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## Necessary Deceptions: Kafka and the Mystery of Law

Peter Fitzpatrick

‘Nothing that is not there and the nothing that is.’

(Wallace Stevens 2006: 9)

### Genres

To begin with an impossible beginning, and in a way that pervades this essay, after finding that “a focus on crime, but sometimes only its investigation” is all that distinguishes the genre, John Scaggs decides that his engaging critical foray will “employ the term ‘crime fiction’ to classify an otherwise unclassifiable genre” (2005: 1). And soon the crowded contraction of Scaggs’ instances attests to the genre’s “flexibility and porosity” (2005: 2). Not all prominent authors of fiction dealing with crime are accommodated (Kafka for one is not there), and with its diversity and immensity the “otherwise unclassifiable genre” remains uncertain and unbound. Yet in Scaggs’ account and generally, the genre is readily recognised. That is our initiating mystery.

It may well be the thousands of works carrying the label ‘crime fiction’ that endow it with a seeming solidity. That endowment may ensue also from the genre’s ‘golden age’ (roughly between the two ‘world wars’ and centred in England) persisting as its paradigm. Contrary instances become exceptions or ‘sub-genres’. So, “the artificial gentility of the classical detective story” (Scaggs 2005: 57) would serve to set it, and especially its resolution, in contained locations apart from the *profanum vulgus*, focusing it through rituals of ratiocination and revelation towards a patterned dénouement which reaffirms order and right.<sup>1</sup> It was never quite that straightforward of course and the inheritors of the ‘golden age’ have managed at times to accommodate some ultimate irresolution as well as departures from the

affirmation of right (e.g. Mann 2006; Leon 2001: 279-80). But the exceptions to classical conformity can be more stark than that. Detective fiction is typically now saturated with social realism and will often and amply accommodate the transgressive and the insistently unsettled.<sup>2</sup>

It is with detective fiction's becoming in this way intrinsically contrary that Kafka can be more confidently re-introduced. It is not uncommon for detective novels to be described as influenced by Kafka, and this goes beyond the trite invocation of the Kafkaesque (see Michaud 2013). More to the point, Laura Marcus finds that Paul Auster's *Trilogy* "operates simultaneously...as both a detective and as an 'anti-detective' novel drawing on the conventions of...Kafka" among others, and she instances Kafka's *The Trial* itself as an anti-detective novel (2003: 251, 261). The "anti-" is not merely oppositional. It "testifies...to the detective genre's openness to subversion and renewal" (Marcus 2003: 264).

This hardly looks like progress. We have the mystery of a generic classification of what cannot be classified, compounded now by a generative link between the genre and that which is quite contrary to it yet still somehow connects to it, the outcome becoming something in-between. This sub-mystery could be approached by way of Benjamin's relating another genre, that of poetry, to Kafka's notorious branding of his own works "as failures" (Benjamin 1973: 129). What Benjamin specifically instances is Kafka's failed and "grandiose attempt to convert poetry into doctrine" (1973: 129). In a later piece, Benjamin emphasised Kafka's general realisation of the inevitability of failure: "One is tempted to say: once he was certain of eventual failure, everything worked out for him....," and that "[t]o do justice to the figure of Kafka...one must never lose sight of one thing: it is the purity and beauty of a failure" (1973: 148; and see Murray 2004: 347). This is, in short, a productive failure, one which in a variety of ways can tell us something of what, for example, poetry 'is'.

Benjamin is less obliging when it comes to law. Gasché observes that Benjamin takes the “laws” in Kafka to have “mainly a semblance-like character,” and that he sees Kafka as not having “said anything determinate about the law or the laws” (2022: 972). This is juxtaposed by Gasché to Gershom Scholem’s remonstrating with Benjamin about one of his talks on Kafka: “How, as a critic, you could manage to say anything about the world of this man without putting the doctrine, what Kafka called the law, into the center, is an enigma for me” (2002: 972). And many after would affirm a comparable significance for law in Kafka’s works (e.g. Minkinen 1996: 350). Yet there is no abrupt resolution here. Gasché’s own essay on “Kafka’s Law” affirms, aptly enough, that “Kafka’s world is a legal world” yet that “Kafka’s legal world is characterized by complete lawlessness. ... [I]n this world *Recht* and *Unrecht* blend without any way of distinguishing between them” (2002: 973, 984).

