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Abstract

Recent scholarship suggests a line of influence from the sociologist Max Weber to the writer Franz Kafka, mediated through the lesser-known figure of Alfred Weber, who was Max's younger brother and a law professor who served as one of Kafka's law school examiners. This paper finds textual support for this claim of influence. Indeed, there is an uncanny similarity between Weber's and Kafka's writings on law, particularly in their diagnosis of a legitimation crisis at the heart of modern law, and in their suspicion that modern law cannot deliver on its promises. Weber and Kafka succeed at capturing the irrationalities, paradoxes, and disaffections of modern law, but in the final analysis their work suffers from a failure to appreciate law's progressive and emancipatory potential.

Keywords

Max Weber; Alfred Weber; Franz Kafka; modernity; legitimacy; rationality; pessimism; law and literature; sociology of law.

Sociologist Max Weber (1864–1920) and writer Franz Kafka (1883–1924) were both lawyers who wrote extensively about law. Although they were rough contemporaries, there is no record of any meeting between them, nor any reason to believe that they knew of each other's existence. In the last several years, however, a number of scholars have speculated that Kafka absorbed some of Max Weber's ideas by reading the work of Alfred Weber (1865–1958), who was Max's younger brother. Alfred Weber also happened to be a professor at Kafka's law school and even served as one of Kafka's doctoral examiners.¹ In this article, I find textual support for a chain of influence from Max Weber to Alfred Weber to Franz Kafka, at least with regard to their writings on law. Indeed,

1. Austin Harrington, "Alfred Weber's Essay 'The Civil Servant' and Kafka's 'In the Penal Colony': the Evidence of an Influence," *History of the Human Sciences*, 20 (2007), pp. 41–63.

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Kafka often seems to be presenting a fictionalized illustration of Weber's sociology of modern law. Despite a number of key differences, their work converges in a sustained catalogue of the pathologies, contradictions, and absurdities that haunt modern legal systems. In this narrow sense, at least, there is a shared vision between Weber and Kafka, even though, as I will argue, their critique falls under its own weight and thereby fails to grasp the progressive and emancipatory potential of modern law.

Although Kafka's writings were generally darker than Weber's, they both prophesied the ascendancy of instrumental rationality and bureaucratic reasoning, causing a slow extinction of previously held religious, traditional, or normative commitments that once undergirded the law. This leaves the legal system (and legal reasoning) in a closed circle of self-legitimation, a vacuum where *legitimacy* collapses onto *legality*. Lacking a normative anchor outside of itself, the legal system becomes a self-referential maze of regulations without higher purpose, reducing lawyers to the role of technocrats who work within a framework that has been aptly described as "structured, but meaningless."² The parallels between Weber and Kafka in this regard are striking. Weber used the word *disenchantment* to describe the condition where "the ultimate and most sublime values have retreated from public life,"³ and this is precisely the legal universe that Kafka depicted in his novels *The Trial* and *The Castle*, stories in which a clueless man finds himself lost in a web of unknowable regulations, shuffling among functionaries who extol the hidden virtues of labyrinthine legal systems where justice is endlessly deferred. At his most pessimistic, Weber mused that modern man could soon be facing a "polar night"⁴ of hyper-rationalization that would leave him "as powerless as the fellahs of ancient Egypt,"⁵ and similarly, Kafka depicted legal systems that possessed a superficial rationality which always, upon closer inspection, proved to be a mere cover for ambiguity and arbitrariness.

In addition to diagnosing a legitimacy crisis at the heart of modern law, Weber and Kafka were among the first thinkers to argue that modern law could not deliver on its pretense of being a stable guarantor of fundamental rights within a body of transparent, systematically ordered rules and procedures. Against this traditional view of modern law, which still holds sway at least in the popular imagination, Weber and Kafka recognized that gaping pockets of irrationality could persist within the framework of highly rationalized modern law. For this reason, their work takes on special relevance in the recent legal environment in the United States, which has devolved into absurdities that mock the pretensions of modern law, such as secret government memoranda justifying torture⁶; federal agencies that insulate the very institutions they are supposed to regulate⁷; an incarceration

2. David Trubek, "Max Weber's Tragic Modernism and the Study of Law in Society," *Law and Society Review*, 20 (1986), pp. 573–98.
3. Max Weber, "Science as a Vocation," in *From Max Weber*, eds. H.H. Gerth and C. Wright Mills (New York: Oxford University Press, 1958), p. 155.
4. Max Weber, "Politics as a Vocation," in *From Max Weber*, p. 128.
5. Max Weber, "Parliament and Government in a Reconstructed Germany," in Max Weber, *Economy and Society*, eds. Guenther Roth and Claus Wittich (Berkeley, CA: University of California Press, 1978), p. 1402.
6. Russ Feingold, "Government in Secret," *Los Angeles Times*, May 8, 2008, p. 27.
7. Eliot Spitzer, "Predatory Lenders' Partner in Crime," *Washington Post*, February 14, 2008, p. A25.

rate unparalleled in any “free” society⁸; a Supreme Court that refuses to give its own decision the status of precedent⁹; and a chief executive who instructs the executive branch *not* to enforce the legislation that he signs into law.¹⁰ There is no question that Weber and Kafka were prescient for anticipating how a legal system that purportedly follows the rule of law can nevertheless sustain these types of contradictions, but at the same time, they failed to fully appreciate the extent to which modern law marks an advancement over previous epochs of law, and they failed to accept that any progressive changes must be mediated *through* modern law.

In what follows, I provide what I believe to be the first comparative analysis of Weber and Kafka’s stances on modern law, demonstrating that not only did they share a similar vision of *bureaucracy*, as previous scholars have noted,¹¹ but also a deeper vision regarding the *legal* structures which buttress the modern bureaucratic state. At a minimum, I want to suggest that the recent scholarship positing a chain of influence from Weber to Kafka should spur cross-pollination among those currently doing research on each figure in isolation, moving us beyond the current situation where legal scholarship on Weber fails to mention Kafka, and vice-versa.¹²

I. The Connection via Alfred Weber

Biographers have pored over the lives of Max Weber and Franz Kafka, but failed to unearth any evidence of a direct connection between the two men. However, it has long been known – and considered innocuous – that the two men were connected by Alfred Weber, a professor of law and economics at the German Karl Ferdinand University in Prague from 1904 to 1907. Kafka attended this school from 1901 to 1906, and university records show that in March of 1906, Alfred Weber served on a panel of professors who examined Kafka in the second of three exams required for graduation. In June of that same year, Kafka passed his third and final exam and was “Promoted” to Doctor of Jurisprudence, and his “Promoter” was Alfred Weber.¹³ On

8. Adam Liptak, “America Tops Global Count of Prison Inmates,” *International Herald Tribune*, April 23, 2008, p. 4.

9. Chad Flanders, “Please Don’t Cite this Case! The Precedential Value of *Bush v. Gore*,” *Yale Law Journal Pocket Part*, 116 (2006), pp. 141–4.

