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**FRANZ KAFKA'S  
LITERATURE AND THE LAW**

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## ***ABSTRACT***

“Life is as infinitely great and profound as the immensity of the stars above us. One can only look at it through the narrow keyhole of one’s own personal experience. But through it one perceives more than one can see. So above all one must keep the keyhole clean.”

– *Franz Kafka*

Law in literature is now an established jurisprudential discipline, but little has been written on the phenomenon of the legal professional as writer. This paper explores the links between law and literature as distinctive but overlapping disciplines and focuses on one lawyer/writer in particular: Franz Kafka. Kafka’s professional life and his art are investigated to discover the connections that lie between them. The paper argues that law – however unintentionally – impacted upon the shape and nature of Kafka’s literature. A selection of Kafka’s literary works are examined with a focus upon substance, structure and style. Much of Kafka’s literature uses the law as a backdrop or plot device. He explores the intersections between law, justice, power and authority, revealing possible disjunctures among them. His literary style also reveals legal influences, with its logical arrangement and store of crisp literal description. Kafka wrote from what he knew. The law inevitably colours his literature.

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## I INTRODUCTION

Law and literature have an important feature in common: they both require the medium of language to exist. This paper explores the link between them with reference to one writer in particular, Franz Kafka. Kafka was legally trained, but his passion was writing. While countless studies have been done on Kafka's literature, little has been written on the connection between Kafka the legal professional and Kafka the writer. This paper explores the link between his professional life and his art, and argues that while law was not a consciously enjoyed activity, it impacted upon the shape and nature of Kafka's literature.

The first part of the paper discusses in a broad sense the link between law and literature, with a particular focus on law *in* literature<sup>1</sup> and the relationship between legal and literary form. It will also address the trend of lawyers as writers of literature and the similarities between the disciplines. The second part describes Kafka's biography. While not fleshed out in this paper as fully as can be found elsewhere, it is important to acknowledge that Kafka's experiences of the everyday world influenced his literature. Brief mention of his biography is vital to isolate those parts of his literature that appear to be primarily influenced by law rather than any other social phenomenon. Part three analyses key literary works in connection with Kafka's experience of the law. Kafka wrote using differing literary forms, and an example of each is included in this paper. They are the novel *The Trial*,<sup>2</sup> short story "In the Penal Colony"<sup>3</sup> and parables "Before the Law"<sup>4</sup> and "The Problem of our Laws".<sup>5</sup> Kafka's writing is examined in

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<sup>1</sup> This is opposed to law *as* literature, which is also gaining popularity as a jurisprudential subject. See Gary Minda "Law and Literature at Century's End" (1997) 9 *Cardozo Stud L & Lit* 245.

<sup>2</sup> Franz Kafka *The Trial* Richard Stokes (trans) (Hesperus Press Limited, London, 2005) [Kafka *The Trial*].

<sup>3</sup> Franz Kafka "In the Penal Colony" Willa and Edwin Muir (trans) in *The Penguin Complete Short Stories of Franz Kafka* Nahun N Glatzer (ed) (Penguin Books Ltd, New York, 1983) 140-167 [Kafka "In the Penal Colony"].

<sup>4</sup> While written as part of *The Trial*, this has also been published separately as a work in its own right.

<sup>5</sup> Franz Kafka "The Problem of our Laws" in Glatzer, above n 3, 437-438 [Kafka "The Problem of our Laws"].

terms of in substance, structure and style, with the conclusion that his legal training and career permeated and influenced his literature.

## ***II THE LINKS BETWEEN LAW AND LITERATURE***

### ***A The Language of Literature and Law***

Kafka considered the term ‘literature’ to encompass both worthy and offensive writing: “[t]he term “literature”, when uttered in reproach, is a conversational catch-all for so much, that-there was probably some such intention in its usage from the very first-it has gradually become a catch-all for ideas as well; the term deprives one of right perspective and causes the reproach to fall short and wide of its mark.”<sup>6</sup> For him, quality penmanship was something of a more defined nature; perhaps he would have called it ‘high literature.’ It is unclear whether Kafka considered his own writing to fall within this categorisation; it has however his work has survived the literary marketplace<sup>7</sup> to become notable fiction, and be defined as classic works.

The literature of law has been criticised as being impervious to the layperson and indeed to the lawyer. When draftspersons were paid by the line, conflated and confusing prose promoted their economic interests.<sup>8</sup> This “jungle of verbiage”<sup>9</sup> has been seen by some as a way of preserving the status of the lawyer and ensuring the continuance of the profession’s existence.<sup>10</sup> This is especially so in common law jurisdictions, where the rule of *stare decisis* means that traditions can be carried through time long after they have ceased to be

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<sup>6</sup> Entry 3 August 1917, Franz Kafka *Diaries 1914-1923* Max Brod (ed) (Schocken, New York, 1949) 174 [Kafka *Diaries*].

<sup>7</sup> George Orwell *Four Collected Essays, Journalism and Letters of George Orwell*, S Orwell and I Angus (eds) (1968) 287, cited in Richard Posner “Law and Literature: A Relation Reargued” (1986) 72 Va L Rev 1351, 1355 [Posner “Law and Literature: A Relation Reargued”].

<sup>8</sup> Steven Stark “Why Lawyers Can’t Write” (1984) 97 Harv L Rev 1389.

<sup>9</sup> *Meek v Clarke* (7 July 1982) EWCA Civ 2, per Slade LJ, also cited in Peter Butt “Plain Language and Conveyancing” (1993) Conv & Prop Law 256.

<sup>10</sup> Stark, above n 8, 1389.

relevant. In continental legal systems, this verbosity is tempered by legal grammar; concepts are tightly reined in, able to be analysed abstractly of specific legal rules, “with all the advantages of algebra over arithmetic”.<sup>11</sup> While the civil law was seen by some a solution to the difficulties in the common law,<sup>12</sup> this method of reasoning has been said to be “unadulterated conceptualism,”<sup>13</sup> and may be as mystifying to the layperson as that of the common law.

While this criticism has been often made, the law strives for clarity and precision, which is probably why it has ended up in such an intricately confusing condition. Lawyers aim for lucidity and the elimination of ambiguity in legal argument, drafting and interpretation; the modern plain English movement is testament to this.<sup>14</sup> This is one site where law and literature diverge; for literature is often purposefully ambiguous, indefinite and figurative. It suggests, rather than pinpoints, meaning, and there can be many layers of sense.

The intersection between law and literature is therefore imprecise but present; literature has been described as law’s “sibling and its rival.”<sup>15</sup> Both disciplines use language as their medium, but this is not unique to these alone. Perhaps the crux is that both are “centrally concerned with the meaning of texts.”<sup>16</sup> The law is not limited to dry fact and analysis; it contains narrative and norms. “Law tells stories, just as stories are told about the law.”<sup>17</sup> Analysis of literature and the law are very similar skills; extracting meaning from words is the same whether it is contained in a poem or a constitution.

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<sup>11</sup> Mirjan Damaska “A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment” (1968) 116 U Pa L Rev 1366.

<sup>12</sup> For instance, John Austin was a proponent of the “moral science”: see M H Hoeflich “John Austin and Joseph Story: Two Nineteenth Century Perspectives On the Utility of the Civil Law for the Common Lawyer” (1985) 29 Am J Legal Hist 36, 50.

<sup>13</sup> Damaska, above n 11, 1369.

<sup>14</sup> See Butt, above n 9, 256-269.

<sup>15</sup> Peter Goodrich “Law by Other Means” (1998) 10 Cardozo Stud L & Lit 111, 113.

<sup>16</sup> Richard Posner *Law and Literature* (Cambridge, Harvard University Press, 1998) 8 [Posner *Law and Literature*].

<sup>17</sup> Goodrich, above n 15, 114.

## **B      *Law in Literature***

The portrayal of law in literature is valuable for both the lawyer and the layperson. For the former, it throws light on broader legal issues and deals with them in an innocuous but influential forum; for the latter, it may be the most accessible form of education about the law. Literature can present an image of the law that is beyond what it can create itself; “a justice that exists like equity beyond the letter of legal rule.”<sup>18</sup> However Richard Posner is right when he says “If I want to know about the system of chancery in nineteenth-century England I do not go to *Bleak House*.”<sup>19</sup> There is a certain necessary distance that literature must stay from law; this is so because while law must have authority to do its work, literature need not. Its influence comes from the ability of the reader to reject the information it contains, or allow it to persuade. Literature has oblique power.

Law as a social practice is linked with power and politics, even though legal texts and practitioners may emphasise its autonomy and independence. Literature is one vehicle to challenge this depiction. The law profession can be a “profoundly isolated... discretely defensive world,”<sup>20</sup> immune to more formal efforts such as critical legal jurisprudence to confront its limitations or affect change. Depictions of law in literature can challenge the establishment in an informal way, with added reach into the layperson’s consciousness.

## **C      *The Lawyer as a Writer***

There have been many great writers who had legal training or worked in the legal profession.<sup>21</sup> The training required to gain a law degree focuses not only on the content of law, but how to analyse legal material and interpret fact

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<sup>18</sup> Goodrich, above n 15, 114.

<sup>19</sup> Posner “Law and Literature: A Relation Reargued”, above n 7, 1356.

<sup>20</sup> Goodrich, above n 15, 111.

<sup>21</sup> Historic figures include Johann Wolfgang von Goethe, Charles Dickens, Mark Twain and Henry Fielding.

situations from a legal standpoint. The composition of legal writing can alter the meaning of what is written, and must be as precise as its substance. Lawyers identify good quality legal writing by its “organisation, development and logical flow,”<sup>22</sup> with information presented in a coherent manner. To a lawyer, the choice of words and any ambiguity surrounding them is highly perceptible. The skills learned in the study of law are therefore very useful in application to other forms of literature.

Although it is beyond the scope of this paper to uncover what possible psychological links drive lawyers to write creatively, it is significant that many of the authors have legal themes running through their literature. While this does not necessarily demonstrate that law is their singular passion, law is the familiar backdrop to their professional lives so it is not surprising that it features so often. It may be that legal education is a “powerful emotional experience”<sup>23</sup> that affects the writers, or that law as a subset of linguistics gives its scholars the tools which can be used to create great literature. Posner has a more sceptical view: for great literature to survive, he considers that it use a theme that changes little over time, and law is one such institution.<sup>24</sup> This familiarity ensures its survival on the literary marketplace across generations, while more temporal writing falls by the wayside. There is certainly merit in this argument, for basic concepts of law remain fairly constant through social and political upheaval, although the law’s substance may change. So too however does the essence of all social institutions, so this is an incomplete answer for the presence of a connection.

It has been said that legal study involves not only an increased knowledge of the law, but the ability to “think like a lawyer”.<sup>25</sup> A search of the Google

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<sup>22</sup> John O White and Norman Brand “Composition for the Pre-Professional: Focus on Legal Writing” (1976) 27 *College Composition and Communication* 41, 42.

<sup>23</sup> Michael H Hoffheimer “Law and Legal Education as A Hotbed for the Novel” (1998) 44 *Wayne L Rev* 1.

<sup>24</sup> Posner “Law and Literature: A Relation Reargued”, above n 7, 1356.

<sup>25</sup> See for example Robert Granfield “Legal Education as Corporate Ideology: Student Adjustment to the Law School Experience” (1986) *Sociological Forum* 514, 515; Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge, 1977) and James B White *The Legal Imagination* (Little, Brown and Company, Boston, 1973).

internet search engine using this phrase results in approximately 29,000 hits.<sup>26</sup> Substituting the word ‘doctor’ produces around 9,530 hits, and ‘engineer’ generates approximately 827. The huge number of sites demonstrates the widespread cultural attitude that studying law influences the method as well as material of thought. The impact upon the thought processes of someone trained in the law must be significant to be charged definitively of ‘thinking like a lawyer’. When such an effect occurs, this impacts upon the person’s worldview or *weltanschauung*, which is:<sup>27</sup>

Our representation of the world determines to a large degree what our experience of the world will be, how we will perceive the world, what choices we will see available to us as we live in the world.

When a person learns to think in a manner common to other lawyers, this may alter not only the way legal problems are viewed but the way the world is represented in a wider sense. The impact upon representation will in turn affect perceptions, experiences and the choices seen as most viable. Therefore, the study and practice of law may influence other areas of the practitioner’s life, which could include non-legal writing.

