with law, it is law in a sense that is alien to our own legal experience.¹⁶ Posner conceives law as a “system of rules,”¹⁷ which means that “these stories just *can’t* be telling us something about *law*, because law is a ‘system of rules,’ and what Kafka describes is more like ‘malevolent whimsy’; they can’t *really* be about work because work is welfare maximizing, and what Kafka describes is sado-masochism.”¹⁸ Yet “this is reading by political fiat.”¹⁹ Though Kafka cannot be read so simplistically as to immediately lend credence to economic interpretation, there is not necessarily a gulf between his fiction and the real world. There is a union of internality and externality in Kafka, who, “of all modern writers, understands and portrays the unity between our tumultuous inner lives, the outer world, and the role of choice in mediating the two.”²⁰ West’s conclusion is that even though Kafka can be read on many levels, most of which will not implicate legal experience, “that is no reason *not* to read them for their tremendous and multiple insights into the nature of law.”²¹

In the years subsequent to the West-Posner colloquy, Kafka became increasingly viable as the subject of mainstream legal scholarship. His work has been cited in articles dealing with family law,²² globalization,²³ internationalism,²⁴ critical legal studies,²⁵ jurisprudence,²⁶ immigration,²⁷

¹³ *Id.* at 1433.

¹⁴ Posner was surprised Kafka would be used in this way. In an article published in November of 1986, he writes:

Literary criticism may seem so remote from my own professional interests as to demand an explanation for this venture. Although long devoted to literature, I did not until recently suspect much overlap between this interest and my professional interests, though I realized there was some. It was only in the course of preparing a response to an attack on the economic model of human behavior surprisingly pivoted on the fiction of Kafka that I became acquainted with the law and literature movement and began to realize that it had potential applications, not to economic analysis, but to the interpretation of statutes and constitutions and the writing of judicial opinions, which are now professional concerns of mine. *Law and Literature*, *supra* note 2, at 1351–52.

¹⁵ Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986).

¹⁶ *See id.* This is the disjunction between the internal and external; Kafka’s law is not only alien to us, but entirely unreal in the sense that it is premised only on the internal machinations of the author’s mind.

¹⁷ *Ethical Significance*, *supra* note 10, at 1433 n.8.

¹⁸ West, *supra* note 15, at 1452.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 1453.

²² Carol Weisbrod, *Family Governance: A Reading of Kafka’s Letter to his Father*, 24 U. TOL. L. REV. 689 (1993).

²³ David A. Westbrook, *Triptych: Three Meditations on How Law Rules After Globalization*, 12 MINN. J. GLOBAL TRADE 337 (2003).

²⁴ Igor Grazin, *Kafka’s Myth of Law in the Context of the Legal Irrationality Inspired by the Russian Post-Communist Market*, 8 MSU-DCL J. INT’L L. 335 (1999); Ed Morgan, *In the Penal Colony: Internationalism and the Canadian Constitution*, 49 U. TORONTO L.J. 447 (1999).

²⁵ Douglas E. Litowitz, *Franz Kafka’s Outsider Jurisprudence*, 27 LAW & SOC. INQUIRY 103 (2002).

and employment,²⁸ to offer but a few examples. Kafka references have become prevalent in judicial opinions, as well.²⁹

Although I have no doubt that Kafka provides a fertile touchstone by which we may compare our own conceptions of legal reality, before that can be undertaken the law of Kafka must be understood as it exists within the confines of his writings. This paper is an attempt to discern the nature of law as it appears in Kafka's unfinished novel *The Trial* and his parable "Before the Law." What follows is primarily a philosophical explication of texts made dense not by a maze of words, but by seemingly infinite levels of meaning. To elucidate these works, held by some to be intolerant of elucidation,³⁰ this paper will proceed in three sections, tracking a contrast between postmodern accounts of Kafka's law and the neo-Marxist position exemplified by Lukács. Although in the final analysis I lean most heavily on the reified characterization of law, the culmination is more aptly viewed as a synthesis of deconstructed and reified aspects of Kafka's law. Part II introduces Kafka, the man, through a short biographical sketch focusing on his legal education and his writings on the law. Part III focuses on the deconstruction of Kafka's law, a stripping away of layers which leaves the reader (and Kafkian subject) confronted by an empty norm. Addressing first the nature of law itself, the works of Gros, Cixous, and Deleuze and Guattari will be examined to determine the essence of Kafka's law. When this has been accomplished, we can then appeal to Jacques Derrida, who attempts to give an account of the origins of this law. These attempts, however, fail to give an adequate account of either the nature or origin of Kafka's law. The law remains an empty norm whose ultimate origin is veiled by an appearance of eternity. Part IV will resurrect the law as an active authority by reference to the process of reification. After the theoretical foundations of reification are established through an examination of Marx's commodity fetishism and Lukács' expansion of this theory, Lukács' theory of the reification of law will be addressed and applied to the textual relationships in Kafka's stories. Finally, it will be shown that the ultimate appearance of law in Kafka's works is a function of the necessity of punishment. It is law manifest as punishment that typifies the fates of Josef K. and the man from the country in these works and represents the logical outcome of a reified legal system.

II. BIOGRAPHY AND LEGAL TEXTS

Kafka's life is a biographer's dream, providing a wealth of both external and internal conflicts that, in turn, provide a fertile baseline for the

²⁶ Martha J. Dragich, *Justice Blackmun, Franz Kafka, and Capital Punishment*, 63 MO. L. REV. 853 (1998).

²⁷ Susan M. Akram, *Scheherazade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51 (1999).

²⁸ Anthony W. Kraus, *Assessing Mr. Samsa's Employee Rights: Kafka and the Art of the Human Resource Nightmare*, 15 LAB. LAW 309 (1999).

²⁹ Parker B. Potter, Jr., *Ordeal by Trial: Judicial References to the Nightmare World of Franz Kafka*, 3 PIERCE L. REV. 195 (2005).

³⁰ Dmitri Zatonsky, *Kafka Unretouched*, in FRANZ KAFKA: AN ANTHOLOGY OF MARXIST CRITICISM 224 (Kenneth Hughes ed., 1981).

textual interpretation of his writings. Although even a brief biographical sketch would be outside the bounds of this paper, there are two facets of his life that are squarely implicated when discussing Kafka's contributions to "law and literature": his legal education and experience, and his writings on the law.

A. KAFKA'S LEGAL EDUCATION AND EXPERIENCE

Upon graduating from the Altstädter Gymnasium in 1901, Kafka elected to continue his studies at Ferdinand-Karls University in Prague. The University itself was divided into two separate universities: one Czech, one German.³¹ This reflected the more general segregation of Prague at the time.³² Although anti-Semitism represented one of the few common grounds between the Czechs and Germans of Prague,³³ most Jews were grouped in with the Germans,³⁴ and it was into the German wing of the University that Kafka enrolled in the fall of 1901.³⁵ The division was relatively total, but although students had to register in either the Czech or the German schools, they were permitted to attend lectures in both.³⁶

Initially, Kafka had decided to pursue philosophy at the University,³⁷ but instead he registered for chemistry in November 1901.³⁸ The reasoning behind this choice lay in the fact that "only two traditional professions were open to Jews—law and medicine—and since neither appealed to Franz . . . [he was] persuaded to try chemistry by a rumour that employment opportunities existed in the chemical industry."³⁹ This course of study lasted only two weeks.⁴⁰ He considered himself unfit for the tedious and precise laboratory work that was required for the degree,⁴¹ and took courses in legal history and philosophy for the remainder of his first semester.⁴² This move seems to be predicated on resignation to a legal education, but the course in legal history was so tedious that Kafka reconsidered his position yet again. The second semester he concentrated on German literature,⁴³ which was, in form at least, in line with the requirement that law students take one semester's worth of humanities.⁴⁴ Along with German literature, Kafka studied art history and the history of philosophy.⁴⁵ He so enjoyed the material that he extended his studies into the summer of 1902, taking additional courses in Germanic philology, syntax, grammar, New High German, and Middle High German poetry.⁴⁶ Kafka even flirted

³¹ FREDERICK R. KARL, *FRANZ KAFKA: REPRESENTATIVE MAN* 153 (1991).

³² *Id.* at 154.

³³ *Id.*

³⁴ PETER ALDEN MAILLOUX, *A HESITATION BEFORE BIRTH: THE LIFE OF FRANZ KAFKA* 74 (1989).

³⁵ KARL, *supra* note 31, at 153.

³⁶ *Id.*

³⁷ ERNST PAWEL, *THE NIGHTMARE OF REASON: A LIFE OF FRANZ KAFKA* 101 (1984).

³⁸ RONALD HAYMAN, *KAFKA: A BIOGRAPHY* 34 (1982).

³⁹ NICHOLAS MURRAY, *KAFKA* 39 (2004).

⁴⁰ MAX BROD, *FRANZ KAFKA: A BIOGRAPHY* 40 (1960).

⁴¹ KARL, *supra* note 31, at 148.

⁴² MAILLOUX, *supra* note 34, at 75.

⁴³ *Id.*; BROD, *supra* note 40, at 40.

⁴⁴ HAYMAN, *supra* note 38, at 35; MAILLOUX, *supra* note 34, at 75.

⁴⁵ HAYMAN, *supra* note 38, at 35; MURRAY, *supra* note 39, at 48; PAWEL, *supra* note 37, at 110.

⁴⁶ KARL, *supra* note 31, at 161.

with the idea of finishing his studies at the University of Munich, where he expressed a desire to study German with Paul Kisch, but this idea never came to fruition.⁴⁷ Because of pressure from his father, financial or otherwise, Kafka returned to Prague for the start of his second year at Ferdinand-Karls.

This time, Kafka did resign himself totally to the rigors of a legal education. Despite the tedium and structured approach of the German University, the study of law provided him with a degree of flexibility that was not present in other disciplines: “Law he took up with a sigh because it was the school that involved the least fixed goal, or the largest choice of goals—the bar, the civil service—that is to say, the school that put off longest taking a decision and anyhow didn’t demand any great preference.”⁴⁸ Kafka himself bolsters this assertion:

[E]verything would be exactly as much of a matter of indifference to me as all the subjects taught at school, and so it was a matter of finding a profession that would be most likely to allow me to indulge this indifference without overmuch injuring my vanity. So law was the obvious choice.⁴⁹

The curriculum provided for eight semesters of study⁵⁰ followed by a set of comprehensive oral examinations, known as the *Rigorosa*, if the individual wished to qualify for the doctoral degree. There are few positives that can be gleaned from the experience: “The purpose of this German law school, operating in an alien and increasingly hostile environment, was to turn out cadres of bureaucrats equipped to enforce the centralized power in peripheral outposts of the empire.”⁵¹ The success of the student was a product of mechanical automatism: “The law degree was obtained by means of two strategies: the pupil should not fall ill and become unable to attend the lectures, and the pupil should leave behind everything except his powers of memory. Law was not an intellectual degree.”⁵² The mode of epistemological conveyance was predominated by lectures, with few seminars offered and almost no chance for discussion.⁵³ Attendance was mandatory as a matter of policy, but it was also necessitated by the need to take copious and continuous notes so as to be ready for the *Rigorosa*.⁵⁴ Kafka’s professors, “from all accounts, were desiccated pedants whose total indifference to their students was surpassed only by their lack of interest in the subject matter itself.”⁵⁵ Although there were exceptions to this,⁵⁶ the

⁴⁷ BROD, *supra* note 40, at 40; MAILLOUX, *supra* note 34, at 78.

⁴⁸ BROD, *supra* note 40, at 40–41.

⁴⁹ FRANZ KAFKA, WEDDING PREPARATIONS IN THE COUNTRY AND OTHER POSTHUMOUS PROSE WRITINGS 201–02 (Ernst Kasier & Eithne Wilkins trans., 1954).

⁵⁰ Samuel Wolff & Kenneth Rivkin, *Essay: The Legal Education of Franz Kafka*, 22 COLUM.-VLA J.L. & ARTS 407 (1998).

⁵¹ PAWEL, *supra* note 37, at 117.

⁵² KARL, *supra* note 31, at 170–71.

⁵³ PAWEL, *supra* note 37, at 117.

⁵⁴ *Id.* at 117–18; KARL, *supra* note 31, at 171 (“One was expected to take extensive notes and spit them back on the examinations; what the instructor said mattered, not what the student thought.”).

⁵⁵ PAWEL, *supra* note 37, at 109.

⁵⁶ Two such examples are Horaz Krasnopolski and Hans Gross. Both seemed to take their profession seriously, and while Krasnopolski’s affinity did not necessarily extend to the students, Gross was a popular teacher who cultivated more than superficial relationships with those he taught. *Id.* at 119–20.

environment was conducive only to preparing mediocre minds for the mundane tasks of bureaucracy; “minds other than mediocre were bound to suffer.”⁵⁷

During his first two semesters of legal study Kafka took courses in Roman and German jurisprudence, ecclesiastical law, and a mandatory course in practical philosophy.⁵⁸ In his second year Kafka’s courses included international law, civil law, constitutional law, commercial law, statistics, economics, political economy, administrative law, history of legal philosophy, and inheritance.⁵⁹ On July 18, 1903, Kafka sat for his first state examination, covering Roman legal history, which he passed.⁶⁰ His third and fourth year classes contained variants on the subjects he had already taken, as well as courses on criminal law and procedure, law of exchange, and civics.⁶¹ After the summer of 1905, Kafka returned to Prague and the University to begin preparations for the *Rigorosa*.

The *Rigorosa II* (see Ernst Pawel, at 122 – *Rigorosa* were not consecutively numbered, II came first, then III, then I ... not sure why!) was administered on November 7, 1905, and covered Austrian civil and criminal law.⁶² He passed, receiving the vote of three out of the four administrators.⁶³ The *Rigorosa III* was held on March 16, 1906, and covered international and constitutional law.⁶⁴ Although Kafka received the votes of only three out of five examiners, it was still a passing score.⁶⁵ With the final *Rigorosa* not scheduled until June, Kafka began a six month clerkship in Dr. Richard Löwy’s office on April 1, performing the basic ministerial functions one associates with a law clerk.⁶⁶ It seems that the time away from the University, even with the examination hanging in the back of his mind, did him well. On the final examination, dealing with Roman, German, and canon law, he received five out of five votes for passing.⁶⁷ Five days later, on June 18, he was awarded the degree of doctor from Professor Alfred Weber, his thesis⁶⁸ adviser and the brother of sociologist Max Weber.⁶⁹

Kafka finished his clerkship with Löwy in October 1906 and then began another clerkship in the civil and criminal courts of Prague, a position he kept until 1907.⁷⁰ He then applied for a position with the *Assicurazioni Generali*, an Italian insurance company with its head offices in Austrian Trieste. The choice of a career in insurance should not be

⁵⁷ *Id.* at 117.