10. Charlie Savage, “Bush Challenges Hundreds of Laws,” *Boston Globe*, April 30, 2006, p. A1.

11. Thomas McDaniel, “Weber and Kafka on Bureaucracy: A Question of Perspective,” *South Atlantic Quarterly*, 78 (1979), pp. 361–75.

12. For example, see Anthony Kronman, *Max Weber* (Stanford, CA: Stanford University Press, 1983); David Trubek, “Max Weber on Law and the Rise of Capitalism,” *Wisconsin Law Review*, 3 (1972), pp. 720–53; Panu Minkkinen, “The Radiance of Justice: On the Minor Jurisprudence of Franz Kafka,” *Social and Legal Studies*, 3 (1994), pp. 349–63; George Dargo, “Reclaiming Franz Kafka, Doctor of Jurisprudence,” *Brandeis Law Journal*, 45 (2007), pp. 495–526; Chantal Thomas, “Max Weber, Talcott Parsons and the Sociology of Legal Reform: A Reassessment with Implications for Law and Development,” *Minnesota Journal of International Law*, 15 (2006), pp. 383–424; Duncan Kennedy, “The Disenchantment of Logically Formal Rationality, or Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought,” *Hastings Law Journal*, 55 (2004), pp. 1031–76.

13. Karl Wagenbach, *Franz Kafka: Pictures of a Life* (New York: Pantheon Books, 1984), p. 54.

the surface, this seemed the full extent of their relationship. There is no evidence that Weber and Kafka had any further contact after law school. Upon graduation, Kafka remained in Prague where he soon landed at a state-sponsored workers' accident insurance institute, a job he would hold until his retirement due to sickness and eventual death, while Alfred Weber moved from Prague to the University of Heidelberg, where he would spend the remainder of his academic career.¹⁴ We simply have no idea how much personal contact Kafka had with Alfred Weber, nor any idea of the extent to which Alfred Weber's ideas might have rubbed off on Kafka by virtue of being a faculty member.

Evidence for Max Weber's influence on Kafka is drawn from an article that Alfred Weber published in 1910 with the title *Der Beamte* – variously translated as “The Civil Servant” or “The Official” or “The Functionary” – in the literary magazine *Der neue Rundschau* that Kafka was known to read on a regular basis.¹⁵ Written at a time when Alfred was very close intellectually to his brother Max,¹⁶ the article displays a number of deep affinities with Max's earlier work *The Protestant Ethic and the Spirit of Capitalism*, with its trenchant critique of modern man as a petty bureaucrat stuck in an iron cage of instrumental rationality. In the essay, Alfred cites *The Protestant Ethic* and echoes a number of its essential themes, the central one being that modernity is characterized by the loss of religious and traditional buttresses for institutions and practices. These foundations have been eroded by a process of rationalization set in motion by the widespread adoption of the Puritan notion of a “calling,” whereby people prove their worthiness for the afterlife by spending this life engaged in thrift, sobriety, and industrious activity, with an emphasis on logic, science, and calculability. According to both Weber brothers, the process of rationalization has penetrated all corners of life – political, economic, legal, educational – to the point where most institutions are now based on formal rules divorced from any underlying normative commitments, such that they become free-standing in the sense of no longer being supported by (or measured against) external forces such as religion or tradition, but rather in circular fashion by the belief in the efficacy and legality of the procedures themselves. This creates a closed circle whereby rules refer to other rules *ad infinitum* without reference to higher purpose, and where rule-based bureaucracies become fetishized and self-referential. Eventually, the process of rationalization calls into question its own religious *raison d'être* (that is, the Puritanical idea of a “calling”) as unscientific and irrational, with the result that people no longer believe in the Puritan idea of a calling but are nevertheless caught up in rationalized systems which both Weber brothers describe as a “cage” that is our “fate.” And importantly for our purposes, both

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14. Edgar Salin, “Alfred Weber,” in David Sills, ed., *International Encyclopedia of the Social Sciences*, vol 16 (New York: Macmillan, 1968), pp. 491–3.
 15. Alfred Weber, “Der Beamte,” *Die neue Rundschau*, 21 (1910), pp. 1321–39, translated and reprinted in Harrington, “Alfred Weber's Essay,” pp. 47–59. Weber was better known for his theory about where industries were located, namely *Theory of the Location of Industries* (Chicago: The University of Chicago Press, 1929 [orig. 1909]).
 16. Eberhard Demm, “Max and Alfred Weber and the *Verein für Sozialpolitik*,” in Wolfgang Mommsen and Jürgen Osterhammel, eds., *Max Weber and his Contemporaries* (London: Unwin Hyman, 1987), p. 88; Wolfgang Mommsen, *The Political and Social Theory of Max Weber* (Chicago: University of Chicago Press, 1989), p. 175.

Weber brothers took the view that this hyper-rationalization and specialization has taken hold among legal professionals and judges. So for example, the measure of a particular law or institution is not whether it harmonizes with a religious, traditional, or normative precept, but rather whether it was enacted in conformity with pre-established, formal procedures; similarly, court decisions increasingly turn not on the merits or substance of a case, but rather on arcane technical minutiae concerning procedures, standings, burdens of proof, and so forth.

Obviously, if Kafka was affected by Alfred Weber's article, it could go some distance toward explaining the similarity between his fiction and Max Weber's analysis of modern law. And while some influential biographers have flatly assumed that Kafka read the article,¹⁷ the evidence is purely circumstantial.

We know that, in 1911, Kafka wrote a postcard to his best friend Max Brod explaining that he was busy reading back issues of the *Rundschau*.¹⁸ Given that Alfred Weber's article appeared in 1910, this would seem a strong indication that Kafka came across the article, and certainly Kafka would have been disposed to notice this particular article given his connection to Alfred Weber from law school. Furthermore, we know from Kafka's letters and diaries that he read the *Rundschau* regularly, so even apart from this specific mention to his friend about reading back issues around the time of the article's publication, he might have noticed it in due course anyway. Furthermore, we also know that Max Brod was a student and an admirer of Alfred Weber,¹⁹ and they kept up a correspondence,²⁰ which suggests that Brod may have brought the article to Kafka's attention even if Kafka missed it in his own examinations of the *Rundschau*. And finally, there is evidence of textual similarity between Alfred Weber's article and some of the themes found in Kafka's fiction, particularly *In the Penal Colony*.²¹ All of this is speculation, and we may never know for certain that Kafka absorbed Alfred and Max Weber's ideas, but at the very least the possibility of the connection provides a sufficient impetus for reading their work together. And as I will show, the two men put forth very similar views of law, which does indeed suggest – but again does not prove – that Kafka was indirectly influenced by Max Weber.²²

17. Reiner Stach, *Kafka: The Decisive Years* (Orlando, FL: Harcourt, 2005), p. 292.

18. *Franz Kafka, Letters to Friends, Family, and Editors* (New York: Schocken Books, 1977), p. 72.

