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To cite this article: Reza Banakar (2010) In Search of Heimat: A Note on Franz Kafka's Concept of Law, *Law & Literature*, 22:3, 463-490

To link to this article: <https://doi.org/10.1525/lal.2010.22.3.463>



Published online: 19 Dec 2013.



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In Search of Heimat: A Note on Franz Kafka's Concept of Law

Reza Banakar*

Abstract. Are Franz Kafka's representations of law and legality figments of his imagination, or do they go beyond his obsessive probing of his neurosis to reflect issues that also engaged the social and legal theorists of his time? Does Kafka's conception of law offer anything new in respect to law, justice, and bureaucracy that was not explored by his contemporaries or by later legal scholars? This paper uses Kafka's office writings as a starting point for reexamining the images of law, bureaucracy, hierarchy, and authority in his fiction—images that are traditionally treated as metaphors for things other than law. The paper will argue that the legal images in Kafka's fiction are worthy of examination, not only because of their bewildering, enigmatic, bizarre, profane, and alienating effects or because of the deeper theological or existential meanings they suggest, but also as exemplifications of a particular concept of law and legality that operates paradoxically as an integral part of the human condition under modernity. To explore this point, the paper places Kafka's conception of law in the context of his overall writing, which the paper presents as a series of representations of the modern search for a lost Heimat. Kafka's writing, the paper argues, takes us beyond the instrumental understanding of law advanced by various schools of legal positivism and allows us to grasp law as a form of experience.

Keywords: Kafka, Heimat, Gemeinschaft, community, Gesellschaft, rhetoric, rationality, literature, state law, living law, legality, justice, authority, bureaucracy, positivism, sociolegal

Much of Kafka's greatness as an analyst of modern life—of the fusion of bureaucracy and technology as its governing principle—is owed to his office job.¹

INTRODUCTION

When reading Franz Kafka's novels, short stories, and parables, one cannot help wondering, "Whatever made him think of that?"² The answer to this

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question involves, according to Clayton Koelb, “an investigation into rhetoric,” that is, into Kafka’s attempt to “understand a particular discourse as fully as possible as if one were certain that all its elements were saturated with meaning.”³ This paper examines Kafka’s “rhetoric” while paying special attention to his day job as an insurance lawyer and bureaucrat and to his legal and clerical writings. These writings reveal that Kafka developed some of the characters, settings, and images in his fiction by borrowing material from the cases he worked on. Joseph K. and his inexplicable experience of the law in *The Trial* were, for example, born out of an actual legal case, and Gregor Samsa and his bizarre transformation into an insect in *The Metamorphosis* were inspired by Kafka’s daily work experience. Would Kafka have thought the way he did, constantly striving “to interpret discourse that looks like one thing but might well be another”⁴—often its opposite—had he not been leading a double life,⁵ practicing law during the day and producing fiction at night? His day job as an insurance lawyer and his nighttime avocation as a fiction writer both involved writing, although one belonged to the world of modern work and the other to the world of art.⁶ In Kafka’s fiction, these two separate worlds merge to uncover the inner contradictions of modernity.

In *The Trial*, Joseph K. encounters a priest in the Cathedral who tells him, “The right perception of any matter and a misunderstanding of the same matter do not wholly exclude each other.”⁷ I will argue in the following pages that Kafka’s technique of conflating the “right” perception of a matter with the reverse of its everyday logic—a technique that is the hallmark of Kafka’s rhetoric—needs to be understood in the discursive context of his work as a lawyer. The legal aspects of Kafka’s work do not, admittedly, explain his “linguistic imagination,”⁸ but they do throw new light on the link between law and his images of legality. They also challenge some of the dominant readings of Kafka’s work that emphasize theological, psychoanalytic, ontological, historical, metaphysical, and existential interpretations at the expense of exploring the role of law as such.⁹ It might be true, as Albert Camus argued, that Kafka’s novel *The Trial* is “the diagnosis,” whereas “*The Castle* imagines a treatment.”¹⁰ This should not, however, distract us from also considering the significance of Kafka’s choice of criminal proceedings when making “the diagnosis” and of private law when searching for a “treatment.”¹¹ Is Kafka’s choice of law arbitrary, or does it resonate with the work of the legal and social theorists of Kafka’s time and their concern with the rise of modernity? More importantly, does Kafka’s work offer insights into aspects of the complex

relationship among modern law, justice, and bureaucracy that both Kafka's contemporaries and later legal scholars have failed to explore?

This essay first sketches the contours of the existing debate on Kafka's literary work. Next, it argues that Kafka's office writings, his training and daily work as a lawyer, and his career as a bureaucrat have significance for his fiction. The essay then explores the ways in which Kafka's legal work shaped his ideas about law and legality, focusing on his unfinished novel, *The Castle*. Like Josef K. in *The Trial*, the protagonist of *The Castle*, known only as "K.," is subjected to an ethical form of judgment that lies beyond the scope and jurisdiction of positive law. This ethical form of judgment, which is ordinarily regarded as the sphere of justice, delivers what in Kafka's world appears to be an incomprehensible form of injustice. Shifting its focus to *The Trial*, the paper goes on to show that Kafka's law is not only dissimilar to positive law but also defies categorization as religious law, natural law, or customary law. The paper ends by making three interrelated points: First, Kafka's notion of law takes us beyond a Weberian concern with the rise of bureaucracy and the rationalization of modern society. Second, Kafka's office writings illustrate that the images of law in his fiction, which critics regard as expressing his "ambivalence about the law,"¹² are based on his experience of working with the law as an insider and an outsider at the same time. This dual perspective allowed Kafka to observe the contradictions intrinsic to the internal and external operations of law. Third, Kafka's work reveals the role of "nonrational"¹³ elements in the formation of modern law and legal institutions. This occurs, however, in the context of Kafka's numerous representations of the search for *Heimat*, the peaceful and harmonious community to which the modern individual would like to belong and with which he or she longs to identify.

At the turn of the nineteenth century, the German-speaking countries developed an elaborate discourse on *Heimat*, a word meaning "home," "native place," or "homeland." This discourse, which had romantic undertones, lamented the rise of modern "mechanical society" and the corresponding loss of an idyllic "organic" community.¹⁴ Ferdinand Tönnies (1855–1936) described modernity as the passage from a form of society dominated by *Gemeinschaft* (community) to one dominated by *Gesellschaft* (association).¹⁵ In Tönnies' account, *Gemeinschaft* was a social order based on spontaneous and tacit common understandings, close emotional ties, sameness, and a strong sense of place, whereas *Gesellschaft* was based on the impersonal bonds intrinsic to modern, industrialized, urban life. The transformation of *Gemeinschaft* into

Gesellschaft also marked a transition from a form of social organization based on interpersonal trust and unofficial sanctions into one based on formal contract and official sanctions. The modern individual, who in the course of this passage remains dependant on both the community and the association, inevitably becomes caught up in the tension between the forces of *Gemeinschaft* and *Gesellschaft*. Many of Kafka's works depict the consequences of this tension for the individual. *The Castle*, for example, uses a rural backdrop to present the dilemma the modern individual faces with respect to *Gemeinschaft*. The village community to which the Land Surveyor K. hopes to belong neither welcomes nor needs him. *The Trial*, meanwhile, uses an urban setting to portray the alienating effects of the impersonal relations characteristic of *Gesellschaft*. These alienating effects are so severe that the novel's protagonist, Joseph K., is virtually an exile in his own hometown.