⁵⁸ *Id.* at 109; HAYMAN, *supra* note 38, at 34; Wolff & Rivkin, *supra* note 50, at 408.

⁵⁹ KARL, *supra* note 31, at 171; MAILLOUX, *supra* note 34, at 79; Wolff & Rivkin, *supra* note 50, at 408.

⁶⁰ HAYMAN, *supra* note 38, at 39; KARL, *supra* note 31, at 172; Wolff & Rivkin, *supra* note 50, at 408.

⁶¹ MURRAY, *supra* note 39, at 48; Wolff & Rivkin, *supra* note 50, at 408.

⁶² MURRAY, *supra* note 39, at 62.

⁶³ PAWEL, *supra* note 37, at 122.

⁶⁴ MURRAY, *supra* note 39, at 63.

⁶⁵ *Id.*

⁶⁶ KARL, *supra* note 31, at 193; PAWEL, *supra* note 37, at 164.

⁶⁷ MURRAY, *supra* note 39, at 62.

⁶⁸ Although a thesis was not required for an applicant seeking the doctoral degree in law, Kafka did write one, entitled “German and Austrian State Law, Common Law, and Political Economy.” MAILLOUX, *supra* note 34, at 100.

⁶⁹ *Id.* at 101.

⁷⁰ Litowitz, *supra* note 25, at 109.

entirely surprising. Kafka never evidenced a true affinity for the legal profession, and his choice of clerkships, first with Löwy and then with the Prague courts, was explained on the resume he submitted with his application: "As had previously been agreed with the attorney, I had entered his office only in order to acquire a year's experience. It had never been my intention to remain in the legal profession."⁷¹ He began work on October 1, 1907, in the *Generali's* Prague offices.⁷² If Kafka was looking for a respite from hard work, his choice of employer was misplaced. The *Assicurazioni* was one of the "most strenuous of commercial offices."⁷³ The position was demanding, and the employees were watched closely by a harshly authoritarian employer.⁷⁴ No personal affects could be kept on the desk or in the files, vacations had to be specifically requested, and such time could not exceed two weeks every two years; on top of this requirement, the management itself would decide the exact timing of the vacations based on the work that was required to be done by the company.⁷⁵ As Karl notes, "the position was no sinecure, but mere drudgery, with daily hours from 8:00 A.M. to 6:00 P.M., low pay to begin with and no pay for overtime; chances of advancement were small for a Czech Jew with no Italian."⁷⁶ This work schedule left little time for writing, and within a few weeks Kafka was already tired of the demanding schedule and office politics. Yet it was not until July 15, 1908, that he left the *Assicurazioni*.⁷⁷ The fact that Kafka continued to work there so long was due to the general disfavor of career-hopping, as well as the fact that he had only been hired because of the recommendation of Arnold Weissberger, the U.S. Vice Consul in Prague, who was a friend of his father's and whose son was a close friend of Brod.⁷⁸ Conscious of the fact that were he to leave and start employment elsewhere it would reflect poorly on himself, his father, and his friend Max, Kafka was able to obtain a medical certificate citing "nervousness and cardiac excitability,"⁷⁹ and thus retire from the firm without bringing disrepute on any of the involved parties. In fact, for sometime after leaving the firm he still corresponded with the director, Ernst Eisner, about certain literary matters.⁸⁰

Kafka began work at the *Arbeiter-Unfall-Versicherungs-Anstalt für das Königreich Böhmen* in Prague (Workers' Accident Insurance Institute for the Kingdom of Bohemia in Prague) on July 30, 1908. The Institute was a semi-governmental bureaucracy founded in 1889 after the passage of social legislation in 1885 and 1887 that had been intended to correct the unjust treatment of workers.⁸¹ Two circumstances conspired to ensure that Kafka was hired into this organization despite the presence of only one other Jew

⁷¹ BROD, *supra* note 40, at 249.

⁷² MURRAY, *supra* note 39, at 65–66.

⁷³ BROD, *supra* note 40, at 79.

⁷⁴ MAILLOUX, *supra* note 34, at 117.

⁷⁵ *Id.*

⁷⁶ KARL, *supra* note 31, at 210.

⁷⁷ HAYMAN, *supra* note 38, at 68.

⁷⁸ MAILLOUX, *supra* note 34, at 124–25; PAWEL, *supra* note 37, at 176, 178, 181.

⁷⁹ PAWEL, *supra* note 37, at 182.

⁸⁰ HAYMAN, *supra* note 38, at 68.

⁸¹ MAILLOUX, *supra* note 34, at 125.

out of the Institute's 250 employees. First, while still working at the *Assicurazioni Generali*, Kafka had taken several classes on the emerging field of worker's compensation insurance at the *Handelsakademie*.⁸² In those classes, taught by officials of the Institute, Kafka received marks of "excellent."⁸³ Second, the chairman of the Institute's board was Dr. Otto Příbram, the father of an acquaintance, Ewald Felix Příbram.⁸⁴ The hours were far superior to what Kafka had had to work while employed at the *Assicurazioni*, 8:00 a.m. to 2:00 p.m., and left him the time he needed to work on his writing.⁸⁵ Kafka's duties at the Institute included reviewing appeals from employers in regard to their classification of trade under various categories of risk, representing the Institute in court proceedings, and inspecting factories within his district.⁸⁶ Additionally, Kafka was able to indulge his desire to write, albeit only within the confines of his job description. He was responsible for writing policy and publicity reports and drafting recommendations for the prevention of accidents and various other reports on the workings of the system.⁸⁷ These articles, "for the most part highly technical in nature, combine an astonishing grasp of abstruse detail with a lucidity of presentation seldom encountered in writings of this sort, least of all German."⁸⁸ He was happy enough with his "work" writing to share it with his friends, including copies of the annual report, which he passed amongst his circle on more than one occasion. Kafka was well liked by his fellow employees and seen as a very diligent and competent employee by management. Promoted several times during his years at the Institute, it is clear that, despite any internal misgivings, he displayed the perfect façade of a career man. He remained at the Institute virtually until the end of his life, although in the latter years his medical leaves became more frequent and more prolonged.

There can be little doubt that Kafka's experience, first at Ferdinand-Karls University and then at the Institute, influenced his writing, both from a stylistic point of view as well as substantively. His prose is formal and simple, in the style of legalese, rather than ornate. It has much more in common with the reports he was writing for the Institute than with the prose of other writers of the time. Both Pawel⁸⁹ and Douglas Litowitz⁹⁰ have noted the parallels between various reports and sections of his writing. For instance, the following is an excerpt from a report Kafka wrote entitled "Accident Prevention Regulations on the Use of Wood-Planing Machines":⁹¹

Not only every precaution but also all protecting devices seem to fail in the face of this danger, as they either proved to be totally inadequate or, whereas they reduced the danger on the one hand (automatic covering of

⁸² HAYMAN, *supra* note 38, at 69; Litowitz, *supra* note 25, at 109.

⁸³ HAYMAN, *supra* note 38, at 69.

⁸⁴ *Id.*; KARL, *supra* note 31, at 140.

⁸⁵ MAILLOUX, *supra* note 34, at 126.

⁸⁶ MURRAY, *supra* note 39, at 70.

⁸⁷ *Id.*; MAILLOUX, *supra* note 34, at 126.

⁸⁸ PAWEL, *supra* note 37, at 186.

⁸⁹ *Id.* at 187.

⁹⁰ Litowitz, *supra* note 25, at 110–11.

⁹¹ MURRAY, *supra* note 39, at 73.

the cutter slot by a protecting slide, or by reducing the width of the cutter space), they increased it on the other by not allowing the chippings sufficient space to leave the machine, which resulted in choked cutter spaces and in injured fingers when the operator attempted to clear the slot of chippings.⁹²

This section, certainly from the standpoint of style, but also on a technical level, is extremely similar to the description of the execution machine Kafka gives in “In the Penal Colony”:

It was a huge affair. The Bed and Designer were of the same size and looked like two dark wooden chests. The Designer hung about two meters above the Bed; each of them was bound at the corners with four rods of brass that almost flashed out rays in the sunlight. Between the chests shuttled the Harrow on a ribbon of steel “Both the Bed and the Designer have an electric battery each; the Bed needs one for itself, the Designer for the Harrow. As soon as the man is strapped down, the Bed is set in motion. It quivers in minute, rapid vibrations, both from side to side and up and down. You may have seen a similar apparatus in hospitals; but in our Bed the movements are all precisely calculated; you see, they have to correspond very exactly to the movements of the Harrow.”⁹³

The work he undertook at the Institute, combining as it did absurdity with tragedy, degradation, and humble passivity, had a tremendous impact on his writing as well. He wrote in a letter to Max Brod:

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.⁹⁴

This world, where absolutely nothing can go right, is surely representative to a degree of those universes into which his characters are placed.

The maze of officials, clerks, and other assorted bureaucratic trappings of the Institute have long been viewed as a direct inspiration for the stagnancy of law and government in *The Trial* and *The Castle*.⁹⁵ This malaise was hardly confined to the insurance industry. The inefficiencies that confronted Kafka were only one part of an endemically problematic apparatus, the confluence of civil law and administrative bureaucracy. At this time, “the German conception of the law was not very different from the French: the law is about administrative rules. It [was] general and impersonal.”⁹⁶ In the face of this sprawling mechanism the people would walk humbly to the gates for their remedies. Kafka noted in a conversation with Brod the degrading passivity imbued in the workers by this

⁹² MAILLOUX, *supra* note 34, at 130.

⁹³ FRANZ KAFKA, *THE METAMORPHOSIS, IN THE PENAL COLONY, AND OTHER STORIES* 195–96 (Willa Muir & Edwin Muir eds., Schocken Books 1995) (1948).

⁹⁴ FRANZ KAFKA, *LETTERS TO FRIENDS, FAMILY, AND EDITORS* 58 (1977).

⁹⁵ See Hannah Arendt, *Franz Kafka*, in *FRANZ KAFKA: AN ANTHOLOGY OF MARXIST CRITICISM* (Kenneth Hughes ed. trans., Univ. Press of New England 1981) (1963).

⁹⁶ Dominique Gros, *Le “gardien de la loi,” selon Kafka*, 14 *CARDOZO STUD. L. & LIT.* 11, 24 (2002).

overarching and powerful nemesis: “How modest these men are. They come to us and beg. Instead of storming the Institute and smashing it to pieces they come and beg.”⁹⁷ The same mentality can be seen in certain of Kafka’s characters, most notably the man from the country in “Before the Law,” who sits patiently before the gates of the Law, waiting for permission to enter, when only a superficial denial keeps him from the interior.

These are but a few examples of a connection that has been treated extensively in the literature. Whatever other episodes and influences contributed to the development of Kafka as a writer, it is clear that his education and experience in the law had a profound impact on his writing, even if this impact is only one head of the hydra. The clearest examples of this influence come as explicit treatments of “the law” in his writings.

B. KAFKA’S WRITINGS ON THE LAW

Only eight of Kafka’s texts relate directly to the law: *The Trial*, “Before the Law,” “The Problem of Our Laws,” “In the Penal Colony,” “The Refusal,” “The New Advocate,” “The Knock at the Manor Gate,” and “The Stoker.” It is *The Trial* and “Before the Law,” however, that are, without a doubt, the most well known of his writings on the law. In the two sections that follow the context and history of each will be explored.

1. “Before the Law”

Kafka wrote “Before the Law” on December 13, 1914,⁹⁸ “in a single sitting and without being completely sure what it meant.”⁹⁹ Although he was content and happy with what he had written,¹⁰⁰ this feeling was tempered with a pessimism expressed in a diary entry dated that same day:

Always conscious that every feeling of satisfaction and happiness that I have, such, for example, as the ‘Legend’ (“Before the Law”) in particular inspires in me, must be paid for, and must be paid for moreover at some future time, in order to deny me all possibility of recovery in the present.¹⁰¹

He first shared the story in early 1915 when he traveled to Bodenbach to visit his fiancé, Felice Bauer, on January 23rd and 24th.¹⁰² It was then that the significance of the story dawned upon him for the first time.¹⁰³ “Before the Law” was first published in December 1915 by Kurt Wolff in his annual almanac, *Vom Jüngsten Tag: Ein Almanach Neuer Dichtung*,¹⁰⁴ and later formed an integral part of chapter nine of his unfinished novel, *The Trial*,

⁹⁷ BROD, *supra* note 40, at 82.

⁹⁸ FRANZ KAFKA, THE DIARIES 1910-1923 321 (Max Brod ed., 1976) (1948) [hereinafter THE DIARIES] (“Instead of working—I have written only one page (exegesis of the ‘Legend’”).

⁹⁹ MAILLOUX, *supra* note 34, at 332.

¹⁰⁰ BROD, *supra* note 40, at 150.

¹⁰¹ THE DIARIES, *supra* note 98, at 321.

¹⁰² KARL, *supra* note 31, at 526, 528.

¹⁰³ THE DIARIES, *supra* note 98, at 329 (“The significance of the story dawned upon me for the first time; she grasped it rightly too, then of course we barged into it with coarse remarks; I began it.”).