19. Hans-Ulrich Derlien, "Bureaucracy in Art and Analysis: Kafka and Weber," *Journal of the Kafka Society of America*, 15 (1991), pp. 4–20.

20. Harrington, "Alfred Weber's Essay," p. 59.

21. Astrid Lange-Kirchheim, "Franz Kafka 'In der Strafkolonie' und Alfred Weber 'Der Beamte,'" *Germanisch-Romanische Monatsschrift*, Neue Folge (1977), pp. 202–21.

22. To be sure, it is conceivable that Kafka missed the article written by Alfred Weber, or that he read Alfred Weber's essay with disinterest, or disagreement. And of course it is possible that the Weberian themes which we recognize in Kafka's fiction were drawn from his readings of Marx and Nietzsche, who were (like Weber) also keen to interrogate religion, bureaucracy, and law. Finally, the similarity between Weber and Kafka's writings on law could be explained by similarities in their backgrounds, for example, that they were both trained as lawyers in the German tradition at roughly the same time, both eschewed the private practice of law, both struggled against dominating fathers, both were political liberals, both lived through wars and upheavals, and both were preoccupied with themes of law, legitimacy,

On my reading, Weber and Kafka's writings on law reach congruence on two overriding themes. The first theme is that modernity creates a loss of grounding for the law, leaving the edifice of law and its legal institutions intact but hollow, as if the legal system splits off from its foundation and assumes its own teleology. What remains is a directionless superstructure of courtrooms, procedures, officialdom, and law books, increasingly unmoored to any substantive notion of justice, and which posits itself as its own *summum bonum*. The second theme is the paradoxical nature of modern law, and by "modern law" I mean those highly rationalized legal systems that arose within industrialized Western societies in the nineteenth century and which promised an ordered and transparent system of entitlements, obligations, and procedures built upon a solid foundation of guaranteed human rights.²³ For Weber and Kafka, these systems quickly devolve into the opposite of their intended goals – becoming irrational, impossible to navigate, opaque, and arbitrary.

Naturally there were differences in their views, as one might expect with any two thinkers, especially since they wrote in different genres. Weber (as a sociologist) had a greater appreciation for the efficiencies, subtleties, and historical antecedents of modern law, whereas Kafka (as a writer) had a stronger sense of the absurdities and gallows humor of those who felt powerless in the face of modern legal systems. As one might expect, Weber was heavily focused on what takes place above the level of individual experience, such as the historical evolution of law and the influence of religion and the economy, whereas Kafka focused on the ways in which individuals were set at odds by their readings of ambiguous texts, often in the form of a puzzling letter or a parable which determines a person's fate. But despite these differences, I conclude that there is sufficient convergence in their writings to render plausible the claim of influence and to read their writings on law together as a shared, unified critique of modern law.

II. Weber and Kafka's Vision of Law

The Protestant Ethic sets forth Weber's famous claim that modernity in the West is characterized by increasing rationalization across all aspects of life that were previously governed along religious and traditional lines, and further, that this process of rationalization derives predominantly from the widespread adoption by Western cultures of the Protestant notion of a "calling." A "calling" in this sense refers to the practice of people allaying their anxieties about whether they were chosen for an afterlife in God's providence by engaging in this-worldly diligence, sobriety, thrift, and calculation – what Weber refers to as "ascetic rationalism." Before his death, Weber added a new introduction to the essay which reframed his inquiry as an attempt to discern what was unique about Western civilization, that is, why it was that only in the West we find highly advanced capitalism,

and domination. However, the shortest distance between two points is a straight line, and therefore the obvious similarity between Weber and Kafka's writings on modern law is best explained by the likely chain of events that Kafka read Alfred Weber's article and was influenced by it.

23. Marc Galanter, "The Modernization of Law," in Lawrence Friedman and Stuart Macaulay, eds., *Law and the Behavioral Sciences* (Indianapolis, IN: Bobbs-Merrill, 1977), pp. 1046–55.

high technology, advanced science, complex financial markets, a central banking system, and a state apparatus with rationally organized bodies of law and professionally trained jurists. With regard to law and legal systems, Weber argued that, “the State itself, in the sense of a political association with a rational, written constitution, rationally ordained law, and an administration bound to rational rules or laws, administered by trained officials, is known only in the Occident [Western culture].”²⁴ Modern law, then, is unique in world-historical terms because of the degree to which it forms its own rationalized system that is relatively autonomous from the pressures of religion, tradition, or charismatic leadership. Unlike previous legal epochs, modern law is set out formally in statutes and other published legal precedents, judicial cases are decided logically based on authoritative sources of law, and the overall structure is systematically charted and administered by specialists, such that it becomes increasingly predictable and machine-like.

The term “rationality” takes on an ominous tone in Weber’s writings. Despite his claim to use the term in the descriptive sense, and despite his protestations of value-neutrality and dispassionate historical analysis, Weber nevertheless describes the ascendancy of rationalization as a “fate,” and he speaks of modern persons as haunted by the “ghost of dead religious beliefs.”²⁵ For Weber, the Puritan’s rationalized asceticism has remodeled the world through science, systematization, dispassionate inquiry, formal logic, and the search for universal laws, but in the final analysis it erodes its own religious (that is, Puritanical) foundations. Thus, we are left with hyper-rationalized institutions stripped of their original religious, traditional, or normative foundations, leaving us stuck within an “iron cage”²⁶ of rule-bound but ultimately meaningless institutions. Weber famously claims that, “the Puritan *wanted* to work in a calling; we are *forced* to do so,”²⁷ meaning that we are stuck in a maze of rationalization cut off from its original promise of religious redemption, much like priests who no longer believe in God but are left to navigate through the church system. The future, says Weber, will be an ever-growing bureaucratic apparatus of narrow-minded “specialists without vision”²⁸ who work on circumscribed tasks in a kind of empty role-playing “stripped of religious and ethical meaning.”²⁹

Max Weber published these ideas in 1904, and they were echoed in Alfred Weber’s 1910 essay, particularly the notion that life has become meaningless for modern people who no longer believe that sober rationalism will be rewarded in the afterlife:

We know that we acquired our concept of a vocation from the inner-worldly asceticism of the Puritans. Self-sacrifice and unflinching dedication grew up on the soil of a belief in this-worldly existence as probation and preparation for another life. There was a time when this concept of a vocation was entirely rational; but now it has become nonsense for a man for whom an

24. Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (New York: Routledge, 1992), p. 16.