In his short piece "Homecoming" (also translated as "I Have Returned"), Kafka strips *Heimat* of its artificial romantic and idyllic attributes by conflating the everyday sense of community and belonging with its opposite:

I have returned, I have crossed the front yard and I look round me. It is my father's old farmstead. . . . Do you feel you belong, do you feel at home? Yes, it is my father's house, but each object stands cold beside the next, as if each was preoccupied with its own affairs, which I have partly forgotten, partly never known. . . . And I dare not knock at the kitchen door, I only listen from a distance. . . . And since I am listening from a distance, I can catch nothing; all I hear, or perhaps just imagine I hear, is the faint chiming of a clock that floats across to me from my childhood.¹⁶

Like *Gemeinschaft*, *Heimat* is the place of taken-for-granted relations, assumptions, and worldviews, and of intuitively shared values and sentiments; it is not a place for conscious, critical reflection. Only outsiders possess the external vantage point required for viewing *Heimat* critically. Kafka's works describe *Heimat* from without, from the standpoint of the outsider, as an estranged space that gives rise to alienating experiences. Nonetheless, the search for *Heimat*'s harmony, security, and warmth continues in his fiction. This continued search for *Heimat* may imply the impossibility of redemption, but it may also denote the inescapable dilemma of the modern individual who, on the one hand, values his or her personal autonomy and, on the other hand, needs the security, support, and sense of belonging *Gemeinschaft* provides. The need to retain one's autonomy as an individual inevitably conflicts with

the need to enjoy the “warm circle” of the community, for membership in the community may only be gained at the expense of compromising one’s autonomy.¹⁷ The search for *Heimat* continues, because *Gemeinschaft*, or community, is modernity’s paradise lost, a place not available to us, but “which we would dearly wish to inhabit and which we hope to repossess.”¹⁸

I. CHEWING SAWDUST

Many critics have attempted to examine Kafka’s legal background and the role of law in his fiction.¹⁹ These attempts, however, comprise only a small portion of the vast literature devoted to the study of Kafka’s life and works, and they are also marginal to legal scholarship.²⁰ Mainstream studies of Kafka’s works generally present his fiction as an engagement with absurdity, a critique of bureaucracy, or a search for redemption, in the process failing to account for the images of law and legality that constitute an important part of his fiction’s “horizon of meaning.”²¹ Many of Kafka’s descriptions of the legal proceedings in *The Trial*²²—metaphysical, absurd, bewildering, and “Kafkaesque” as they might appear—are, in fact, based on an accurate and informed knowledge of the German and Austrian criminal proceedings of the time.²³ The significance of law in Kafka’s fiction is also neglected within legal scholarship, for, as Richard Posner has pointed out in some of his earlier writings on law and literature, most lawyers do not consider writings about law in the form of fiction of any relevance to the understanding or the practice of law.²⁴ Regardless of mainstream Kafka scholarship’s focus on redemption and absurdity, and regardless of what lawyers like Judge Posner might think relevant to law and legal practice, the fact remains that Kafka was an insurance lawyer who, besides being involved in litigation, was also “keenly aware of the legal debates of his day.”²⁵

After receiving his law degree in 1906, Kafka worked for two years at the Italian insurance firm Assicurazioni Generali. He then joined the Workmen’s Accident Insurance Institute for the Kingdom of Bohemia in Prague, a quasi-governmental agency that managed the local administration of the Austrian Empire’s Workers Compensation system. Because of his Jewish background, Kafka was promoted slowly, but he eventually rose “to a high-ranking position (*Obersekretär*)” and became “a significant innovator of modern social and legal reform in the Crown Land of Bohemia.”²⁶ The Institute was responsible for determining and collecting insurance premiums covering work-related injuries

for all types of industrial settings. Kafka remained at the Institute until his poor health led him to resign in 1922, two years before his death in the Kierling sanatorium near Vienna. During the years Kafka worked as an insurance lawyer, he produced a large number of office documents ranging from reports and briefs to speeches and newspaper essays. Stanley Corngold, Jack Greenberg, and Benno Wagner have translated eighteen of these documents into English and equipped them with commentaries that contextualize and analyze each document. This collection reveals the extent to which Kafka used material and ideas from his office work to develop his fiction, and how his general style influenced his legal writings and vice versa. Jack Greenberg provides several examples of how Kafka used material from his office writings in his fiction:

In Kafka's professional writing about insuring quarries, we find what may be a one-to-one correspondence with the location of the ultimate scene in *The Trial*. . . . The 1914 report on quarry safety described a quarry in which there was "a loose stone block 1m³" and accompanied the text with a photograph. That year Kafka began writing *The Trial*, which ends in a chilling execution scene in a quarry.²⁷

Not as congruent as the quarry of the insurance report and the quarry of the execution site, but suggestive nevertheless, is the relationship between wood planing machines insured by Kafka's Institute and the torture machine of *In the Penal Colony*. Planing machines caused many injuries that required workmen's compensation. In a report directed at technical experts, mechanical engineers, and business owners, Kafka wrote of finger joints and entire fingers cut off by square-shaft planing machines, presenting a lengthy argument, illustrated with drawings that advocated replacing them with much safer cylindrical-shaft planing machines.²⁸

The official documents often carry more than traces of Kafka's style as a fiction writer—we hear in them what the editors of his office writings aptly call "Kafkaesque echoes."²⁹ For example, his brief on "Risk Classification and Accident Prevention in Wartime (1915)" ends with the following reference to a German case:

A prisoner of war was employed as an operator of a large overhead crane. One day, for no good reason, he set the crane's hoist motor at full power. When the hoist cable broke, the pulley block shot up into the air and flew into the work place behind, without as it happened, hitting anyone.

There was no doubt that the prisoner of war's principal intention had been to disable the crane and to disrupt the flow of work. The German authorities recommended that any firm employing prisoners of war make certain that these are not called upon to perform tasks on which the welfare of the operation depends.³⁰

This ending not only reminds us of Kafka's story *In The Penal Colony*, but also highlights, in Kafka's special style, the precariousness and vulnerability of the normality of daily life.

A number of people, including Kafka himself and Max Brod, Kafka's friend, biographer, and editor, bear responsibility for drawing critics' attention away from Kafka's legal work. Brod writes, for example, that "Franz had always looked on his legal profession solely as a makeshift, and dreamed of other activities."³¹ Kafka often complained in his diaries and letters that his day job was unbearable and conflicted with his only desire and calling, which was literature.³² In a letter to his father, he belittled his legal career by writing that he studied law only by default after he failed to find something that was compatible with his "self-absorption" and "vanity."³³ In the same letter, he famously described his experience of studying law in terms of chewing sawdust: "for the few months before the final university exam, my mind was fed with intellectual sawdust which had been chewed by a thousand mouths before."³⁴ This does not mean that Kafka was not exposed to the jurisprudence of his day while studying at the German-speaking Ferdinand Karl University in Prague. Besides taking courses in Roman law, Austrian civil law, constitutional law, economics and trade law, and administrative law, Kafka took "four courses with Hans Gross, who was a professor in Prague from 1902–1905—three in criminal law and one on the history of philosophy of law."³⁵ It is, therefore, likely that Kafka was familiar with Gross's idea that "it is not the crime but the criminal who is the proper object of punishment,"³⁶ an idea based on criminal psychology that later, arguably, shaped the fate of Joseph K. in *The Trial*.³⁷

The same idea can be discerned in *In The Penal Colony*, where a man who has been condemned to death for falling asleep on duty is to be executed by "the remarkable piece apparatus," in reality a barbarous torture instrument inspired, as noted above, by the dangerous wood planing machines whose operators Kafka's Institute insured.³⁸ The condemned man has had no opportunity to defend himself and has no idea what sentence he is about to receive. As the officer in charge of the torture machine—who, incidentally, is also the

judge—explains to “the explorer,” a stranger on a visit to the Penal Colony, “There would be no point in telling him. He’ll learn it corporally on his person.”³⁹ The officer nostalgically recalls the days under the Old Commandant when executions brought the community together: “A whole day before the ceremony the valley was packed with people; they all came to look on.”⁴⁰ To the officer’s regret, the New Commandant is influenced by women around him and, thus, no longer favors this method of punishment, which is why no one attends the executions anymore. Although the New Commandant has the power to stop this barbarous practice, he does not dare to.

In this story, we see how Kafka employs his linguistic imagination to transform the wood planing machines, which mutilated the fingers of the workers who operated them, into a torture instrument. At the same time, Kafka links the idea of the criminal as an object of punishment to a romantic, but perverted, sense of justice and to the sense of community that has been lost in the passage from the old to the new social order. The new order disapproves of the violence of the old system, but dares not end it. The perversion of justice in the Colony mirrors the working conditions of those operating the planing machines, who—like the condemned man in the Colony—are kept unaware of their sentence and of the punishment they are to receive. The story also suggests the inability of the Workmen’s Accident Insurance Institute, presented as the new order in the Colony, to put an end to the old practices that put workers at risk of serious injury. This is, admittedly, not the only interpretation of *In The Penal Colony*, but it is one that becomes possible once we place Kafka’s fiction in the context of his office writing and his legal background.