The danger in the inquiry into the links between an author’s legal livelihood and their literature is the tendency for overstatement of connections. There is a natural inclination to see a correlation between similar things; however, the distant reader cannot *know* that the law consciously or otherwise influences the literature of the novelist. We can only draw comparisons and speculate. It may not ever be proven beyond reasonable doubt that law irrevocably shapes literature, but it may well be highly probable.

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<sup>26</sup> Search performed from search engine <www.google.co.nz> (12 September 2007).

<sup>27</sup> R Bandler and J Grinder *The Structure of Magic* (Science and Behavior Books, California, 1975) 7 cited in James R Elkins “The Legal Persona: An Essay on the Professional Mask” (1978) 64 Va L Rev 735, 738.

## **D      *Implications of Translation***

It is indisputable that different words and grammatical devices create diverse types of prose. What is potentially problematic for the purposes of this paper is the degree that translation changes the original sense of the author's work. There is the hazard that a translation will be "mechanical and lifeless" and fail to reproduce the "nuances of thought, and something of the style and tone and spirit of the original as well."<sup>28</sup> There are turns of phrase in English that cannot be replicated exactly in other languages and vice versa. Words bear different connotations simultaneously which can colour their use; so-called synonyms can each convey slightly different meanings. For instance, the word 'scent' can mean smell (general), aroma (connotations of food), perfume (agreeable, usually floral smell), odour (distasteful);<sup>29</sup> but any of these senses could be used without intention by a translator. If one is to analyse the style of an author's works as translated, it may not therefore be the style of the author but of the translator which is examinable.

Kafka wrote in German, and the unfinished or incomplete nature of many of his stories has resulted in the publication of several different versions. In 1975, 1,778 variations of *The Trial* existed between the first edition and later printings.<sup>30</sup> Since then the novel has been re-edited and translated into many languages. There is the potential for a disjunction between what Kafka wrote and what modern readers can access. Translations remain true to the literal meaning of a text; what changes are the layers of meaning derived from sense. An example is the excerpt from "In the Penal Colony" where two translations provide the same literal meaning for a passage, but have very different impacts:

At this point, almost against his will, he looked at the face of the corpse. It was as it had been in his life. He could discover no sign of the promised

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<sup>28</sup> Thomas R Palfrey "Literary Translation" (1933) 17 *Modern Language Journal* 410, 411.

<sup>29</sup> Microsoft Word English (UK) Thesaurus © 2007.

<sup>30</sup> Eric Marson *Kafka's Trial The Case Against Josef K* (University of Queensland Press, Queensland, 1975), 8.

transfiguration. What all the others had found in the machine, the Officer had not. His lips were pressed firmly together, his eyes were open and looked as they had when he was alive, his gaze was calm and convinced. The tip of a large iron needle had gone through his forehead.<sup>31</sup>

And here, almost against, his will, he had to look at the face of the corpse. It was as it had been in life; no sign was visible of the promised redemption; what the others had found in the machine the officer had not found; the lips were firmly pressed together, the eyes were open, with the same expression as in life. The look was calm and convinced, through the forehead went the point of the great iron spike.<sup>32</sup>

While both translations explain the events of the execution, the latter is written in more natural English prose than the former. The last sentence is especially telling; while in the first extract the structure of the sentence is plain and informative, the second packs a weighty punch through subtle grammatical changes. The tense in the first sentence is past perfect; the second is simple past, which as used here is unusual. The subject ‘spike’ is defined at the last moment, leaving a powerful impact upon the reader. It is also a definite subject, described with rich visual imagery, and sounds much more vicious than the former event.

So, which is to be the authoritative text from which to analyse Kafka’s style? The translations that have been used in this paper are high quality: the translators of the short stories and parables, Edwin and Willa Muir, were the first to impart Kafka’s literature to the English-speaking public. The process involved, Willa Muir recounted, was such that they “tore a book in two, did half each, then I went over Edwin’s translation and he went over mine.”<sup>33</sup> They can be assumed to closely reproduce Kafka’s content and structure, but there may be small stylistic variations that impact upon the shades of meaning available to an

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<sup>31</sup> Franz Kafka “In the Penal Colony” (1919) Ian Johnston (trans) available from <[www.mala.bc.ca/~Johnstoi/kafka/inthepenacolony.htm](http://www.mala.bc.ca/~Johnstoi/kafka/inthepenacolony.htm)> (last accessed 30 July 2007).

<sup>32</sup> Kafka “In the Penal Colony”, above n 3, 166.

<sup>33</sup> Elgin W Mellown “The Development of a Criticism: Edwin Muir and Franz Kafka” (1964) *Comparative Literature* 310, 320.

English-speaking reader. Analysis of Kafka's works, then, must be performed with the translators in mind.

## **II KAFKA'S BIOGRAPHY**

To understand Kafka's literary works, one must peer a little into his personal life, for one's perceptions are shaped by "the narrow keyhole of one's own personal experience."<sup>34</sup> Franz Kafka was born in 1883 in Prague, and continued to have his permanent home in that city for most of his life. His father was a successful importer of fine goods for the rising German middle class<sup>35</sup> and his mother was the "moral pillar"<sup>36</sup> of the family. Kafka was the eldest of six children; he had three sisters and two brothers who both died in infancy. He was diagnosed with tuberculosis in 1917 and finally moved to a sanatorium based in Vienna in 1924. He died of the disease later that year in the sanatorium, shortly after his fortieth birthday.

Kafka was Jewish and could speak Czech and German, although he could write only in the latter,<sup>37</sup> which was the official language of the Austro-Hungarian Empire and that spoken by the upper and middle classes.<sup>38</sup> He had limited contact with the Jewish community, attending a synagogue only rarely.<sup>39</sup> At that time, nationalist tension was running high; Czechs and Germans were in

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<sup>34</sup> Quote of Franz Kafka, from Gustav Janouch *Conversations with Kafka* 35 Goronwy Rees (trans) 2 ed (New Directions Books, 1971) (1968), 191 cited in George Dargo "Reclaiming Franz Kafka, Doctor of Jurisprudence" (2007) Spring Issue Brandeis L J 495, 525.

<sup>35</sup> Allan Blunden "A Chronology of Kafka's Life" in J P Stern (ed) *The World of Franz Kafka* (Holt, Rinehart and Winston, New York, 1980) 11 [Stern *The World of Franz Kafka*].

<sup>36</sup> C S Wyatt "Franz Kafka" (2005) < [www.tameri.com/csw/exist/kafka.shtml](http://www.tameri.com/csw/exist/kafka.shtml) > (last accessed 2 July 2007).

<sup>37</sup> Louis Begley "Kafka: The Axe for the Frozen Sea Inside Us" (1997) 141 *Proceedings of the American Philosophical Society* 253, 257.

<sup>38</sup> John W Mason *The Dissolution of the Austro-Hungarian Empire 1867-1918* (Longman Group Limited, London, 1985) 11.

<sup>39</sup> In a letter addressed to his father, Kafka wrote "As a young man, I could not understand how, with the insignificant scrap of Judaism you yourself possessed... you could reproach me for not making an effort to cling to a similar insignificant scrap. Four days a year you went to the synagogue, where you were, to say the least, closer to the indifferent than to those who took it seriously..." Franz Kafka *Letter to His Father* Ernst Kaiser and Eithne Wilkins (trans) (Schocken Books, New York, 1953) 76 [Kafka *Letter to His Father*].

conflict and placeless Jews were sandwiched in between, often choosing one or other ethnicity to identify with.<sup>40</sup> Kafka remarked upon this once after observing a patriotic parade “originated by Jewish businessmen who are German one day, Czech the next; admit this to themselves, it is true, but were never permitted to shout it out as loudly as they do now.”<sup>41</sup> The family’s distance from Judaism combined with their use of the German written language was probably an attempt by Kafka’s father to assimilate his family with the German middle class. Such assimilation into German culture was common in the Empire, particularly if the family was wealthy, as it aided access to opportunities in German commercial life.<sup>42</sup>

Kafka was an avid keeper of diaries which revealed his innermost thoughts and emotions, and the many volumes have now been published. Many entries contain beginnings or extra material to stories that were not included in their final form, observations of his friends and strangers he had seen, and musings on his life. Most entries are fragmentary, combining the profound with the mundane. An example is the entry of 2 August 1914: “Germany has declared war on Russia. – Swimming in the afternoon.”<sup>43</sup> He described his childhood as “indescribably lonely”<sup>44</sup> due to the large gap between himself and the birth of his sisters, and the lack of attention from his busy parents. He was educated by governesses and in “soulless schools,” referring to this sadness as “earth-weight”.<sup>45</sup>

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<sup>40</sup> Barbara Jelavich *Modern Austria Empire and Republic, 1815-1986* (Cambridge University Press, Cambridge, 1987) 88.

<sup>41</sup> Entry 6 August 1914, Kafka *Diaries*, above n 6, 78. Kafka criticised his father for in such behaviour, observing that he was “running down the Czechs, and then the Germans, and then the Jews” in a display of hypocrisy. Kafka *Letter to His Father*, above n 39, 21.

<sup>42</sup> Mason, above n 38, 21.

<sup>43</sup> Entry 2 August 1914, Kafka *Diaries*, above n 6, 75.

<sup>44</sup> Max Brod *Franz Kafka: A Biography* (1937) G H Roberts and R Winston (trans) 2 ed (Schocken Books Inc, New York, 1963) 9.

<sup>45</sup> *Ibid.*

Kafka was overshadowed by his “powerful and extraordinarily imposing father”<sup>46</sup> who he considered to be a criticising, self-assured, dominant, articulate man. Kafka wrote in *Letter to His Father*,<sup>47</sup> a cathartic essay meant for his father to read but never delivered to him, that “[f]rom your armchair you ruled the world... For me you developed the bewildering effect that all tyrants have whose might is not founded on reason, but on their own person.”<sup>48</sup> The fact that Kafka felt he never had his father’s approval meant a life of “fear, weakness and self-contempt.”<sup>49</sup> Kafka had a deeply negative view of himself.<sup>50</sup>

Kafka was also rather eccentric. He became a vegetarian early in life, was addicted to fad diets<sup>51</sup> and was susceptible to hypochondria. He seems to have had a delicate disposition, and was disgusted with bodily functions and sex.<sup>52</sup> While he had a string of love affairs and was twice engaged to Felice Bauer, he never married, and broke off their last engagement when he learned of his serious illness. Perpetual bachelorhood represented to him his failure to fully become a man.<sup>53</sup> He remarked in *Letter to His Father* that the reason he did not marry was that “what is necessary is just what I recognise you [his father] have... strength and contempt for others, health and a certain excess, eloquence and stand-offishness, self-confidence and dissatisfaction with everybody else, superiority to the world and people in it...Of these qualities I had comparatively nothing.”<sup>54</sup>

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<sup>46</sup> Ibid, 5.

<sup>47</sup> Kafka *Letter to His Father*, above n 39. This work has been described as a “ferocious document, like a lawyer’s pleading.” See Begley, above n 37, 258.

<sup>48</sup> Kafka *Letter to His Father*, above n 39, 21.

<sup>49</sup> Ibid, 113.

<sup>50</sup> “There was I, skinny, weakly, slight, you strong, tall, broad.” Ibid, 19.

<sup>51</sup> Begley, above n 37, 259.

<sup>52</sup> “Kafka wrote that coition was the punishment for marriage.” Begley, above n 37, 259. See also the diary entry 18 October 1916: “Sometimes this bond of blood too is the target of my hatred; the sight of the double bed at home, the used sheets, the nightshirts carefully laid out, can exasperate me to the point of nausea, can turn me inside out...” Kafka *Diaries*, above n 6, 167.

<sup>53</sup> See diary entry for 9 March 1914: “my job is only a part of the general intolerableness... The security, the lifelong provision, the good salary, the fact that it doesn’t demand all my strength – after all, so long as I am a bachelor all these things mean nothing to me and are transformed into torments.” Kafka *Diaries*, above n 6, 26.

<sup>54</sup> Kafka *Letter to His Father*, above n 39, 119.