25. Op. cit., p. 124.

26. Op. cit., p. 123.

27. Op. cit., p. 123.

28. Op. cit., p. 124.

29. Op. cit., p. 124.

afterlife lacks any full reality. Now that the old basis of the vocational idea is destroyed, it confronts us today with its grotesque inner meaninglessness for us.³⁰

Turning from Max Weber to Alfred Weber to Kafka, notice how closely the preceding quote tracks with Kafka's enigmatic parable, *Couriers*:

They were offered the choice between becoming kings or the couriers of kings. The way children would, they all wanted to be couriers. Therefore there are only couriers who hurry about the world, shouting to each other – since there are no kings – messages that have become meaningless. They would like to put an end to this miserable life of theirs but they dare not because of their oaths of service.³¹

Here we have specialists without spirit, working in a narrow calling, who find themselves lost in a pantomime, powerless to create their own values, that is, to become “kings.” They persist, in words aptly used by Roberto Unger to describe certain law professors, “like a priesthood that had lost their faith and kept their jobs.”³²

For Weber, the type of rationalization ascendant in Western culture is *instrumental*: it cannot provide answers to questions of what we *ought* to value, that is, toward what *ends* the rational apparatus should be directed. Nor could such issues even be resolved by scholars because, for Weber, “A choice among ultimate commitments cannot be made with the tools of science.”³³ This means that modern societies are left with instrumental rationality and a directionless rage for order, but no sense of where to orient their rational apparatus. As the system becomes increasingly complex, power becomes ever more diffused among functionaries, committees, agencies, and advisors, such that the bureaucrat emerges as the real seat of power:

The question is always who controls the existing bureaucratic machinery. And such control is possible only in a very limited degree to persons who are not technical specialists. Generally speaking, the highest-ranking career official is more likely to get his way in the long run than his nominal superior, the cabinet minister, who is not a specialist. ... Bureaucratic administration means fundamentally domination through knowledge. This is the key feature of it which makes it specifically rational. ... The absolute monarch, too, is powerless in the face of the superior knowledge of the bureaucratic expert . . .³⁴

The result, as parodied by Balzac in his novel *The Bureaucrats*, is “Bureaucracy, a gigantic power set in motion by dwarfs.”³⁵ This system justifies itself and needs no external support from religion or ethics because legitimacy is now measured exclusively by formal

30. Harrington, “Alfred Weber’s Essay,” p. 56.

31. Franz Kafka, “Couriers,” in Franz Kafka, *The Basic Kafka* (New York: Pocket Books, 1984), p. 185.

32. Roberto Unger, *The Critical Legal Studies Movement* (Cambridge, MA: Harvard University Press, 1986), p. 119.

33. Max Weber, *Economy and Society*, p. 1381.

34. *Op. cit.*, pp. 224–5, 993.

35. Honoré de Balzac, *The Bureaucrats* (Chicago: Northwestern University Press, 1993), p. 15.

compliance with institutional rules, and thus Weber concludes that, “Today the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct.”³⁶ And this of course brings us back to a vicious circle of self-legitimation, where there is nothing outside the legal and bureaucratic apparatus to ground the institutions and practices of the state, leading to a growing acquiescence in the existing law, a trend which “cannot really be stayed.”³⁷

So there is a trade-off inherent in modern law. We have cast aside the pre-modern irrationalities of unwritten and haphazard legal systems inspired by religious texts and administered by chieftains and elders, and in its place we have installed a rational, predictable, machine-like apparatus. Yet, the legal system has become so rationalized that all reasoning becomes immanent within it, such that the system becomes unfettered from its normative anchors and begins to appear pointless, arbitrary, and alien, while at the same time it also becomes deified because, after all, it is the sole remaining stand-in for the missing religious and traditional sources of value. Paradoxically, modern legal systems become so unknowable and impossible to navigate that their inner workings appear to modern persons to be as mysterious as the secret world of priests and shamans. Even to those inside the system such as lawyers and judges, there are whole areas of law that appear incomprehensible (for example, tax law, employee benefits law, and administrative law come to mind), and the system begins to look formally rational but substantively irrational. This “irrationality of rationality”³⁸ is visible in the description of a tax shelter in *American Lawyer* magazine:

An investor forms a single-member limited liability company. The LLC borrows money from an investment bank, then uses that money to buy a long option from the bank and sell a short option to the bank. The net cost to the investor is minimal. A general partnership is created. The LLC becomes a general partner, and contributes the option positions and minimal capital assets. The investor’s basis is inflated because he or she claims basis from the contribution of the long position but no reduction in basis from the short position. An S corporation is created. The LLC contributes its interest in the general partnership to the S corporation in exchange for stock. The partnership terminates. The options expire. The S corporation’s assets are then sold, triggering a capital loss that passes through to the investor.³⁹

In this scenario and others like it (Enron and its hundreds of interlocking subsidiaries comes to mind), the law becomes so narrow that the higher purposes of the legal system drop out completely. According to Weber, this hyper-technicality is tied up with a mutant form of legal positivism, where lawyers begin to see the law as a closed system in which laws are judged solely by their procedural pedigree instead of their substantive content. To be sure, Weber identified some counter-tendencies against the increasingly formal character of modern law, such as labor activists and others calling for a “social law” based on justice and human dignity, but he felt that such claims would not derail the

36. Max Weber, *Economy and Society*, p. 37.

37. Op. cit., p. 895.

38. George Ritzer, *The McDonaldization of Society* (Thousand Oaks, CA: Pine Forge Press, 2000).

39. Philip Braverman, “Helter Shelter,” *The American Lawyer* (November 2003), p. 65.

march of rationalization, since the demand that the law be imbued with abstract principles of justice would be outmatched by the need for increased rationalization and legal certainty, especially in business law. Ultimately Weber concludes with melancholy that, “Legal positivism has, at least for the time being, advanced irresistibly,” and “Inevitably the notion must expand that the law is a rational technical apparatus . . . devoid of all sacredness of content.”⁴⁰