As between law and lawlessness, Kafka’s work is almost invariably typified by the latter. Such tokens of law as can be found are fragmentary, incoherent, unhinged. “In Kafka,” adds Cixous, “the law is not figured by anyone” (1991: 3). And for Banakar “...the legal images in Kafka’s fiction” come with “their bewildering, enigmatic, bizarre, profane and alienating effects” (2010: 463). And that description would readily match Minkinen’s equating law and “the Kafkaesque” (1994: 353) – a word readily revealed by the Oxford English Dictionary (2<sup>nd</sup> ed. 1989) as denoting horror and despair in the face of the deepest existential uncertainty, a self-abnegation when confronted with an all-pervading, tentacular, inscrutable and inescapable power. It appears then that Kafka would not be contributing to that quest of an occidental Jurisprudence forever seeking what an elusive law may be. But perhaps a part for Kafka can be intimated in his providing a formative force of negation in the making of the genre of crime fiction. And perhaps that part could be amplified in Kafka’s seeing himself as having “vigorously absorbed the negative element of the age in which I live” (in Murray

2004: 272). Perhaps further, and finally, Kafka's composition of the genre 'law' may be revealed in terms not only of what law is, but of what it is not.

Another generic impasse to end this section. Within a work of crime fiction, at least 'classically', resolution comes only with conclusion. Within the genre of the academic essay, resolution comes with, or is explicitly anticipated in, the introduction. Matters for now, and here also, are left in-between. There are already plenty of clues.

### ***The Trial***

With *The Trial* the work of negative formation begins at the beginning.<sup>3</sup> There is no trial. Or the title could be translated as "the process". There is no process. And in a sense the novel itself is not 'there' in being reputedly unfinished. Yet incompleteness is apt since, contrary to the constituent expectation of crime fiction, this novel insistently pursues irresolution. And the focal figure of this irresolution, and of the Law – where "[a]ll reality has become the Law" (Citati 1990: 132) – is "the court".

The court is everywhere and, as a result, is nowhere. Or reversing the emphasis, with Citati: "The Court is secret and manifest: concealed and apparent, invisible and most visible – as is God" (1990: 132). "Everything belongs to the court" – this said by way of explaining why certain licentious "girls belong to the court" (150). Character after character, location after location (attics, stairs, windows and doors, doors opening onto more or closing off more, being frequently singled out) are said to be of the court. Vivid and palpable as such people and places can be, it is not long before they fall out of contention or are implicitly set against their contrary. The windowless room acquires a window, or *vice versa*; or a "reddish" beard becomes "blonde" a few pages later (13, 18). Even the usual indicia of a court – a courtroom, a hearing, officials – soon dissipate into something else. The official merges into an unofficial

and quotidian inconsequence. Officialdom can only be approached unofficially – through “influence” or “connections” (e.g. 58, 90). Petitions to the court are unconsidered or they are incapable of being finished because one’s “entire life, down to the smallest actions and events, would have to be called to mind, described, and examined from all sides” (127 and see 122). The courtroom dissolves into a scene of sexual improprieties or of mysterious and diverse groups. Any resort to certain levels of the court is eventually revealed as futile, only some highest court having any efficacy at all, but it never appears and the only relevant courts are “inaccessible” (121).

Yet the court has a “strange attraction” (29). The focal character, Josef K. assiduously seeks the court feeling that the law is something he has to effect – effect even to the point of knowing “it was his duty” to carry out his own execution (230).<sup>4</sup> He believes he lives “in a state governed by law” where “all statutes were in force” (6). He seeks to obtain a hearing and is assured by his lawyer that his case “had excited a great deal of attention at the court from the very start” (124). But lawyers had already been shown to be irrelevant with “everything” being “laid upon the defendant himself” (115, 121). And K. also finds himself trying to deal with “an unknown system of jurisprudence” (61). Not only is K. denied knowledge of his supposed offence, an offence for which he is usually assumed to be guilty, but as an “accused” he can know nothing of the processes of the court or secure any significant hearing to present his defence, or to present anything at all (e.g. 113-4, 121). His securing a hearing is something either effectively deferred or simply speculated about. “Where was the judge he’d never seen? Where was the High Court he’d never reached?” (132). And even if all that were as nought, there is in Benjamin’s gloss the ultimate impasse: “The court does not dare to admit that it cannot make up its mind” (2005: 68).

Benjamin also finds in *The Trial* an impasse that is potentially more productive. This entails another return to the in-between – now a condition in and between determinacy and evanescence, the graspable for now and the ever-elusive. For Benjamin, Kafka peoples this in-between with messengers and assistants, “beings in an unfinished state,” beings for whom “there is hope,” and beings in whose “activities” law “may be discerned, subtly and informally” (1973: 117). A contender for what Gasché (2002: 973, 974) calls this “intermediate” or “intermediary” status could be the “man from the country” coming in search of law in the parable beginning “Before the Law” found towards the end of *The Trial* (215-17). Before adding to the numberless engagements with this homily, it may help to range somewhat more widely through Kafka’s work in search of law.

### **“The Problem of Our Laws”**

*The Trial* has long provided the focal impetus for the content of the ‘Kafkaesque’ and for generalised accounts of Kafka’s work, along with the pervasive part of an abject law within it. And there is much in this work sustaining that reduction, but there is also much else. First, some instances of the sustenance.