Kafka's feelings of self-loathing and failure<sup>55</sup> did not appear to impact upon his ability to sustain friendships. Max Brod, a lifelong friend and later his biographer, met Kafka in their first year of study at the Imperial and Royal Karl-Ferdinand German University of Prague, and his documentation of Kafka's life contributes enormously to contemporary knowledge of the writer. He described Kafka as someone who "talked very little... but when he did say something people had to listen immediately, because it was always something full of meat..."<sup>56</sup> Kafka had an active social life,<sup>57</sup> meeting up with Brod and a select few others almost every evening, often reading his writing aloud to an audience that would laugh "quite immoderately"<sup>58</sup> at his ironic humour and observations. Brod's impression of Kafka was that "for him nothing was ordinary, always and everywhere he expressed himself with his own peculiar gift of pregnant observation and simile. And this he did in a completely unforced manner without preciosity, with the most charming naturalness."<sup>59</sup>

### ***III KAFKA'S LITERATURE AS SHAPED BY LAW***

#### ***A Substance***

Taken as a whole, Kafka's writing has an air of portent and melancholy. "In all literature, the narratives of Kafka are among the blackest, among those most riveted to an absolute disaster."<sup>60</sup> Much of Kafka's literature uses the law as a backdrop or plot device. While much has been written on the meanings behind

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<sup>55</sup> For instance, see his diary entry for 6 August 1914: "I am...an empty vessel, still intact yet already in the dust among the broken fragments, or already in fragments yet still ranged among those that are intact. Full of lies, hate and envy. Full of incompetence, stupidity, thickheadedness. Full of laziness, weakness and helplessness. Thirty-one years old." Kafka *Diaries*, above n 6, 76-77.

<sup>56</sup> Brod, above n 44, 40.

<sup>57</sup> Zadie Smith (ed) "Biographical Note" in Kafka *The Trial*, above n 2, 211.

<sup>58</sup> Brod, above n 44, 40.

<sup>59</sup> *Ibid*, 39.

<sup>60</sup> Maurice Blanchot "Reading Kafka" James Rolleston (ed) *Twentieth Century Interpretations of The Trial* (Prentice-Hall Inc, New Jersey, 1976) 19.

Kafka's literature, most commentators have "refused to take Kafka at his word"<sup>61</sup> and stressed that the law is only relevant metaphorically.<sup>62</sup> While there are certainly symbolic and abstract meanings throughout Kafka's fiction, it does not necessarily follow that the law is irrelevant. It is probable that he based his writing upon subject matter that he was familiar with.

In the most basic of ways, *The Trial* is about law. The main plot device is a legal trial. The plot is mainly straightforward, but its incongruous nature has captured the imagination of readers. The opening line is "[s]omeone must have been slandering Josef K., for one morning, without having done anything wrong, he was arrested."<sup>63</sup> The reader has the limited perspective of the protagonist K., a respectable man employed by a bank, and so knows only as much as what K. can uncover as the story progresses. K. attempts to find out why he has been arrested and by which authority. This is never revealed; however K. becomes increasingly drawn into the world of the court<sup>64</sup> and its strange apparatus. The use of the law as a plot device is not surprising considering Kafka's daily contact with the discipline.

"Kafka used the law as a template for his fiction. The law is what he knew."<sup>65</sup> Kafka referred to "the narrow keyhole of one's own personal experience"<sup>66</sup> as providing a view of the world, and it was the law-shaped keyhole which defined his writing. Kafka was exposed to many facets of the law by being a law student, an employee at a commercial firm, the courts, and at the Worker's Accident Insurance Institute for the Kingdom of Bohemia. Each of

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<sup>61</sup> Dargo, above n 34, 523.

<sup>62</sup> For example, see Cyrena Norman Pondrom "Kafka and Phenomenology: Josef K.'s Search for Information" (1967) 8 *Wisconsin Studies in Contemporary Literature* 78, where it is argued that K. searches for knowledge and an understanding of the world, which is limited by inherently incomplete human perception. Similarly, Richard Posner's view is that *The Trial's* "heart seems to lie elsewhere than with law." Posner *Law and Literature*, above n 16, 119.

<sup>63</sup> Kafka *The Trial*, above n 2, 3.

<sup>64</sup> The court in *The Trial* is referred to in the singular as a proper noun, but does not have a capital letter in the translation referred to. This paper will use lower case for the court for reasons of consistency.

<sup>65</sup> Dargo, above n 34, 522.

<sup>66</sup> Quote of Franz Kafka, Janouch, above n 34, 525.

these experiences shaped Kafka's knowledge and familiarity with the law and their influence can be seen through his writing.

### *1 A reflection of Kafka's legal system*

During Kafka's lifetime Prague was part of the decadent Austro-Hungarian Empire, which had been created in 1867.<sup>67</sup> This was a civil jurisdiction, based heavily upon Germanic codification in a series of Austrian codes.<sup>68</sup> Austria-Hungary was formed as a dual monarchy between the Habsburg monarchy of Austria and the Hungarians. Austria-Hungary had a vast bureaucracy.<sup>69</sup> There was a strong middle class that depended upon the heaving state machinery for employment; it was "infinitely complicated, slow, and inexorable in its functioning."<sup>70</sup> Kafka lived during the rise and assassination of successor to the throne, Francis Ferdinand d'Este. This event led to the collapse of the Empire after World War One and the subsequent creation of Czechoslovakia.<sup>71</sup>

There was a great deal of ethnic tension in Austria-Hungary partially caused by the refusal of the Czechs to acknowledge the Empire's legitimacy and their resentment of the high concentration of Germans in important positions.<sup>72</sup> While German-Czech tension was the prime conflict, major controversies also involved Poles, Ruthenians and South Slavs.<sup>73</sup> The middle class and civil servantry were predominantly German even though they made up only 35 percent

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<sup>67</sup> Alan Sked *The Rise and Fall of the Habsburg Empire 1815-1918* (Longman Group Limited, England, 1989) 187.

<sup>68</sup> The Civil Code of Austria was called the Allgemeines Bürgerliches Gesetzbuch (ABGB) and was enacted in 1811. It remains a foundational legal instrument in Austria.

<sup>69</sup> Martha S Robinson "The Law of the State in Kafka's *The Trial*" (1982) 6 ALSA Forum 127, 129.

<sup>70</sup> Begley, above n 37, 258.

<sup>71</sup> Sked, above n 67, 255.

<sup>72</sup> Douglas E Litowitz "Franz Kafka's Outsider Jurisprudence" (2002) 27 Law & Soc Inquiry 103, 112.

<sup>73</sup> Jelavich, above n 40, 98.

of the population.<sup>74</sup> The military, press, Catholic hierarchy and cultural life were also almost exclusively German, resulting in a power struggle between Germans and other ethnic groups in the Empire, especially the Czechs.<sup>75</sup> The ethnic tension has been described as dwarfing all other problems of the Empire, and for this reason it was “foredoomed to failure”.<sup>76</sup>

Bohemia, where Prague was situated, was particularly vulnerable to these ethnic tensions, for it was the most important industrial area of the Empire with a rising Czech middle class.<sup>77</sup> The ethnic makeup of Prague was overwhelmingly Czech. Germans made up only six percent of the city’s population by 1910.<sup>78</sup> Around the turn of the twentieth century, Czech politico-cultural nationalism was strong in this area. Ideals of secularism, democracy and laissez-faire capitalism were criticized by the Czechs, and their protest included strains of anti-Semitism.<sup>79</sup> Jewish people were perceived to be primarily involved in perpetuating such processes, and the Czech public often fused the terms ‘Jew’ and ‘capitalist’<sup>80</sup>. This merged class resistance into ethnic struggles.

Criminal procedure in the Austro-Hungarian Empire was inquisitorial. There were two stages to a criminal proceeding: a preliminary examination and the trial proper.<sup>81</sup> The proceedings were typically commenced by an accusation, of which the accused person may have been unaware. The Magistrate had wide powers to investigate and the accused could remain ignorant of the inquiries as they would remain private until a possible state of guilt was ascertained.<sup>82</sup> Pre-trial proceedings were sometimes also used to gain an admission of guilt from the

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<sup>74</sup> Mason, above n 38, 10.

<sup>75</sup> Ibid, 12.

<sup>76</sup> Ibid, 9.

<sup>77</sup> Jelavich, above n 40, 79.

<sup>78</sup> Mason, above n 38, 13.

<sup>79</sup> Jelavich, above n 40, 89.

<sup>80</sup> Mason, above n 38, 21.

<sup>81</sup> Robinson, above n 69, 129.

<sup>82</sup> Ibid, 130.

defendant.<sup>83</sup> It was therefore conceivable that by the trial stage, guilt of the accused was almost inevitable.

The Empire had very similar processes as the protagonist experienced in *The Trial*.<sup>84</sup> Everything about the court in the novel is secret or unknown, including the identity of the senior judges. Petitions, though written, are not read by the court; records and legal documents cannot be accessed and defendants are not required to defend themselves or attend hearings. Verdicts are not published; the only knowledge of cases passes down through legend. There is no way to relinquish the hold of the court once it is upon a defendant; K. is advised that “all you can do is confess.”<sup>85</sup> This is difficult for K. as he does not know of the offence that he is considered to have committed. The most important assets of lawyers are their personal contacts within the court, in particular examining magistrates. Such officials volunteer information that would otherwise be undiscoverable. Perhaps the most perplexing feature of the court is that once it is involved with a defendant it “can never be persuaded to change its opinion”,<sup>86</sup> and yet there are countless lawyers and defendants involved in pursuing their case.

The lack of tangible information and the random exercise of power closely resembles the actions of the Austrian secret police in the mid 1800s, before the alliance with Hungary. Informants were often hired to report to police on activities of citizens which led to seemingly indiscriminate arrests.<sup>87</sup> Several other countries at this time also used these practices to gain information, including France, Germany and the United Kingdom, but in a less widespread manner.<sup>88</sup> Kafka may have drawn upon Austria’s history of surveillance and secrecy in the treatment of K. in *The Trial*. This is evident in the first line of the novel: “someone must have been slandering Joseph K., for one morning, without

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<sup>83</sup> Dargo, above n 34, 505.

<sup>84</sup> Marson, above n 30, 12.

<sup>85</sup> Kafka *The Trial*, above n 2, 95.

<sup>86</sup> *Ibid*, 135.

<sup>87</sup> Sked, above n 67, 47.

<sup>88</sup> *Ibid*, 45.

warning, he was arrested.”<sup>89</sup> The ability for an arrest to be made based on the allegations of a person without supporting evidence would not be possible in modern continental legal systems, but it could be in the regime that existed in the time of Kafka’s parents.

The information that the court holds about K. that apparently confirms his guilt is never revealed to him, and his attempts to learn this by examining of the content of the books of the Magistrate are frustrated when he finds that they contain only obscene pictures.<sup>90</sup> This is the closest in the novel that the protagonist comes to physical contact with information about his case, and then it is thoroughly unhelpful. K. suspects that information is gained by monetary incentives, and states to the woman in the scene that “you could do me the favour of telling the Examining Magistrate, or anyone else who likes to spread important information, that I’ll never be persuaded to pay a bribe...”<sup>91</sup> The view that the secret police acted as “an extremely effective shroud of intimidation”<sup>92</sup> is mirrored by K.’s lack of means by which to oppose the action of the court.

The mystery of the court is amplified by the locations it resides in the novel. The court is always referred to in the singular, even though it is located in a myriad of unexpected places. The first encounter K. has with the court is in an attic, past a warren of stairs and alleys.<sup>93</sup> Later in the novel, the court is revealed to reside in many other places too; the punishment of disobedient warders occurs in a small lumber room at K’s bank offices, and when K. visits Titorelli the painter, court offices are directly next door. The painter remarks “didn’t you know there were court offices here? They’re practically in all the attics, why shouldn’t they be here too?”<sup>94</sup> The court has claim to an unexpectedly wide set of resources, including ownership of the painter’s premises and having control of a

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<sup>89</sup> Kafka *The Trial*, above n 2, 3.

<sup>90</sup> *Ibid*, 48.

<sup>91</sup> *Ibid*, 52.

<sup>92</sup> *Sked*, above n 67, 45.

<sup>93</sup> Kafka *The Trial*, above n 2, 35.

<sup>94</sup> *Ibid*, 149.

group of girls that pester K. on his way to see Titorelli. The painter explains matter of factly “everything, you see, belongs to the court.”<sup>95</sup> The court is a single entity, but has multiple locations and strange resources at its disposal. This is a similar notion to ‘the law’ which is referred to in the singular but comprises many personnel and distinct parts. The singular noun is used to denote the unity of the system; the court in *The Trial* is a similar creature to the abstract ‘law’ of Kafka’s reality.

An important feature of the legal system was that unless flight or public safety was at issue, the accused remained out of custody before trial.<sup>96</sup> This mirrors almost exactly the experience of Joseph K. as he did not know of the investigation leading to his arrest and was told by the warder that he could live as he did before:<sup>97</sup>

‘Yes, you’re under arrest, but that should not prevent you from going about your business.’ ‘Then being under arrest isn’t so bad’, K. said... ‘I never said it was’ he replied. ‘In which case it looks as if there was no real necessity for you to even tell me about my arrest, K. said... ‘It was my duty,’ said the Inspector. ‘An idiotic duty,’ said K. without sympathy.