To explore the relationship between Kafka’s concept of law, his overall concern with the human condition, and modernity’s search for a lost community, I will focus next on *The Castle*, which scholars interested in Kafka’s legal ideas often overlook in favor of *The Trial*. I turn to *The Trial* itself in Part IV, where I explore Kafka’s notion of law as a nonstate form of legality.

II. THE CASTLE

At the beginning of Kafka’s novel *The Castle*, the Land Surveyor K. arrives in a village blanketed in snow.⁴¹ On his arrival, K. takes up refuge in a local inn for the night. He sleeps briefly, but then a castellan’s son rudely awakens him and challenges his right to stay in an inn that belongs to the Castle.

When K. explains that he is the Land Surveyor summoned by the Castle,⁴² the castellan's son makes a phone call to the Castle to verify his claim. The Castle official first replies that no such person has been summoned, but then calls back a moment later to confirm K.'s story. K. is thus allowed to stay. The next morning, K. leaves the inn and makes his way through the snowy streets toward the Castle, where he hopes to clarify the confusion surrounding his visit. More importantly, he hopes to assume the duties for which he has been summoned. The Castle appears sharply outlined in clear daylight as an untidy and miserable heap of low-lying village houses on top of the hill. K. sets off with his eyes fixed on the Castle, for nothing else matters to him but reaching it. The way to the Castle proves long, however:

The street he had taken, the main street in the village, did not lead to the Castle hill, it only went close by, then veered off as if on purpose, and though it did not lead any farther from the Castle, it didn't get any closer either. K. kept expecting the street to turn at last toward the Castle, and it was only in this expectation that he kept going.⁴³

Exhausted by his futile attempt to reach the Castle, K. takes a sleigh back to the inn. At this point, a messenger appears with a letter from a Castle official named Klamm.⁴⁴ The letter orders K. to report to the village mayor. The mayor informs K. that he has only been summoned as a result of confused communications between the Castle authorities, who are not actually in need of a land surveyor.

K. is neither granted permission to enter the Castle nor given direct access to the Castle officials. The Castle, nonetheless, acknowledges K.'s presence, apparently facilitates his stay by finding him a position as the janitor in the local school, and assigns Barnabas, a messenger from the Castle, as a go-between. This arrangement proves unsatisfactory, for K. soon realizes that Barnabas does not receive letters directly from Klamm, but rather from a clerk. Barnabas goes to "the offices" but is not certain if these are in the Castle. Moreover, although Barnabas is at the service of the Castle, he is uncertain of his messenger status and not sure if the high official he meets, who is referred to as Klamm, is in fact Klamm or only someone who looks like Klamm.

The villagers are alarmed by K.'s defiant attitude toward the rules and conventions that create their community and that govern their relations with the Castle. Accordingly, they view K. with suspicion. K. violates the local mores by questioning normal procedures and by endlessly seeking to contact

Klamm. The villagers—especially the landlady of the inn, who had once been Klamm’s mistress—know that a stranger like K. cannot approach such an important official. Momus,⁴⁵ one of Klamm’s village secretaries, seeks to take a deposition to fill a gap in the Castle’s official records on this matter. During the deposition, the landlady tells K. that “Klamm will never speak to anyone he doesn’t want to speak to, no matter how strenuously a certain individual exerts himself and no matter how insufferably he pushes himself to the fore.”⁴⁶ The landlady does give K. a slight hope, however: K. might be able to establish an official connection with Klamm by way of his secretary’s deposition. The landlady tells K.:

In your case the only path leading to Klamm passes through the secretary’s depositions. But I don’t wish to exaggerate, perhaps this path doesn’t lead to Klamm, perhaps it ends long before it reaches him; that decision is made by the secretary at his own discretion. Anyhow, for you this is the only path that does at least lead in Klamm’s direction.⁴⁷

K. employs all the means at his disposal to contact Klamm, hoping that Klamm can unlock the doors of the Castle to him. All his efforts fail.

Toward the end of the novel, K. finally meets a Castle official named Bürgel while waiting to see one of Klamm’s village secretaries at the Herrenhof Inn in the early hours of the morning. Bürgel begins telling K. many important things about the Castle’s inner workings, but K. falls asleep during this meeting. Kafka never finished *The Castle*, and the manuscript ends here, but he told Max Brod about the ending he envisioned for the novel:

The ostensible Land Surveyor was to find partial satisfaction at last. He was not to relax in his struggle, but was to die worn out by it. Round his deathbed the villagers were to assemble, and from the Castle itself the word was to come that though K.’s legal claim to live in the village was not valid, yet, taking certain auxiliary circumstances into account, he was permitted to live and work there.⁴⁸

The Castle is heavily indebted to *The Grandmother*, a realist novel by Božena Němcová, a female Czech writer who lived between 1820 and 1862. Němcová’s tale is about the people of a Czech village who have no access to their overlord in the castle, where German is spoken. Kafka must have read this novel at school, where, according to Max Brod, it was used “as the basis for instruction in the Czech language.”⁴⁹ Although Kafka borrowed some of

the main themes and characters of *The Castle* from Němcová's village tale, his story unfolds differently. In Němcová's version, the protagonist, "the grandmother," succeeds against all odds at making contact with the duchess who rules the village, obtaining justice in the process. In Kafka's version, not only justice but also the authority governing the village remain out of K.'s reach. K., incidentally, is a character born out of a report on "Fixed Rate Insurance Premiums for Small Farms Using Machinery (1909)."⁵⁰ This report deals, among other things, with land surveying and invalid surveys. It documents the Institute's unsuccessful attempts to mediate between the world of the farmers (the village) and the Ministry in Vienna (the Castle).

Borrowing material from his office work allowed Kafka to retain a vital link between his fiction and the "real world." The fact that the "real world" appears to be "without anchor"⁵¹—that is, the link Kafka chose is legal and formalistic, and thus subject to misreading—is part of the irony that defines Kafka's work. Kafka's fiction employs this material in the same way dreams use daytime objects, experiences, and images from the dreamer's immediate life context, and waking thoughts. Kafka's rhetoric (his specific style of "verbal imagination,"⁵² which the following section will discuss as a form of "double thinking") transforms this material, incorporating it into his fiction in a way that gives expression to many of the same concerns about the nature of modernity that preoccupied the social sciences of Kafka's time. The fact that Kafka transformed this material while integrating it into his work also explains why his critics have too readily neglected law as a significant element in the interpretation of his texts.

Kafka wrote *The Castle* over a period of nine months, between January and September of 1912, while recovering from a nervous breakdown. His writings are reminiscent of Max Weber's *Economy and Society*, published ten years later,⁵³ insofar as bureaucracy, domination, and authority loom large in them. Kafka's writings are, at the same time, very different from Weber's work, for not only do they choose the medium of fiction and, thus, nurture no social scientific aspirations, but they also demonstrate that bureaucracy, in spite of its formally rational properties, does not eliminate the unpredictable and arbitrary elements in social organization. The irrationality of modern rational organization, at which Weber's notion of the "iron cage" only hints, plays a key role in Kafka's writings. The meeting between K. and Momus, during which the latter seeks to take a deposition that most likely no one will ever read, is an excellent example of Kafka's concern with the spread of bureaucracy

as an end in itself. *The Castle* represents a quintessentially arbitrary and unpredictable bureaucracy. As Malcolm Warner points out, “the rules change every time he [K.] seeks confirmation of what is expected of him in his post of Land Surveyor. He is confronted by an unpredictable ‘personnel bureaucracy’ that first appears to hire him and then seems to find ways of evading this commitment.”⁵⁴

Subversion

The Castle is written in Kafka’s usual style: the events are described in a sober, pedantically detailed, formal, at times legalistic, but above all realistic manner. At the same time, an unmistakable sense of dreamlike unreality presides over the description of events. The borderline between everyday, taken-for-granted reality and unreality is disturbingly blurred in Kafka’s writing. The dichotomy of real/unreal does not withstand his descriptions—he shows the “unreal” as a poorly concealed, integral part of the taken-for-granted reality. The realistic description of K. leaving the inn in the morning with the intention of walking to the Castle, for example, is subverted by K.’s failure to get any nearer to it, the longer he walks. On two different levels, Kafka challenges the surface logic of everyday life, laying bare its nonrational elements and its fragmented structures. He subverts the reality in his fiction externally, that is, at the level of the reader, by conflating realistic and unrealistic narrative elements, leaving the reader bewildered and confused.⁵⁵ He also subverts the reality of his fiction internally, however, and K.’s actions in *The Castle* exemplify this second order of subversion. When K. refuses to give a deposition to Klamm’s village secretary, for example, he violates the village community’s rules and social norms, thus calling the village’s normal state of affairs into question. K. subverts the reality of the village community by provoking the hostility of the villagers and unveiling the nonrational constituents of their seemingly peaceful and harmonious existence. Expressed differently, by exposing the inner contradictions and hidden conflicts within the seemingly harmonious village community, K. threatens the foundations of the *Heimat* to which he wishes to belong.