In line with Weber’s claim that the Puritan wanted to work in a calling but we as modern citizens are forced to do so, it is interesting to note that both of Kafka’s great novels, *The Trial* and *The Castle*, are stories about a person who is “called” but has no idea why. In *The Trial*, his best-known work, a respectable bank officer is arrested, accused, and ultimately executed without learning the charges against him or having a chance to appear before a court. His attorney flatly states that the court system is unfathomable, and “the ranks of officials in the judicial system mounted endlessly so that not even the initiated could survey the hierarchy as a whole.”⁴¹ In *The Castle*, a man known only as “K.” wanders into a village ruled by a Castle, claiming to be a land surveyor summoned by the Castle authorities, but it is not clear why, or even if, he was called to the village. The Castle turns out to be a mysterious and vast bureaucracy, the contours of which remain unknown. Even the government officials in the village cannot figure out if the Castle ever requested a land surveyor in the first place or whether K. was the person summoned, so he is permitted to remain in the village until his situation can be sorted out by the authorities. During this indefinite waiting period, he shuffles cluelessly and bluffs his way through a variety of positions and interpersonal relationships, while always engaging in an endless quest for a meeting with the officials in the Castle, which he never reaches. The book ends in mid-sentence, suggesting that K. is forever condemned to being caught in the wheels of a mysterious bureaucracy that, at best, merely tolerates his existence. In both *The Trial* and *The Castle*, a man finds himself thrown into contact with a legal system that he expects to be rational, and which has the outward pretense of rationality, but ultimately the system is exposed as hollow, dangerous, and impossible to navigate.

During his lifetime, Kafka only authorized the publication of two very short stories about law: *The New Advocate* and *Before the Law*. These stories paint a landscape of a legal system devoid of justice and one in which lawyers are reduced to animals. *The New Advocate* is rarely discussed even among Kafka scholars but it is important for our purposes because it clearly sets forth Kafka’s view on lawyers. It is a two-paragraph parable dealing with the conversion of Alexander the Great’s horse, Bucephalus, into a bar-licensed attorney. In the story, the horse is now turning the pages of law books in the library, and has received the approbation of the organized bar and also a friendly reception into the legal community, which the narrator deems appropriate since “there is no Alexander the Great nowadays.”⁴²

Kafka’s decision to write about a domesticated Bucephalus is an interesting choice. According to Plutarch, the horse Bucephalus was brought to Alexander’s father, Philip,

40. Max Weber, *Economy and Society*, pp. 874, 895.

41. Franz Kafka, *The Trial* (New York: Schocken Books, 1999), p. 119.

42. Kafka, “The New Advocate,” in Franz Kafka, *The Complete Stories*, ed. Nahum Glatzer (New York: Schocken Books, 1971), pp. 414–15.

but no one could tame it.⁴³ Alexander was merely a boy at the time, but he boasted that he could tame the horse, and to everyone's surprise, he did so and kept the horse, naming it Bucephalus ("ox-head") due to its large head. The horse led Alexander beyond Macedonia to Eastern lands, helping to make Alexander one of the greatest conquerors of all time. In looking back to Kafka's parable, a reasonable interpretation of this short piece is that Kafka intended to show how the heroic greatness of former times has been transformed into mild-mannered conformity – how the conqueror has become a tame bureaucrat who adapts to the law instead of creating it. The story has a parallel in Max Weber's claim that nowadays, "Even the modern high-ranking officer fights battles from the office," adding, "The modern mass army, too, is a bureaucratic army, and the officer is a special type of official, distinct from the knight, the chieftain, or the Homeric hero."⁴⁴ This seems to echo Kafka's hilarious parable *Poseidon*, where the Greek god is a beaten and powerless bureaucrat who sits at a desk, tries to keep track of assistants, and submits futile requests for a change of position. Here again, the gods are demystified and reduced to petty tasks. Just as Alfred Weber described a bureaucrat as a "climber" who gives up his soul for "the opportunity to climb his way up the apparatus,"⁴⁵ Kafka depicts a domesticated lawyer who "mounts the marble steps" of the law courts.⁴⁶

The other story that Kafka authorized for publication, *Before the Law*, can be read as a mythical parody of modern legal systems. The story, perhaps Kafka's best-known piece and the subject of endless exegesis, is about a man from the country who dies while awaiting permission from a doorkeeper to enter the law. Before he dies, he asks the doorkeeper why no one else has asked for admittance to the law for all the years he has been waiting, and the doorkeeper tells him that the door was meant only for him, and would now be shut. As in all of Kafka's stories, the victim is subject to unknowable authorities, endless delays, and concentric circles of doorkeepers who themselves don't understand what they are guarding. In the end the victim is undone by his own belief in the law: he wants so badly to believe that there is more to the law than delays and doorkeepers that he stakes his life on this hope, and loses. Perhaps Kafka thought that this was an accurate picture of the injured workers who came to his office to assert their rights under the new workers' compensation laws, for he told his best friend Max Brod, "How modest these men are; instead of storming the Institute and smashing it to little pieces, they come and beg."⁴⁷

This parable was inserted into the novel *The Trial*, in the form of a story told by the prison chaplain to the accused man prior to his execution. The prison chaplain says that the doorkeeper is beyond human judgment because to doubt the doorkeeper is to doubt the law itself, which is impermissible. Finally he concludes, "It is not necessary to accept everything [that the doorkeeper says] as *true*, one must only accept it as *necessary*."⁴⁸ In other words, legitimacy is no longer something that the law has to earn; the existing legal machinery has become deified simply because it exists. And this, of course, takes us back

43. Plutarch, *Plutarch's Lives*, vol IV (Boston, MA: Little, Brown, and Company, 1868), p. 165.

44. Max Weber, "Parliament and Government in a Reconstructed Germany," p. 1393.

45. Harrington, "Alfred Weber's Essay," p. 51.

46. Kafka, "The New Advocate," p. 414.

47. Max Brod, *Franz Kafka: A Biography* (New York: Schocken Books, 1960), p. 82.

48. Kafka, *The Trial*, p. 220.

to Kafka's messengers in the parable *Couriers*, who slavishly obey their commitment to the kings even though the basis of their obligation no longer exists. So for Kafka, the modern legal system is so complex, and the division of labor so great, that no person can understand the entire system. And in any event, there is no center to the system and its higher purposes are unknowable or perhaps even nonexistent. In the final analysis there might as well be no law at all, since what appeared to be a highly rational apparatus is ultimately no more rational and no more just than the irrational decisions of a pre-modern legal system run by a priest or tribal elder.

So far we have focused on Weber and Kafka's description of the modern legal system caught in the grip of a legitimacy crisis. But there is a second, deeper theme in Weber and Kafka, namely that modern legal systems have the paradoxical effect of achieving the opposite of their intended effects. To understand this claim, we need to look at the modern legal systems that were being built at the time Weber and Kafka were writing.