*The Castle* offers something of a mirror image of *The Trial* even if the reflection is less sharply focussed. Here, along with the main character K., and borrowing a summary from Brod, we are involved with “the inexplicable, unpredictable and unappeasable nature of the reigning powers” (1995: 254). Despite K.’s insistent efforts, the decisions he needs from the castle are never forthcoming, and the holder of its ultimate authority is never seen. The quiescent populace do not even bother to seek “official decisions” considering them to be “as shy as young girls” (1983: 317). The role of the in-between, drawing again on Benjamin’s category, is filled by a messenger, Barnabas, who provides precarious connection between K. and the castle’s officialdom (Benjamin 1973: 117).

In the short stories and parables, unappeasable authority and its quiescent objects are evident, if not as extensively as standard descriptions of Kafka's work would allow. The instance most signalled has to be the terrifying exercise of paternal authority in "The Judgment" (1988). And as Benjamin puts it: "There is much to indicate that the world of the officials and the world of the fathers are the same to Kafka" (1973: 113). With this short story, a son is becoming comfortably involved in life and in the family business in particular, taking over from his ailing father. Yet he kills himself in self-abnegation when the father, reasserting himself as a figure of complete authority, issues an insane judgement that the son must do so (1988: 87-8). To take just one more example, also a short story, there is "The Refusal" (1988) in which the custodian of the village's law compliantly succumbs whenever his petitions are refused by the representative of a remote authority.

Yet, always 'yet' with Kafka, matters become more mixitive when we add another helpful trio – this time all parables. "The Problem of Our Laws" announces at the outset that "[o]ur laws are not generally known; they are kept secret by the small group of nobles who rule us" – nobles who "stand above the laws," laws "entrusted exclusively into their hands" (1988: 437). There is an imperative quality to the existence of this nobility: "...nobody would dare to repudiate the nobility... . The sole visible and indubitable law that is imposed upon us is the nobility, and must we ourselves deprive ourselves of that one law?" (1988: 438). Yet there is an ancient tradition, and an accessibility, to the law. It has been studied by the people so there is *a* knowledge of the law, a knowledge which discerns "certain main tendencies which permit of this or that historical formulation; but when in accordance with the scrupulously tested and logically ordered conclusions we seek to adjust ourselves somewhat for the present or the future, everything becomes uncertain, and our work seems only an intellectual game, for perhaps these laws we are trying to unravel do not exist at all" (1988: 437-8). That



supposition is held by “a small party” who anticipate a brand of legal realism in also holding that “[t]he Law is whatever the nobles do” (1988: 438). Nonetheless, “the overwhelming majority of our people” would hold “that the tradition is far from complete and must be more fully inquired into” (1988: 438). And although it would be a conclusion to be long awaited, “when everything will have become clear, the law will belong to the people and the nobility will vanish” (1988: 438). But in the interim “nobody would dare to repudiate the nobility”: “the sole visible and indubitable law that is imposed upon us is the nobility, and must we ourselves deprive ourselves of that one law?” (1988: 438)

Before looking at the remaining two of our contrary trio, it could be emphasised that with Kafka the hold of remote power is usually neither clear nor complete. A stark illustration of the point is offered in “The Great Wall of China” where we find that “[l]ong-dead emperors are set on the throne in our villages, and one that lives on in song recently had a proclamation of his read out by the priest before the altar” (1988: 245). The very remoteness of authority puts the purchase of actual edicts in doubt, something vividly affirmed in the parable “An Imperial Message” where a message issued by the emperor, and one on which he sets great store, fails to negotiate the compounded complexity of its passage leaving its intended recipient to “dream it” to himself (1988: 5).

Returning to our contrary trio, now the second parable where we are immersed in the contemplative calm of “The New Advocate,” Dr. Bucephalus. Once the mighty horse of Alexander the Great, this Bucephalus, remaining very much alive, no longer follows Alexander’s precipitate path of violent assertion and acquisition – a path that inevitably reached its limit: “Even in his [Alexander’s] day the gates of India were beyond reach, yet the King’s sword pointed the way to them. Today the gates have receded to remoter and loftier places; no one points the way...”:

So perhaps it is really best to do as Bucephalus has done and absorb oneself in law books. In the quiet lamplight, his flanks unhampered by the thighs of a rider, free and far from the clamour of battle, he reads and turns the pages of our ancient tomes.

(1988: 415)

Benjamin again, after noting that Bucephalus actually “does not seem to be practicing law,” continues: “The law which is studied and not practiced any longer is the gate to justice” (1973: 139).

The protagonist in the third parable, “Advocates,” is also unconstrained, ultimately able to range beyond limits, but initially he is deeply uncertain. In his search for advocates he is unsure whether a surreal court and its corridors, reminiscent of *The Trial*, house the law, whether an incessant and pervasive droning said to be characteristic of “a law court” originated in “the place where one happened to be standing”, or whether that was an illusion “for it came from a distance” (1988: 449).<sup>5</sup> Yet he remains set on his search to find advocates for they are needed “everywhere” because the “verdict” is based on “inquiries” that extend “everywhere” (1988: 450). Indeed, advocates are, “if anything needed less in court than elsewhere” for a court, “one assumes, passes judgment according to the law”:

If one were to assume that this was being done unjustly or frivolously, then life would not be possible; one must have confidence that the court allows the majesty of the law its full scope, for this is its sole duty.