Petty village officials, such as the schoolmaster, treat K. with contempt, thus expressing their concern for maintaining the village’s social order.⁵⁶ K., in a sense, challenges these officials directly whenever he questions the Castle’s authority, upon which their status depends. The villagers also feel challenged and therefore react with hostility. A villager tells K. that their lack of

hospitality, which might surprise him, only reflects the fact that they have no need for guests.⁵⁷ Admittedly, if the Castle has summoned K., then he may be an “exception,” but the villager says that “we little people go by the rule.”⁵⁸ The “rule” is the rule of the Castle, which is in turn the village’s source of authority and social order. It is important to note that the Castle is as inaccessible and incomprehensible to ordinary villagers as it is to K. Unlike K., however, the villagers have learned to take the legitimacy and authority of the Castle for granted. This interpretation does not make K. a “pilgrim-hero,” as the editors of *The Office Writings* suggest.⁵⁹ If anything, K. is a nonbeliever among those who have seen the “light,” and this “light” is not necessarily divine, but simply a form of social psychological domination. What sort of authority does the Castle possess if it needs to call in a stranger like K.? It is thus not only K.’s ignorance of the village’s rules and customs that poses a threat to the villagers’ identity and social order; his very presence in the village is a constant and disturbing reminder of the Castle’s fallibility and of the uncertainty of the social order it represents. The Castle summoned K. either out of necessity or as a result of official error. In either case, K.’s presence undermines the Castle’s authority. K. thus embodies the villagers’ anxieties and signifies the irreconcilable tension between *Gemeinschaft* and *Gesellschaft*.

Why does K. remain where he is neither needed nor welcomed, but instead is treated with scorn and hostility? K. does view the villagers’ hostility as “cause for a slight attack of despair,” but he is not in the village accidentally; he is there on a mission.⁶⁰ Only by accessing the Castle and clarifying matters with Klamm, whose name means “illusion” in Czech,⁶¹ can K. hope to vindicate his rights as a citizen of the village community and thus obtain justice. Paradoxically, K. seeks to vindicate his right of entry into the village community by breaking that community’s basic rule, that is, by trying to contact Klamm. In a sense, K.’s relentless efforts to enter the Castle represent the modern individual’s quest to recover a sense of *Heimat* without compromising his or her autonomy. Although this search is rationally motivated by the need for safety and security, K. conducts it irrationally by appealing to the inaccessible and impersonal authority of *Gesellschaft* to open up the doors of the *Gemeinschaft*. Two interrelated issues are, thus, brought into sharp focus: first, the paradoxical condition of the modern individual as captured by Kafka’s rhetoric, and second, the kinship between the search for *Heimat* and the desire for justice as revealed in *The Castle*.

III. PARADOXES

Throughout Kafka's fiction, but also occasionally in his office writings, the rational is conflated with the nonrational, the mundane with the extraordinary. For example, by ending his brief on "Risk Classification and Accident Prevention in Wartime (1915)" with a discussion of the case of a prisoner of war who intentionally sabotages a crane (quoted above in Part I), Kafka underlines how precarious and vulnerable the normality of daily life is. Kafka can explain, for example, why the prisoner of war endangered his workmates—he obviously wished to disrupt the flow of work—yet he adds that the prisoner acted "for no good reason." Admittedly, Kafka might be suggesting that there is no good reason to disrupt the flow of work or to endanger other people's lives, but the way he tells this story also suggests that the prisoner acted impulsively, perhaps to express a suppressed or inexplicable feeling. In the scheme of Kafka's fiction, this frequent conflation of the rational and the nonrational—or of the real and the unreal—diverts our attention from his more fundamental subversion of our cogent experiences of life. According to Michael Wood, Kafka "invites" us to think contrary thoughts, what Wood calls "double thoughts":

"It is certainly an excellent arrangement," the official says, "always unimaginably excellent, even if in other respects hopeless." We can easily picture, or even recall, arrangements that are excellent for some and hopeless for others, and that is what the phrase "in other respects" invites us to do. But the larger rhythm and grammar of the sentence asks us to go beyond this option and think both contrary thoughts at once, taking excellence and hopelessness as partners in an intricate dance, calling for and implying the other; as if the arrangement is excellent because it is hopeless, hopeless because it is excellent.⁶²

In fact, Kafka is not "inviting" us to think double thoughts, but only holding up a mirror to us. Kafka's mirror, which is made of his linguistic imagination, works through his "rhetoricity," as Clayton Koelb has called it.⁶³ It "allows for two incompatible, mutually self-destructive points of view,"⁶⁴ one of which asserts while the other denies its own illocutionary mode. Kafka's mirror reveals that our thoughts and actions often contain contradictory elements, rational as well as nonrational components, even when we believe we are thinking logically and acting normally. It reveals how extraordinary the mundane can be. Where does this awareness of the conflation of contrary thoughts and images come from? Would Kafka express himself in this way

had he not been trained as a lawyer to bring order to the chaos that constitutes everyday life, trained to select elements out of this chaos, dislodge them from their context, and reconstruct them through a formal style that claims to be factual, objective, conceptually exact, coherent, and concise? Kafka's office writings show that he mastered and practiced this formal, rational style of writing. His fiction, on the other hand, bears the scars of a continual battle with law's reductionist tendencies, its artificiality and conceptual limitations, its denial of subjectivity, and finally, the terror of its arbitrariness.⁶⁵

Richard Weisberg describes Joseph K.'s terror in *The Trial* as "his misreadings of reality," which threaten to become the reader's terror.⁶⁶ These "misreadings" are as much necessitated by law's reductionism (what Niklas Luhmann conceptualizes as law's normatively closed, self-reproductive limits⁶⁷) as by Kafka's rhetoricity, that is, his ability to capture and reproduce discourses' openness "to radically divergent interpretations."⁶⁸ In the well-known parable *Before the Law*, the door of the law is kept open specifically for the man from the country, even as the doorkeeper standing in front of the door paradoxically denies him entry. The door is both "dreadful and intoxicating," and the word "before" lends itself to several interpretations: "standing outside of something spatially, preceding it temporally, awaiting something, or being on display before something or someone."⁶⁹ Would Kafka have known how to use this type of formal language, the ostensibly logical construction of which vainly attempts to conceal the illogic of the situation it describes, if he had not been familiar with legal forms of "double thought"?

Kafka's "rhetoric"—which exploits discourses' openness to divergent interpretations, allowing him to identify and employ "double thoughts" in his narratives—places him in the company of postmodern writers and legal scholars whose works often highlight the fragmentary, contradictory, and paradoxical nature of modern law.⁷⁰ Kafka came to law thinking rhetorically and in terms of "double thoughts." As Koelb shows, Kafka's name (Franz Amschel Kafka⁷¹) already contains "an enormous narrative potential" and "a powerful stimulus toward a recognition of the rhetorical possibilities"⁷² across languages, cultures, and religions. His legal training and practice as an insurance lawyer in a bureaucratic and hierarchically organized company could only enhance his rhetorical style and his sensitivity to the "double thoughts" that pervade our thoughts and actions. "Double thoughts" also reflect Kafka's experience of leading a double life, not to mention his feeling of being a "crossbreed" (part kitten and part lamb). Both his day job and night job consisted of writing, but,

as Ruth Gross points out, these two types of writing belonged to two different worlds, one to the world of work, the other to art. Like Poseidon, who instead of ruling the seas spends his time “going over the accounts,” Kafka’s day job also ostensibly prevented him from realizing his true calling. Kafka thus had no alternative but to merge these two worlds and “to balance his *brotheruf* with his *beruf*—the two sides of his calling as a writer.”⁷³ In the remaining part of this paper, I will examine the extent to which Kafka’s understanding of law is permeated by the interplay of contradictory thoughts.