It also explains the assumption of guilt that everyone who meets K. holds.<sup>98</sup> The initial enquiry scene in *The Trial* comprises of K. discussing his case with the Examining Magistrate in front of an assembly who he presumes are a neutral audience able to be won over by his rhetoric. When they later reveal themselves to be court officials, K. calls them a “corrupt mob” who “wanted to learn how to lead an innocent man astray.”<sup>99</sup> It has been suggested that this scene was meant to parody a jury<sup>100</sup> which was facing rejection from criminal proceedings at the time Kafka was writing. The jury was made part of the criminal process in 1873 but

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<sup>95</sup> Kafka *The Trial*, above n 2, 136.

<sup>96</sup> Robinson, above n 69, 134.

<sup>97</sup> Kafka *The Trial*, above n 2, 15.

<sup>98</sup> At one point, K. is advised “don’t keep going on about how innocent you feel, it disturbs the otherwise not unfavourable impression you are making.” Ibid, 13.

<sup>99</sup> Ibid, 46.

<sup>100</sup> Robinson, above n 69, 135.

did not gain acceptance by legal theorists because it was thought that they were easily influenced by government and skilled counsel, and were unable to be politically independent.<sup>101</sup>

## 2 *A metaphor for justice*

While it is not contested that Kafka used themes of law, punishment and a trial to explore abstract ideas, commentators have differed in their views as to the significance of their roles. “In the Penal Colony” challenges readers’ conceptions of justice and punishment, and *The Trial* questions the very notion of what ‘guilt’ can be. Kafka evokes a sense in the reader that there *ought* somehow to be a ‘right’ and ‘wrong’; that a man should not be on trial if he is not legitimately charged and punishment should be meted out only when deserved. However ultimate ambiguity surrounding these assumptions means that the reader’s ideas about justice are challenged.

In both *The Trial* and “In the Penal Colony” the idea of unquestioned guilt is explored. In the novel, it is assumed that because K. is on trial, he must be guilty: “[o]ur officials... never go looking for guilt in the population... but are, as the law states, attracted by guilt.”<sup>102</sup> This can be linked to the trend of the pre-trial proceedings to only alert the subject of the inquiry as to the trial’s existence after guilt has been in effect established, but the literature goes further and challenges the requirements for a legitimate judgement of guilt.

In *The Trial*, K. encounters a painter named Titorelli who explains the three possible outcomes of a trial. Actual acquittal is theoretically possible, but in reality unattainable. Apparent acquittal gives the appearance of freedom, but the

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<sup>101</sup> Hermann Mannheim “Trial by Jury in Modern Continental Criminal Law” (1937) 53 LQR 99, 102.

<sup>102</sup> Kafka *The Trial*, above n 2, 8. This is further emphasised at 135 where K. attempts to demonstrate his knowledge of the court’s workings: “the court, once it has brought a charge, is firmly convinced of the guilt of the accused and can only with difficulty be persuaded to change its opinion.’ ‘With difficulty?’ the painter asked, flinging one hand into the air. ‘The court can never be persuaded to change its opinion.’”

charge continues to hover above the defendant and can be reinstated at any time. “No file is ever lost, the court never forgets.”<sup>103</sup> If postponed, the trial remains in its preliminary stage without progression, but requires constant attention from the defendant and lawyer. They must remain in personal contact with the court and “not let the trial out of [their] sight.”<sup>104</sup> K. realises that both latter methods prevent conviction but “they also prevent an actual acquittal.”<sup>105</sup> This is an inescapable journey; the court is the ultimate victor. No declaration of innocence is possible, even though it theoretically exists. The confidence the court system has in being able to accurately find guilt is also found in the lack of due process or open justice in despotic regimes.

“In the Penal Colony” explores the interface between justice and punishment. It is a short story that was published as a separate volume during Kafka's lifetime.<sup>106</sup> He recorded in his diary that he read it aloud to Max Brod and a friend, with the result that he was “not entirely dissatisfied, except for its glaring and ineradicable faults.”<sup>107</sup> The story begins with the scene of a desert-like sandy valley with four characters: an explorer, officer, soldier and prisoner, the explorer having been invited to witness the prisoner's execution. The prisoner does not know that he has been sentenced, or what is about to happen to him. The explorer finds this repugnant, exclaiming “But he must have had some chance of defending himself.”<sup>108</sup> The officer attempts to explain to the explorer why this is not wrong:<sup>109</sup>

‘I have been appointed judge in this penal colony... My guiding principle is this: Guilt is never to be doubted. Other courts cannot follow that principle, for they consist of several opinions and have higher courts to scrutinise them. That is not the case here...The captain came to me an hour ago, I wrote down his statement and appended the sentence to it. ....If I had first called the man before me and

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<sup>103</sup> Kafka *The Trial*, above n 2, 144.

<sup>104</sup> *Ibid*, 145.

<sup>105</sup> *Ibid*, 146.

<sup>106</sup> Litowitz, above n 72, 122.

<sup>107</sup> Entry 2 December 1914, Kafka *Diaries*, above n 6, 98.

<sup>108</sup> Kafka “In the Penal Colony”, above n 3, 145.

<sup>109</sup> *Ibid*, 145-146.

interrogated him, things would have got into a confused tangle. He would have told lies...’

The lack of the rule of law seemingly not to matter to the officer due to his obsession with the perfection of the apparatus called the ‘Harrow’. The Harrow is a giant tattooing machine, which has a bed upon which the condemned man is laid, and an upper ‘Designer’ which is set with needles that tattoo the command that he has broken. The man understands the inscription by “deciphering it with his wounds”<sup>110</sup> before dying. The officer is blinded by its ‘logical’ workings so far that he has lost sight of just procedure. The rule of law is flouted, as there is no investigation or opportunity for the accused’s defence. The only way that the system could be fair was if the reporting captain always had correct information as to the prisoner’s conduct. This is not demonstrated in the story, leaving the impression that it may not be the case. Efficiency is valued above just process, with the officer viewing protestations of innocence from prisoners as an irritating disruption in an inevitable course of action. The peculiar reversal of punishment from the prisoner to the officer reveals his fanatical belief in the fairness of the process. This underlines the ludicrous extent of the wrongdoing: even those with power within the system cannot perceive its flaws and blindly conform to the perverse procedure.

Another important feature of “In the Penal Colony” is the gap of understanding between the administrator of ‘justice’ and the subject. The prisoner, a “stupid-looking, wide-mouthed creature,” and the soldier who guards him are “paying no attention to anything.”<sup>111</sup> They cannot comprehend the explanations of the officer because they do not speak French, the tongue in which the officer communicates with the explorer. It is only the officer and the explorer who hold meaning in the events, though they are not the ones who the Harrow is meant to work upon. The officer explains that the prisoner does not know of the commandment that he has broken; “there would be no point in telling him. He’ll

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<sup>110</sup> Kafka “In the Penal Colony”, above n 3, 150.

<sup>111</sup> Ibid, 142.

learn it on his body.”<sup>112</sup> The logic in punishing one who does not understand the process or crime is flawed. In contemporary New Zealand, this is recognised in criminal law where a person must have sufficient mental capacity to stand trial, make pleadings and understand the consequences of proceedings.<sup>113</sup> The excruciating death awaiting the prisoner seems even more terrible because of his complete failure to comprehend his fate. The lack of a common language between the officer and the prisoner ensures that this distance is maintained. This evokes in the reader a sense that the events cannot constitute justice, even in the most archaic sense, if the subject is unaware of the transgression and the justification for the penalty. Without subjective awareness, there can be no justice.

In another sense, however, the story describes a more basic justice that supersedes the unjustified punishment of the prisoner. Before the ‘judgment’ begins, the officer confides in the explorer that support for the Harrow has waned, and that it will be abolished should the explorer disagree with its use. Seeing that he can make the prisoner avoid his gruesome death, the explorer reveals his disgust and tells the officer that he does not approve. The officer, dejected, announces to the prisoner that he is free, adjusts the machine to spell a new commandment, ‘BE JUST’, and climbs onto the machine himself. However the machine breaks and gears fly out of the Designer. Instead of suffering a long, slow – but ghoulishly ‘apt’ – death, the officer dies immediately: “through the forehead went the point of the great iron spike.”<sup>114</sup> The officer complies with the ‘justice’ that he normally applies to others, which reveals the system to be internally consistent rather than a situation where some are above the law. The requirement to ‘Be Just’ was broken by the officer after the explorer’s denunciation of the process. This means that the officer’s idea of justice was not so after all; and yet he succumbs to the very same unfair process that he was about to inflict upon another. Guilt fails to be properly established in relation to the prisoners, but those who administer punishment are so absorbed in their own

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<sup>112</sup> Kafka “In the Penal Colony”, above n 3, 145.

<sup>113</sup> Criminal Procedure (Mentally Impaired Persons) Act 2003, s 7.

<sup>114</sup> Kafka “In the Penal Colony”, above n 3, 166.

process that they too deny themselves justice. Kafka therefore demonstrates the irony of punishment of injustice with injustice to bring about the right outcome.

In one scene of *The Trial* Kafka deals directly with the concept of justice, when it is depicted in human form. The character Titorelli, who is a painter, depicts the Goddess of Justice with a blindfold over the eyes and holding scales, but without wings on the heels or carrying a sword, as is customarily included. Around the figure is brightness “like an embellishment or a sign of high distinction.”<sup>115</sup> K. observes that the figure appears to be running, to which the painter replies that the figure is a mix of Justice and the Goddess of Victory. K. remarks “[t]hat’s not a good combination...Justice must stand quite still, or else the scales will waver and a just verdict will not be possible.”<sup>116</sup> The painter replies that he is merely complying with his client’s instructions. K. then notices that the figure looks less like Justice and “much more like the Goddess of the Hunt.”<sup>117</sup> In Greek mythology, the Goddess Artemis represents the hunt and is depicted with a bow and arrow. The merging of victory, the hunt and justice reflects the workings of the court: it approached K. without violence and was certain of its opinion regarding his guilt. The court will eternally win, and be the powerful pursuer of those who break its laws: “a swordless, hunting justice is always victorious over guilt.”<sup>118</sup>

The explicit exploration of the meaning of justice is somewhat diverse from the rest of the novel which is based in temporal narrative of K.’s activities. It symbolises the intersection between law and power. ‘Justice’ seeks out guilt with the skill of a hunter and is driven on by victory rather than mercy, undermining the traditional depiction of a serene dispassionate force. The small allegory hidden in an encounter between the protagonist and a painter is linked to

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<sup>115</sup> Kafka *The Trial*, above n 2, 131-132.

<sup>116</sup> Ibid, 132.

<sup>117</sup> Ibid, 133.

<sup>118</sup> Marson, above n 30, 207.

ideas of natural justice and the institution of law, which does not always reflect the former.

The novel also contains a parable<sup>119</sup> written by Kafka called 'Before the Law,' published as a separate work during Kafka's lifetime.<sup>120</sup> K. is told a story about a man from the country who begs admittance to the Law from a doorkeeper who guards it. The doorkeeper answers that he is able to let the man inside, but not yet. The man had not expected the entrance to be difficult; "the Law should, after all, be accessible to anyone at all times, he thinks",<sup>121</sup> and so waits until he grows old and feeble. Finally, nearing his end, he asks "[e]veryone strives to reach the law... how is it, then, that in all these years no one has sought admittance but me?" The doorkeeper replies "No one else could gain admittance here, because this door was meant solely for you. I shall now go and shut it."<sup>122</sup> K. upon hearing this assumes that the doorkeeper has deceived the man; but the storyteller retorts "the man from the country is really free... if he sits on the stool to the side of the door and remains there throughout his entire life, he does so of his own free will... However [the doorkeeper] may appear to us, he is still a servant of the Law... and is thus beyond human judgement...you do not have to consider everything true, you merely have to consider it necessary."<sup>123</sup> K. replies in one of the most significant statements of the novel that this "turns lying into a universal principle."<sup>124</sup>

The parable has mystified commentators since it was published, with several analyses and explanations offered regarding its ultimate meaning. Kafka read it aloud to Felice Bauer, remarking in his diary that "during the reading of

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<sup>119</sup> As well as longer works, Kafka wrote many parables, or short fables, usually which demonstrated an irony or succinct point. These were occasionally incorporated into stories or separated from them after publication, revealing a versatility of structure and sense of separability in his work.