¹⁰⁴ MAILLOUX, *supra* note 34, at 332.

published posthumously by the Berlin avant-garde house Verlag Die Schmiede in 1925.¹⁰⁵

Although the length of “Before the Law” runs to less than two pages, this fact obscures the depth of thought that is presented. Kafka himself, despite his professed understanding, may still have been working through the interpretative intricacies of the parable when he included it within *The Trial*. It is there, during the dialogue on interpreting the parable between the Priest and Josef K., that the Priest tells K. in relation to those interpretations, “You must not pay too much attention to them. The scriptures are unalterable and the comments often enough merely express the commentators’ despair.”¹⁰⁶ This resigned despair is echoed in Dmitri Zatonksy’s description of the style in which the parable was written:

The form of the parable, that of the biblical or evangelical type, vague and at the same time specific in its vagueness, is so complete and so closed in on itself that it does not tolerate elucidation. . . . It is the way the religious fanatics of ancient Israel thought, or the holy monks of medieval monasteries.¹⁰⁷

2. *The Trial*

Der Prozess was posthumously published by Brod in 1925. Kafka had begun work on *The Trial* in August 1914, although diary entries prior to this foreshadow the genesis of the novel.¹⁰⁸ In a broader context, his work on the novel occurred in the highly charged atmosphere of a Europe on the brink of war. The formal declaration was made on August 2, which Kafka noted in an oft-quoted diary entry: “Germany declared war on Russia—Swimming in the afternoon.”¹⁰⁹ The novel was already under way by the 21st of August, when Kafka wrote in his diary “I start *The Trial* again—The effort wasn’t entirely without result.”¹¹⁰ Six days later another entry, tinted with the typical tension he evidenced between satisfaction and self-doubt: “The end of one chapter a failure; another chapter, which began beautifully, I shall hardly—or rather certainly not—be able to continue so beautifully, while at the same time, during the night, I should have succeeded with it. But I must not forsake myself, I am entirely alone.”¹¹¹ In early October he took a vacation from the Institute to “push the novel on,”¹¹² but despite the reprieve from work he wrote “little and feebly.”¹¹³ At some point during the process of writing *The Trial*, Kafka read parts of it to his friends. Brod recalled one of these readings: “We friends of his laughed immoderately when he first let us hear the first chapter of *The Trial*. And he himself laughed so much that there were moments when he couldn’t read any

¹⁰⁵ PAWEL, *supra* note 37, at 441.

¹⁰⁶ FRANZ KAFKA, *THE TRIAL* 217 (Breon Mitchell trans., Schocken Books 1998) (1937).

¹⁰⁷ Zatonksy, *supra* note 30, at 224.

¹⁰⁸ For instance, the diary entry of July 29th includes a sketch concerning Joseph K. *THE DIARIES*, *supra* note 98, at 297–98.

¹⁰⁹ *Id.* at 301.

¹¹⁰ *Id.* at 313.

¹¹¹ *Id.*

¹¹² *Id.* at 314.

¹¹³ *Id.*

further.”¹¹⁴ As a whole, Kafka’s life was characterized by a sharp dichotomy between manic outbursts of productivity and isolated, introspective reticence, a fact highlighted by the commentary he provides in relation to writing *The Trial*. The entries of November 30th and December 8th give flesh to this assertion: “I can’t write anymore. I’ve come up against the last boundary, before which I shall in all likelihood again sit down for years, and then in all likelihood begin another story all over again that will again remain unfinished. This fate pursues me,”¹¹⁵ compared with “Yesterday for the first time in ever so long an indisputable ability to do good work.”¹¹⁶ On the whole, the period in which he was working on *The Trial* was one of his most productive.¹¹⁷ Yet a kind of creative despair gripped him in the early part of 1915. Stretched thin between writing, his father’s factory, and his job at the Institute, he was “[a]lmost incapable of going on with *The Trial*.”¹¹⁸ Work must have progressed reasonably well after that, for it was in April that Kafka read Brod the fifth and sixth chapters.¹¹⁹ The last explicit mention of *The Trial* in Kafka’s diaries comes on September 30, 1915, as a point of comparison between K. and Karl Rossman, the hero of *Amerika*: “Rossman and K., the innocent and the guilty, both executed without distinction in the end, the guilty one with a gentler hand, more pushed aside than struck down.”¹²⁰ Kafka stopped work on *The Trial* sometime in the latter part of 1916.¹²¹

He gave the manuscript to Brod in June of 1920 with no clear ordering or numbering of the sections.¹²² Brod used internal evidence to put the work into its present form. Along with the chapters that have been included in the novel, Brod was given several fragments of additional chapters. There are also several sketches in Kafka’s diaries concerning variants on the execution at the end of *The Trial*.¹²³ Whatever critiques may be leveled against Brod for his organization and choice in leaving certain fragments out, it is clear that having heard the work read aloud, the final ordering he decided upon most likely bears a reasonable resemblance to how Kafka himself would have organized the chapters.¹²⁴

The impact of *The Trial* on both the literary and legal landscapes cannot be understated. Milena Jesenká, in her eulogy published in the July 6, 1924, issue of *Národní listy*, wrote: “The last novel, *The Trial*, has for

¹¹⁴ BROD, *supra* note 40, at 178.

¹¹⁵ THE DIARIES, *supra* note 98, at 318.

¹¹⁶ *Id.* at 320.

¹¹⁷ “Have been working since August, in general not little and not badly, yet neither in the first nor in the second respect to the limit of my ability, as I should have done, especially as there is every indication (insomnia, headaches, weak heart) that my ability won’t last much longer. Worked on, but did not finish: *The Trial*, ‘Memoirs of the Kalda Railway’, ‘The Village Schoolmaster’, ‘The Assistant Attorney’, and the beginnings of various things. Finished only: ‘In the Penal Colony’ and a chapter of *Der Verschollene*, both during the two-week holiday. I don’t know why I am drawing up this summary, it’s not at all like me!” *Id.* at 324.

¹¹⁸ *Id.* at 325.

¹¹⁹ BROD, *supra* note 40, at 154.

¹²⁰ THE DIARIES, *supra* note 98, at 343.

¹²¹ GRAY, *supra* note 1, at 107.

¹²² *Id.* at 110.

¹²³ See diary entry of 19 July 1916 (THE DIARIES, *supra* note 98, at 366); diary entry of 22 July 1916 (*Id.* at 368).

¹²⁴ GRAY, *supra* note 1, at 111.

years been complete in manuscript, ready for publication; it is one of those books whose impact on the reader is so overwhelming that all comment is superfluous.”¹²⁵ Although the emergence of the law and literature movement in legal academia has signaled an increased importance of Kafka’s work within that academy, *The Trial* is equally compelling from a practitioner’s perspective. Supreme Court Justice Anthony Kennedy noted that “all lawyers—better than that, all law students—should read *The Trial*. *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.”¹²⁶

Although the narrative facts are clear from a reading of both stories, what is never revealed is the content or the essence of the Law to which both K. and the man from the country become subject. What is the form of this unseen entity? What are the substance, content, and essence of this Law? It is the objective of the two subsequent sections to explore, and, to the extent possible, answer these questions. Part III examines postmodern philosophy, specifically the exercise of deconstruction. The Law of Kafka, once deconstructed, disappears. It is an empty norm, an edifice built around a hollow interior. Yet if this is the case, what gives the Law its power and enables it to maintain its pervasive presence throughout both of these stories? The answer to that question lies in the phenomena of reification. The Law-as-empty-norm becomes reified, an independent entity distinct from its societal evolution and antecedents, taking the form of necessity and punishment. It is this necessitous machinery to which K. and the man from the country become subject.

III. THE “EMPTY NORM”: KAFKA’S LAW DECONSTRUCTED

Let me begin with the most elementary, foundational question that could possibly be posed. Why do we care about either “Before the Law” or *The Trial*? This question seems childish, for certainly there are concrete reasons why a project such as the present is useful. Perhaps it will be easier to start with fictitious recreations of the two stories, pointing out in what particular manifestations they would hold no interest. Through this negative deduction we can hopefully arrive at a clear answer to the question posed. In what circumstances, then, would “Before the Law” and *The Trial* pose little interest to the reader and scholar alike?

It is easy to establish parallel stories that would be basic fiction, endowed with a logical beginning, middle and end, that would leave the reader, once the final page had been turned, sated, with no lingering unease. Say the man from the country arrived at the door of the law and was immediately granted entrance by a smiling and cordial doorkeeper. Or, if we would rather the tragedy remain, say the man was kept waiting, but at least told why he could not enter, perhaps by the law itself, which may even come out to greet the man and express its condolences. If K. actually has

¹²⁵ MURRAY, *supra* note 39, at 387.

¹²⁶ Terry Carter, *A Justice Who Makes Time to Read, and Thinks All Lawyers Should, Too*, CHI. DAILY L. BULL., Jan. 26, 1993, at 2.

his day in Court, if the authority that has accused him tries him, there would be no tension in the story, even if he were ultimately executed. In those circumstances the story has progressed in a way that makes sense to us: K. is accused, apprised of the charges, tried, and convicted or acquitted. This is a snapshot of a legal system at work, even if the end may not be what we, as readers, desire. These fictitious reworkings present no interest because the tension is removed; the *why* that haunts these stories disappears. The man from the country enters the law, or at worst is told why he cannot. K. is told the charges against him, offered his day in court, and justice takes whatever route is dictated by the proceedings. But, to state a truism, these are not Kafka's stories.

The tension, the interest, must then arise from within the written text exactly as penned by Kafka. Yet this avenue of inquiry also proves unavailing. In their simplest constructions there is no paradox or conflict at any point in "Before the Law" or *The Trial*. A man comes from the country to the door of the law, seeking admittance to a place he believes should be open to all at all times. Warders arrive at K.'s home and notify him that he is under arrest. Nothing is out of the ordinary! Daily, around the world, individuals come before the law of their own volition, while others are placed there against their will. The initial "plights" of the man from the country and K. are not extraordinary, they are mundane. The ultimate outcomes of these stories are also uninteresting, if one holds strictly to the text and a view of legal reality. The man never gains the law, yet many who seek the law are never admitted. Standing and justiciability are two doctrines that may limit access. Every law has its intended objects, and every positive law may become effective only once the objects have placed themselves in a situation that would implicate the law.¹²⁷ Perhaps the man has not done this; there may yet be a condition to be fulfilled, a deed to be done, a paper to file. It is clear that the tension in the story does not necessarily have to arise from the fact that the man does not attain the law. In K.'s situation, he is condemned on the most fundamental level. Such condemnation is not unique in a general sense, even though it is obviously unique as a function of K.'s individuality. People are sentenced everyday, some even to the capital punishment that K. suffers.

No word that Kafka writes, no element of the logical progression of fiction, is at odds with our worldview or experience of legal reality. And so I have, through these trivial ramblings, painted myself into a corner. Surely, if conflict and paradox do not lie in the written text itself, these stories are entirely unworthy of academic attention. Yet the utterance itself is not what is important in these texts. The written word is only a framework, a point of reference through which thought passes abjectly, again and again, trying to find both its source and meaning, seeking some deeper enunciation that could make sense of it. It is not what is said in these stories that make them important and nearly impenetrable. The "strangeness of [these texts] lies

¹²⁷ Gros, *supra* note 96, at 23.

rather in what [they do] not say.”¹²⁸ The law itself remains ever silent, as do the texts on this focal point.

Returning to the parallelism internal to each story, the first sentence of both place an individual “before the law”: the man from the country by his own volition and K. by the will of some amorphous “authority.” The last line of each makes complete that same individuals’ banishment from the law. The man from the country dies having never reached his objective. K. is killed *sans* trial, effectively ending his own pursuit of the law. What is missing, and the crucial factor in maintaining the importance of both texts as compared to my fictitious redrafts, is a delineation of the *object* of this law, its meaning and essence. The law withdraws itself at the moment it should become manifest, leading to a “desultory observation about the inaccessibility of the law, a veritable contradiction in terms that points to the absence of law or to its vast arbitrariness.”¹²⁹ The question presented becomes “what was, what is the object of this well-guarded law, which the man would like to penetrate through knowledge? What is this law, what does it mean, what does it hold for the law-seeker who is supposed not to be ignorant of the law? What does the law say?”¹³⁰

An answer proves unavailable in the words offered by Kafka. As noted in the biographical sketch, German law at the time was general and impersonal. The law of neither “Before the Law” nor *The Trial* contradicts this. The law in both appears generalized, majestic, and supreme. It is also impersonal, rigid, and formal, requiring certain rules and conditions to be met, at least by assumption, in order for it to be summoned forth. If to this point Kafka’s law could just as easily be German or French law, why are its objects consigned to their respective fates?

Underlying this question is the fatal presupposition: that the man from the country and K. are objects of this law. Despite this rationalization, injected into the text by those familiar with traditional conceptions of legal reality, Kafka’s law is unlike any that may be encountered in contemporary society. Kafka’s law is not paradigmatic, and in no facet is this more apparent than on this point: this law seems to be *without object*.¹³¹ A mind weaned on Western legal education may find it impossible to even formulate such a law. Law without object is, “at first blush[,] something unthinkable.”¹³² Stepping back to survey this alien landscape, what is at issue? It is not the normative character of the law, or its interpretation, or its procedures of access. What is at issue is the very essence of the law, an essence that by all accounts seems to be constituted by silence. “The law of ‘Vor dem Gesetz’ blockades the subjects of the law with silence, a void making it fundamentally plain that the law has nothing to say. It is pure hiatus, an empty norm.”¹³³ Yet even defining the law’s essence in this way doesn’t ease the conflict. Questions inevitably remain:

¹²⁸ *Id.*

¹²⁹ *Id.* at 19.

¹³⁰ *Id.* at 22.

¹³¹ *Id.* at 23.

¹³² *Id.*

¹³³ Gros, *supra* note 96, at 23.

What is an empty norm? What is this insanity? Is it part of the experience of a normal person, a simple reader like you and me? We know all the many administrative and judicial torments that screen the clarity of the law, but the text rests on a darker observation: one could spend an entire lifetime waiting to gain access to a law without knowing its object. The law would then be nothing but a performative based on absence: *you must, you can, or rather you have the right to . . .* yes, but what? to do what? ridiculous croaking, followed by silence.¹³⁴

May I pass through the door? Not at this moment, but perhaps at some later time, reiterated *ad infinitum* and *ad nauseam*. Silence from behind the door, even if at the very moment it could no longer prove useful the law shines brilliantly from the gate. Paraphrasing K.'s thoughts in those final determinative moments before the knife finds its mark; where was the judge, the jury, the courtroom? What were the charges? Who had made the accusation? Yet even if these questions had been formulated at the proper time what answer would have come? An inhuman, phlegmatic wheeze, Gros' ridiculous croaking, followed by a silence not so total as to obscure the sound of the hangman tightening the knot. The man from the country and K. thus remain forever "isolated, bent upon an anxious solipsism. The law, haunted by the void, dissolves into absence, becomes pure emptiness, anomie."¹³⁵

There is a subtle dialectical movement in this conception of law, a "becoming" which characterizes the law even if it fails to give it a voice. The law, this vast and arbitrary empty norm, when confronted with what should be its proper object, becomes manifest as "the act of waiting; or, painfully the law is despair."¹³⁶ The law for the man from the country is not a spatial entity to which he can come and go as he pleases, but the act itself that he consciously performs. The waiting, undertaken in the hopes of a desire that remains contingent and ambivalent, is the very crisis point at which the man reaches the law, a point endogenously distinct from formulaic imperatives. The law for K. becomes his despair, living as he is "outside desire, on the slopes of death."¹³⁷ There is no longer hope, even if failed leads and other potential actions race frantically through his mind as the curtain parts and the apparition glances down at him from the distance. His despair, his law, is the failing of desire, a nihilistic resignation, the emotive impulse that forces the last humiliating cry through his lips: "Like a dog!"