IV. THE DESIRE FOR JUSTICE

Arnold Heidsieck points out that Kafka’s fiction demonstrates an interest “in the interrelationship of constitutional, civil, administrative, and criminal law with the history of law and moral thought.”⁷⁴ Josef K., in *The Trial*, wonders about the men who arrested him, asking himself: “What authority could they represent? K. lived in a country with a legal constitutional state . . . all the laws were in force; who dared seize him in his own dwelling?”⁷⁵ K. is fully aware of his rights and possesses a working knowledge of law (he is “virtually a lawyer”),⁷⁶ and yet he at the same time appears to be a complete outsider to the law and its processes, declaring that he does not understand the court system. When K. meets his lawyer, Herr Advokat Huld, he is surprised that a lawyer like Huld, who works “at the court in the Palace of Justice and not at the one in the attic,”⁷⁷ moves in “legal circles” where his case is discussed.⁷⁸ Later he asks Block, a businessman who is also a client of Advokat Huld:

“Does the lawyer take on ordinary legal cases too?” . . . K. found this alliance between court and jurisprudence profoundly reassuring. “Of course,” the businessman said, and then whispered to K., “They say that he is better at the ordinary legal cases than the others.”⁷⁹

In a passage that Kafka crossed out in the original manuscript of *The Trial*, Josef K., while being dragged to his death in the final part of the novel, sees a policeman and thinks, “The state is offering me its help . . . what if I shifted my case over to the jurisdiction of the state law?”⁸⁰ This leads Ziolkowski to conclude that “K. has been caught up in a different jurisdiction all together.”⁸¹ According to Ziolkowski, the novel is characterized by the “parallel existence of a dual law”—much like the Roman civil law and the Church canon law that

functioned side by side for centuries—that derived “from a common source in Justinian’s *Corpus Iuris Civilis*” and that “shared procedures that often betrayed their kinship.”⁸² The law applied to Josef K.’s case is similar only in certain respects to state law: it uses such concepts as a legal proceeding, case, court, defendant, lawyer and judge. Otherwise, it is unlike state law in that courts or legal proceedings are “distorted” beyond everyday recognition and, perhaps more significantly, represent a system against which “one cannot defend oneself; one must make confessions.”⁸³ This law is highly bureaucratic in a modern rational sense, but overtly arbitrary and nonrational with respect to its substantive outcomes and judgments. (As we shall see in the concluding section of this paper, this parallel legal system resembles the quasi-legal framework of Austrian insurance law). As Block tells K.: “Many people claim that they can predict the outcome of the trial from the defendant’s face, especially the shape of his lips. And these people claimed that, judging from the expression of your lips, you were certain to be convicted, and soon.”⁸⁴ The unfolding of *The Trial* shows that these people predicted the outcome of Josef K.’s trial correctly.

Whereas law in *The Trial* is couched in the procedural form of criminal law, with its intent being to punish Josef K., the law of *The Castle* is a form of private law; it is conciliatory in tone and restitutive in effect. There is no need for state intervention in *The Castle*, because the Land Surveyor K. has already been condemned and sentenced to exile in a village that neither welcomes nor needs him. Seen from a different angle, the tension between K. and the Castle appears to have been caused by a contractual dispute. The Castle acknowledges K.’s presence in the village, but it does not recognize the existence of a binding contract to employ him as a land surveyor. The problem arises once K. insists, as a matter of principle, on confronting the Castle to clarify the matter. He is driven by an inexplicable urge to vindicate his right and to satisfy his desire for justice. His desire may, admittedly, be interpreted as a metaphor for the search for God and (the impossibility of) redemption. He might, indeed, be the “sacred man” (*homo sacer*) who, as Martha Umphrey and colleagues argue in reference to Joseph K. in *The Trial*, “has been abandoned by law.”⁸⁵

I suggest, however, that K.’s desire for justice should be seen above all as another double thought, one that captures the tension between the individual and his or her community: To satisfy his desire for justice, K. must gain an audience with the Castle authorities and convince them to recognize his particular situation and circumstances. The only medium of action available to K., however, is the Castle’s impersonal bureaucracy, which K. must access

through Momus's deposition. K. must thus submit to procedures that establish their objectivity precisely by disregarding the singularity of his position and by misreading the events that created his case. This is a paradox that lies at the heart of the relationship between modern law, which strives toward *generality* and *universality*, and justice, which requires the recognition of *singularity* and *specificity*.⁸⁶ In this context, K.'s rights function as a mediating element between the universalistic drive of law, represented by the timeless bureaucracy of the Castle, and K.'s particularistic need for justice. Kafka expressed this paradox not only in his fiction, but also in his legal writings. In "The Scope of Compulsory Insurance for The Building Trades" (1908),⁸⁷ for example, Kafka recognizes the tension between "a 'top-down' bureaucracy based on centralized power and a 'bottom-up' model based on the voices of the individuals."⁸⁸ This once again suggests the tension between *Gesellschaft* and *Gemeinschaft*.

In short, two forms of law can be identified in Kafka's work. One is the law of criminal proceedings exemplified in *The Trial*, which appears to run parallel to state law, and the other is the private law of *The Castle*, which does not need the direct intervention of the state for its enforcement. The former is predicated on punishment, and the latter is concerned with restitution.⁸⁹ Both are independent of state law, yet are highly bureaucratic and patriarchal and exercise their power in an arbitrary fashion. Why does Kafka insist on using the formal bureaucratic vocabulary of state law if he is referring to a form of law other than state law? It has been argued that he was perhaps thinking in terms of religious law, canon law, or Talmudic law, all of which existed alongside state law during certain periods. However intriguing these explanations might be in view of Kafka's troubled relationship with his father, his Jewish background, and his feeling of exclusion from the Jewish, the German, and the Czech cultures, they are not quite convincing, for they fail to account for the procedural characteristics of the law in his fiction. These characteristics belong to modern law—more specifically, to the German and Austrian legal systems of his time—rather than to canon law or the Talmud. Moreover, the inaccessibility of justice and the obscurity of the source of legal authority, on the one hand, and the indeterminacy of the outcomes of cases, on the other, distinguish Kafka's law not only from religious laws but also from traditional natural law.

One can better understand Kafka's fusion of various forms of law and his mixing of strict procedures with arbitrary outcomes if one returns to his office writings, specifically to the voluminous case of Josef Franz Renelt,⁹⁰ the "owner of an orchard and a quarry in the northern Bohemian village of

Pömmeler,” whom the Institute suspected of making an “incomplete wage declaration.”⁹¹ According to the Institute, Renelt defrauded the authorities by listing some of his quarry workers, whom he was required by law to insure, as orchard workers, who were exempt from the insurance requirement. Kafka was involved in this case, which lasted some nine years and was litigated before an insurance tribunal and both criminal and administrative courts before finally being settled. In an extended commentary on this case, the editors of *The Office Writings* explain that, although Renelt ultimately won on a procedural point (the Institute had, in breach of the rules of insurance law, interviewed Renelt’s employees without his knowledge), the Institute vigorously pursued (almost persecuted) him for years in an attempt to make an example of him. Greenberg sums the case up this way:

The Institute sued Renelt repeatedly. Evidence was difficult to gather, witnesses recanted, memories failed, and Renelt’s side used physical force to wrest records from investigators.

The Renelt chronicles left traces in three of Kafka’s major novels. In *The Man Who Disappeared*, or *Amerika*, written at the time Renelt’s chronicles began, Karl Rossmann loses his job and runs into a policeman. After a short interrogation, he attempts escape and runs away again. . . .

Shortly afterwards, Kafka started writing *The Trial*. As Renelt encounters insurance law and criminal law, the accused Josef K.—who, like Renelt before the Aussig district court, “is not in custody”—tries to identify the jurisdiction he is dealing with. His later reflections on his strange trial could be regarded as a copy of Renelt’s successful shift of focus from the factual to the procedural aspects of the legal dispute and its ensuing transformation into an out of court settlement: in a deleted passage of Kafka’s last novel, *The Castle*, we find a comment on the vain struggle for physical possession of written evidence that occurred in yet another phase of Renelt’s matters.⁹²

Kafka’s use of Renelt’s case in *The Trial* and *The Castle* suggests that his protagonists are neither innocent nor victims of a bureaucratic system. They appear as victims only because Kafka is telling the story from their point of view and not from the standpoint of the court or the Castle, which, being bureaucratic systems, cannot have a personal point of view. This does not mean that justice was done in *The Trial*, in *The Castle*, or in Renelt’s case. However, it implies that Kafka’s concept of law encompassed not only an understanding of law as an organizing tool of *Gesellschaft* (i.e., the top-down structure of state law) but also a consideration of law as it is experienced by the modern individual.