(1988: 450)

Within the ambience of the seeming court with its unlikely and vaporous denizens, he fails to find advocates, realises that “I cannot rid myself of the feeling that I’m not in the right place, I ought to be in a place where all kinds of people meet, from various parts of the

country, from every class, every profession of all ages...” (1988: 450). Impulsively, he runs into a house and offers us a string of nostrums to the effect that in any existential search one cannot go back. These culminate in a beautifully buoyant passage which ends the parable:

So if you find nothing in the corridors open the doors, if you find nothing behind these doors there are more floors, and if you find nothing up there, don't worry, just leap up another flight of stairs. As long as you don't stop climbing, the stairs won't end, under your climbing feet they will go on growing upwards.

(1988: 451)

### ***“In the Penal Colony”***

To claim that Kafka's short story, “In the Penal Colony,” extends that illimitable search could seem utterly perverse, but a proposition to that effect will come later. The usual response to this famed and lurid account of a penal colony and its mechanized mode of execution is that it renders the Kafkaesque gruesomely “real” and “portrays the horror of the world as it truly is” (see Minkkinen 1994: 352). But the specific inability of this regime to endure signals what is needed for there to be an enduring authority, and law (cf. Minkkinen 1994: 355, 361).

The setting is a penal colony in which there is a machine that executes those who break the law. It does this by inscribing the letter of the law on their bound bodies and doing so over a long period – twelve hours in all, the words eventually piercing all the way through the body. The story is about a particular execution or attempted execution. The law to be inscribed is “HONOR THY SUPERIORS” (1988: 144).<sup>6</sup> It is to be inscribed on the body of a condemned man whose duty it was throughout the night to salute the door of a captain at regular intervals. He sleeps through one saluting slot, is caught out by the captain, vigorously resists

being arrested by him and, in all, is to be executed. The main character, however, is an officer who superintends the execution and who describes the machine to another character, a visiting explorer, in terms of its autonomy and functional perfection – “it works all by itself” (141): “No discordant noise spoiled the working of the machine” (154). “It is effective in itself” (154). “[M]ovements [of a key section] are precisely calculated” (143). The machine was the invention of a former authoritarian Commandant of the colony. The officer proudly shows the Commandant’s plan of the machine to the explorer who finds it entirely inexplicable.

The range of set determinations of which the machine is the symbol and instrument extends to the status of the condemned man. His “guilt is never to be doubted” (145). He is entirely submissive, even taking a compliant interest in the whole proceedings. And with executions generally, and as the officer claims, “just about the sixth hour” of the machine’s “Harrow” inscribing the law, a luminous “enlightenment” (more accurately translated as ‘understanding’) shines out of the face of the condemned when they “begin...to understand the inscription” (150) – “the radiance of that justice, achieved at last and fading so quickly” (154). This is for the officer “[a] moment that might tempt one to get under the Harrow oneself” (150).

But with this particular planned execution, it soon becomes evident that all is not well with either the machine or the penal regime that it comprehensively characterises. For a start, the whole scene has a stark solitariness to it. There is only the officer, the explorer, the condemned man and a soldier who guards him, all set along with the machine in a desolate landscape. This contrasts to the glory days when “[a] whole day before the ceremony [of execution] the valley was packed with people” (153) wanting to come to it. “It was impossible to grant all the requests to be allowed to watch it from nearby” (154).

The lack of popular concern and commitment is not the only problem however. There is a new regime, a new Commandant, the colony is changing, and neither the officer nor the machine fit into the new scheme of things. So, whereas the machine inevitably required occasional replacement parts, now those parts are not so forthcoming and the machine creaks with mounting dysfunctions. Furthermore, both the condemned man and the soldier supposedly guarding him act in undisciplined, almost casual ways. Generally, the machine with its concordant regime are no longer the focal force of the colony but are increasingly marginalised and set apart with the officer now being its sole supporter. The new regime would seem to be humane, to accommodate some popular participation, and to have popular support (158, 167). And it becomes evident, repeatedly so, and much to the chagrin of the officer, that the new Commandant is much influenced by “the women” or “the ladies” seemingly always around him (e.g. 153, 158).<sup>7</sup>

The *dénouement* is as gruesome as it is abrupt. The condemned man is strapped into the machine by the officer. Previously “the condemned man was laid under the Harrow by the Commandant himself” (153). But, with the explorer having refused the officer’s request to seek the new Commandant’s support for the machine, the officer decides that “the time has come” (160) and, perhaps seeking that enlightenment he found so tempting, frees the condemned man in a farcical scene and substitutes himself in the machine. With that sacrifice the machine may for one terminal time complete its intrinsic function of dealing death, of effecting finality. Which it proceeds to attempt, but in the process its functioning becomes a horrifying malfunctioning. As the machine fragments, it still kills but in an incoordinate way that fails to complete the old process. This also dissipates the ability of the machine itself to inscribe the law. So the legal text the officer wants to have inscribed in and through his body, “BE JUST” (161), itself dissipates as “the machine was obviously going to pieces” (165). It

“was not writing, it was only jabbing”, and “this was no exquisite torture” suffused with a radiant “enlightenment” or understanding – “this was plain murder”: “no sign was visible of the promised redemption” (165, 166).