This is but one reading. Even beginning from the starting point of the "empty norm" there is no necessary teleology to textual interpretations of Kafka. Gilles Deleuze and Félix Guattari, in their study *Kafka: Toward a Minor Literature*, begin with the same observation, that "the famous passages in *The Trial* present the law as a pure and empty norm without content."¹³⁸ Instead of viewing this as a function of the law's absolute

¹³⁴ *Id.*

¹³⁵ *Id.* at 24.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ GILLES DELEUZE & FÉLIX GUATTARI, *KAFKA: TOWARD A MINOR LITERATURE* 43 (Dana Polan trans., Univ. Minnesota Press 1986) (1975).

transcendence, however, Deleuze and Guattari describe it in terms of immanence and desire. “K. will realize that even if the law remains unrecognizable, this is not because it is hidden by its transcendence, but simply because it is always denuded of any interiority: it is always in the office next door, or behind the door, on to infinity.”¹³⁹ This contamination, the infinite expanse of the field of immanence, destroys any distinction between interior and exterior; there is no longer any way to determine whether one is in the law, or before it, or outside of it. The mistaken view that justice is law rather than desire, is at the center of K.’s delusion, and the man from the country’s delusion. Where they both believed there was law there was in “fact desire and desire alone. Justice is desire and not law.”¹⁴⁰

The appearance of the empty norm derives from the fact that justice cannot be represented in these stories, because justice is in fact desire. Desire cannot itself be visible in the process. “Desire could never be on a stage where it would sometimes appear like a party opposed to another party.”¹⁴¹ Inherent in this realization is the observation that all that takes place in *The Trial* and “Before the Law” is superficial. The man from the country’s interactions with the doorkeeper, every question posed and every possession parted with, is unimportant. K.’s various interrogations, his meetings with Huld, and the whipping he witnesses in the Bank are likewise unimportant. It is not the visible that matters, not the explicit, but the clandestine: “The important things are always taking place elsewhere, in the hallways of the congress, behind-the-scenes of the meeting, where people confront the real, immanent problems of desire and power—the real problem of justice.”¹⁴² Herein lies the difference between the conceptions of law as transcendence and justice as desire. “If the ultimate instances are inaccessible and cannot be represented, this occurs not as a function of an infinite hierarchy belonging to a negative theology but as a function of a *contiguity of desire* that causes whatever happens to happen always in the office next door.”¹⁴³ The painting of Titorelli takes on added significance. Justice is painted with winged feet. Yet this is not because Justice flitters about the dizzying heights of some infinite hierarchical edifice of the law, but because Justice lies and must lie in the infinitely expansive field of immanence, the field of desire, the constantly opening and closing doors arranged at every corner of the Court.

If the basis of *The Trial*, and by analogy “Before the Law,” lies in an absolute and infinite field of immanence rather than the infinite transcendence of the law, then justice itself “is no more than the immanent process of desire. The process is itself a continuum, but a continuum made up of contiguities. The contiguous is not opposed to the continuum—quite the contrary, it is a local and indefinitely prolongable version of the

¹³⁹ *Id.* at 45.

¹⁴⁰ *Id.* at 49.

¹⁴¹ *Id.* at 50.

¹⁴² *Id.*

¹⁴³ *Id.*

continuous.”¹⁴⁴ There is a parallel here with Barnabas, a character in *The Castle*. Barnabas

is admitted into certain rooms, but they’re only a part of the whole, for there are barriers behind which there are more rooms. Not that he’s actually forbidden to pass the barriers. . . . And you mustn’t imagine that these barriers are a definite dividing-line. . . . [T]here are barriers he can pass, and they’re just the same as the one’s he’s never yet passed.¹⁴⁵

This is exactly the notion of Justice presented in *The Trial*, and it is commensurate with Titorelli’s exposition of indefinite postponement as one of the decisional possibilities of K.’s “trial.” Action following action, opening one door, then the next, and so forth. Yet the “delay is perfectly positive and active—it goes along with the undoing of the machine, with the composition of the assemblage, always one piece next to another. It is the process itself, the tracing of the field of immanence.”¹⁴⁶ There is no individual within the confines of *The Trial* that escapes characterization as part and parcel with this field; each is part of a series that never stops proliferating, each is a functionary or representative of justice.¹⁴⁷ The initial divisions themselves continually divide, such as the man Block, a cog in the initial wheel, who himself has many attorneys working for him. And so on, exponentially the field of immanence increases, although even this is a mischaracterization, for the field is infinite to begin with!

What is the individual left with? Desire is constituted as the whole, as the assemblage, and so it is “precisely one with the gears and the components of the machine, one with the power of the machine.”¹⁴⁸ Yet each segment itself is “power, a power as well as a figure of desire. Each segment is a machine or a piece of the machine, but the machine cannot be dismantled without each of its contiguous pieces forming a machine in turn, taking more and more place.”¹⁴⁹ The field of immanence, already infinite in its moment of birth, only expands further when its essence is sought. More doors are promulgated, put into place throughout the apparatus. Open one, that is fine, but rather than expect to find what you are looking for, whether it be the law, justice, truth, a judge or jury, be content to find another door. But perhaps behind that door. . . ? Justice does lurk behind one of these doors. The problem is, it will always be behind the door we have not yet opened, no matter how many in the series have been explored.

Hélène Cixous offers another interpretation, an explanation peculiar to the subject himself. The man from the country comes to the door of the law seeking admittance, but his journey and goal are premised on a false belief: that the law has a material inside. The spatial dimension of the story is narrower. Immediately upon arriving at the door the story is already concerned only with the man and the law. The doorkeeper is window-

¹⁴⁴ DELEUZE & GUATTARI, *supra* note 138, at 51.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 52.

¹⁴⁷ *Id.* at 53.

¹⁴⁸ *Id.* at 56.

¹⁴⁹ *Id.*

dressings, a necessary construct to fulfill the subjective creation of the law. Viewing the law from the perspective of the man from the country, it is inaccessible and unapproachable, forbidden. It is prohibited and thus itself prohibits, defending *toward* the inside while also defending *against* the outside.¹⁵⁰ This defense is not to ensure that nobody gains entrance; rather, the law must vigorously defend its own secret, “which is that it does not exist. It exists, but only through its name. As soon as I speak about it, I give it a name and I am inside Kafka’s texts. The law is before my word. It is a verbal rapport. The entire force of the law consists in producing this scene so that it be respected.”¹⁵¹ The tragedy of these stories arises from the failure of the subject to view the law *as it is*, as a singular construct of the individual’s own creation.

Cixous draws a parallel between this failure and Maurice Blanchot’s *The Writing of Disaster*. Blanchot writes:

[t]he sky, the *same* sky, suddenly open, absolutely black and absolutely empty, revealing, (as though the pane had broken) such an absence that all has since always and forevermore been lost therein—so lost that therein is affirmed and dissolved the vertiginous knowledge that nothing is what there is, and first of all nothing beyond.¹⁵²

The difference lies in the realization that there is nothing, that what immediately appears to the individual is “nothingness” and that beyond this void there is also nothing. Kafka’s man from the country died without ever wavering in his belief that “there was somebody or something inside. He *thought* there was an inside.”¹⁵³ This is the very secret of the law, “that it has no material inside.”¹⁵⁴ The law exists only as relation. It “cannot be defined. . . . It is known only as a verbal construct and is designated to come and go, in relation with a concrete object. . . .”¹⁵⁵

The enunciation of the law, its status as a verbal rapport, derives solely from the individual. The law is the individual’s unconscious construct, existing within the subject alone, and once the law is *thought* the subject also thinks the concept of *transgression*. If the law is that which should be obeyed, then disobedience to its dictates must result in a transgression. All of this is subjective, internal to the thinking individual. The man from the country does not obey some general or natural law when he takes a seat at the gate; he obeys only his own law. By not transgressing, by not entering despite the doorkeeper’s prohibition, the man conforms his actions to his own constructed law. The man obeys because he has happened to enunciate the law as a universal utterance.¹⁵⁶ Cixous also views this failure to act as a function of desire. The doorkeeper tells the man “if you want, you can”

¹⁵⁰ HÉLÈNE CIXOUS, READINGS: THE POETICS OF BLANCHOT, JOYCE, KAFKA, KLEIST, LISPECTOR, AND TSVETAYEVA 17–18 (Verena Andermatt Conley ed. trans., Univ. Minnesota Press 1991).

¹⁵¹ *Id.* at 18.

¹⁵² *Id.* at 22 (quoting MAURICE BLANCHOT, L’ÉCRITURE DU DÉSASTRE 117 (Paris: Gallimard, 1980), translated in MAURICE BLANCHOT, THE WRITING OF DISASTER 72 (Ann Smock trans., Univ. Nebraska Press, 1986) (1980)).

¹⁵³ *Id.* at 25.

¹⁵⁴ *Id.* at 18.

¹⁵⁵ *Id.* The relation to “the apple” is a reference to Clarice Lispector’s *Near the Wild Heart*.

¹⁵⁶ CIXOUS, *supra* note 150, at 17.

enter.¹⁵⁷ The man's response is "I can but do I want to? I can go in and out of all the doors but am I sure that I want to?"¹⁵⁸ There is a split desire, the desire to want: the "man from the country desires himself as wanting."¹⁵⁹ The doorkeeper's presence and offer to sate the desire of the man transforms desire, "I can and I want," into a hierarchy of doubt, culminating in the realization of the law as *I*. Desire split becomes the phrase "If only I could want what I want. This is the instance of the law. Nothing prevents me, except the law transformed into the self. *I*, the law."¹⁶⁰ Prohibition comes not from outside, not from the law as an independent and forbidden entity, but from the man himself, as an internal struggle between the self and desire. The law is the divided desire within the man: the desire, on the one hand, to enter the law, to reach its origin, etc., and on the other hand, the desire to hold true to its precepts, to respect the law and not transgress by action. This tension places the man firmly within the law even as he sits on the stool. There is nothing to enter—the man is already "within" the law.

Thus we arrive at the essence of the law. Variably, it is the synthesis of subject and object which becomes manifest as the "waiting" itself, or the despair of the subject. It is a split desire premised on the subjective creation of law by the unconscious enunciation of universality by the individual. Law is that one door that may not be opened, even though the whole world, save this door, is given to the individual. All is then well and good. Except have we really transcended Gros' initial desultory observation? Does defining the law in terms of desire, whatever conception that may take, ease the conflict? Does the tension evaporate when placed in this light, or are we simply led to a more fundamental question? No longer may we concern ourselves with the essence of law. We have discerned its essence and it still leaves as wanting, perhaps desiring. But wanting what? Desiring what? That horrible question, itself clothed in a furred robe, hirsute and forbidding, remains: *why*? Why is the law an empty norm? Even if we have correctly arrived at the answer to our initial question, the law's derivation and origin still remain clouded in obscurity. If this is the essence of law, this emptiness, this vast arbitrariness, this waiting and despair, why must it be so? The question is unanswerable so long as it is posed from inside Kafka's texts. To discover an origin one must step outside the system; questions of evolution and development may only be answered from a point that allows a view of the whole. To understand the law's essence, its present manifestation must be understood as a product of such evolution and development. Cixous recognized this most fundamental question: "The definition of the law can unfold only in relation to the question of the origin of the law. In order to get out of Kafka's text[s], we must ask: Where does the law come from? and not think that it has always been there."¹⁶¹ It is to Jacques Derrida that I appeal in an attempt to answer this question: where does this law come from? Derrida's answer, to the degree that it can be so

¹⁵⁷ *Id.* at 18.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 18–19.

called, is contained in his essay “Before the Law,”¹⁶² first given as a lecture to the Royal Philosophical Society in London in 1982.¹⁶³

Preceding the text is a quote from Montaigne’s *Essays* II: “Even our law, it is said, has legitimate fictions on which it bases the truth of its justice.”¹⁶⁴ This interplay between fiction and law is at the center of Derrida’s reading of Kafka, and Derrida’s reading focuses on the fundamental question: “what if the law, without being itself transfixed by literature, shared the conditions of its possibility with the literary object?”¹⁶⁵ This question implicates an *appearance* of the law and the story, for “the story, as a certain type of *relation*, is linked to the law that it relates, appearing, in so doing, before that law, which appears before it.”¹⁶⁶ Yet this gives rise to a paradox: the law as law should not give rise to a story.¹⁶⁷ It is without history, genesis, or derivation, invested as it is with categorical authority—this is the law of the law, reminiscent of Immanuel Kant’s statement that pure morality has no history.¹⁶⁸ Stories of the law fail to refer to the law as such, concerning only events external to the law, its revelation in specific circumstances.¹⁶⁹ At the center of any attempt to enter into the law in a relational sense is the impossibility of such a goal, and thus the focus of the story shifts to the implicit inaccessibility of the law.¹⁷⁰ Yet even the term “inaccessible” implies a spatial location, somewhere from whence the law of laws comes.¹⁷¹ This possibility dangles in front of the reader, as well as the literary object, creating an irresistible urge to uncover the origin of the law while at the same time confronting the willing traveler with a quixotic essence: “the law yields by withholding itself, without imparting its provenance and its site. This silence and discontinuity constitute the phenomenon of the law.”¹⁷² On the one hand, “[t]o enter into relations with the law which says ‘you must’ and ‘you must not’ is to act as if it had no history or at any rate as if it no longer depended on its historical presentation.”¹⁷³ On the other hand, to embark on a quest to discern the origin of law is to “let oneself be enticed, provoked, and hailed by the history of this non-history. It is to let oneself be tempted by the impossible: a theory of the origin of law, and therefore of its non-origin. . . .”¹⁷⁴

With the question of origin firmly presented, Derrida leaves Kafka’s text for a moment to explore Freud’s own quest for the origins of moral law and the initial answer he had given to this question: repression.¹⁷⁵ Freud’s

¹⁶² JACQUES DERRIDA, *Before the Law*, in ACTS OF LITERATURE 181 (Derek Attridge ed., 1992).

¹⁶³ *Id.* at 182.

¹⁶⁴ *Id.* at 183.