V. CONCLUDING REMARKS

Does Kafka have a concept of law? Such a question would have probably amused Kafka, whose descriptions and images of law and legality are diffused by the practice of double thoughts. His perpetual fusion of the rational with the nonrational, the mundane with the extraordinary, renders obsolete any concept of law (understood as a set of logically interrelated propositions about the nature and operations of law in modern society). However, three interrelated insights can be gained from his work, which might serve as a basis for sketching an outline of a general concept of law.

First, Kafka's notion of law takes us beyond a Weberian concern with the rise of bureaucracy and the rationalization of modern life. Weber did, admittedly, take into account the irrational; however, using his ideal types, he distinguished sharply between the rational and the irrational elements in law and social organization. In contrast to Weber's conceptual distinction, Kafka shows the rational and the nonrational as two sides of the same coin, as inseparable entities, as the inherent paradox of modernity.

Second, Kafka understands law not only in terms of a fusion of the rational and nonrational outcomes of bureaucratic procedures (which requires observing law's operations from outside), but also in terms of the nonrational elements contained in law's internal procedures. Kafka's jurisprudence is, therefore, not limited to an outsider's perspective,⁹³ even though he creates that impression by telling his stories from the points of view of protagonists who appear, perhaps somewhat misleadingly, to be innocent victims. Instead, Kafka's fiction also reflects an *insider's* awareness of the paradoxical nature of law's internal operations. His office writings allow us to see that Kafka in fact combined internal and external views of the law. Kafka was not a legal functionary in the strict sense. He was not an officer of the court and did not work within the institutions of the law as narrowly defined. Instead, he was an insurance lawyer working at a quasi-official Institute. In this capacity, he was simultaneously an insider and an outsider to legal processes and institutions. Renelt's case proves that Kafka actively participated in litigation, and his other writings show that he reflected on the importance of courts' interpretations of the law. In his legal writings, he argues for continuity and uniformity in legal decision making, even when the interpreter is not in favor of the substance of the rule being interpreted. This argument signals his position

as an insider.⁹⁴ One of his parables, meanwhile, reflects his awareness of the paradoxical nature of legal interpretation:

Our laws are not generally known; they are kept secret by the small group of nobles who rule us. We are convinced that these ancient laws are scrupulously administered; nevertheless it is an extremely painful thing to be ruled by laws that one does not know. . . . For the laws are very ancient; their interpretation has been the work of centuries, and has itself doubtless acquired the status of law; and though there is still a possible freedom of interpretation left, it has now become very restricted. Moreover the nobles have no cause to be influenced in their interpretation by personal interests inimical to us, for the laws were made to the advantage of the nobles from the very beginning, they themselves stand above the laws, and that seems to be why the laws were entrusted exclusively into their hands. Of course, there is wisdom in that—who doubts the wisdom of ancient laws?—but also hardship for us; probably that is unavoidable.⁹⁵

The first part of this passage, up to the point where the narrator argues that the interpretations of the laws have themselves become a source of law, indicates an insider's experience of the authority of the law as it is constructed internally through self-reference. The second part, where the narrator points out that the nobility have no reason to allow their personal interest to influence them into interpreting the laws to our disadvantage, because the laws are already constructed to serve their interests, subverts any assumption of the law's self-sufficiency by confronting this assumption with an outsider's view of the same authority as being rooted in the hegemony of the "nobility." Kafka is almost suggesting that the internal paradox of the law—that it can operate self-referentially—is a function of the political domination of "the nobles." Kafka's notion of "the nobility" here can be construed as being compatible with any number of modern and postmodern legal ideas ranging from Kelsen's *Grundnorm* to Derrida's "originary violence" of law.⁹⁶

Third, as the Institute's "principal compliance officer,"⁹⁷ Kafka used the threat of litigation and criminal prosecution as means of implementing a social policy aimed at distributing risks linked to work-related injuries. Through this type of regulation, the state "juridified" a socioeconomic sphere that employers had previously organized informally (contractually). Kafka was, in effect, using insurance law to implement a social policy aimed at strengthening the position of employees. We must also remember that this type of welfare-oriented, top-down intervention was a novel idea at the time. Benno

Wagner explains that the radical welfare policy that developed in Austria during Kafka's time disconnected civil and criminal law from insurance law.⁹⁸ Each insurance institute had an arbitration tribunal headed by a professional judge and four lay assessors. These tribunals decided a large number of disputes involving compensation payments to injured workers. Wagner adds that because "no central court for public insurance existed in Austria, no appeal was possible against the rulings of arbitration courts."⁹⁹ What appears in Kafka's fiction as a parallel jurisdiction to state law—a legal system against which one cannot defend oneself¹⁰⁰—could illustrate his outsider's view of this process of *indirect* juridification in which relations between the state and the individual came to be regulated by way of policy measures implemented by bureaucrats rather than legal rules enforced by courts of law.

These insights into Kafka's conception of law must, however, form part of a larger understanding of his fiction as a representation of the search for *Heimat*, a search which, in *The Castle*, is combined with the desire for justice. K.'s abandonment by the Castle authorities, his inability to enter the Castle, and his estrangement from the village community paradoxically emancipate him from the rules, norms, and traditions of both the Castle (i.e., from the external, impersonal bonds of *Gesellschaft*) and the village (i.e., from the internal, personal relations of *Gemeinschaft*), allowing him to retain his autonomy while defining his identity and his situation. At the same time, this freedom from both internal and external constraints situates him in a seemingly hopeless and meaningless struggle. K. represents the figure of the modern immigrant who frees himself from the socioeconomic and political constraints of his *Heimat*, only to find himself in the impossible position of an unwelcome outsider who does not belong and is apparently not needed. He is the figure of the modern refugee who flees the tyranny of his countrymen, seeking his human rights in foreign lands, only to be caught up in dehumanizing and degrading bureaucratic networks. He is an outsider in spite of the fact that he is not a member of any racial, ethnic, religious, or linguistic minority. Neither is he excluded on the basis of his gender or class. This leads Litowitz to argue that Kafka's protagonists are "situational outsiders," that is, their outsider status is not a function of race, gender, religion, or class, but is determined "in relation to the dominant legal apparatus."¹⁰¹ Kafka himself was both an insider and an outsider to the law. The fact that he chooses to tell his stories from the standpoint of outsiders shows the alienating effect of the law at the level of the individual. But, more importantly, the Land Surveyor K. represents the tension between the modern

individual and his or her *Heimat*, that is, the modern sense of alienation—the otherness—that turns all of us, to different degrees, into outsiders.

A similar search for *Heimat* can be identified in the writings of sociolegal scholars of the time, such as Eugen Ehrlich, a contemporary of Kafka and a citizen of the decaying Austro-Hungarian Empire, who devised the concept of “living law” to describe a nonstate law of social integration.¹⁰² Ehrlich’s living law emerges spontaneously out of the *Gemeinschaft* as people interact to form social networks. In contrast to state law, which operates in a top-down fashion, this “living law” shapes social relations from the bottom up. Similar ideas can be traced from Georges Gurvitch’s “social law”¹⁰³ to Roger Cotterrell’s notion of “law’s community,”¹⁰⁴ a community based on mutually binding interpersonal trust that gives rise to a form of law that operates from the bottom up and independently of the state. The difference between Kafka’s fictional search for *Heimat* and these sociolegal searches for a socially and culturally embedded form of law that can link the “warm circle” of the community with the impersonal relations of modern society is that the former treats the search as an end in itself (the search is all there is), whereas the latter sees the search as part of the answer to the social malaise and fragmentation caused by the passage from a form of society organized around *Gemeinschaft* to a form of society dominated by *Gesellschaft*.