When Weber and Kafka were trained as lawyers, the prevailing rhetoric among German jurists was to consider law as a science and to codify and rationalize this systemic knowledge into a giant rational system modeled on the natural sciences.⁴⁹ As legal historian John Merryman explains, "Legal science is primarily the creation of German legal scholars of the middle and late nineteenth century," and "The concept of legal science rests on the assumption that the materials of the law (statutes, regulations, customary rules, etc.) can be seen as naturally occurring phenomena, or data, from whose study the legal scientist can discover inherent principles and relationships, just as the physical scientist discovers natural laws from the study of physical data."⁵⁰ In this spirit, Frederick the Great instructed his jurists to prepare a code based on pure reason, while Napoleon demanded a code that was so succinct and complete that a peasant could read it by candlelight and become fully aware of his rights.⁵¹ In the same way that the emerging science of chemistry had replaced medieval alchemy, modern legal systems would sweep away the irrationalities that had plagued the law, allowing the maximum range of freedom and self-determination. To be sure, this was the extension of a larger Enlightenment project to take the scientific method and apply it to morality, law, and governance,⁵² or in more pejorative terms, to create a "gardening state" driven by an imperative of rational design.⁵³

Modern thinkers from Bacon to Locke to Kant to Jefferson to Bentham extolled the virtues of a legal system grounded in first principles, logically arranged, and publicly available to citizens. Landmark treatises such as Blackstone's *Commentaries* contain long introductory paeans to the "science of law," attempting to provide a totalizing account of the entire legal system.⁵⁴ Legal historian Lawrence Friedman nicely captured the dominant thinking about the law during the modern period:

49. Karl Gareis, *Introduction to the Science of Law* (New York: A.M. Kelley, 1911), p. 13.

50. John Merryman, *The Civil Law Tradition* (Stanford, CA: Stanford University Press, 1985), p. 61.

51. Edward McWhinney, "Code Law Systems," in Sills, ed., *International Encyclopedia of the Social Sciences*, vol 9, pp. 214–17.

52. Stephen Toulmin, *Cosmopolis* (New York: Free Press, 1990), pp. 16, 200.

53. Zygmunt Bauman, *Modernity and Ambivalence* (Ithaca, NY: Cornell University Press, 1991), p. 20.

54. William Blackstone, *Commentaries on the Laws of England: Facsimile of the First Edition of 1765–1769, Vol. I* (Chicago: University of Chicago Press, 1979), p. 5.

Ultimately the age of reason became the age of legal codification. What society needed was a single, rational code. In it the lawmaker would set out, clearly and distinctly, principles of law flowing from human nature and the nature of life in society. Moreover, such a code would be uniform throughout the land. It can hardly be an accident that the codification movement went hand in hand with the rise of the unitary, powerful, absolutist nation-state.⁵⁵

A formative figure in this project was Francis Bacon, who wrote at length about how the law ought to be rationally reconstructed into an ordered body of knowledge, with each subject broken down into subheadings, “whereto any one may occasionally turn on a sudden, as to a storehouse furnished for present use.”⁵⁶ This vision of a unified and complete body of law was articulated by Jeremy Bentham, who offered his services to codify the American legal system:

In a system thus constructed upon this plan, a man need but open the book in order to inform himself what the aspect borne by the law bears to every imaginable act that can come within the possible sphere of human agency. ... In the map of a law executed upon such a plan there are no *terra incognita*, no blank space: nothing is omitted, no thing unprovided for: the vast and hitherto shapeless expanse of jurisprudence is collected and condensed into a compact sphere which the eye at a moment’s warning can traverse in all imaginable directions.⁵⁷

Bentham and other thinkers of legal modernity set forth an idealized system consisting of a centralized, legitimate government with clear separation of powers, with a judicial apparatus that is administered by clear rules of procedure, guaranteeing substantive civil liberties. This goal – an encyclopedic law administered with machine-like efficiency, and growing increasingly rational – captures the spirit of the great codification projects in Kafka and Weber’s day, and in fact, Weber suggested that Continental legal systems approached Bentham’s ideal.⁵⁸

Against this, Weber and Kafka refused to celebrate modern law as an unqualified advancement over previous epochs in legal history. Weber warned that modern legal systems are no less problematic than pre-modern systems based on religious, traditional or charismatic leaders, for two reasons. First, modern legal systems are grounded almost entirely in the belief in legality (i.e., the notion that a law is legitimate if enacted in conformity with formal rules) so there is nothing outside the law itself which serves as a kind of anchor by which law is moored – meaning that the legal edifice can be easily hijacked or redirected by the very irrational forces which it sought to expel. Furthermore, once created, the legal and bureaucratic machinery is fueled by self-preservation (that is, no government agency has ever disbanded itself) such that, “Even in case of revolution by force or by occupation of an enemy, the bureaucratic machinery will normally continue

55. Lawrence Friedman, *Law and Society: An Introduction* (Englewood Cliffs, NJ: Prentice-Hall, 1977), p. 42.

56. Francis Bacon, *Advancement of Learning* (New York: American Home Library, 1902), p. 413.

57. Jeremy Bentham, “The Limits of Jurisprudence Defined,” in Clarence Morris, ed., *The Great Legal Philosophers: Selected Readings in Jurisprudence* (Philadelphia: University of Pennsylvania Press, 1959), p. 287.

58. Max Weber, *Economy and Society*, p. 866.

to function just as it has for the previous legal government.”⁵⁹ Modern law, then, means rule by narrow-minded bureaucrats and the absence of any normative bulwarks.

Kafka was keen to point out that vast injustices could be committed despite the presence of a fully modern legal system, and indeed this is a key message of the novel *The Trial*, namely that in a modern legal system a person can be wrongfully accused and executed even though he “lived in a country with a legal constitution, there was universal peace, all the laws were in force,” and the victim can go to his death asking, “Where was the Judge whom he had never seen? Where was the high Court, to which he had never penetrated?”⁶⁰ Although counterintuitive, this notion that a person can be persecuted for no reason despite living in a country with a modern legal system was echoed in the admission of Nuremberg prosecutor Robert Jackson, who said, “With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it; it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.”⁶¹ Note the paradox: the specificity of modern criminal law has given rise to the potential for abuse of discretion that it was designed to prevent.