¹⁶⁵ *Id.* at 191.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ DERRIDA, *supra* note 162, at 191.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ A definitional point: Derrida uses the term “law of laws” because in “Kafka’s story one does not know what kind of law is at issue—moral, judicial, political, natural, etc. What remains concealed and invisible in each law is thus presumably the law itself, that which makes laws of these laws, the being-law of these laws.” *Id.* at 191–92.

¹⁷² *Id.* at 192.

¹⁷³ *Id.*

¹⁷⁴ DERRIDA, *supra* note 162, at 192.

¹⁷⁵ *Id.*

hypothesis was that repression is organic and linked to height.¹⁷⁶ The gradual movement of the olfactory sense away from the sexual zones gave birth to a distance realized psychologically as a delay in action when the evolution had become complete.¹⁷⁷ The origin of morality lay in this turning away, the gradual upward movement which gives birth to the distinction between the high (good, pure, clean, etc.) and the low (base, sexual, etc.).¹⁷⁸ Yet in seeking origin, Freud was fundamentally concerned with discerning the *history* of this law, the history of morality.¹⁷⁹ He did so by a narrative in order to relate the origin of that which disrupts its own origination:

The law, intolerant of its own history, intervenes as an absolutely emergent order, absolute and detached from any origin. It appears as something that does not appear as such in the course of history. At all events, it cannot be constituted by some history that might give rise to any story. If there were any history, it would neither be presentable nor relatable: the history of that which never took place.¹⁸⁰

Derrida then returns to the text and poses the simple question: what is immediately apparent upon reading “Before the Law?” A man from the country comes to the door of the law, believing that it should be open to all at all times, and is astonished to see it guarded by a doorkeeper. This doorkeeper refuses him entrance, but does so in the form of an adjournment: It’s possible, but not at this moment.¹⁸¹ Stepping aside the man peers through the door, at which point the doorkeeper laughs and tells him he may go in despite the doorkeeper’s veto. At this point he *can* enter (even if he *may* not enter); no physical impediment stands in his way. Yet he decides to wait, he “decides to put off deciding, he decides not to decide, he delays and adjourns while he waits.”¹⁸² This decision is neither a renouncement of the desire to enter nor a decision to wait for permission—he doesn’t *need* permission to pass through the door.¹⁸³ If he desires it, he can pass freely through the door, even if such passage will bring him face to face with another doorkeeper. He decides to put off making his decision, a decision that reminds one of repression, the Freudian “delay.” The man’s entrance into the law is hampered by the paradox of law and literary relation, “its possibility and impossibility, its readability and unreadability, its necessity and prohibition, and the questions of relation, of repetition and of history. . . .”¹⁸⁴ This paradox is akin to Kant’s notion of respect.¹⁸⁵ The

¹⁷⁶ *Id.* at 193.

¹⁷⁷ “To put it crudely, the memory actually stinks just as in the present the object stinks; and in the same manner as we turn away our sense organ (the head and nose) in disgust, the preconscious and the sense of consciousness turn away from the memory. This is *repression*. What, now, does normal repression furnish us with? Something which, free, can lead to anxiety; if psychically bound, to rejection—that is to say, the affective basis for a multitude of intellectual processes of development, such as morality, shame, and the like. Thus the whole of this arises at the expense of extinct (virtual) sexuality.” *Id.* (quoting THE COMPLETE LETTERS OF SIGMUND FREUD TO WILHELM FLIESS, 1887–1904 280 (J.M. Masson, ed. trans., Harvard Univ. Press 1985)).

¹⁷⁸ *Id.* at 194.

¹⁷⁹ *Id.*

¹⁸⁰ DERRIDA, *supra* note 162, at 194.

¹⁸¹ *Id.* at 196.

¹⁸² *Id.* at 195–96.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 196.

decision to put off deciding itself manifests the law. The law is respect, or rather the law is the respect *of the individual*.¹⁸⁶ One is never brought immediately before the law. Its origins and history must remain hidden. The law addresses the individual only insofar as that individual gives an *example* that the law can be *respected*. The door is open, the doorkeeper is to the side and has told the man he can enter without permission, yet the law remains inaccessible. Perhaps, then, the origin of the law lies in the concept of prohibition?¹⁸⁷

Derrida suspends this line of thinking in order to return to Freud and his refinement of the initial schema of the origins of morality. Freud frames this refinement in terms that implicate the Kantian “as if” and operate against an historical frame of reference. This story refers to the murder of the primeval father. The son, wishing to take the place of the father, murders him. The act, however, does not have its desired effect, nor is the murderer without qualms. The initial term here must remain abstract, for it is only *after* that the feeling is given a name or purpose. Feelings of morality within a given society evolved from a deed that was done yet should not have been done. The act can, after disgust is felt, be fairly categorized as “prohibited” or “immoral.” The moral reaction itself lies in the failure of purpose. The son wishes to take his father’s place and so he kills him, thinking this will affect his desire. Yet the murder does nothing to accomplish this. The father possesses more power dead than alive. This failure is conducive to the moral reaction that allows for the categorization of an act as “prohibited” or “immoral.” As Derrida describes this account, “morality arises from a useless crime which in fact kills nobody, which comes too soon or too late and does not put an end to any power; in fact, it inaugurates nothing since repentance and morality had to be possible *before* the crime.”¹⁸⁸ This story has the mark of fiction, a non-event, happening only *as if*.¹⁸⁹ The murder is not a true event because it is useless.¹⁹⁰ Because this account does not implicate an event in the normal sense of the word, the origin of moral law cannot be said to lie in an event.¹⁹¹ It is a quasi-event, bearing

the mark of fictive narrativity (fiction *of* narration as well as fiction as narration: fictive narration as the simulacrum of narration and not only as the narration of an imaginary history). It is the origin of literature at the same time as the origin of law—like the dead father, a story told, a spreading rumor, without author or end, but an ineluctable and unforgettable story. Whether or not it is fantastic, whether or not it has arisen from the imagination, even the transcendental imagination, and whether it states or silences the origin of the fantasy, this in no way diminishes the imperious necessity of what it tells, its law. This law is even more frightening and fantastic, *unheimlich* or uncanny, than if it

¹⁸⁵ *Id.*

¹⁸⁶ DERRIDA, *supra* note 162, at 200.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 198.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 199.

emanated from pure reason, unless precisely the latter be linked to an unconscious fantastic.¹⁹²

If the law is fantastic, then to be “before the law” becomes a place that is essentially inaccessible to both the reader and the man from the country.¹⁹³ The quest “becomes the impossible story of the impossible. The story of prohibition is a prohibited story.”¹⁹⁴

But what is the nature of this prohibition? It is not in the form of an imperative.¹⁹⁵ Leaving aside the fact that nothing physical stands in the man’s way of gaining “entrance” to the law, even the doorkeeper does not form the prohibition in terms of “you can’t.” Derrida terms this tension *ifference*.¹⁹⁶ The door of the law remains open, the man peers through and the doorkeeper steps to the side, verbally expressing the man’s ability to enter if he desires.¹⁹⁷ It is the man who chooses to take a seat in front of the door. Thus we are:

compelled to admit that he must forbid himself from entering. He must force himself, give himself an order, not to obey the law but rather to *not gain access* to the law, which in fact tells him or lets him know: do not come to me. I order you not to come yet to me. It is there and in this that I am law and that you will accede to my demand, without gaining access to me.¹⁹⁸

The law is both prohibition and that which is prohibited.¹⁹⁹ *It is prohibited but does not itself prohibit.*

It forbids itself and contradicts itself by placing the man in its own contradiction: one cannot reach the law, and in order to have a *rapport* of respect with it, *one must not* have a *rapport* with the law, *one must interrupt the relation*. One must *enter into relation* only with the law’s representatives, its examples, its guardians. And these are interrupters as well as messengers. We must remain ignorant of who or what or where the law is, we must not know who it is or what it is, where and how it presents itself, whence it comes and whence it speaks. This is what *must* be before the *must* of the law.²⁰⁰

The contradiction of the law lies in this self-prohibition.²⁰¹ There is a division here, stark and foreboding. The law is prohibited, yet at the same time this prohibition is not enforced by the law itself but through the self-prohibition of the man from the country.²⁰² In fact, this freedom becomes utterly concealed by the man’s decision not to decide.²⁰³ Reminding one of Deleuze and Guattari, as well as Gros and Cixous, Derrida writes, “As the doorkeeper represents it, the discourse of the law does not say ‘no’ but ‘not

¹⁹² DERRIDA, *supra* note 162, at 199.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 200.

¹⁹⁵ *Id.* at 202–03.

¹⁹⁶ *Id.* at 203.

¹⁹⁷ *Id.*

¹⁹⁸ DERRIDA, *supra* note 162, at 203.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 203–04.

²⁰¹ *Id.* at 204.

²⁰² *Id.*

²⁰³ *Id.*

yet' indefinitely. That is why the story is both perfectly ended and yet brutally, one could say primally, cut short, interrupted."²⁰⁴ Entry into the law is deferred forever, perpetuated by this "not yet," while the law itself is nothing more than that which dictates the wait.²⁰⁵

Essence is given to the object that is present, but the law eludes this essence by remaining forever un-present, leading to the conclusion that the law must be without essence.²⁰⁶ The truth of the law is akin to Martin Heidegger's truth of truth: non-truth.²⁰⁷ As the truth of truth the law guards itself, yet guards nothing and does not in fact do the guarding: it is the doorkeeper who guards the gate which itself opens only on a vacuum.²⁰⁸ The law is the guarding itself.²⁰⁹ No other formulation can be given; if one strictly adheres to Kafka's own language, then *das Gesetz* evades other interpretations.²¹⁰ The term is neuter and thus does not lend itself to personification.²¹¹ It transcends sexual or grammatical characterization, and thus the reader is left asking, "Is it a thing, a person, a discourse, a voice, a document, or simply a nothing that incessantly defers access to itself, thus forbidding *itself* in order thereby to become something or someone?"²¹²

This thought, coupled with the radiance that streams from the law at the story's conclusion, leads Derrida to draw an analogy between "Before the Law" and Judaic law. He refers to Georg Wilhelm Friedrich Hegel's account of the story of Pompey and the Jewish tabernacle. Pompey hopes to find in the temple's center, the Holy of Holies, "the root of the national spirit," an object on which he could focus his devotion and veneration.²¹³ Upon entering the arcanum, however, Pompey finds himself in an empty room.²¹⁴ Derrida concludes that the root Pompey sought was extraneous to the Jews, being *ungesehen und ungefühlt*.²¹⁵ This is in part true, but the extraneity of the infinite Object, encompassed within the Holy of Holies, is a force of creation rather than negation.²¹⁶ The relation of Object to subject is mutual. The infinite Object is object only so long as it has a subject, and the subject is subject only in so far as the infinite Object is contrasted with

²⁰⁴ DERRIDA, *supra* note 162, at 204.

²⁰⁵ *Id.* at 205.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 206.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ DERRIDA, *supra* note 162, at 206.

²¹¹ *Id.*

²¹² *Id.* at 208.

²¹³ G.W.F. HEGEL, EARLY THEOLOGICAL WRITINGS 192 (T.M. Knox trans., Univ. Pennsylvania Press 1971) (1948).

²¹⁴ *Id.*

²¹⁵ *Id.* at 208.

²¹⁶ *Id.* at 191. ("The principle of the entire legislation was the spirit inherited from his forefathers, i.e., was the infinite Object, the sum of all truth and all relations, which thus is strictly the sole infinite subject, for this Object can only be called 'object' in so far as man with the life given him is presupposed and called the living or the absolute subject. This, so to say, is the sole synthesis; the antitheses are the Jewish nation, on the one hand, and, on the other, the world and all the rest of the human race. These antitheses are the genuine pure objects; i.e., this is what they become in contrast with an existent, an infinite, outside them; they are without intrinsic worth and empty, without life; they are not even something dead—a nullity—yet they are something only in so far as the infinite Object makes them something, i.e., makes them not something which *is*, but something *made* which on its own account has no life, no rights, no love.")

subject and creates it. Derrida's point is one of nullification rather than of synthesis. Nonetheless, the Hegelian dialectic provides an interesting point of departure. Whereas in Hegel the juxtaposition of subject and object leads to a synthesis, the same positioning leads to the dissolution of Kafka's law. Rather than an absolute union from opposition, Kafka gives us a nullification:

Guardian and guardian. This differential topology (*topique différencielle*) adjourns, guardian after guardian, within the polarity of high and low, far and near (*fort/da*), now and later. The same topology without its own place, the same atopy (*atopique*), the same madness defers the law as the nothing that forbids itself and the neuter that annuls opposition. The atopy annuls that which takes place, the event itself. This nullification gives birth to the law, before as before and before as behind. That is why there is and is not a place for a story.²¹⁷

The story and the law converge on this single point: inaccessibility. The closure of the door occurs at the exact same point and time as the closure of the text itself.²¹⁸

Yet in this act—the closure of the text and the simultaneous closure of the door by the doorkeeper—nothing is in fact closed any more than there existed something within the framework of the story that could have itself been closed.²¹⁹ The door is shut, but behind it lies nothing. Even if this door was open, it would be open to *nothing*, only a yawning void. As within the text itself, the story also conveys nothing, tells nothing, describes nothing, save itself as text.²²⁰ Harkening back to the incapability of elucidation Zatozsky maintains is present, the quest of both the reader and the man from the country concludes on a single point: the

unreadability of the text, if one understands by this the impossibility of acceding to its proper significance and its possibly inconsistent content, which it jealously keeps back. The text guards itself, maintains itself—like the law, speaking only of itself, that is to say, of its non-identity with itself. It neither arrives nor lets anyone arrive. It is the law, makes the law and leaves the reader before the law.²²¹

After forty pages of commentary, we again find ourselves trapped within the realization of a desultory conclusion. “[A]t once allegorical and tautological, Kafka's story operates across the naively referential framework of its narration which leads us past a portal that it comports, an internal boundary opening on nothing, before nothing, the object of no possible experience.”²²² Finishing the essay, greeted with Gros' croaking, we are again left feeling as though “nothing had come to pass.”²²³

The law, under these interpretations, seems to clearly be an empty norm, an edifice devoid of an interior. The sole question that might have

²¹⁷ DERRIDA, *supra* note 162, at 208–09.

²¹⁸ *Id.* at 210.

²¹⁹ *Id.*

²²⁰ *Id.* at 210–11.

²²¹ *Id.* at 211.

²²² *Id.* at 212.