Unlike Ehrlich and the scholars who have followed in his footsteps, Kafka neither challenges the supremacy of state law nor enters into a polemic with the proponents of legal positivism. By applying his “rhetoric” to material from his office writings, and with the benefit of the insights gained from living a double life as a lawyer and a writer, he nevertheless succeeded in producing an imaginative understanding of law and legality as integral parts of the human condition under modernity. Without sociological or legal theorizing, Kafka’s fiction takes us beyond the understanding of law as an instrument of social control and reform and introduces us to law as a form of experience.

* I am indebted to Richard Weisberg from whose comments and suggestions this paper has benefited. I am also grateful to George Dargo for his helpful comments on the final draft of this paper.

1. Stanley Corngold et al., eds., *Franz Kafka: The Office Writings* (Princeton: Princeton University Press, 2009), at ix.
2. Clayton Koelb, *Kafka’s Rhetoric: The Passion of Reading* (Ithaca: Cornell University Press, 1989), 1.
3. *Id.*

4. *Id.*, at 65.
5. Kafka probes the duality of his identity and of his daily experiences in several places. In “My Neighbour,” for example, he reveals the tension between his two types of work and writing, and in “A Crossbreed,” he examines his split personality: half kitten, half lamb. See Kafka, *Description of a Struggle and other Stories* (London: Penguin, 1979).
6. Ruth V. Gross has developed this point in “Kafka’s Short Fiction,” in *The Cambridge Companion to Kafka*, Julian Preece ed. (Cambridge: Cambridge University Press, 2003).
7. Franz Kafka, *The Trial*, Willa and Edwin Muir, trans. (London: Penguin, 1978), 238–39.
8. Stanley Corngold, “Kafka’s *Die Verwandlung*: Metamorphosis of the Metaphor,” 3 *Mosaic* 106 (Summer 1970), cited in Koelb, *supra* note 2.
9. For overviews of various interpretations of the works of Kafka, see Susan Sontag, *Against Interpretation and other Essays* (New York: Doubleday, 1966), 8; and Douglas E. Litowitz, “Franz Kafka’s Outsider Jurisprudence,” 27 *Law and Social Inquiry* 103–37, 113–14 (2002).
10. Albert Camus, “Hope and the Absurd in the Work of Kafka,” in *The Plague, The Fall, Exile and The Kingdom, and Other Essays* (New York: Alfred Knopf, 2004), 599.
11. Josef K., the protagonist of *The Trial*, is subjected to criminal proceedings according to the Austro-Hungarian law of the time, whereas the Land Surveyor K. in *The Castle* is engaged in what amounts to a civil law dispute with the Castle authorities who have allegedly summoned him.
12. Litowitz, *supra* note 9 at 106.
13. I am using the notion of “nonrational” intentionally as a type of rationality that, although it does not comply with Weber’s “instrumental rationality,” is not necessarily irrational. It might, for example, refer to “communicative rationality” as developed by Habermas. Thus, in the following, “nonrational” does not necessarily imply irrational.
14. For a discussion of the relationship between *Heimat* and Kafka’s novel *The Castle*, see Elizabeth Boa, “The Castle,” in Preece, *supra* note 6 at 61–79.
15. Ferdinand Tönnies, *Community and Association (Gemeinschaft und Gesellschaft)* (London: Routledge and Kegan Paul, 1955).
16. Franz Kafka, “Homecoming,” in *Description of a Struggle and Other Stories*, Willa and Edwin Muir, trans. (London: Penguin, 1979), at 140.
17. Zygmunt Bauman, *Community: Seeking Safety in an Insecure World* (Cambridge: Polity, 2001).
18. *Id.* at 3.
19. See, e.g., Martha M. Umphrey et al., “The Sacred in Law: An Introduction,” in *Law and the Sacred*, Austin Sarat et al. eds. (Stanford, CA: Stanford University Press, 2007), 1–27; Litowitz, *supra* note 9; Theodore Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crisis* (Princeton, NJ: Princeton University Press, 2003); George Dargo, “Reclaiming Franz Kafka, Doctor of Jurisprudence,” 45 *Brandeis Law Journal* 495–526 (2006–7); Patrick J. Glen, “The Deconstruction and Reification of Law in Franz Kafka’s ‘Before the Law’ and *The Trial*,” 17/22 *Southern California Interdisciplinary Law Journal* 23–66 (2007); Arnold Heidsieck, *The Intellectual Contexts of Kafka’s Fiction: Philosophy, Law, Religion* (Columbia, SC: Camden House, 1994); Panu Minkkinen, “The Radiance of Justice: On the Minor Jurisprudence of Franz Kafka,” 3 *Social and Legal Studies* 349–63 (1994); Martha S. Robinson, “The Law of the State in Kafka’s *The Trial*,” 6 *ALSA Forum* 127–47 (1982).
20. For biographies of Kafka, see, e.g., Max Brod, *Franz Kafka: A Biography* (New York: DA Capo Press, 1995); Klaus Wagenbach, *Kafka* (London: Haus Publishing, 2003); Nicholas Murray, *Kafka* (London: Abacus, 2004); and Ritchie Robertson, *Kafka: A Very Short Introduction* (Oxford: Oxford University Press, 2004).
21. No author can claim a monopoly over the interpretation of his or her text or be fully conscious of all the possible connections between thoughts and images that his or her text might offer. Admittedly, any text has its “horizon of meaning,” yet the readers of the text may legitimately contextualize it within their own universes of meaning and personal experiences in order to make sense of it. In fact, readers

- have no alternative but to interpret the text against their preunderstanding of the world. The process of interpretation is, to borrow from Hans-Georg Gadamer (*Truth and Method* (London: Continuum, 2006)), the reader's dialogue with the text, which brings the text's horizon of meaning face to face with the reader's preconceptions of the world in general and of the text in particular. This also means that the meaning of a text is never fixed, never complete; a text is always open to reinterpretation, and its meaning is continuously subject to negotiation and constantly evolving.
22. *The Trial* is a mistranslation of the original German title *Der Prozeß*, which means "The Proceeding."
 23. Corngold et al., *supra* note 1 at 230. See also Robinson, *supra* note 19.
 24. Richard Posner, "Law and Literature: A Relation Reargued," 72 *Virginia Law Review* 1351, 1356–57 (1986). For a discussion, see Robin West, "Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner," 99 *Harvard Law Review* 384–427 (1985). Posner's argument holds only if we regard law as "positive law" and legal practice as a rule-based activity predicated on legal doctrine. For a critique of Posner's concept of law and literature, see Richard Weisberg, *Poethics and Other Strategies of Law and Literature* (New York: Columbia University Press, 1992), 201–10.
 25. Ziolkowski, *supra* note 19 at 224.
 26. Corngold et al., *supra* note 1 at ix.
 27. Jack Greenberg, "From Kafka to Kafkaesque," in Corngold et al., *supra* note 1 at 357.
 28. *Id.*, at 358.
 29. *Id.*, at xii.
 30. Franz Kafka, "Risk Classification and Accident Prevention in Wartime (1915)," in Corngold et al., *supra* note 1 at 332–33.
 31. Brod, *supra* note 20 at 7.
 32. See, e.g., Franz Kafka, *Letters to Felice* (New York: Schocken, 1973), 279. See also Gross, *supra* note 6 at 82.
 33. Franz Kafka, *Letter to My Father*, Howard Colyer, trans. (North Carolina: Lulu, 2008), 62–63.
 34. *Id.*, at 63.
 35. Ziolkowski, *supra* note 19 at 225.
 36. *Id.*
 37. Arnold Heidsieck sketches the intellectual environment of the law faculty and shows that Kafka was taught by several prominent academics of the time. In particular, the legal philosopher Oskar Kraus played an important role in giving him "a firm grasp of how modern law emerged from the Aristotelian, Roman, and Judeo-Christian concepts of natural law and rational law." See Heidsieck, *supra* note 19. See also Arnold Heidsieck, "The Fictional and Non-Fictional Uses of Administrative, Civil, and Criminal Law by Kafka and his Friends," at 1. An electronic copy is available at <http://ssrn.com> (accessed Aug. 2010).
 38. Greenberg, *supra* note 27 at 358.
 39. In Franz Kafka, *Metamorphosis and Other Stories* (London: Penguin, 1997), 174.
 40. *Id.*, at 183.
 41. Franz Kafka, *The Castle*, Mark Herman trans. (New York: Schocken Books, 1998), 1. Originally published in Germany as *Das Schloß* (Munich: Kurt Wolff Verlag, 1935).
 42. There is a suggestion in the text that K. might, indeed, not know where he is, for when he is woken up in the inn, he wonders, "What village is this I have wandered into? Is there a castle here?" Kafka, *supra* note 41 at 9. This suggests that K. might be a self-appointed land surveyor.
 43. Corngold, *supra* note 1 at 10.
 44. In Czech, *Klam* means "illusion." Although Kafka's works are all written in German, he could also speak and write in Czech. His choice of the name Klamm for K.'s official contact with the Castle is, therefore, most probably not accidental, particularly because Klamm turns out to be a shadowy figure