<sup>120</sup> Entry 24 January 1915, Kafka *Diaries*, above n 6, 112.

<sup>121</sup> Kafka *The Trial*, above n 2, 196.

<sup>122</sup> *Ibid*, 197.

<sup>123</sup> *Ibid*, 200-201.

<sup>124</sup> *Ibid*, 201.

the doorkeeper story greater attention and good observation. The significance of the story dawned upon me for the first time..." The parable mirrors K.'s situation of self-imposed hopelessness, the waiting for an opportunity that is ostensibly able to be taken up but should be ignored for its practical futility. "Like the man from the country, K. is also free, despite his arrest."<sup>125</sup> The parable demonstrates that the law does not provide the solution that the man looks for, even when he spends his entire life waiting for what appears to be available. Justice therefore cannot be guaranteed in the law.

The novel creates a sense of uncertainty and unreality. The ultimate ambiguity is in the failure of the reader to know whether K. is guilty or innocent. What makes matters more confusing is that K. also fails to uncover the authority of the court, even though other characters in the novel are familiar with its workings. This creates two main camps of commentators: those who believe the court to be tyrannous, arbitrary and totalitarian, and therefore that K. is innocent,<sup>126</sup> and those who see K. as guilty of a transgression which he cannot see but nevertheless exists. This is alternatively conceived of as moral, divine, or ethical justice, and is beyond human understanding.<sup>127</sup>

A famous early critique by J P Stern saw such depictions as a sign of Kafka's "deep distrust and distaste"<sup>128</sup> in social institutions. He found evidence from a note written by Kafka which said "I have intensely absorbed the negative aspect of my time – a time which is very close to me and which I have not the

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<sup>125</sup> Ingeborg Henel "The Legend of the Doorkeeper and Its Significance for Kafka's *Trial*" in Rolleston, above n 60, 46.

<sup>126</sup> J P Stern "The Law of *The Trial*" Franz Kuna (ed) *On Kafka: Semi-Centenary Perspectives* (Elek Books Limited, London, 1976) 30 [Stern "The Law of *The Trial*"]: Stern argues that *The Trial* is "a prophetic – or rather an anticipatory – fictional account of both the concepts underlying socialist legislation and the practice of its law courts."

<sup>127</sup> See Solomon J Spiro "Verdict -- Guilty! A Study of "The Trial"" (1971) 17 *Twentieth Century Literature* 169, Stuart Lasine "The Trials of Job and Kafka's Josef K." (1990) 63 *German Quarterly* 187 and Marson, above n 30.

<sup>128</sup> Stern "The Law of *The Trial*", above n 126, 22.

right to challenge, but only as it were to represent.”<sup>129</sup> It was Stern’s view that Kafka as an outsider – a Jew in an anti-Semitic society, alienated from his father, writing German for a populace that mostly read Czech – wanted to show how a man could be condemned for simply being who he was, rather than for something he did.<sup>130</sup> “His status as a Jew is symbolic of the powerlessness and conformism of humane and liberal beliefs everywhere...He is able to anticipate the future because he is not very much at home in the present.”<sup>131</sup> This guilt “as a state of being”<sup>132</sup> was argued to foreshadow the persecution of Jews and other ethnic and cultural groups in the totalitarian Nazi and Stalinist regimes. Stern was writing at a time when communism was a serious Western concern so it is not surprising that he linked Kafka’s novel with the dangers of anti-Semitism and fascism. This may be giving Kafka too much credit as a prophet; his depiction of arbitrary ‘justice’ stands for all time, and can be applied to any capricious or unfair regime.

The novel may also appear to represent totalitarianism to the modern Anglo-Saxon reader more than it did to Kafka’s contemporaries. Continental law was considered “more intimate, more paternalistic, more invasive of privacy, less structured, less adversary”<sup>133</sup> than common law at that time, which could make the reader from a common law jurisdiction perceive injustice more sharply than would their continental counterparts. Prejudice may result from informal, discretionary procedures, but it is important to note that the common law also has its weaknesses, such as the many legal technicalities which may befall a defendant. Jeremy Bentham famously critiqued the common law, recommending to “shut your ports against our common law, as you would shut them against the plague.”<sup>134</sup> Considering it fragmentary and uncertain, he advocated a

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<sup>129</sup> Note from Franz Kafka dated 25 February 1918 in *Hochzeitvorbereitungen auf dem Lande*, Max Brod (ed) (New York, 1953) 120 in Stern “The Law of *The Trial*”, above n 126, 22.

<sup>130</sup> Stern “The Law of *The Trial*”, above n 126, 29.

<sup>131</sup> *Ibid*, 39.

<sup>132</sup> *Ibid*, 29.

<sup>133</sup> Posner *Law and Literature*, above n 16, 134.

<sup>134</sup> Jeremy Bentham (1817) “Papers Relative to Codification and Public Instruction” 136 cited in Peter M Tiersma “The Textualization of Precedent” (2007) 82 *Notre Dame L Rev* 1187, 1235.

systemisation of law into rational codes.<sup>135</sup> Each legal system, therefore, contains features vulnerable to misuse or exploitation, and a reader unfamiliar with the workings of a civil jurisdiction may perceive the opportunities for abuse to be greater than those who live within it. While from a common law perspective *The Trial* appears to violate every part of the rule of law, procedures do imitate normal criminal procedure in Kafka's time. The mirror, however, creates an absurd and distorted reflection, perhaps designed to be a gentle reproach or caricature rather than a nightmarish experience.

The other main position is that K. is in fact guilty but the reader is not told why. Commentators conceive of this guilt as stemming from an ethical transgression, divine justice or an inescapable burden of K.'s humanity. In *The Trial* K. does not act for any reason other than to attain personal advantage or avoid disadvantage. In the sole episode that K. could be considered to be acting altruistically, he tries to stop warders from being whipped by their superior.<sup>136</sup> He is told that they must be punished for taking K.'s clothes, as this is not permissible. It is K.'s statement to the court that this indeed occurred which has led to the punishment of the warders.<sup>137</sup> K attempts to bribe the flogger to stop, but when he realises that this is fruitless and the warders begin screaming, he leaves the room. He rationalises this:<sup>138</sup>

The moment Franz had started screaming, it was of course all over. K. could not allow the messengers... to arrive and catch him negotiating with this rabble...No one could really expect K. to make such a sacrifice...K. had no option but to slam the door, although by doing this he had not, even now, removed all danger to himself.

K.'s attitude is one of self-interest, as demonstrated by his preference to hide the flogging from his peers rather than try to stop it. This is also visible through the

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<sup>135</sup> Tiersma, above n 134, 1236.

<sup>136</sup> Kafka *The Trial*, above n 2, 72.

<sup>137</sup> Ibid, 45.

<sup>138</sup> Ibid, 76-77.

complete faith K. has of his innocence; not once in the novel does he question whether he could have indeed done something wrong, even though he never uncovers the law he is supposed to have violated. This shows that his position is untenable in logic, let alone in a moral or emotional sense. It is only in the last few pages of the novel that the reader obtains a concession from K., as he goes to his death: "I've always wanted to snatch at life, and not with the best intentions either."<sup>139</sup> At the moment of his execution, he knows that he is expected to plunge the knife into his own heart, yet he does not do so. The manner of his death is devoid of dignity: K. finally gasps "'Like a dog!' ... as if the shame would outlive him."<sup>140</sup> K.'s death is inconsequential, like an animal's, due to his lack of lived humanity.

Eric Marson considers that K. is guilty not of a normal crime but of failing to be a charitable human being. He stresses that Kafka was deeply concerned with the ethics of interpersonal relations and day-to-day living<sup>141</sup> and that his protagonist ignorantly violates such norms. K's fault is "mere moral blindness in small things"<sup>142</sup> which cumulatively makes up the stuff of life:<sup>143</sup>

The novel is an almost literal objectification of this way to the truth, stretched not at any exalted height, where the impression-orientated Josef K.s of the world expect it, but low over the ground where, because they trip so often over it, it comes to be seen as designed to cause stumbling....The novel as a whole is designed to show the seedy and unpretentious but somehow humanly crucial operation of such grandiose things as truth and the ultimate of morality in places where one would not expect to find them.

William Dodd also draws upon this conception of guilt in his examination of Kafka's works, concluding that 'justice' is used in a moral or religious sense of being a higher form of truth that does not depend on human understanding for

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<sup>139</sup> Kafka *The Trial*, above n 2, 207.

<sup>140</sup> *Ibid*, 210.

<sup>141</sup> Marson, above n 30, 16.

<sup>142</sup> *Ibid*, 347.

<sup>143</sup> *Ibid*, 11.

validity.<sup>144</sup> Similarly Ignace Feuerlicht conceptualised the source of guilt as stemming from original sin, inescapable as part of human nature.<sup>145</sup> This existential guilt is shared by all persons, and K. represents “everyman.”<sup>146</sup> That Kafka was obsessed with guilt is evident from his diaries. In one entry he wrote “have mercy on me, I am sinful in every nook and cranny of my being...If I am condemned then I am not only condemned to die, but also condemned to struggle till I die.”<sup>147</sup>

### 3 *A reflection of Kafka's legal education*

While there are countless interpretations of *The Trial* that view it alternatively through the lens of political science, philosophy or psychology, a great deal of the work can be related to Kafka's own experience of the law from his studies. Kafka received his Doctorate in Jurisprudence from the Imperial and Royal Karl-Ferdinand German University of Prague in 1906, although law was not his passion. He took it “with a sigh”<sup>148</sup> because it involved the largest choice of occupations and he required some form of financial means. In *Letter to His Father* he recorded that “there was no real choice of profession for me... everything will be as indifferent to me as the subjects I took in my secondary school, and so the only thing is to find a profession which will give the widest scope for this indifference... so the law was the obvious choice.”<sup>149</sup> He recounted studying for law exams as “intellectually [feeding] myself exclusively on sawdust – sawdust, too, which had already been chewed by thousands of jaws before me.”<sup>150</sup> Kafka therefore separated his intellectual passion for literature with his

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<sup>144</sup> William J Dodd (ed) *Kafka: The Metamorphosis, The Trial and The Castle* (Longman Group Limited, London and New York, 1995) 19.

<sup>145</sup> Ignace Feuerlicht “Omissions and Contradictions in Kafka's Trial” (1967) 40 *German Quarterly* 339, 341.

<sup>146</sup> Ronald Gray “Kafka: A Critical Essay” in Kuna, above n 126, 168.

<sup>147</sup> Entry 20 July 1916, *Kafka Diaries*, above n 6, 161.

<sup>148</sup> Brod, above n 44, 40.

<sup>149</sup> *Kafka Letter to His Father*, above n 39, 95.

<sup>150</sup> *Ibid.*

conception of earning a living. It was Brod's opinion that Kafka had viewed his studies as a "makeshift, and dreamed of other activities."<sup>151</sup>

Kafka's experiences at law school may also have influenced the events in *The Trial*. Kafka, being schooled in a civil law jurisdiction, was taught in both canon law and Roman law,<sup>152</sup> the latter of which he famously described as "disgusting".<sup>153</sup> The parable 'Before the Law' could reflect canon law doctrines.<sup>154</sup> It is relayed to K. by a priest who describes "a radiance that streams inextinguishably"<sup>155</sup> from the door beyond which lies the Law, purposively written by Kafka with a capital letter only in this chapter. This gives the law a "reverential, almost mystical status"<sup>156</sup> and places it hopelessly above the reach or understanding of any person who wishes to access it. A similar point is made in *The Trial* with a feature of the court system being "too difficult even for the initiated to grasp."<sup>157</sup> The process is overly complicated to the point of being purposively mystifying, which ensures that those who are subject to its power are unable to escape its clutches. Kafka's view of Roman law was uncomplimentary, and the 'Law' in the parable is perhaps a criticism of the field.

At the beginning of the novel it is implied that K. is innocent, but he cannot be sure as he remains ignorant of the law which he has allegedly offended. This contradiction is expressed in the dialogue between K. and the warders who inform him of his arrest: "I don't know this law", K. said... But the warder merely said dismissively: 'You soon will.' Franz interrupted and said: 'See, Willem, he admits he doesn't know the law, yet he claims he's innocent.'"<sup>158</sup> While the reader sympathises with the protagonist in his predicament, the warders

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<sup>151</sup> Brod, above n 44, 7.