In the final scene, the explorer visits the hidden grave of the old Commandant which contains this inscription: “There is a prophecy that after a certain number of years the Commandant will rise again and lead his adherents from this house to recover the colony. Have faith and wait!” (167). This is something which “the bystanders” seem to find “ridiculous” (167), perhaps a little uneasily. Then at the end of the story, when the explorer is leaving the colony, the once-condemned man and the soldier seem desperately to want to go with him. But he rejects them. He does not want to engage with them. Perhaps he is repulsed by the whole experience. But in any case he is only an observer, something he had been concerned to emphasize throughout.

### ***“Before the Law”***

And so we come, inevitably and finally, to Kafka’s most famed engagement with the law, his parable “Before the Law”. For present purposes, this piece will serve to draw out the law incipient in the series of works sketched so far. In *The Trial* the parable is told near the end when K. comes to place, or misplace, some trust in an ostensibly obliging priest who “belong[s] to the court” (1998: 215), and with whom K. engages in the hope of finding some way of influencing the court or avoiding its jurisdiction. The priest is quick to disabuse K., and having chastised him for seeking “too much outside help,...particularly from women,” the priest tells K. he is “deceiving [himself] about the court” and continues with that now resonant opening: “in the introductory texts to the Law it says of this deception: before the Law stands a doorkeeper...” (1998: 213, 215). The parable tells, or seems to tell, of someone persistently denied any access to the law, to a law that seems ever beyond him. The parable is

tightly packed, but a summary could go like this: “A man from the country comes to this doorkeeper and requests admittance to the Law” (1998: 215). The doorkeeper, a figure of official authority and the first in a hierarchy of keepers stretching beyond the door, asserts control over entry to the law. Despite the man’s repeated, “insatiable” efforts to obtain entry, this doorkeeper only allows him a glimpse beyond the door and refuses immediate entrance through what is an ever-open doorway to the law (1998: 217). Yet he does not rule out the possibility of later entry. After a lifetime of waiting by the door and of seeking to persuade the official to let him enter, the man from the country is near death:

[H]is eyes grow dim and he no longer knows whether it’s really getting darker around him or if his eyes are merely deceiving him. And yet in the darkness he now sees a radiance that streams forth inextinguishably from the door of the Law. ...Before he dies, everything he has experienced over the years coalesces in his mind into a single question he has never asked the doorkeeper. ...“everyone strives to reach the Law,” says the man “how does it happen, then, that in all these years no one but me has requested admittance.” The doorkeeper sees that the man is nearing his end and in order to reach his failing hearing, he roars at him: “No one else could gain admittance here, because this entrance was meant solely for you. I’m going to go and shut it now.”

(1998: 216-17)

With that the parable ends and the multitude of engagements with it begins, starting with a debate between K. and the priest which will eventually be drawn on after looking at some other contentions, those of Cixous and of Derrida.<sup>8</sup> “Before the law” provides both the opening phrase of the parable and its title when Kafka published it separately. And in *The Trial* the priest tells K. that the parable is to be found “in the introductory texts to the Law” (1988: 215), in what introduces the law – in what would, by way of the etymology of

“introduce”, bring it in and within (Skeat 1963: 266). So, from the many meanings attached to ‘before’, we can begin with what comes before the law in the sense of what there has to be before there can be law.<sup>9</sup>

Cixous then:

The definition of the law can unfold only in relation to the question of the origin of the law. In order to get out of Kafka’s text, we must ask: Where does the law come from? and not think that it has always been there.

(1991: 19)

Which may not be immediately promising since Cixous would add that the originary dimension of law is what impels a feminine law – a law which “has no material inside,” “does not exist,” “does not take place,” “cannot be defined” (1991: 18). Furthermore, and in another setting, Cixous would affirm: “Not the origin: she doesn’t go back there” (Cixous and Clement 1986: 93). Not the origin, the origin as the delimited, appropriated, place of secure return to which “he will go: she will go further, always beyond,” “to the unknown” (Cixous 1986: 93).<sup>10</sup> Hence, his eternally straitened law as against her “wild,” her “savage” heart (Cixous 1991: 1, 3). Yet, even when contrary to the pathology of positivism, for law there is still a “closing” as well as an “opening” beyond (Cixous 1991: 18).