²²³ DERRIDA, *supra* note 162, at 212

assuaged the tension of these stories—“where does this law come from?”—has proven unanswerable. The law hides its origin, or defies any attempt to discern the well from which it springs. Yet even if the exact origin of this law cannot be pinned down with any specificity, there is a certain characteristic of legal reality that may give an answer to why Kafka’s law has developed as it has: its origin in societal relation. The question becomes, if the philosophical underpinnings of law rest in the relation of individuals within a society, why do those relations appear nowhere in *The Trial* or “Before the Law?” I now turn my attention to this question, whose answer lies in the phenomenon of reification.

IV. REIFICATION AND THE QUESTION OF LEGAL REALITY

The classic explanation of reification is given by Georg Lukács. In defining the essence of the commodity-structure, Lukács asserts that “[i]ts basis is that a relation between people takes on the character of a thing and thus acquires a ‘phantom objectivity,’ an autonomy that seems so strictly rational and all-embracing as to conceal every trace of its fundamental nature: the relation between people.”²²⁴ Reification results from a confusion between the

natural world and the social world, where the very people who create and sustain a social construction treat their own product as something fixed and unchanging. In the act of reification, people mistakenly treat a non-thing, such as an institution, social role, or relationship, as a thing, an immutable part of the natural world.²²⁵

The purpose of this section is to elucidate the empty norm that the law is revealed to be after it is deconstructed. By viewing the law as reified its presence and form can be better understood, even if that presence and form are based on a confusion between the social and natural worlds. This section proceeds by examining Karl Marx’s account of commodity fetishism and the explication of this theory by Lukács. Following this, reification will be applied to Kafka’s law from a textual standpoint. Finally, “necessity” as the form of reified law will be explained as it becomes manifest through the imposition of punishment.

A. FROM MARX TO LUKÁCS: COMMODITY FETISHISM AND REIFICATION

On its most basic level, “fetishism is the process by which fundamentally human relations . . . become thingified, transformed into relations between things . . . which then appear to take on a life of their own.”²²⁶ The “things” referred to in the preceding quote are commodities, products of human labor. Marx gives his account of commodity fetishism in the first chapter of the first volume of *Capital*: “A commodity appears at first sight an extremely obvious, trivial thing. But its analysis brings out

²²⁴ GEORG LUKÁCS, HISTORY AND CLASS CONSCIOUSNESS 83 (Rodney Livingstone trans., photo. reprint 1973) (1971).

²²⁵ Douglas Litowitz, *Reification in Law and Legal Theory*, 9 S. CAL. INTERDISC. L.J. 401, 401 (2000).

²²⁶ Norman W. Spaulding III, *Commodification and Its Discontents: Environmentalism and the Promise of Market Incentives*, 16 STAN. ENVTL. L.J. 293, 311 (1997).

that it is a very strange thing, abounding in metaphysical subtleties and theological niceties.”²²⁷ Turning first to the use-value of a commodity, it is apparent that its mystical character does not arise from this aspect. The use-value is simply the “usefulness of a thing.”²²⁸ It is “conditioned by the physical properties of the commodity, and has no existence apart from the latter.”²²⁹ Use-value is only the physical body of the commodity as realized in either use or consumption.²³⁰ Taking a table as a concrete example, even though the wood is transformed from a raw material into a finished product, the wood itself retains its sensuous characteristic: the table retains its “wooden” quality. Yet as soon as the same table is deemed a commodity it “transcends sensuousness”²³¹ and becomes something else. The metaphysical nature of the commodity can likewise not be explained by examining the determinants of value.²³² The social characteristic of these determinants is always present. First, the physical act of production, no matter what form it takes, retains a physiological characteristic that grounds it firmly within the social context.²³³ Second, examining production from a quantitative basis, this production retains its social character as a function of time, i.e. the hours needed to create a commodity.²³⁴ Finally, the organization of work is itself social, arising from the employer-employee relationship, which is obviously a relation between people.²³⁵

The enigma of the commodity is a product of the form itself, of the commodity as commodity. When a product of labor assumes the form of a commodity,

[t]he equality of the kinds of human labour takes on a physical form in the equal objectivity of the products of labour as values; the measure of the expenditure of human labour-power by its duration takes on the form of the magnitude of the value of the products of labour; and finally the relationships between producers, within which the social characteristics of their labours are manifested, take on the form of a social relation between the products of labour.²³⁶

The mystery of the commodity is found solely in the fact that the “commodity reflects the social characteristics of men’s own labour as objective characteristics of the products of labour themselves, as the socio-natural properties of these things.”²³⁷ A commodity is in fact nothing more than social relations. Yet through fetishism these social relations are transformed into relations between things, each endowed with a mystic-theological persona that establishes them as autonomous objects.²³⁸ This fetishism arises through the process of exchange. When individuals bring

²²⁷ KARL MARX, CAPITAL I: THE PROCESS OF PRODUCTION OF CAPITAL 163 (Ben Fowkes trans., 1976).

²²⁸ *Id.* at 126.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 163.

²³² *Id.* at 164.

²³³ MARX, *supra* note 227, at 164

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 164–65.

²³⁸ *Id.* at 165; KARL MARX, CAPITAL II: THE PROCESS OF CIRCULATION OF CAPITAL 303 (David Fernbach trans., 1978).

products into the market they do so in a way that conceals the true nature of their products. The act of transacting becomes a material relation between persons and a social relation between things.²³⁹ This confusion between the social and exchange worlds occurs without the knowledge of the individual participants.²⁴⁰

The commodity fetishism of Marx was adopted and advanced as the *Verdinglichung*, “reification,” of Lukács. Lukács analyzes the phenomenon of reification so as to implicate both the objective form and the subjective taints that naturally arise from this process. As Lukács states, “At this stage in the history of mankind there is no problem that does not ultimately lead back to that question [the question pertaining to the commodity-structure] and there is no solution that could not be found in the solution to the riddle of commodity-structure.”²⁴¹ The broad purpose of Lukács is to show the pervasive damage wrought by reification on society and the individuals that comprise that society.

This damage is a product of the one overarching effect reification has on man, which in turn has both an objective and subjective component.²⁴² Because of reification “a man’s own activity, his own labour becomes something objective and independent of him, something that controls him by virtue of an autonomy alien to man.”²⁴³ This alienating autonomy gives birth to “things” and “relations between things.”²⁴⁴ The objective societal manifestation of reification lies in the genesis of commodities and markets, both of whose existence becomes self-perpetuating.²⁴⁵ In this objective sense, “man projects the contingent facts of the capitalist economy onto the natural world as if the current arrangement was part of the furniture of nature, rigid and unalterable.”²⁴⁶ Once the commodity-structure has been put into place, man may be able to manipulate the market, learn its laws, etc., but he will be at a loss to alter it objectively.²⁴⁷ Subjectively, reification becomes manifest after the market has been established. Once this occurs, “a man’s activity becomes estranged from himself; it turns into a commodity which, subject to the non-human objectivity of the natural laws of society, must go its own way independently of man just like any consumer article.”²⁴⁸ This subjective reification results in

the fact of a double alienation: the worker is first of all cut off from the substance of his work and then, secondly, from the product of his labor. The consequence of this reification is manifested in the progressive disappearance of the individual, personal, and teleological character of human work. . . .²⁴⁹

²³⁹ MARX, *supra* note 227, at 166.

²⁴⁰ *Id.* at 166–67.

²⁴¹ LUKÁCS, *supra* note 224, at 83.

²⁴² *Id.* at 87.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Litowitz, *supra* note 225, at 408.

²⁴⁷ LUKÁCS, *supra* note 224, at 87.

²⁴⁸ *Id.*

²⁴⁹ Jean Grondin, *Reification from Lukács to Habermas*, in LUKÁCS TODAY: ESSAYS IN MARXIST PHILOSOPHY 90 (Tom Rockmore ed., 1988).

When reification persists both objectively and subjectively, “natural” relations will be replaced at all points within society by rationally reified relations.²⁵⁰ Individuals themselves turn to automatism because of the appearance that society as a whole is seemingly subjected to a unified economic process governed by unified laws, even though this appearance represents only the phantom objectivity arising from the phenomena of reification.

Capitalism thus perpetrates a form that transcends economics proper and imprints itself on every aspect of society, concealing the qualitative and material character of things as things through this rational objectification.²⁵¹ The effect on the consciousness of the subject populace is total ignorance. The reified nature of the forms of capital and commodities in capitalist society project themselves onto the mind of the bourgeois as the “pure, authentic, unadulterated forms of capital.”²⁵² The fallacy of this projection is never realized, because in these forms “the relations between men that lie hidden in the immediate commodity relation, as well as the relations between men and the objects that should really gratify their needs, have faded to the point where they can be neither recognized nor even perceived.”²⁵³ The reified mind comes to regard these forms as the true representations of its societal existence, making reification the “necessary, immediate reality of every person living in capitalist society.”²⁵⁴ Once a society becomes fully reified “there can be no serious discussion of alternative arrangements. The universe of discourse collapses onto the existing arrangement in an unending cycle of legitimation and resignation.”²⁵⁵ This unwitting cyclical blindness can only be overcome by examination of the totality of the capitalist structure, by “*constant and constantly renewed efforts to disrupt the reified structure of existence by concretely relating to the concretely manifested contradictions of the total development, by becoming conscious of the immanent meanings of these contradictions for the total development.*”²⁵⁶ Only by removing oneself from the immediate reality of the reified society and bringing the process of reification into “full view of the critical, conscious mind”²⁵⁷ may the contradictions be viewed for what they are, and the natural, social relations underlying the commodity-structure be restored.

B. THE REIFICATION OF KAFKA’S LAW

The Deconstructionist failure in coming to terms with either the nature of Kafka’s law or its ultimate origins is not a function of the law in its objective manifestation, but rather arises because of the inability of the subjective consciousness to take true account of the situation that gives rise to the law as Kafka portrays it. The law remains an empty norm not

²⁵⁰ *Id.* at 89.

²⁵¹ LUKÁCS, *supra* note 224, at 92.

²⁵² *Id.* at 93.

²⁵³ *Id.*

²⁵⁴ *Id.* at 197.

²⁵⁵ Litowitz, *supra* note 225, at 411.

²⁵⁶ LUKÁCS, *supra* note 224, at 197.

²⁵⁷ Litowitz, *supra* note 225, at 409.

because the edifice is denuded of interiority, but because the functioning of the machine takes place entirely behind the open door. The law is empty in relation to its logical objects because it no longer requires interaction with these objects in order to reach decisions. In a very real sense, K. and the man from the country are stripped of their individuality and humanity and subjected to a process that objectifies all relations that come into contact with it. This objectification, which alters the characterization of all relationships that touch upon the law, is a function of the phenomenon of reification, a process that can explain the alienation and subordination of the individual in Kafka's legal texts.

The analysis of the reification of law in Kafka's texts proceeds on three levels. First, we must return to Lukács to understand the formal process that leads to the reification of law. Second, Kafka's texts must be examined, paying special attention to the nature of the "social" relationships in each story. Finally, the ultimate appearance and nature of the law in these stories can be understood as a function of punishment. The law, once reified, becomes the act itself, the imposition of formal punishment. In undertaking this tripartite study we can finally disrupt the reified structure of Kafka's law and extricate ourselves from Gros' desultory observation, for at once we are able to step outside the texts and judge them with no hindrance of consciousness.

1. *Lukács' Account of the Reification of Law*

As noted previously, reification has the effect of alienating man from the objects he creates. Yet these objects themselves suffer the same alienation, as does any "thing" which is reified, including institutions such as the law. The capitalist economists divorce these empty manifestations, these reified things, "from their real capitalist foundation and make them independent and permanent by regarding them as the timeless model of human relations in general."²⁵⁸ This divorce is a function of the fact that the capitalist transformation must touch on all aspects of society if the preconditions of its self-realization are to be fulfilled.²⁵⁹ Thus even the legal system *must* become reified, and this process will totally conceal the true origin of the law. The essence of reified law is formalism. Lukács quotes from Max Weber's *Gesammelte politische Schriften*:

The modern capitalist concern is based inwardly above all on *calculation*. It requires for its survival a system of justice and an administration whose workings can be *rationally calculated*, at least in principle, according to fixed general laws, just as the probable performance of a *machine* can be calculated. It is as little able to tolerate the dispensing of justice according to the judge's sense of fair play *in individual cases* or any other irrational means or principles of administering the law . . . as it is able to endure a patriarchal administration that obeys the dictates of its own caprice, or sense of mercy and, for the rest, proceeds in accordance with an inviolable and sacrosanct, but irrational tradition They (modern

²⁵⁸ LUKÁCS, *supra* note 224, at 94–95.

²⁵⁹ *Id.* at 95.

businesses) could only come into being in the bureaucratic state with its rational laws where . . . the judge is more or less an automatic statute-dispensing machine in which you insert the files together with the necessary costs and dues at the top, whereupon he will eject the judgment together with the more or less cogent reasons for it at the bottom: that is to say, where the judge's behavior is on the whole *predictable*.²⁶⁰

Within this development there is both a subjective and objective break with the traditional empirical-irrational method of the administration of justice. Subjectively, tradition had focused on the requirements of men and tailored justice to these requirements. Objectively, justice had been tailored to the specific matter at hand. Reification causes a break with tradition, and in place of the empirical-irrational system there

arises a rational systematization of all statutes regulating life, which represents, or at least tends toward a closed system applicable to all possible and imaginable cases. . .the legal system is formally capable of being generalised so as to relate to every possible situation in life and it is susceptible to prediction and calculation.²⁶¹

Capitalist society needs the exact calculation that necessitates the abandonment of empiricism and tradition, yet at the same time this need "requires that the legal system should confront the individual events of societal existence as something permanently established and exactly defined, i.e. as a rigid system."²⁶² Thus the reification of the system precipitates the reification of the relationships that become subject to it. This causes constant conflicts within the system. Yet these conflicts are not resolved immediately as a function of a specific societal tension between persons as they would be in the traditional system, but merely result in newer and newer codifications to the system, an evolution perpetuated ad infinitum, which has the effect of entrenching the legitimacy of the system itself. This constant need of codification is the source of the

paradoxical situation whereby the 'law' of primitive societies, which has scarcely altered in hundreds or sometimes even thousands of years, can be flexible and irrational in character, renewing itself with every new legal decision, while modern law, caught up in the continuous turmoil of change, should appear rigid, static and fixed.²⁶³

The law, characterized as an empty norm, fits within this broader view of the reification of the legal system. If the law, once reified, becomes an entirely general body of statutes, and justice is a function of inserting files and dues into the system, the individual will be confronted with nothing. He must only stand aside and wait for a dispensation that will (hopefully) come. As the reification transforms the entirety of the process, not only will a solitary individual be isolated from the system, but personal litigants will also be estranged from each other. The law is no longer about litigant A versus litigant B in a personal and immediate sense. It is their relation transformed into a "thing," and that alone, which is cycled through the

²⁶⁰ *Id.* at 96.