<sup>152</sup> Litowitz, above n 72, 111 and Dargo, above n 34, 503.

<sup>153</sup> Carol Weisbrod "Family Governance: A Reading of Kafka's Letter to His Father" (1993) 24 U Tol L Rev 689, 701 cited in Dargo, above n 34, 503.

<sup>154</sup> Litowitz, above n 72, 111.

<sup>155</sup> Kafka *The Trial*, above n 2, 197.

<sup>156</sup> Litowitz, above n 72, 111.

<sup>157</sup> Kafka *The Trial*, above n 2, 106.

<sup>158</sup> *Ibid*, 8.

are correct: ignorance of law is no defence.<sup>159</sup> Readers must juxtapose their sense of grievance for K. with the indisputable logic of the warders. The confusion highlights the tension between instinctive ‘justice’ and legal form.

One of Kafka’s law professors was Hans Gross, who supported the positivist criminology of Cesare Lombroso.<sup>160</sup> Lombroso believed that criminality was hereditary and could be detected by particular physical characteristics.<sup>161</sup> Kafka indicates this school of thought through the character Block, who explains to K. that people believe that guilt can be read in the lines and shape of a man’s lips, and that K. is said to have the guilty trait.<sup>162</sup> It is unclear whether Kafka supported this theory, as Block qualifies this by calling it a “superstition”, which people fall back on when they are “simply too tired and distracted to think a great deal...”<sup>163</sup> It is evident is that Kafka was engaging with (then) new ideas of criminality and psychology; “Kafka has slyly had his pithy say.”<sup>164</sup>

The internal dialogue of the protagonist illustrates the way legal reasoning attempts to solve problems and its resulting shortcomings. K.’s assessment of his situation is reasoned and composed, communicating to the reader the protagonist’s belief that if he is rational, his problems will be solved. K retains confidence until the conclusion of the novel; when being walked to his execution: “[t]he only thing to do now’, he said to himself... ‘is to keep calm and analytical to the end.’”<sup>165</sup> He weighs pros and cons without emotion and is genuinely surprised when people do not react the way he expects. This is a legalistic way to

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<sup>159</sup> In New Zealand this principle is demonstrated in *Waaka v Police* [1987] 1 NZLR 754.

<sup>160</sup> Gross’ text *Criminal Psychology* was published in 1897 and used widely in Europe. He believed that guilt and innocence could be determined by scientifically tested questioning procedures, thereby focussing upon the criminal individual rather than criminogenic social circumstances. See Dargo, above n 34, 506.

<sup>161</sup> Cesare Lombroso *The Criminal Man* (1876) Mary Gibson and Nicole Hahn Rafter (trans) (Duke University Press, Durham, 2006).

<sup>162</sup> Kafka *The Trial*, above n 2, 158.

<sup>163</sup> *Ibid*, 158.

<sup>164</sup> Robinson, above n 69, 142.

<sup>165</sup> Kafka *The Trial*, above n 2, 207.

approach a problem; legalism only works when the other party understands the rules of engagement. If K. appealed to human emotion instead of cold calculation, he may have had better success, and indeed may have successfully navigated his way through his trial. This could be a critique of the law: while designed to solve problems and mediate between people, it removes emotional reality from the equation and therefore gives an imperfect solution.

#### 4 *The relationship between law and authority*

The court is simultaneously depicted as representing the law and omnipotent authority. Its warren of backrooms and attics is described throughout *The Trial* as having an oppressive atmosphere. The rare use of metaphor symbolises the confusing and domineering effect on the institution upon those in its grasp. When K. first visits the court offices he becomes dizzy and nauseous from the “close and heavy”<sup>166</sup> air; however he is reassured that “when you come here for the second or third time, you’ll hardly notice the oppressiveness at all.”<sup>167</sup> The effect that the court has is curiously local to its offices; as soon as K. nears the door he immediately recovers from his stupor.<sup>168</sup> While this could be limited to physical acclimatisation, it also goes further to suggest that as defendants spend more time concerned with their case, they get used to the hold that the court has upon them. Defendants gradually accept the authority of the court and passively resign themselves to their fate.

Kafka also explored the relationship between authority and law using K.’s efforts to uncover why he has been put on trial. In the first chapter, K. asks “what sort of people were they? What were they talking about? To which authority did they belong? K., after all, lived in a legal state, there was universal peace in the land, all the laws were upheld, who had the temerity to assault him in his own

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<sup>166</sup> Kafka *The Trial*, above n 2, 65.

<sup>167</sup> *Ibid*, 66.

<sup>168</sup> *Ibid*, 70.

home?”<sup>169</sup> K. seeks justification for the incursion into his life. There is a tension between positive and natural conceptions of law, with the protagonist asserting that he must recognise the source before it has legal authority over him. In K.’s speech at the first interrogation he speaks to the crowd: “You may argue that they are not legal proceedings at all, and in this you would be quite correct, for they are in fact only legal proceedings if I recognise them as such. But for the present I do recognise them, out of pity as it were.”<sup>170</sup> K. appears to posit that some principle is required to legitimise authority, following the tradition of legal positivism. He is not prepared to accept the court’s legality merely because it purports to be so.

In the novel the lawyers are also subject to repressive conditions. The chambers are “narrow and low” with one room having a hole in the floor so large that a person’s leg would fall through into the ceiling of the storey below.<sup>171</sup> Such treatment is said to demonstrate the “court’s contempt for these people.”<sup>172</sup> Lawyers are not officers of the court in *The Trial* as they are in reality, but obstacles between the court and defendants. Lawyers were also not recognised by the court as being advocates; any action they took “was not really recognised by the law, but only tolerated, and even that was a matter of dispute...”<sup>173</sup> Lawyers are impotent and powerless, yet necessary for the opportunity they represent for contact with the secretive court officials. Lawyers in *The Trial* therefore lose their traditional role as participants in the law and are instead on the periphery, at the mercy of the officials who offer crumbs of information.

The mystery surrounding the court’s authority is not uncovered due to the internal coherence of its workings. In the flogging scene, the flogger tells K. “their punishment is as just as it is inevitable”,<sup>174</sup> while the warder cries “we’re

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<sup>169</sup> Ibid, 5.

<sup>170</sup> Kafka *The Trial*, above n 2, 40.

<sup>171</sup> Ibid, 102.

<sup>172</sup> Ibid, 102.

<sup>173</sup> Ibid, 102.

<sup>174</sup> Ibid, 73.

only being punished because you reported us... do you call that justice?"<sup>175</sup> There appears to be a sense of fairness in the system that the warders work in, which is unbalanced by K.'s complaint. The flogger rationalises the punishment as being 'just' which gives the court consistency: it punishes insiders as well as strangers to its workings. Kafka also reveals the procedures of the court through internal dialogue of the flogger:<sup>176</sup>

The Flogger, by the way, would certainly not have accepted such a replacement [for the warders], since it would have been a grave dereliction of duty... since no employee of the court had the right to harm K., while his case was in progress. Special regulations, of course, might have been applicable here.

The internal dialogue enhances the court's authority. The mention of K.'s 'rights' by an administrator of the court is infrequent but its inclusion is important; it tells against the court as a totally arbitrary system. It could also hint at the consequences of ever-increasing rationalisation: while internal consistency might satisfy those within the system, they are blind to the illogical whole.<sup>177</sup>

Kafka illustrated how legitimacy may be attained through time and practice. As the novel progresses K. learns that many other characters are not only familiar with the court but accept its workings, and slowly he comes to recognise it also. At the end of the novel, K. does not know whether the men who come for him are from the court; he merely presumes them to be so: "[s]o they've sent second rate actors to fetch me."<sup>178</sup> The reader does not know then, whether his execution is murder or some kind of punishment. Like the rest of the novel, ambiguity rules.

Kafka also explores how rules can be given the status and legitimacy of laws by the exercise of power. "The Problem of Our Laws" discusses most

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<sup>175</sup> Ibid, 73.

<sup>176</sup> Kafka *The Trial*, above n 2, 77.

<sup>177</sup> Litowitz, above n 72, 114.

<sup>178</sup> Kafka *The Trial*, above n 2, 205.

directly the relationship between ruler and ruled. The opening line sets the scene: “[o]ur laws are not generally known; they are kept secret by the small group of nobles who rule us.”<sup>179</sup> Administration of the law is entrusted to nobles who stand above it; attempts to unravel the mysteries of the law’s working are “only an intellectual game”.<sup>180</sup> A paradox lies in the belief of the narrator that power will shift when it deserves to: “a time will eventually come when... the law will belong to the people... we have not yet shown ourselves to be worthy of being entrusted with the laws.”<sup>181</sup> The ultimate meaning of the parable is, like all Kafka’s writing, impossible to unravel, but it hints at the relationship between power and knowledge, and the responsibility of the individual to grasp what is within one’s reach.

The narrator of “The Problem of our Laws” explains the relationship between himself<sup>182</sup> as one of the public subjected to an unknown set of laws, and the nobles who sit above the system. He remarks that “the Law is whatever the nobles do,”<sup>183</sup> meaning that by the very action of an elite group, binding rules are created. The laws also serve the nobles, but this is speculation, for “they are a mystery confided to the nobility”.<sup>184</sup> There is a glimmer of hope that the laws may become knowable, but that is only when the people show themselves to be worthy of such entrustment. This judgement, of course, comes from above. Such a state of affairs is akin to extremely paternalistic law or a totalitarian regime with effective propaganda. The reader’s reaction is one of contempt of the system and of the narrator who placidly accepts such an uneven distribution of power. It also shows how power alone can be sufficient to give rules the veneer of legality, even when they violate all senses of justice.

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<sup>179</sup> Kafka “The Problem of our Laws”, above n 5, 437.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> The gender of the narrator is not specified but for aid of reading, male gendered pronouns will be used.

<sup>183</sup> Kafka “The Problem of our Laws”, above n 5, 438.

<sup>184</sup> Ibid, 437.

The parable “Before the Law” is the most overt examination of the nature of law. One commentator, Victor Fleming, takes a legalistic view, suggesting that the law admits only those who are confident that they deserve entry. Adequate preparation means that one must never meet a doorkeeper.<sup>185</sup> The “man from the country”<sup>186</sup> is an ignoramus, a representation of a layman who does not understand the protocols for entry, while the doorkeeper symbolises modern bureaucracy.<sup>187</sup> The parable is made truly tragic because the door is meant for the man alone, and he knows no way to enter. This could be give a glimpse into Kafka’s experience and view of the legal profession as putting up barriers, excluding those who are not prepared, and maintaining a monopoly over the law. The metaphor could be extended to all mechanisms of power that ensure that those who are entitled to benefits remain unaware of how they can help themselves.

##### 5 *A manifestation of Kafka’s legal experiences in employment*

Perhaps the greatest influence on Kafka’s writing was his employment. During his last term at the university Kafka worked in a high pressure commercial office drafting legal documents and after graduation spent a year working in the criminal courts.<sup>188</sup> In 1908 he began working in the quasi-government department of the Worker’s Accident Insurance Institute for the Kingdom of Bohemia in Prague, which apparently was an achievement because the Institute did not normally employ Jews.<sup>189</sup> Kafka decided that this was the best occupation for him: “[a]s an Austrian lawyer, which, speaking seriously, I am not, I have no prospects; the best thing I might achieve for myself in this direction I already possess in my present post, and it is of no use to me.”<sup>190</sup>

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<sup>185</sup> Victor A Fleming “Before the Law: An Analysis for the Legal Profession” (1978) 1 UALR L J 324, 330.

<sup>186</sup> Kafka *The Trial*, above n 2, 195-196.

<sup>187</sup> Fleming, above n 185, 327.

<sup>188</sup> Robinson, above n 69, 128 and Litowitz, above n 72, 108.

<sup>189</sup> Begley, above n 37, 257.

<sup>190</sup> Entry 9 March 1914, Kafka *Diaries*, above n 6, 27.

The Insurance Institute exposed Kafka to a “vortex of contentious economic interests and forces.”<sup>191</sup> It was Brod’s opinion that:<sup>192</sup>

Kafka derived a great amount of his knowledge of the world and of life, as well as his sceptical pessimism, from his experiences in the office, from coming into contact with men who had suffered injustice, and from having to deal with the long-drawn-out process of official work, and from the stagnating life of files. Whole chapters of [*The Trial*] derive their outer coverings, their realistic wrappings, from the atmosphere Kafka breathed in the Workers’ Accident Institute.