This generative irresolution “before the law” links the man from the country with the feminine of Cixous – links them through their resolute seeking of the law: “There are always men from the country with a little bit of femininity who feel like going in to see nevertheless...” (1991: 27). Like those “women” in *The Trial* whose “help” K. was chastised for seeking, the man is also “outside”, at least insofar as he comes from the country and the country is “beyond of the reach of the court somewhat” (1998: 94, 213). Likewise, it would



seem, the new Commandant who brings a more open regime to the penal colony is faulted by the officer for being influenced by “the women” and “the ladies” (e.g. 1988: 153, 158) – the officer who is now the sole representative of the draconic old regime. Yet the old Commandant had “his ladies” (1988: 153), but nothing is said or could be said, about their ability to influence that regime.

It is time to return pointedly to Benjamin’s finding in Kafka’s writings “beings” in between, beings who are “in an unfinished state” in whose “activities” law “may be discerned,” and for whom “there is hope” (1973: 117). These are beings of embedded possibility, neither settled in a determinate world nor outside and dissipated indeterminately. Seen in such an “intermediary” way (Gasché 2002: 974), this in-between is nonetheless attuned and related to the determinate and the indeterminate, and it is in and as this relation that we may find the formative force of law.

But another impasse, another denial of entry to the law, would seem to ensue from the impossible simultaneity of the determinate and the indeterminate, of “an opening and a closing” (Cixous 1991: 18). Thence mystery compounded for, even if that one were solved, we would still find, having entered, a law which “has no material inside,” “does not exist,” “does not take place” (Cixous 1991: 18). Perhaps then a return to the force of negative formation ‘in’ Kafka’s works may help. The plan now is to tackle, in order, as it were, the determinate and closed, then the indeterminate and open, and then both in combination.

The determinate, or the seeming determinate, abounds in Kafka. As for law, it can somehow be found or accessed through a multitude of palpable sites – doors, stairs, attics, bedrooms, even courtrooms – and more. The guilt of both K. in *The Trial* and of the condemned “In the Penal Colony” is not to be doubted. And in the colony, the erstwhile machine effects the law in a complete calculability and cutting assertion. Here the law

becomes a further variety of legal positivism, one where it is the creature of an entirely surpassing authority, much like the paternal “sentence” in “The Judgment”. From that surpassing position, appeals to law can be arbitrarily and constantly rejected, as in “The Refusal”. And so, in “Before the Law”, the priest says that “[o]ne could almost argue that the doorkeeper exceeded his duty by holding out to the man the prospect of a possible future entry. At that time his sole duty appears to have been to turn the man away,” that time being when the man from the country first requested entry to the law (1998: 218). Kafka’s evocative precision: “one could almost argue,” but not quite.

The doorkeeper may have some intuition of “The Problem of our Laws”. At the outset we would seem to be in the positivist’s paradise where the laws “are kept secret by the small group of nobles who rule us” (1988: 437). Not only do the nobles “stand above the laws,” such laws are “entrusted exclusively into their hands” (1988: 437). And this nobility is indispensable: “The sole visible and indubitable law that is imposed upon us is the nobility” (1988: 438). Yet this pellucid scene not only poses a problem, it is also a “problem of *our* laws”. Such laws are demotically generated – generated to the extent of discernible “main tendencies which permit of this or that historical formulation”, but also formulations that are taken as far as “scrupulously tested and logically ordered conclusions” (1988: 437). The focal “problem of our laws” ensues when “we seek to adjust ourselves somewhat for the present or the future” because then “everything becomes uncertain, and our work seems only an intellectual game, for perhaps these laws we are trying to unravel do not exist at all” (1988: 437-8). The emphasis here would have to be on “perhaps” because this is the view of “a small party” who hold that “the Law is whatever nobles do” (1988: 438). “[T]he overwhelming majority” insistently think otherwise, however (1988: 438). Even though “nobody would dare to repudiate the nobility,” still that majority would cling to their legal tradition because it

“is far from complete and must be more fully inquired into” to the extent that eventually “everything will have become clear [and] the law will belong to the people and the nobility will vanish” (1988: 438). And another of Kafka’s frequent themes is the evanescence of imperative authority. In “an imperial message” the message disappears in its transmission (1988: 4-5). The Emperors in the instances taken from “The Great Wall of China” are fictive (1988: 245). The father in “The Judgment” collapses on his issuing it (1988: 87). And the all-presiding court in *The Trial* dissipates in the very effort to locate it, and ‘in any case’, Benjamin again, ‘[t]he court does not dare to admit that it cannot make up its mind’ (2005: 68). We are left, then, in a hyper-determinacy, in Rushdie’s “surreal”: “The surreal is the strangeness of the world made visible: it’s a court case that appears to have no end...” (2007: 274).