To put the point differently, Weber and Kafka saw danger not in a world destabilized by the *absence* of legal rules, but rather by an overgrowth of rules without any inherent direction, meaning that the individual can live in a state with a full legal system and still be persecuted and crushed for no reason (as in *The Trial*) or as the result of bureaucratic bumbling, as in *The Castle*, when K. listens to a speech by the village mayor about the bloated Castle bureaucracy and responds that, “It gives me some insight into the ridiculous tangle that may under certain circumstances determine a person’s life.”⁶² Indeed, in both Weber and Kafka, the imagined seat of power (the King, the Emperor, the Judge, the Castle) is always an empty placeholder, since the power lies in the ability of agencies and functionaries to endlessly defer, delay, and mystify. So while the dominant view of the era saw lawlessness as the problem for which modern law was the solution, Weber and Kafka argued that a pernicious kind of lawlessness could exist at the heart of modern law.

Recent events in the United States seem to support much of Weber and Kafka’s critique of modern legal systems. For example, the US Supreme Court let stand a ruling that a person can sue the National Security Agency for illegal wiretapping in violation of the Fourth Amendment only if he or she can prove that they were specifically wiretapped – but the list of persons actually wiretapped must remain a state secret.⁶³ Recently, the

59. Max Weber, *The Theory of Social and Economic Organization*, ed. Talcott Parsons (New York: Free Press, 1947), p. 338.

60. Kafka, *The Trial*, pp. 4, 228.

61. Robert Jackson, “The Federal Prosecutor,” Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), quoted in *Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting).

62. Franz Kafka, *The Castle* (New York: Schocken Books, 1998), p. 63.

63. Tony Mauro, “Supreme Court Declines Review of NSA Wiretapping Program,” *Legal Intelligencer*, February 21, 2008, p. 4.

Department of Justice wrote a secret memorandum which redefined torture to exclude any procedure commonly understood as torture – however violent or gruesome – so long as the torturer subjectively believed in his own mind that he was not committing torture.⁶⁴ Recently it came to light that key members of the President’s inner circle held secret meetings where agents of the Central Intelligence Agency demonstrated torture techniques that would be imposed on so-called “enemy combatants,” a newly invented category of persons who may be held indefinitely. Recently the Comptroller of the Currency, a federal agency created to control abuses by banks, promulgated new rules specifically to *prevent* banks from prosecution for predatory lending techniques.⁶⁵ Similarly, the Environmental Protection Agency argued before the Supreme Court that it lacked the authority to regulate greenhouse gases that are destroying the environment, while it simultaneously prevented the State of California from enacting its own stringent tailpipe emissions standards.⁶⁶ These and other recent developments in the last few years – the announcement of rights that can never be exercised, secret memoranda, illicit wiretapping, illogical and subjective definitions of torture, government agencies that act in diametric opposition to their mandates, courts proclaiming their own decisions non-binding, a President who instructs the executive branch not to enforce the laws that he signs – certainly seem to affirm Weber’s and Kafka’s claim that modern law cannot deliver on its promises, and that whatever rationality and coherence seems to exist at the surface is belied by a more fundamental incoherence. And even beyond these extreme developments, Weber’s and Kafka’s work helps to make sense of the quotidian operation of the legal system in America, which in the eyes of most Americans is remote, bureaucratic, unknowable, expensive, and punitive. Even Justice Kennedy of the US Supreme Court acknowledged that Kafka’s novels are reflections of how most Americans feel about the legal system: “*The Trial* is actually closer to reality than fantasy as far as the client’s perception of the system.”⁶⁷ All of this suggests that Weber and Kafka are central thinkers for understanding the pathologies and absurdities of modern law, both in its everyday operation and during extraordinary periods such as the last few years. But at the same time, there are certain laudatory aspects of modern law that Weber and Kafka seem to gloss over, or miss entirely, and this is a lacuna that ought to be addressed.

III. Excessive Pessimism in Weber and Kafka

As Weber and Kafka might have predicted, the century that saw the most advancements in science and technology – and seemingly the most *rationality* – turned out to be a century of world wars and mass murder. And many of the worst offenses were mediated through the law (that is, through modern legal systems) and thereby sanctified with an imprimatur of legitimacy. However, the story of modern law is not one of abject failure.

64. Dan Eggen, and Josh White, “Memo: Laws Didn’t Apply to Interrogators,” *Washington Post*, April 2, 2008, p. A1.

65. Spitzer, “Predatory Lenders,” p. A25.

66. Juliet Eilperin, “EPA is Sued for Answers on Emissions,” *Washington Post*, April 3, 2008, p. A4.

67. Terry Carter, “A Justice Who Makes Time to Read, and Thinks That All Lawyers Should, Too,” *Chicago Daily Law Bulletin*, January 26, 1993, p. 2.

Pessimism must be tempered by counterbalancing developments, such as the rise of international laws and treaties, the increased recognition of the rights of minorities, the creation of the modern welfare entitlements, the expansion of rights for the accused, expanded consumer protection laws, and the regulation of markets and business entities. The question here is whether heavily one-sided perspectives on law, such as those offered by Weber and Kafka, can be compelling if they fail to account for all of these positive developments and for the full potentiality of modern law. A number of recent thinkers in the critical tradition have offered what seem to be more balanced perspectives on modern law. For example, Marc Galanter characterizes modern law as a general movement or “vector” toward which legal systems move, becoming more centralized, unified, hierarchic, comprehensive, and bureaucratic – and yet at the same time, the negative effects of these features are counterbalanced by an increase in positive developments such as legal diversity and complexity.⁶⁸ Similarly, the legal historian E.P. Thompson recognized the modern rule of law as an “unqualified human good” while conceding that law is often a tool of class power to legitimate and rationalize injustice.⁶⁹

The current heir of the Weber and Kafka position would perhaps be historian Howard Zinn, who refuses to see modern law as an advance over pre-modern methods of governance:

[T]he modern era, replacing the arbitrary rule of men with the impersonal rule of law, has not brought any fundamental change in the facts of unequal wealth and power. What was done before – exploiting the poor, sending the young to war, and putting troublesome people in dungeons – is still done, except that this no longer seems to be the arbitrary action of the feudal lord or the king; it now has the appearance of neutral, impersonal law. The law appears impersonal. It is written on paper, and who can trace it back to what men? And because it has the look of neutrality, its injustices are made legitimate. It was not easy to hold onto the “divine right” of kings – everyone could see that kings and queens were human beings. A code of law is more easily deified than a flesh-and-blood ruler.⁷⁰

On this view we have not gained much ground since Emperor Caligula posted the laws of Rome at such a height and in such small print that no one could read them,⁷¹ because under the current system the law is so complicated that an ordinary litigant cannot understand which court has jurisdiction over their case or what law governs it, and in any event the law is stacked in favor of elites. Zinn’s refusal to celebrate modern law seems to resonate in Michel Foucault’s insistence that, “Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination.”⁷² Like Foucault, neither Weber

68. Galanter, “Modernization of Law,” p. 1046.

69. E.P. Thompson, “The Rule of Law,” in Piers Beirne and Richard Quinney, eds., *Marxism and Law* (New York: Wiley, 1982), pp. 130, 136.