It was not a cheerful occupation. Brod refers to the interior of that building as having “bleak, echoing corridors.”<sup>193</sup> Kafka quipped that “[i]nsurance is like the religions of primitive peoples who believe they can ward off evil by all kinds of manipulations.”<sup>194</sup> Kafka continued to work for the Institute until he became ill with tuberculosis. The reason for his occupation appears to be that it was well paid with minimum interference with his passion for writing, which he did every evening and sometimes for entire nights.<sup>195</sup> Writing for Kafka was a “form of prayer.”<sup>196</sup> He lamented that he had to work during the day: “everything written down bit by bit rather than all at once in the course of a larger part (or even the whole) of one night is inferior, and that the circumstances of my life condemn me to this inferiority.”<sup>197</sup> While Kafka constantly affirmed that his passion lay with writing, he was not an incompetent employee. He won many promotions and was well-liked, writing numerous reports on the subject of risk-management.<sup>198</sup>

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<sup>191</sup> Dargo, above n 34, 507.

<sup>192</sup> Brod, above n 44, 84.

<sup>193</sup> Ibid, 79.

<sup>194</sup> Ibid, 74.

<sup>195</sup> An example is his short story *The Judgment*, which he wrote completely during the night 22-23 August 1912. Posner “Law and Literature: A Relation Reargued”, above n 7, 1367.

<sup>196</sup> Brod, above n 44, 214.

<sup>197</sup> Entry 8 December 1914, Kafka *Diaries*, above n 6, 100-101. See also entry 19 January 1915: “immediate contact with the workaday world deprives me... of the possibility of taking a broad view of matters, just as if I were at the bottom of a ravine, with my head bowed down in addition.” Kafka *Diaries*, above n 6, 109.

<sup>198</sup> Dargo, above n 34, 505.

There have been several studies of Kafka's professional reports and a comparison of these with his literary works with the finding that his employment did indeed influence what he wrote.<sup>199</sup> Most reports were written during his most industrious years as a writer, from 1910-1915.<sup>200</sup> On a fundamental level, scenes from his stories are connected to the experiences and places Kafka visited while at the Institute. For instance in *The Trial* the location for K.'s execution is a "small stone quarry, deserted and desolate."<sup>201</sup> In the same period, Kafka wrote a report called 'Accident Prevention in Stone Quarries.' In another article, 'Report on Wood Planing Machines,' Kafka described with precision how the machine operated and could amputate limbs.<sup>202</sup> This bears a strong resemblance to "In the Penal Colony"'s descriptions of the Harrow. Kafka's depiction gives a strong visual image, even though the apparatus is extremely complex. Kafka almost lavishly describes its arrangement and process, revealing a "love of machinery and his fascination with industrial processes of all kinds."<sup>203</sup> There is a connection between the imagination of Kafka and his 'keyhole of experience'.

Academic Klaus Hermsdorf noted that "the contradictions, the multiple meanings, and the unfathomability of the law were the reality of his professional experience, and it was just such questions about the law that he posed in his novels."<sup>204</sup> Kafka's stories frequently contain instances of almost comic pointlessness, such as "In the Penal Colony" where the dumb wits of the prisoner are such that he does not understand the events which are to unfold. It is ironic when he is finally freed, for he does not comprehend the significance of this either. His 'freedom' is therefore worthless, for it is the recognition of value that creates its worth. Similarly, in *The Trial* K. struggles in vain to understand the workings of the court and the charges against him, only to accept the authority of the men who finally execute him. Such futility was also present in Kafka's

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<sup>199</sup> Litowitz, above n 72, 110.

<sup>200</sup> Dargo, above n 34, 509.

<sup>201</sup> Kafka *The Trial*, above n 2, 208.

<sup>202</sup> Dargo, above n 34, 517.

<sup>203</sup> Ibid.

<sup>204</sup> Klaus Hermsdorf *Introduction to Franz Kafka: Amtliche Schriften* (Akademie-Verlag, 1984) 2 cited in Dargo, above n 34, 513.

employment: while his post was to improve working conditions and minimise health risks, in reality he had to ‘balance’ the demands of the employers who did not want to pay for costly safety precautions.

It was also Kafka’s impression of humanity, gained first by his impression of the relationship between his father and his employees and later by experience working with labourers and examining factory sites, which led to his peculiarly haunting writing, and later to the term ‘Kafkaesque’ being incorporated into popular vernacular.<sup>205</sup> From when Kafka was a young man, he resented his father’s treatment of those who worked for him. He recalled that his father called the employees “paid enemies” and thought “you seemed to be to be their paying enemy...That was why I could not but side with the staff...”<sup>206</sup> Later, through the Institute Kafka saw firsthand the extent of social inequality in Prague; powerless workers were crippled or killed through neglect of safety precautions. The workers did not rise up against the conditions; rather they applied to the Institute for compensation and accepted their circumstances. Kafka once wondered that the workers “come to us and beg. Instead of storming the institute and smashing it to little pieces, they come and beg.”<sup>207</sup> “Before the Law” reflects this hopelessness: the workers have the ability to gain power, but wait patiently in the bureaucratic structure which is designed to work against them, just like the man from the country waits in vain to be admitted entrance to the law.

Kafka depicts injustice as normal, expected and tolerated by his protagonists,<sup>208</sup> mirroring the plight of workers lost in a “bureaucratic maze”<sup>209</sup> that they could not hope to successfully navigate. His sympathy for the “injured

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<sup>205</sup> “Kafkaesque is the only word in common English use which derives from German literature... it involves a process in the course of which the humdrum elements of our experience are estranged from us.” J P Stern “Introduction” Franz Kafka *The Trial* Douglas Scott and Chris Waller (trans) (Pan Books Ltd, London, 1977) 7.

<sup>206</sup> Kafka, above n 39, 55-56.

<sup>207</sup> Brod, above n 44, 79.

<sup>208</sup> Litowitz, above n 72, 107.

<sup>209</sup> *Ibid*, 111.

and maimed, the downtrodden and dispossessed”<sup>210</sup> is expressed through the harsh plots of his novels, perhaps designed to arouse compassion in the reader. Kafka portrays the way the law appears to operate from the perspective of the outsider who does not understand how to navigate the system.<sup>211</sup> This ‘outsider’ may be ethnically, culturally or linguistically different, but he or she does not have to be. Indeed in most of Kafka’s works the outsider protagonist is a white male.<sup>212</sup> Kafka could portray this experience with uncomfortable accuracy due to his position as simultaneously a social outsider and a legal insider, “giving [outsiders] a voice in his fiction that they did not have within the legal system.”<sup>213</sup>

## ***B Structure***

While the themes and plots of Kafka’s literature have close ties with the law, this is not the only way that legal influences are revealed. Legal themes are also exposed through structure. The composition of legal writing is very important as it can alter the meaning or understanding of a piece of work. The writing ought to have “organisation, development and logical flow,”<sup>214</sup> giving the reader information in the manner it is most usefully digested and containing relevant information in close proximity.

*The Trial* is the longest piece of fiction examined in this paper and yet the least reliable work for which to analyse writing structure. The novel was crafted in piecemeal form, with chapters written out of sequence and many remaining unfinished at Kafka’s death. Had they been completed, the chapters may have changed the sense or direction of the novel. Brod, Kafka’s executor, was directed

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<sup>210</sup> Dargo, above n 34, 522.

<sup>211</sup> Litowitz, above n 72, 107.

<sup>212</sup> Ibid, 105.

<sup>213</sup> Ibid, 133.

<sup>214</sup> John O White and Norman Brand “Composition for the Pre-Professional: Focus on Legal Writing” (1976) 27 *College Composition and Communication* 41, 42.

to burn all his papers and manuscripts, but he did not do so.<sup>215</sup> Instead, he saved them and compiled *The Trial* into the novel readers are familiar with from the collection of chapters. The chapters were organised into logical sequence by Brod. Kafka gave no direction as to the order they were to take; Brod read through the fragments and decided which order made the most sense. There is a great store of literature discussing the order Brod chose and the significance of excluded unfinished chapters.<sup>216</sup> The structure of the novel is therefore is susceptible to influence from Brod. It is with these qualifications that *The Trial's* structure is analysed.

Kafka does not use an omnipotent narrator; there is no foreshadowing of events or perspectives. The information is presented logically, without jumps in time or space, almost in the same manner as a police report records the facts of an unpleasant incident. Events unfold in a linear path that cannot be anticipated by the reader. This gives the stories an air of mystery, for the reader has no clue as to the direction of the narrative. While this serves as an incentive for continued reading, it also allows the reader to construct his or her own opinion as to the nature of events. "When a narrator appears as a character within the story we are at liberty to 'interpret' what he says."<sup>217</sup>

Many characters in Kafka's literature are depicted as some variety of defendant or plaintiff, and the structure of the works gradually release information in a manner which is analogous to a case before the courts. The opening line of *The Trial* sets out the accusation for which the protagonist – or

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<sup>215</sup> A copy of the note to Max Brod directing all writing to be burned can be located at Litowitz, above n 72, 115 and Franz Kafka *The Trial* Willa and Edwin Muir (trans) (Martin Secker and Warburg Ltd, London, 1935) 292.

<sup>216</sup> An example of such a work is Heinz Politzer "The Puzzle of Kafka's Prosecuting Attorney" (1960) 75 PMLA 432, 428, which discusses a fragment called "Prosecuting Attorney" excluded from the final version of *The Trial*. In the chapter, the protagonist attends a dinner party with members of the legal profession and establishes personal relations with the court. Politzer considers that the fragment was never completed because it distracted from the predetermined "melancholy outcome."

<sup>217</sup> Martin Walser "On Kafka's Novels" Allen Blunden (trans) in Stern *The World of Franz Kafka*, above n 35, 90.

defendant – is accused, and follows with the contention that he is innocent.<sup>218</sup> The initial proposition is followed by a steady release of information about K. and his attempts to uncover what the court is and why it is pursuing him. The reader is given the puzzle but not the answer; they must come to their own conclusion from the information. Unlike a detective novel where the truth is disclosed at the conclusion of the book, Kafka gives his reader no easy solution. This is similar to the process a court undergoes in uncovering the guilt or innocent of an accused. In jury trials, members of the jury are presented with evidence that they must interpret; in inquisitorial hearings the judge must ‘factfind’ to ascertain whether charges are proved. The structure therefore mimics the difficult decision-making process of a court, and leaves the outcome in the imagination of the reader, who must decide where the justice lies.

In the works there is no impartial higher authority to come to the plight of those accused; “judgment has been usurped by those who oppose the hero.”<sup>219</sup> The characterisation means that the reader at first sides with the protagonist who appears to deserve support, but as the work progresses it emerges that judgment is required from the protagonists toward themselves. By the end of *The Trial* the reader is almost apathetic toward K.’s death, and the reversal of the punishment onto the officer in “In the Penal Colony” has a sense of justification. Ultimate ambiguity as to the moral worth of the officer or K. means that the reader is at an impasse and may resign themselves to legalistic acceptance of the facts.

## **C**     *Style*

In addition to coherent structure, good quality legal language has the features of precision, brevity and clarity. It must be “plain, active, direct and verbal.”<sup>220</sup> This is a difficult task when one considers that “language is not an

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<sup>218</sup> Kafka *The Trial*, above n 2, 3.

<sup>219</sup> Walser, above n 217, 98.

<sup>220</sup> Richard Hyland “A Defense of Legal Writing” (1986) 134 U Pa L Rev 599, 602.

instrument of mathematical precision.”<sup>221</sup> The ability to write in such a manner is a skill that must be learnt. In legal training, students are taught to write so that documents will be interpreted in the manner they were intended; precise sentence construction and the minimisation of ambiguities are central skills for a lawyer.<sup>222</sup> When interpreting legal documents, the grammar and structure of phrases is examined to decide upon their meaning. Good legal writing includes but does not repeat all relevant information, and presents it in a concise and clear manner. The tone of legal documents ought to be “direct and formal”<sup>223</sup> and sentences should be short and uncomplicated to aid reader comprehension.

The style of Kafka’s writing in his work for the Insurance Institute illuminates his legal training. His reports regarding safety procedures, machinery, the inspection of factories and manufacturing processes have been described as “both concise and precise... so that one finds, sentence to sentence, an almost obsessive clarity.”<sup>224</sup> This may also have been due to the language in which Kafka wrote; the German spoken in Prague was renowned for its skeletal nature, linguistic precision and accuracy of grammar.<sup>225</sup>

The style of Kafka’s fiction is similarly clean, crisp and decisive. He writes in short sentences, using literal descriptions and including detail because it is necessary rather than decorative. Every sentence is full of meaning, rather like a legal contract; the narrative covers all facets of the story fully, sometimes slightly repeating themes, but only so much to convey to the reader the importance of that detail. The precise, legalistic narration is consistent with training in subtle, decisive use of language.