²⁶¹ *Id.*

²⁶² *Id.* at 97.

²⁶³ *Id.*

system. The empirical model, which had sought to base justice not only on the circumstances but also the individuals in specific cases, is sacrificed to a total formalism that has no need of man. Once reification is made complete, the edifice of the law loses all interior and a man in search of justice will find only empty croaking.

Derrida's failure to penetrate and discover the origin and essence of Kafka's law can be seen as the product of this pervasive reification. In the reified legal system the question of whether the qualitative content can be understood by means of a rational, calculating approach is a function of the question of form versus content rather than the interaction of two principles operating in the same sphere.²⁶⁴ Lukács traces the genesis of this thinking to the bourgeoisie attack on natural law. The assumption of the bourgeois jurists was that the "formal equality and universality of the law (and hence its rationality) was able at the same time to determine its content."²⁶⁵ Thus there was a general refusal "to admit that a legal relationship had a *valid* foundation merely because it existed *in fact*."²⁶⁶ Summing up neatly the rationalist tendencies of the day is a quote from Voltaire: "Burn your laws and make new ones! Whence can new laws be obtained? From Reason!"²⁶⁷ But after this juridical revolution had achieved partial victory, a critical and historical view began to emerge, holding the belief that the "content of law is something purely factual and hence not to be contemplated by the formal categories of jurisprudence."²⁶⁸ Yet this movement itself destroys the possibility of grounding law in reason. The critical view's attempt to base the study of the content of law in history, sociology, and/or politics fulfilled the formalistic prophecy of Georg Hugo: they had to systematically abandon the "attempt to ground law in reason and to give it a rational content"²⁶⁹ in favor of a conception of law "as a formal calculus with the aid of which the legal consequences of particular actions (*rebus sic stantibus*) can be determined as exactly as possible."²⁷⁰

This evolution is only a particular historical account of the general process of the reification of law. Yet the critical view, by maintaining a formalistic approach to jurisprudence divorced from reason, veils the origin and evolution of law, turning it into something as "incomprehensible to the jurist as the bourgeois crises had been to the political economist."²⁷¹ If the law has become only a system into which certain information is pumped and the resolution of every case is based on generalized statutes, then the exact understanding of the evolution of law or its origins should remain shrouded; it has in fact become alienated from the system that it gave birth to. Derrida's failure to discern the origin of Kafka's law results from the inability of consciousness to pierce this shroud. Reified law takes on the appearance of something fixed and static, something that has always been

²⁶⁴ LUKÁCS, *supra* note 224, at 107.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 108.

²⁶⁹ *Id.*

²⁷⁰ LUKÁCS, *supra* note 224, at 108.

²⁷¹ *Id.*

and thus must represent the true nature of interaction within society. Portrayed through the lens of eternity, reified law will defy all attempts to find its origin. There can be no origin, because were this origin to be viewed it would contradict the image that the law itself portrays. Reified law must remain without origin and unknowable in its essence, and thus the projection is mechanistic objectively and empty from a subject point of view. An *a priori* necessity, based upon the projection of eternal existence, is the true nature of law within Kafka's writings.

The only way to overcome this is to return to Cixous' exhortation, by treating the law *as if it has not* always been there. Breaking the cycle of reification, disrupting the projection of its illusions, is the only way to come to terms with Kafka's law.

2. *Reification, "Before The Law," and The Trial*

The reification of law is made complete by the formalization of the legal apparatus, a total generalization of legal principles that no longer requires man and operates on the basis of the cogs and wheels put into place by initial and subsequent codifications. This mechanistic conception of justice creates the appearance of the empty norm and, in severing the question of origin from its societal bases, obscures even those foundational premises that should shed light on what the essence of the law is. An examination of Kafka's law and the legal relationships in Kafka's stories displays this phenomenon with remarkable consistency.

From an objective perspective, it is clear that the law in these stories has *become* reified, transformed into a formalistic system. Although Kafka does not write a great deal on the history of the court, through hearsay a few "legends" are conveyed. Titorelli, when apprising K. of the possible decisional outcomes, notes that definite acquittal is no longer granted, though it had been in the legends told of the court. The ever-active Block, even though he has employed Huld and an array of pettifogging attorneys, yearns to employ one of the "great lawyers," those brilliant jurists talked about only in legends who could secure any outcome they desired. These references are brief and come to the reader after passing through many ears and mouths, yet these legends paint a portrait of a system that has not always been so rigid and formal. The objective reification creates this image of eternity and the notion that the system has always been the way it is. By concealing these legends and chalking them up to fantasy the system is able to perpetuate its own existence not only into the future, but also as a fiction that extends into the past.

Subjectively, the relationships of all who come into contact with the Law are reified. "Before the Law" is simplistic in its overt construction; the sole relationship that consumes the reader is between the man from the country and the doorkeeper. The law remains forever on the periphery. If the task of the man is truly to attain the law, has he achieved this goal? It seems not. Yet if this is so, it is less a function of an emptiness behind the gate than of the formalism alluded to by Weber. Viewing the law as reified one is led to the conception of the judge, and by obvious extension the law,

that Weber characterized as necessary in capitalist society. Justice becomes a matter of computation; the law is given information and a judgment is disgorged. The man has given the doorkeeper some information, for the doorkeeper knows that he has come from the city seeking admittance to the law. That being the case, non-admittance must be the result of one of two things, both endemic to a reified system.

First, the law might be in the process of computing the judgment. It may have attained all necessary information and is simply passing it through the necessary channels to decide the judgment. Perhaps the matter is extremely complex, requiring the consultation of any number of codifications. Or perhaps the light shining in the dimness of the dying man's eyes is evidence of an imminence of judgment. Maybe the process itself is infinite, tracing Deleuze and Guattari's field of immanence, the information passed on from room to room, another functionary always waiting behind the closed door to prolong the process indefinitely. The waiting may simply be a function of this processing. In any event, this function itself is a result of the reification of law which expels the exhortations of the man from its midst to focus solely on the thingified relation he has brought to the gate.

Second, if the law has become reified and thus formal, then surely the rules of invocation are also formal and rigid. This matter has already been touched upon, but it is worth repeating in this context. German law was impersonal and formal and no doubt required a certain form of invocation to summon it forth. Previously I had noted the doctrines of standing and justiciability. Obviously it could be something far more mundane, such as a complaint being filed on paper of the wrong color or the improper structure of the man's question of entrance. No matter the reason, the rules of the law have not been complied with and the law itself has not taken notice of the man. A machine will only work if certain levers are pulled and buttons pushed. If the exact sequence is not held to nothing will happen. Law as machine, reified law, has this exact characteristic; one must call it forth very specifically, taking care in the structure of the sentence, the order of the words, the color of the complaint, etc. If not, no audience will be granted.

Whether the non-admittance of the man from the country is a function of the first or second scenario is not important. In either case it is the reification of law that has alienated the man, leaving him alone on the slopes of despair waiting for a judgment that may or may not come, depending solely on how well the machine is working or the question of whether it is even in the process of functioning. Ernst Fischer paints this portrait succinctly: "The law is no longer a living being, but a petrified institution, no longer timely, only still intimidating."²⁷² In such a stark portrait one is inevitably reminded again of Kafka's own words, recast through the reified and clouded consciousness of the man: "How modest this man is. He comes to the Law and begs. Instead of storming the Law

²⁷² Ernst Fischer, *Kafka Conference*, in *FRANZ KAFKA: AN ANTHOLOGY OF MARXIST CRITICISM* 91 (Kenneth Hughes ed., 1981).

and smashing it to pieces he comes and begs.” This isn’t technically a quote – just my rephrasing of a statement Kafka had made

The Trial provides a dizzying array of what should be social relationships, each touching on the law in its own way. Before treating K.’s experience with the law specifically, there are certain other relationships that must also be examined. One is that between the warders and the whipper, which provides an example of the necessity and formalism that colors even the law’s interaction with its own functionaries. K., upon hearing why the two men are being whipped, protests that he had never intended such a result. One of the warders explains that as soon as a grievance is aired openly, punishment is bound to follow. Yet this punishment is based solely on the enunciation and not on any notions of justice. It is necessary, or, stated differently by the mouth of the whipper, it is “as just as it is inevitable.”²⁷³ This necessity is premised on the form itself, on the ventilation of a complaint. The formalism is pervasive in its totality, and addressing the second quote, transforms even occupation into a notion of necessity: “I am here to whip people, and whip them I shall.”²⁷⁴ Once the machine is put into motion there is a certain *telos* that takes over. This *telos* is independent of all else, even the relation that it should be judging, and is thus transformed into a “thing,” a concrete result that must be carried out no matter the legitimate objections that could be leveled against it. The relationship between Block and Huld is also thingified, manifest as the punishment inherent in a mismatched power struggle. Huld alone seems to hold the keys to Block’s deliverance, to the extent a decision in his case could be so characterized, yet he is concerned only with the maintenance of his advantage. This is displayed in the most depressing manner when Huld crushes the man in front of K. with the information that his case, despite years of preparation and attention, has not even officially begun.

The most important relationships K. has with the law and which implicate the reification of the system are those with the Priest and his executioners. However, several other important interactions K. has with the Court and its functionaries are worth noting, including those with the warders, the Inspector, the Examining Magistrate, and Huld. These relationships are multi-tiered, evidencing reification in both its objective and subjective manifestations.

The warders, in and of themselves, represent a formalism born of the reification of the legal system. They don’t question the legitimacy of their orders to watch over K., but go about their task blindly, keeping him under their eyes for the required ten hours daily and then drawing their pay for the job. They are not swayed by K.’s protestations of innocence, for, as they tell K., the law has decreed that we arrest you, and how could there be a mistake in that? In this circular reasoning the law itself is portrayed as rigidly formal, eternal, and always correct. What the law decrees must be done for no other reason than that the law has decreed it. This objective

²⁷³ KAFKA, *supra* note 106, at 84.

²⁷⁴ *Id.* at 86.

reification has trickled through the system into the consciousnesses of those who carry out the will of the authorities. The reification of law reifies the minds of those who come into contact with it in such a way as to obscure the arbitrariness of its appearance. Certain questions can never be asked, and thus the warders view them as idiotic and childish. When K. offers his identification papers to the warders he is rebuffed with, "You're behaving worse than a child."²⁷⁵ When K. is forced to admit that he is not aware of the Law that has accused him, the warder Franz mocks him, saying "[h]e admits that he doesn't know the Law and yet he claims he's innocent."²⁷⁶ The reification in this case renders the warders incapable of viewing K. as a unique individual. He is viewed through their official eyes as just another bit of chafe to be put through the machinery.

K.'s experience with the Inspector on the day of his arrest furthers the notions of necessity and mechanism inherent in this system of "justice." There is the oddly empty designation of "arrested man" that is given to K., what surely must be viewed as only a formal term to be used in set circumstances. It has no meaning past the enunciation itself. He is arrested, but that need not keep him from going about his business. More importantly, in this first meeting is the realization that this Law very much resembles an assembly line, where not only does each station undertake a different task, but each station is oblivious both to what other stations are doing and what the line as a whole is producing. When K. challenges the Inspector to answer some of his questions, the Inspector portrays for the first time the layered and ignorant reaches of the Court:

You are laboring under a great delusion. These gentleman here and myself have no standing whatever in this affair of yours, indeed we know hardly anything about it. . . . I can't even confirm that you are charged with an offense, or rather I don't know whether you are. You are under arrest, certainly, more than that I do not know.²⁷⁷

This quote reinforces the position of the warders, for even the Inspectors of the Court fall into the same formalism without question. Where there should be questions there is only blind obedience to an authority that increasingly takes on the appearance of divinity.

The Examining Magistrate provides an example both of a comical "computational" error and the lack of information the Court uses in making its determination. The Magistrate begins his examination by asking, so "you are a house painter?"²⁷⁸ Of course this is incorrect and could represent the perils of trying to send information through the many channels of the Court; by the time the information reaches the end of its path it has become garbled in the same way a phrase is in the child's game of "telephone." This pitfall must be viewed as endemic to the type of mechanistic system reification gives rise to. The decisional formalism, alluded to by both the warders and the usher, is also present. If the cases are by rule a foregone conclusion, then what need of files and books does the Magistrate have?

²⁷⁵ *Id.* at 9.

²⁷⁶ *Id.* at 10.

²⁷⁷ *Id.* at 16–17.

²⁷⁸ *Id.* at 40.

None, save for his own amusement. When K. returns the next week and examines the mass of material on the Magistrate's desk, he finds only lewd drawings and a pornographic novel. This being the case, the examination itself can hardly be seen as more than a sham, and K.'s presence only an appearance of legitimacy. The system did not need either the occurrence or K.'s presence, yet puts it forward for the sake of appearances.

Huld's position with the Court, and by extension his representation of K., is commensurate with the reification of the system noted by Weber. The position of defense counsel is viewed as anathema by the officials and judges of the Court. They are, in the best cases, merely tolerated, and at no point are given even enough information about the charges to adequately combat them through pleadings. In the worst cases attempts are actually made to bar them from the courtroom, such as the story of the clerk who continually throws down attorneys from the doorway of the Court until he becomes so tired that the lawyers are able to overpower him. Every word spoken by Huld presents the system exactly as Weber had. The system itself is reified, but further, through the subjective reification perpetrated upon those subject to the Court, there also results an alienation. The attorney is alienated, a presence that at best will be tolerated by the Court, while the client is never granted a view of the internal apparatus that will judge him. Both are placed outside of a system they should be granted access to, while the machine proceeds with its machinations unaware or barely tolerant of either's presence.