Perverse as it may seem, the road to resolution is opened up by Kafka’s most spectacular, and most thorough, dissipation of determinate law – the demise of its mechanical exaltation “In the Penal Colony”. Dissolution ensues when the focal instruction given the machine is “BE JUST” (1988: 161). This instruction proves to be entirely destructive of the machine’s complete calculability. A more specific outcome is provided by “The New Advocate,” Dr Bucephalus. Having reached a limit of Alexander’s acquisitive violence, and in the recognition that there was more “beyond reach,” Bucephalus throws off restraint and serenely seeks the law – and returning to Benjamin yet again, and this time in relation to Dr Bucephalus: “The law which is studied and not practiced any longer is the gate to justice” (1973: 139).

The justice here could, peremptorily for now, be found in one of Derrida’s engagements with ‘Before the Law’ (2002: 270). Here the law identified with justice is a law “always to come, always promised,” the antithesis yet necessary companion of a determinate law:

“[o]nly the ‘to-come’...will produce the intelligibility or the interpretability of this law...” – that is the law determinate (Derrida 2002: 270). So, for the demotic majority in “The Problem of Our Laws,” these laws have ever to “be more fully inquired into” even as the attempt to bring them to bear intimates that they “do not exist at all” (1988: 438). A more optimistic scenario is adopted by the seeker of the law in “Advocates”. Although initially uncertain whether a manifestation of the law was in “the place where one happened to be standing” or whether it came from afar, he proceeds irrepressibly to seek it “everywhere” (1988: 450). He could be disappointed. The “force” of this law beyond, the law that is to come, is one of negative formation: it is “not law” (Derrida 2002: 254). So when seeking through various doors he anticipates finding “nothing” (1998: 451), much like the man from the country who would find that the door meant for him would “open on nothing” (Derrida 1992: 206), “has no material inside” (Cixous 1991: 18). It would follow, as Derrida notes of “Before the Law,” that this law is “essentially inaccessible” (1992: 199). But some relief may be found in Derrida’s revealing that the distinction between this law ever beyond and the law determinate “is not a true distinction,” and that the two combine in an “aporetic structure” (2002: 270). And to activate the combining of the two would depend upon a “performative act by which” the man from the country “institutes” the law, a law that always “depends only on who is before it” (Derrida 2002: 270).

We are coming closer to the exact terms of “Before the Law” but before reaching them there remains a further obstacle besides that presented by the doorkeeper. *The Trial* has already given us something like a combining of these two dimensions of law. “Everything belongs to the court” (1998: 150). Everywhere there are palpable locations where law is, supposedly, to be determinately found. Yet, for all Josef K.’s performative searching, the law proves to be entirely malleable or ever elusive. A more dramatic outcome climaxes “In the

Penal Colony” where a mechanistic mode of determination is to perform the illimitable injunction “BE JUST,” only for the machine to self-destruct in the process (1988: 161). Apparently then, these two dimensions of law must not only be joined but also and decidedly kept apart. In solving this particular mystery, a conspicuous clue can be found in a return to Derrida’s seeing these dimensions of law as combined in an “aporetic structure” (2002: 270). “Aporetic”, so they are not joinable. “Structure”, so they must be joined. A condition of there being such an aporetic structure would require the opposition itself to be connective. A further condition would require the connection to be constituted in terms of the opposition.

The antithesis of each condition can be found in *The Trial*. With the novel as a whole and its fusing the two dimensions of law, the aporetic opposition is lost and along with it the emergence of any resolving law. The trial, the process, is in-terminable. Then, towards the end of the novel the parable “Before the Law” provides the corrective by instating the enduring opposition between the determinate, limited law and the illimitable. But the effect of this opposition is suspended. The man from the country seeks a determinate law but is left before the law in its illimitability, before its taking determinate place. Although entry to such a law is “open as always” the illimitable cannot be entered and any resolution is at best deferred from one doorkeeper to another; yet the immediate doorkeeper holds out future entry as “possible” (Kafka 1998: 215). This is something which the priest affirms is not a deception. But before coming to this possibility of entry, a little more needs to be unravelled.

To appreciate how entry to and as law can take place by connecting the dimensions in opposition, that connectibility could be considered a little more closely. What, in brief, it consists of is the necessity of one dimension for the sustained existence of the other. Should “everything” belong to the law, as it does in *The Trail* by way of the court as law’s proxy (1998: 150), the law would be incapable of any differentiated existence. Should it be

differentiated and seek to be purely and enduringly so, it would decline and disappear with its inability to respond receptively to change – as with the isolated and increasingly dysfunctional machine “In the Penal Colony”. Turning to the obverse, the illimitable, the law beyond the door cannot have any operative effect unless made determinate. And for this conjunction and disjunction of law’s dimensions to work each has to remain distinct and untrammelled by the other. The determinate cannot persist inviolate in part any more than it can in its putative whole. And the illimitable cannot be delimited.