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<sup>221</sup> *Seaford Court Estates Ltd v Asher* [1949] 2 KB 481, 499 Lord Denning.

<sup>222</sup> Margaret Greville, Scott Davidson and Richard Scragg *Legal Research and Writing in New Zealand* (LexisNexis NZ Limited, Wellington, 2004) 395.

<sup>223</sup> Greville et al, above n 222, 359.

<sup>224</sup> Fredrick Karl *Franz Kafka: Representative Man* (Ticknor & Fields, Boston, 1991) 222.

<sup>225</sup> Dargo, above n 34, 510.

Kafka disliked elaborate language and strove to communicate without resorting to rhetorical devices. He remarked that “[m]etaphors are one among many things which make me despair of writing. Writing’s lack of independence of the world... writing is helpless, cannot live in itself, is a joke and a despair.”<sup>226</sup> Language is used in a clear, concise way with details included due to necessity, rather than poetic abandon. “His imagination was too profoundly literal to allow his images to assume a metaphoric quality.”<sup>227</sup> An example of the visual imagery Kafka uses is the picture of Justice in the painter’s attic in *The Trial*. The representations of the hunt and victory are portrayed in a literal manner. “The symbols Kafka takes from the visible world are often distorted and in a threatening way transparent.”<sup>228</sup>

One particular stylistic detail which could perhaps be overlooked by the first-time reader is Kafka’s use of nouns. The names Kafka gives for entities in the novel are used with precision, and on a close reading can be seen to impart meaning that is unable to be communicated through plot. The court in *The Trial* is always referred to as no more than that bare description. When K. is arrested, no mention of ‘court’ is made; however the words ‘officials’, ‘proceedings’, ‘the law’ and ‘authority’ are used to describe events.<sup>229</sup> When K. explains his predicament to a fellow lodger, he refers to a ‘Commission of Enquiry’, “but I know it wasn’t a Commission of Enquiry at all, I only call it that because I’ve no other name for it.”<sup>230</sup> The word ‘court’ is first introduced to the reader at the Initial Enquiry, where K. decides to go to the proceedings at 9am on Sunday “since that was when all the courts began work on weekdays.”<sup>231</sup> However this is ‘courts’ in plural, and is not the court that plagues K. throughout the novel. The particular institution is referred to by K. as a ‘court of justice’ for the first time in

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<sup>226</sup>Entry 6 December 1922, Kafka *Diaries*, above n 6, 200.

<sup>227</sup> Heinz Politzer “Franz Kafka’s Language” Harold Bloom (ed) *Modern Interpretations Franz Kafka’s The Trial* (Chelsea House Publishers, New York, 1987) 37 [Politzer “Franz Kafka’s Language”].

<sup>228</sup> Politzer “Franz Kafka’s Language”, above n 227, 34.

<sup>229</sup> Kafka *The Trial*, above n 2, 11-13.

<sup>230</sup> *Ibid*, 26.

<sup>231</sup> *Ibid*, 32.

his speech to the assembly of officials.<sup>232</sup> From this point on, the novel refers simply to ‘the court’. This on its own is not remarkable, for writers must commit to one stylistic device to achieve consistency. What is significant, however, is that ‘the court’ is described thus until the last page, immediately before K.’s execution. Here, K.’s thoughts are expressed to the reader: “Where was the High Court he had never reached?”<sup>233</sup> This is a distinct change from the numerous previous references to the court.<sup>234</sup>

Not until the end of the novel is there a hint that a ‘High Court’ exists.<sup>235</sup> The court is thrust into higher eminence with its magnitude emphasised by the official name. It denotes an acceptance by K. of the court’s authority as an institution with power over him. K.’s internal recognition of the court gives it legitimacy. The institution may not exist in the world of the novel, but it does in the mind of K. Similarly, it is K. who first uses the word ‘court’ when referring to the proceedings against him; the court could have begun its existence at the point where K. accepts that such an institution is possible. This raises philosophical questions regarding the nature of reality, as was touched upon by K. in his assertion that the proceedings “are in fact only legal proceedings if I recognise them as such.”<sup>236</sup> K. constructs a “subjective world”<sup>237</sup> to which the reader is privy, but whether this world is akin to the world of others remains unknowable. He finds the court and transforms the officials into corrupt men out of his own self-justifications. There is no objective truth with which to compare K.’s

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<sup>232</sup> Kafka *The Trial*, above n 2, 44.

<sup>233</sup> *Ibid*, 210. In another translation the line reads “Where the High Court of Justice?” Kafka, above n 215, 290.

<sup>234</sup> On this translation, the noun also moves from lower to upper case ‘C’, giving it proper noun status. However, many other translations of the text and German editions use a capital ‘C’ for the court throughout the novel, so this is not a material difference. The text of *The Trial* used in this paper stands alone in using a lower case ‘c’ for the court. Other texts which use an upper case ‘C’ throughout include Kafka, above n 215; Franz Kafka *The Trial* Willa and Edwin Muir (trans) (Penguin Books, Harmondsworth, 1953); Kafka, above n 205, and Franz Kafka *Der Proceß* (Schocken Books Inc, New York, 1990), where the German equivalent to ‘High Court’ is ‘hohe Gericht’.

<sup>235</sup> While Titorelli explains that “only the highest court... has that authority”, it does not automatically follow that a ‘High Court’ exists in the concrete sense. Kafka *The Trial*, above n 2, 143.

<sup>236</sup> Kafka *The Trial*, above n 2, 40.

<sup>237</sup> Henel, above n 125, 47.

perception of reality. Whether reality is sourced from an objective world outside oneself or whether it is completely internal to one's mind is one of the great philosophical conundrums. On a more basic level, Kafka's use of nouns reveals a very precise use of language and its component parts to add a different kind of meaning to his prose.

While the style of legal writing has the appearance of clarity, it is also frequently used by lawyers as “an instrument of deception.”<sup>238</sup> Language can be used to hide truth or euphemise a disappointing state of affairs; if a case looks weak, creating confusion for the court or opposing party may be the best course of action.<sup>239</sup> Kafka knew that language was “ultimately unintelligible”<sup>240</sup> and so created impossible puzzles from the most plain of statements. The text is uncomfortable for it preserves “both the enigma and the solution, both the misunderstanding and the expression of this misunderstanding.”<sup>241</sup> Kafka forces language to reveal its self-contradiction; “paradox permeates Kafka's style.”<sup>242</sup> The skill in bending words that seem to make sense into riddle is legalistic indeed.

A professional report written concurrently with *The Trial* in 1915 called ‘Accident Prevention in Stone Quarries’ has been argued by Valerie Greenberg as having connections with the literary work.<sup>243</sup> His report was written in professional discourse with textual devices to render what appeared to be substance into a non-committal evasion of responsibility or command. The futility of attempting to prevent accidents by institutional means was masked behind various qualifications and retractions.<sup>244</sup> A statement which begins by asserting that safety regulations are desirable ends with a retraction of just that, “since the deciding factor is profit and power lies with the owners. Of course this

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<sup>238</sup> Stark, above n 8, 1392.

<sup>239</sup> Ibid.

<sup>240</sup> Anthony Thorlby “Kafka and Language” in Stern *The World of Franz Kafka*, above n 35, 133.

<sup>241</sup> Blanchot, above n 60, 15.

<sup>242</sup> Politzer “Franz Kafka's Language”, above n 227, 37.

<sup>243</sup> Valerie D Greenberg “The Trial in the Stone Quarry” (1990) 20 *Modern Language Studies: Literature and Science* 96.

<sup>244</sup> Ibid, 94.

truth or grounding is never stated directly... the voice of reason is drowned out by its own words.”<sup>245</sup> Similarly in *The Trial*, statements are twisted and turned until they stand on the head of what the reader was first told. An example of this is the confusing dialogue between K. and the priest after the relation of the parable ‘Before the Law’ where the priest appears to be talking in circles and leads K. to the conclusion that “lying is a universal principle.”<sup>246</sup>

The legalistic linguistic precision of Kafka’s writing is evident in both his fiction and occupational reports, but it is also the lack of emotive appeal in his work which smacks of legal writing. Kafka was a “deadpan realist”<sup>247</sup> who creates in the reader an acceptance of events, because the description is so banal. “In the Penal Colony” traverses the workings of a torture and killing machine but the reader forgets their revulsion, lost in the precision of the workings; “the unbearably cruel are accepted by the reader as a given, because the account is so implacably matter of fact.”<sup>248</sup> There is a lack of emotion in describing such frightening events; these too are masked in objectivity and detachment, just as the most appalling facts in a legal case are described with professional impartiality.

#### ***IV CONCLUSIONS***

While law and literature is a topic that is gaining momentum in jurisprudential circles, there has been a lack of focus upon the agent of these works: the lawyer/writer. The law is often examined in the abstract, separately from the author’s own experience of the law. This paper has attempted to delve deeply into the personality and experience of the writer rather than contain inspection to the works, for the specific incidents of legal life that are experienced in the writer’s own study and practice may impact more strongly upon their literary works than any abstract notion of ‘the law’.

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<sup>245</sup> Greenburg, above n 243, 96.

<sup>246</sup> Kafka *The Trial*, above n 2, 199-203.

<sup>247</sup> Begley, above n 37, 261.

<sup>248</sup> Ibid.

Why the law is such a popular literary topic is a conjecture that has many possible answers. The process of the trial is highly dramatic, and serves well to provide the climax to a plot. The law also remains relatively stable and unchanging over time, thereby allowing future generations to appreciate literature many years after its publication. It also shares similar characteristics across space; readers from both civil and common law traditions can understand broad themes of justice and the legitimacy of power. These features greatly increase the chances of a work's survival in the literary marketplace.

The most obvious tie occurs when law is written about *in* literature, either as a plot device or to highlight legal themes. The substance of Kafka's work is influenced by the law. Undoubtedly there are a multitude of possible metaphoric meanings that can be drawn from his fiction, but this should not displace the primary position of the law. Kafka wrote from what he knew; the law was therefore his chief source of knowledge. In Kafka's works, the themes were drawn from his contact with the law – at university, when gaining his Doctorate of Jurisprudence, and as a professional working with the law. *The Trial* centres on the proceedings of a defendant; "In the Penal Colony" focuses on the legitimate punishment of a convicted man; and "The Problem of our Laws" explores the relationship between law and power. Legal themes stretch from broad explorations of justice and legitimate process to narrow jurisprudential issues such as the positivist belief that one can judge criminality from individual bodily characteristics.

Legal influences can also be seen in the style and composition of literature. Legal study trains the mind to use words in a precise and crisp manner, in well organised sentences and structured paragraphs. The use of words to create or evade clarity is purposive, with lucidity as an aim to be circumvented if it serves the plans of the writer. Superfluity is to be avoided, as are exaggerations, hyperboles and rhetoric literary devices. When this style is translated into literary fiction, it creates stark depictions that convey bleakness and isolation. Words

when used in their literal sense create confusion in the reader when they are twisted into nonsense by legal sleight of hand.

When applying the study of law and literature to a particular author, one must be careful to acknowledge all factors that may impact upon the level of understanding of the text. When looking to Kafka, the English critic must remember that the literature is only able to be read through the interface of a translator, who in converting the German may lose some of the sense of the work or substitute it for their own. Often it is not substance that is lost but style, which is impossible to replicate exactly across languages.

In Kafka's case, the translation has replicated features of his writing which are also found in his professional reports. There is a strong, direct, simply constructed progression of information that is logically organised and literally presented. Locations that he visited in site inspections are found as settings in his novels. The workings of equipment that he explained in safety assessments breathe new life as fictional instruments of torture. The style of his work is similar across the varied literary disciplines he engaged in, and it leans toward the legalistic turn of phrase.

The links between law and literature are imprecise but certainly present. Law can be regarded as a form of literature in itself, as it creates narratives of justice and power through the reasoning and outcomes in cases, and what is considered most persuasive in policy considerations when implementing legal reform. A definite link can be seen between the literary product of a lawyer writing in his or her professional capacity and as an author of fiction. The subject matter that Kafka likened to 'sawdust' infiltrated his artistic writing. The study of law has been suggested as changing the way one thinks; if this is so, then such cross-pollination is not only understandable but inevitable.

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