K.'s final scene with his executioners is tainted with the same rigid formalism as his preceding relationships. They undertake a constant exchange of odious formalities, ranging from their initial entrance to deciding who will plunge the knife into K.'s breast. Even their bearing and essence, accompanying K., seems to be something inorganic and eternal: "It was a unity such as can hardly be formed except by lifeless matter."²⁷⁹ Moving beyond the text itself, Orson Welles' film version of *The Trial* presents an even starker vision of a reified system at work. The narrative is slightly changed. The lawyer and Priest, speaking to K. in the Cathedral, want him to plead insanity, to say that he is a victim of persecution by some state agency that remains veiled, invisible and impenetrable. This K. won't do, always maintaining he is but a member of society, not a victim. In fact, the conspiracy resides in the attempt to persuade the citizens that they are victims and that the world is absurd and meaningless. For his failure to plea he is killed. Slavoj Žižek describes this execution in terms that implicate the means utilized to extract oneself from the reified system. K. is killed because "he presents a threat to the power the moment he unmasks, 'sees through,' the fiction upon which the social link of the existing power structure is founded."²⁸⁰ If one is to remove themselves from the delusions of the reified system they must somehow get outside that system. Since the system's hold "upon the subject is entirely phantasmic, it is sufficient to

²⁷⁹ KAFKA, *supra* note 106, at 224.

²⁸⁰ Slavoj Žižek, *Ideology Between Fiction and Fantasy*, 16 CARDOZO L. REV. 1511, 1511 (1995).

break its spell via a gesture of distancing and the Court falls to dust.²⁸¹ Therein resides the political lesson of Welles' *The Trial*: if we are to overcome the 'effective' social power, we have first to break its phantasmic hold upon us."²⁸² Unfortunately for K., his attempt to do just this may be the cause of his death, an ominous foreboding of the ultimate manifestation of the reification of law.

The Priest provides some of the most notable and famous quotes of *The Trial*, while also recounting the parable to K. It is within the last interpretation of the parable that the form of reified law comes to the surface. K. had previously indicted the doorkeeper for ignorance at best and deceitfulness at worst in his relations with the man from the country. But in the final account the Priest explains why those interpretations are improper:

Many aver that the story confers no right on anyone to pass judgment on the doorkeeper. Whatever he may seem to us, he is yet a servant of the Law; that is, he belongs to the Law and as such is beyond human judgment. In that case one must not believe that the doorkeeper is subordinate to the man. Bound as he is by his service, even only at the door of the Law, he is incomparably greater than anyone at large in the world. The man is only seeking the Law, the doorkeeper is already attached to it. It is the Law that has placed him at his post; to doubt his dignity is to doubt the Law itself." "I don't agree with that point of view," said K., shaking his head, "for if one accepts it, one must accept as true everything the doorkeeper says. But you yourself have sufficiently proved how impossible that it is to do that." "No," said the priest, "it is not necessary to accept everything as true, one must only accept it as necessary."²⁸³

The identity of the Law with the doorkeeper forces the observation that the Law itself is not concerned with truth or an altruistic concept of justice. It is solely concerned with necessity and predictability. The entire apparatus builds towards a decision that had been determined even before the particular accused was made subject to it. This is the reason the usher can tell K. with all seriousness that no matter what he does, his case will not be harmed. The decision has been made, the outcome is a foregone conclusion even prior to the commencement of proceedings. Above all else this seems to be the delusion K. suffers from: the thought that the law should be about the individual, about truth and justice and the specific facts and circumstances of each case. If the Priest serves any purpose it is perhaps only to set K.'s mind at ease as the end closes around him, much like the last moments a condemned man spends with the chaplain before walking to the chair. Nothing more could have been done, no other person could have been appealed to. K. played his part to perfection, on the outside looking in.

²⁸¹ Vladimir Nabokov's *Invitation to a Beheading* provides a parallel to this point. At the moment of his execution Cincinnatus finally begins questioning the absurdity of his position. As he gets up from the bench the whole scene around him grows smaller and more transparent, until those that had persecuted him simply disappear. The system fell to dust as soon as he was able to distance himself from it, look back, and realize that its foundations were flawed, that it was no more than a hollow shell built over a void. See VLADIMIR NABOKOV, *INVITATION TO A BEHEADING* 220-23 (Dmitri Nabokov trans., Capricorn Books 4th ed. 1965) (1959).

²⁸² Žižek, *supra* note 276, at 1513.

²⁸³ KAFKA, *supra* note 106, at 220.

He could have offered nothing to the Court, and the Court certainly wanted nothing from him. As the Priest explains, the Court's only action vis-à-vis the individual is to receive them when they come and to dismiss them when they go. Although the receiving of the individual is a superficial and empty gesture, the dismissal is the ultimate instance of necessity within Kafka's work: the imposition of punishment.

3. *Necessity Manifest as Punishment*

The ultimate instance of the reification of law is accomplished through the imposition of punishment. For reification to be complete the illusion must be perfect; the system must appear rigid, formal, eternal, etc. Thus the reified law "wants to make us forget life before the law."²⁸⁴ It does this by commandeering the individual, by inscribing its rule on the flesh. As Jean-François Lyotard writes, the law is inscribed "on the body that does not belong to it. . . . This inscription must suppress the body as savagery outside the law."²⁸⁵ The law must bring the individual within its province and subordinate it, leaving nothing outside the law that could expose the hollowness of the interior. The punishment of the individual is not a function of a theological or ontological guilt, however, but rather the last machination of the machine of necessity the law has become. In relation to *The Trial*, K.'s

inner development and the machine's functioning finally come together in the last scene of the execution, when K. allows himself without resistance or even contradiction to be led off and killed. He is murdered for the sake of necessity and in the confusion of his guilt feelings he subordinates himself.²⁸⁶

The apparatus that finally seizes K. and enforces its judgment is nothing more than the appearance of necessity made concrete by the broader reification of the law. The subjective reification of law alters the individual's consciousness, blotting the memory of that which came before and entrenching the view that law, as necessity, is all there is, all that was, and an entity that must be respected and admired. Once this subjective reification is accomplished and people understand the vaunted position of necessity and automatism within society, the machine itself can get started, culminating in the objective reification of the system made complete by the necessitous imposition of punishment.

This punishment seeks the subordination of man to the functioning of the machine, and such "subordination is achieved when the question of guilt and innocence is silenced and replaced by the decision to play

²⁸⁴ Elisabeth Weber & Jean-François Lyotard, *Before the Law, After the Law*, in QUESTIONING JUDAISM: INTERVIEWS BY ELISABETH WEBER 104 (Rachel Bowlby trans., Stanford Univ. Press 2004).

²⁸⁵ *Id.* (quoting JEAN-FRANÇOIS LYOTARD, LECTURES D'ENFANCE 40 (Paris: Galilée 1991)). Lyotard's reading ultimately parallels the Judeo-Christian tradition of original guilt. "There are singularities in the way the law is present in Kafka and particularly in *The Penal Colony*. The extreme force and intensity with which the question of the body is posed, as well as the necessity for the law to come and, if one can put it this way, recover the body, reinscribe itself, by means of the needles of the machine, in the very body of the condemned man, who is condemned *a priori*. . . ." *Id.* at 105-06.

²⁸⁶ Arendt, *supra* note 95, at 4.

whatever role in the play of necessity arbitrariness dictates.²⁸⁷ The only guilt still possible in this conception of the system resides in the individual who refuses to play his part, who refuses to subordinate himself to necessity and the role dictated to him.²⁸⁸ Yet punishment will accrue to both the guilty and the innocent; only the characterization of the punishment will differ. The man who does not subordinate himself sins against the necessity of the system and is guilty in that regard. He is punished in much the same manner as Lyotard describes—the machine inscribes its rule on the body thereby bringing the individual back within the confines necessity has decreed.²⁸⁹ Punishment in this regard establishes (or reestablishes) the status quo and is commensurate to a high degree with Western conceptions of the nature of punishment; it is the law itself that enacts the punishment, and this punishment is concrete and physical. On the other hand is the individual who is “innocent,” who has not sinned against the mechanics of the system or rebelled against the part assigned to him. The punishment suffered by this class is pseudo-psychological, the self-subordination of the individual to the machine and the concomitant sacrifice of personal autonomy and freedom that must accompany such an act. Whereas the flesh of the sinner is rendered forfeit by guilt, it is the individual will of the innocent that is obliterated when the law exacts its punishment. The importance of punishment and the completion of the concept of necessity are so important within Kafka’s work that it appears virtually without fail when his writings touch upon the law.

In *The Trial* it is the physical and concrete punishment of the guilty that K. must suffer. The knife is plunged into his breast not because of a violation of some code or statute, but because of his consistent apostasy, his refusal to play the part of the accused. The facts that led to his conviction are the same as the ideas that race through his mind in the final moments. He still questions what could have been done, where the judge had been, who else may have been appealed to in order to aid his situation. The mere formulation of these questions is enough to damn the accused, for they represent the belief in something more than mechanics. These thoughts are

²⁸⁷ *Id.* at 3–4.

²⁸⁸ Arendt views this subordination as a particular characteristic of modernity and ultimately a symptom of a broader individual and societal decay:

Insofar as life is always inevitably and naturally terminated by death, its end can always be prophesied. The way of nature is always the way of decline, and a society which blindly turns itself over to the necessity of the laws inherent in it can only decline. Prophets are not necessarily prophets of doom simply because the catastrophe can always be predicted. The miracle is always salvation and not doom, because salvation and not doom depends on man’s freedom and his capacity to change the world and its natural course. The delusion, widespread in Kafka’s time as well as in ours, that man’s job is to subordinate himself to a process predetermined by whatever powers, can only accelerate the natural decline, because in such a delusion man and his freedom come to the aid of nature and its tendency to decline As a functionary of necessity, man becomes a highly superfluous functionary of the natural law of ephemerality, and since man is more than nature, he thereby degrades himself to an instrument of active destruction. For as surely as a house built by men according to human laws will decay as soon as man leaves it and abandons it to its fate, just as surely will the world built by men and functioning according to human laws once again become part of nature and be abandoned to catastrophic doom as soon as man decides to become himself once again a part of nature, a blind tool of natural laws, but one which works with utmost precision. *Id.* at 8–9.

²⁸⁹ Weber & Lyotard, *supra* note 285, at 105–06.

the belief in the irrational justice of Lukács, the individually and situationally specific rules that will ensure some transcendent, rather than necessitous, form of justice will be realized. K. is killed because he refuses to believe that justice is only the machine itself; the list of charges leveled against him would all come back to this point. Through his death he is finally and definitively brought within the system. The questions are silenced and despite his living refusals to subordinate himself, through death he will finally play the part the law has assigned him.

The man from the country suffers the punishment of the innocents. Fischer would rather characterize the man's waiting-onto-death as the result of an active prohibition by the law: "The guard *repels* the only one who as an individual requests entry, who is looking for his human rights as an individual. He *threatens* with his powers, with the hierarchy of power."²⁹⁰ Yet this is clearly not an accurate depiction of the situation. The man is not physically forced to sit at the gate, nor is he even in an objective sense required to take that seat. The adjournment is key; the qualified prohibition leaves the chosen course of action entirely up to the man. He willingly gives up his freedom and takes the seat, subordinating himself in the same manner that K. refused to do. His life will be determined not by any action that he consciously undertakes, but rather by the whim and fancy of necessity. His part is cast and he has chosen to play it to the bitter end. The fact of punishment resides in this decision to renounce individuality and to hand oneself over to the machine.

K. and the man from the country both suffer punishments that have their roots in the law. For refusing to subject himself to automatism within the machine, K.'s sentence is enacted on the body itself; the law executes him and thereby reestablishes the illusion of permanency and necessity inherent in reified law. The man from the country never reaches the law, yet still allows it to subordinate him to its dictates. Rather than storm the gate, the adjournment freezes him in his task and forces him to beg from the fleas in the doorkeeper's coat. Necessity requires him to sit dejected and alone at the door and in doing so he sacrifices the only aspects of himself that truly constitute humanity: individuality, freedom, and personal autonomy. The exact characteristic of the punishment suffered, however, is less important than the simple fact that necessity requires and sanctions this punishment.

V. CONCLUSION

If the substantive portions of this paper represent an attempt to move beyond Gros' desultory observation, then I have mixed feelings whether that has truly been accomplished. The Law of Kafka, portrayed through the lens of reification, is no longer entirely empty nor can it be characterized as totally arbitrary. Despite the appearance of law as an empty norm in the work of the postmodernists, reification can explain what hides beneath this façade. Through the confusion that arises between the social origins of the

²⁹⁰ Fischer, *supra* note 271, at 91.

legal system and its characterization as something eternal and fixed, injected with a “phantom objectivity,” a system arises imbued only with the notion of necessity and concerned only with the internal workings of its machinery. Justice as a concept does not disappear but is rather absorbed by the system’s need for a necessity of decision, predictability in result, an *a priori* concrete end to any possible set of facts. This mechanistic notion of “justice,” made complete by the objective reification of the system and subjective reification of the consciousnesses of those who come into contact with it, leads to the same fact of double alienation that existed in Marx’s and Lukács’ account of the damage wrought on the economic identity of the proletariat within capitalist society: the system becomes alienated from its object, while the object remains isolated from the system. The only point at which this alienation and isolation is shed is at the ultimate moment when the system inflicts its punishment, the final and definitive manifestation of reification within Kafka’s system of law. This explanation is a success to some degree, yet within it resides the same depressing depiction of law as formal necessity that originally caused Gros such frustration. This analysis has provided an explanation and account of Kafka’s law, but aside from this “success” the landscape is as stark and forbidding as it was when it began. Ultimately I have been unable to extricate myself from his texts and worlds, a task that may in fact be impossible, and so my thought like the lives of K. and the man from the country, remains necessarily trapped within the system Kafka has given birth to, bent upon an anxious solipsism.

For those wishing to ring this dark cloud with the proverbial silver lining, take heart in the logic underlying part of Posner’s critique of West. What is offered here is but one interpretation, a written exposition of one commentator’s despair. Perhaps there is a way out of the maze of meaning Kafka has created, one passed-over door that remains closed but behind which hides the key that will lead one to answers. In typical postmodern fashion, however, it is more likely that the room behind that door will be empty and the form of another door at the far side of the room will mock the individual so assured of achieving success in this tumultuous and dizzying environment. As West noted, there is no writer who so perfectly unites the internal and external aspects of human life and the mediation of choice that must temper the two than Kafka. This sometimes nightmarish depiction is inevitably transferred to those that seek to understand Kafka, forcing them in the same way to read these stories through the lens of their own mind and experience of reality. Every analysis of the sort attempted here cannot help but be subjective and specific in its reach. Thus, in the end, I may only maintain that the preceding is my experience of Kafka, the form in which his texts speak to me, and nothing more.