- who regularly visits the village and because the letter brought by the messenger identifies Klamm as K.'s point of contact with the Castle.
45. The choice of the name Momus shows Kafka's sense of humor. Momus is the Greek god of mirth, but whenever he speaks in *The Castle*, everyone becomes serious. See Robertson, *supra* note 20 at 40.
 46. Kafka, *supra* note 41 at 109.
 47. *Id.*, at 112.
 48. Quoted in Willa and Edwin Muir's translation of *The Castle* (London: Vintage Books, 2005), 7.
 49. Brod, *supra* note 20 at 251.
 50. Corngold et al., *supra* note 1 at 74–79.
 51. Weisberg, *supra* note 24 at 135.
 52. See Koelb, *supra* note 2.
 53. Max Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie* (Mohr: Tübingen, 1922).
 54. Malcolm Warner, "Kafka, Weber, and Organisation Theory," 60/7 *Human Relations* 1019–38, 1025 (2007).
 55. To give another example, Gregor Samsa, a travelling salesman, wakes up one morning to find himself transformed into a monstrous insect. Instead of panicking in response to his inexplicable overnight transformation, Gregor stays in bed, feeling melancholy because of the rainy weather and bemoaning his exhausting job, which forces him to be "on the move day in and day out." Franz Kafka, *The Transformation ("Metamorphosis") and Other Stories* (London: Penguin, 1992), 76.
 56. This sounds like a caricature of petty bureaucrats in action, a parody of "the little cogs," to borrow a phrase from Max Weber: "those little cogs, little men clinging to little jobs." Quoted in Irving M. Zeitlin, "Max Weber's Sociology of Law," *Max Weber: Critical Assessments (Pt. 1)*, Peter Hamilton, ed. (London: Routledge 2001), 323.
 57. Kafka, *supra* note 41 at 12.
 58. *Id.*, at 12.
 59. Stanley Corngold, "Kafka and the Ministry of Writing," in Corngold et al., *supra* note 1 at 2.
 60. Kafka, *supra* note 41 at 14.
 61. See *supra* note 44, regarding the meaning of Klamm in Czech.
 62. Michael Wood, "Double Thought," *London Review of Books*, Nov. 20, 2008. An electronic copy is available at http://www.lrb.co.uk/v30/n22/wood01_.html (accessed Aug. 2010).
 63. Koelb, *supra* note 2 at 10.
 64. Paul de Man, *Allegories of Reading: Figural Language in Rousseau, Nietzsche, Rilke, and Proust* (New Haven, CT: Yale University Press, 1979), 131, quoted in Koelb, *supra* note 2 at 10.
 65. Kafka's letters and diaries show that he was struggling with the limits of language as a medium of communication and a tool for obtaining understanding and grasping the truth. The more he sharpens his language to enhance his descriptions and better dissect the complexity of social reality, the more apparent the shortcomings of the language become.
 66. Weisberg, *supra* note 24 at 136.
 67. Niklas Luhmann, "The Self-Reproduction of Law and its Limits," in *The Dilemma of Law in the Welfare States*, Günther Teubner, ed. (Berlin: Walter de Gruyter, 1986).
 68. Koelb, *supra* note 2 at 10.
 69. Umphrey et al., *supra* note 19 at 6.
 70. For example, in *Force of Law*, Jacques Derrida describes the juridical ideology as consisting of super-structures that "both hide and reflect the economic and political interests of the dominant forms of society"; Jacques Derrida, "Force of Law: The Mythical Foundations of Authority," 11 *Cardozo Law Review* 991 (1990), 941. Alan Norrie, thinking along similar lines, writes that "legal discourse is essentially contradictory," or as he prefers to call it, "antinomial in its form"; Alan Norrie, *Law and the Beautiful Soul* (London: Glasshouse Press, 2005), ix.
 71. Kafka's parents gave him the Hebrew name of Amschel, derived from Anselm (blackbird), which may be translated into Czech as *kavka*. According to Koelb, Kafka's first lessons in rhetoric began already

- when he was an infant: “The name bore concealed in its few syllables an abundance—an overabundance—of meanings not all of which sat comfortably with the others. The lesson must have been repeated on numerous occasions throughout Franz’s childhood, as he was unnecessarily reminded over and over again that he bore the name of a comical and not altogether respectable bird” (Koelb, *supra* note 2 at 19).
72. *Id.*, at 20.
73. Gross, *supra* note 6.
74. According to Heidsieck, Kafka was taught by several prominent academics of the time. In particular, the legal philosopher Oskar Kraus played an important role in giving him “a firm grasp of how modern law emerged from the Aristotelian, Roman, and Judeo-Christian concepts of natural law and rational law.” See Heidsieck, “Fictional and Non-Fictional Uses,” *supra* note 37 at 1. See also Heidsieck, *Intellectual Contexts*, *supra* note 19.
75. Kafka, *supra* note 7 at 10.
76. Quoted in Ziolkowski, *supra* note 19 at 229.
77. In *The Trial*, Josef K.’s Court of Inquiry is not held in the Palace of Justice on a weekday, but in the attic of a building in the suburbs on a Sunday morning. As Martha Robinson points out, such descriptions of legal proceedings in *The Trial* provide a parody of the legal system. See Robinson, *supra* note 19 at 134–35. See also Minkkinen, *supra* note 19, for a discussion of “reversals” in Kafka’s descriptions of the law.
78. Franz Kafka, *The Trial*, Richard Stockes, trans. (London: Modern Voices, 2007), 91.
79. *Id.*, at 156.
80. Ziolkowski, *supra* note 19 at 229.
81. *Id.*
82. *Id.*
83. Kafka, *supra* note 78 at 126.
84. *Id.*, at 158.
85. Umphrey et al., *supra* note 19 at 7.
86. Ethical paradoxes emanating from legality and the rule of law are, of course, not unique to modern law. Cicero noted a similar paradox when he said that “we are slaves of the law” so that “we might be free.” Quoted in Jack Hayward, ed., *Out of Slavery: Abolition and After* (New York: Frank Cass, 1986), 19.
87. Corngold et al., *supra* note 1 at 54–73.
88. *Id.*, at 71.
89. Similarly, Émile Durkheim used different forms of law to represent stages of social solidarity and moral cohesion, suggesting that law evolved from repressive forms (punishment offences) to restitutive forms (using, for example, compensation) as society became more socially differentiated. Émile Durkheim, *The Division of Labor in Society* (New York: Free Press, 1893).
90. “Criminal Charge Against Josef Renelt for Illegal Withholding of Insurance Fees (1913),” Corngold et al., *supra* note 1 at 225–48.
91. *Id.*
92. Greenberg, in Corngold et al., *supra* note 1 at 362–63.
93. See Litowitz, *supra* note 9 at 113–14.
94. For a discussion, see Greenberg, in Corngold et al., *supra* note 1 at 359–61.
95. Franz Kafka, “The Problem of Our Laws,” *The Complete Short Stories* (London: Vintage, 2005), 437.
96. See Derrida, *supra* note 70; and Hans Kelsen, *Pure Theory of Law*, Max Knight, trans., 2nd ed. (Oxford: Oxford University Press, 1995).
97. Greenberg, in Corngold et al., *supra* note 1 at 359.
98. Benno Wagner, “Kafka’s Office Writings: Historical Background and Institutional Setting,” in Corngold et al., *supra* note 1 at 19–48.
99. *Id.*

100. Kafka, *supra* note 78 at 126.
101. Litowitz, *supra* note 9 at 127–28.
102. Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, Walter A. Moll, trans. (German 1913; English 1936; repr. London: Transaction Publishers, 2002).
103. Georges Gurvitch, *L'idée du droit social* (Paris: Recueil Sirey, 1932).
104. Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford: Clarendon Press, 1995).