70. Howard Zinn, *Declarations of Independence* (New York: Harper Perennial, 1991), p. 11.

71. Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964), p. 93.

72. Michel Foucault, “Nietzsche, Genealogy, History,” in Paul Rabinow, ed., *The Foucault Reader* (New York: Pantheon Books, 1984), p. 85.

nor Kafka are willing to celebrate modern law, instead tending to see it as a different instance of domination, with no claim to unqualified superiority over previous modes of domination by religion, charisma, or tradition.

The problem with this depiction of modern law is that it flies in the face of evidence that lawyers and judges are not irretrievably locked into instrumental rationality, forever subservient to existing legal doctrines. Our legal system allows – one might even say that it *facilitates* – debate on normative questions on a range of substantive topics, such as the nature of personhood, the purposes of punishment, federalism, civil rights, and so on. To be sure, as Foucault and others have pointed out, the discourse of law is molded and constrained by power relations that define what is sayable, what is presentable, and who can speak, but at least there is some dialogue on normative matters. For example, while it is true that the Guantanamo Bay Detention Camp (which even former Vice President Al Gore has derided as something out of Kafka⁷³) operates under color of modern law, it is also true that our legal system allows the Supreme Court to denounce and overturn the procedures at the camp as inconsistent with fundamental principles of liberty and security.⁷⁴ In other words, modern law is characterized by a struggle, or dialectic, between the forces of bureaucratization and the forces of normative commitment, and cannot be simply reduced to an eclipse or erasure of normativity, as Weber and Kafka tend to depict.

Neither Weber nor Kafka offer a navigable path around – or through – the dilemmas of modern law. Weber had strong political beliefs, but felt no theoretical demand to justify them, in part because he felt that a sociologist must retain a value-neutral view toward the object of his studies, and in part because he believed that ethical and political disputes could not be settled dispassionately by reasoned argument since they were essentially matters of personal commitment. Similarly, Kafka flirted with various political groups but eventually turned inward, proclaiming that his task was to represent his internal world. Although the secondary literature is replete with protestations that Weber was not a “prophet of doom,”⁷⁵ and that Kafka was not apolitical,⁷⁶ the prevailing theme in their writings on law is that modernity is an irredeemable and destructive force, that we no longer have the power to generate new substantive values (in a kind of Nietzschean will to power) nor to redeem the emancipatory features latent within modernity (for example, in Jürgen Habermas’ understanding of modernity as an incomplete project). Weber, a liberal and a nationalist, dismissed socialism on the grounds that it would only lead to the creation of a worse bureaucratic state, and he appeared to call for the emergence of a new political party or charismatic leader who could re-orient the bureaucratic apparatus.⁷⁷ For Kafka, who wrote in his diary such apolitical comments as “Germany has declared war

73. Al Gore, *The Assault on Reason* (New York: Penguin, 2007), p. 133.

74. *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229 (2008) (finding that detainees have the right of habeas corpus).

75. Talcott Parsons, “Introduction,” in Max Weber, *The Theory of Social and Economic Organization*, p. 84.

76. Lee Baxandall, “Kafka as Radical,” in Angel Flores, ed., *The Kafka Debate* (New York: Gordian Press, 1977), pp. 120–125.

77. Max Weber, “Politics as a Vocation,” pp. 126–28.

on Russia. Swimming in the afternoon,”⁷⁸ any political message that he tried to send was filtered through a stream of ironic portrayals, provocations, and dark humor, which betray a tendency against large-scale political positions in favor of self-reference and narcissistic preoccupation.⁷⁹ To be sure, there are those who see Kafka’s refusal to engage politically as a kind of statement by omission,⁸⁰ but this charitable reading is too clever by half, for despite the claim (especially in postmodern criticism) that Kafka was politically subversive, or that his work ironically mocks the German formalism under which the Czech minority lived in Prague,⁸¹ the dominant message of Kafka’s fiction is not subversion but masochism – namely that people secretly desire that their requests be refused. This much is obvious from the short story *The Refusal*, where the townspeople gather ritually to present their grievances before a local official and are always met with a refusal, which causes most of them to breathe a sigh of relief.⁸² In Weber we find a similar notion that modern persons are stuck in a cage, powerless, haunted by religious ghosts, and condemned to an increasingly rationalized but meaningless world. And yet buried beneath the surface in both Weber and Kafka is a set of normative commitments. Their outrage at modern law is grounded in the notion that it offends some fundamental values or has defaulted on its promises, but one reads their work vainly hoping that they will take the next logical step of explaining what a legitimate legal and political order would look like. It is true, of course, that modern law has failed, miserably at times, to fulfill its promise, but at a minimum a more nuanced understanding of this failure is required than that offered by Weber and Kafka.

The view of modernity sketched by Weber and Kafka will continue to resonate with scholars and laypersons who believe that the existing political and legal structure is, in the words of a scholar who is sympathetic to Weber, “an elaborate series of public rituals that legitimate bureaucratic rule, [where] the prospects for authentic self-governance are grim.”⁸³ Under this view, lawyers are condemned to be Kafka’s “couriers” and Weber’s “specialists without spirit,” engaging in empty rituals and struggling to adapt within an incomprehensible system that no longer commands moral authority. No one can deny that this extremely negative viewpoint – so brilliantly sketched by Weber and Kafka – captures a large part of what goes on in modern law and legal institutions, and that is why their work remains important. But at the same time, it must be acknowledged that their withering critical analysis is far more successful at capturing the pathologies of modern law than in articulating its strengths and potentialities.

78. Bill Dodd, “The Case for a Political Reading,” in Julian Preece, ed., *The Cambridge Companion to Kafka* (Cambridge: Cambridge University Press, 2002), p. 131.

79. Malcolm Pasley, “Semi-private Games,” in *The Kafka Debate*, pp. 188–205.

80. Patrick Bridgewater, *Kafka and Nietzsche* (Bonn: Bouvier, 1974), pp. 151–55.

81. Gilles Deleuze and Felix Guattari, *Kafka: Toward a Minor Literature* (Minneapolis: University of Minnesota Press, 1986).

82. Kafka, “The Refusal,” in *The Complete Stories*, p. 263.

83. Reihan Salam, “Habermas versus Weber on Democracy,” *Critical Review*, 15 (2001), pp. 59–85, 74.