The illimitable, as itself and in its intrinsic necessity for the enduringly determinate, resists any connective reduction. And these dimensions of law (also) have to remain distinct from, and opposed to, each other. Whilst that opposition has been shown (I hope) to be connective, the formative and sustaining terms of that connection remain mysterious. Much of Kafka’s work delved into here can be read “in the quiet lamplight” with Dr Bucephalus as a search for that connection (1988: 415). Acutely appreciative of limits as he is, Dr Bucephalus is surely not so intent on seeking that which can simply and never be found. Likewise, the joyous search in “Advocates”, starting with the uncertainty of whether the law was near or came from afar, is not one dedicated to futility. And in “The Problem of our Laws” the demos, or its majority party, seeks the law not as a vacuity but as ultimately realizable. Both K.s, in *The Castle* and especially in *The Trial*, are dedicated to the search for a palpable, a realizable connection. And the man from the country seeks its possibility, a possibility held out to him by the doorkeeper, and that same possibility pervades *The Trial*. K. does not find connection in the factuality of law’s officials and locations, in the force of the state’s statutes, or in any positive conceptual constraint, and he realises at times that he is dealing with “an unknown system of jurisprudence,” but he remains committed to the possibility of resolution (1998: 61). Derrida finds the law “whose presence always escapes” the man from the country to be

quite beyond, to be “transcendent” (2002: 270). With the worlding of law, and with Blanchot, this has to be a “pure transcendence,” one not tied to any determinate entity beyond the immanent (Blanchot 1992: 25). The “performative” connection is to a law that is “always to come, always promised,” (Derrida 2002: 270).

The existential challenge this poses is intimated by the priest in his response to K.’s claiming that the doorkeeper deceived the man from the country: “One passage says: ‘that he can’t grant him admittance now’; and the other: ‘this entrance was meant only for you’ ” (1988: 217). But here “there is no contradiction. On the contrary, the first statement even implies the second” (1988:218). Whilst the priest is surely being disingenuous in disregarding the deception involved in the doorkeeper’s explanatory restraint, there is no delimitable, ultimately measurable moment in which we can enter, assuredly know or attain the law – a law ever receding from gate to gate and a law which, in its infinite deferral, cannot be finally ‘entered’. Yet this is a law which holds out the possibility of determinate resolution for the time being – for a transient time being, the law as promised and as possibility being for the man from the country “nearest to him...depends only on him, on the performative act by which he institutes it” (Derrida 2002: 270). The gate-way, “the entrance is meant solely for” him (Kafka 1998: 217). The law cannot be simply ‘there’, whether as fact, command or concept. It is ‘a matter’ of belief and commitment, and of their operative extent. And of hope – the hope of Kafka’s “beings in an unfinished state,” those beings in between in whose “activities” and for Benjamin, law “may be discerned,” if “subtly and informally” (1973: 117).

As for obviousness and form, we are still before the law, before there can be law. The man from the country is performatively insistent, “insatiable” (1998: 217), but still there is no resolution. Yet again Kafka takes us further through the provocation engendered by absence.

This time it is the absence of sociality. The man from the country is isolated. Although, unlike the country dwellers in *The Castle*, he is insistent, like them he does not challenge and transgress the existing authorities. And similarly to the populace in “The Refusal” and the son in “The Judgment,” there is no generative ground left for any resistant law. In *The Trial* K. is a solitary whose attempts to link with others are continually truncated or frustrated. There is also a stark solitariness to the officer “In the Penal Colony” and to the regime which he represents, a regime that cannot withstand the contrary sociality the very existence of which now undermines it. More affirmatively, the seeker after law and its advocates in “Advocates” comes to realize that “I ought to be in a place where all kinds of people meet, from various parts of the country, from every class, every profession, of all ages” (1988: 450).

Even if that excess of instances did not counter the asocial, lawless element of the Kafkaesque, there would still be the culminating instance of “The Problem of Our Laws”. Here the laws become ours, and decidedly so. Whilst our efforts to know and adapt ourselves to the laws produce uncertainty, and whilst it remains obvious that we still depend on the nobles to determinatively know the laws – true to an etymology of ‘noble’ which would draw upon both the “well known” and “to know” (Skeat 1963: 349), there is still the expectation that the demotic “tradition” of insistent enquiry into the law “is far from complete and must be more fully” continued (1988: 438). In this endeavour we are sustained by the messianic expectation that “when everything will have become clear, the law will belong to the people, and the nobility will vanish” (1988: 438). Here Kafka captures something of an impelling sociality in and as law – with Derrida again, “a law of originary sociability..., perhaps the very essence of law,” a law “prior to all organized *socius*,...*before* all ‘law’. Prior to and before all law, in Kafka’s sense of being ‘before the law’” (1997: 231 – his emphasis).



The radical reflection of this sociality within ‘the process’ of the law can be derived from *The Trial*, *Der Prozess*, again by way of negative inference. With law, there is always an “opening” as well as a “closing”, a possibility somehow embedded, a “pure transcendence” (Cixous 1991: 18; Blanchot 1992: 25). For this opening to exist and be sustained it must be distinct and self-sufficing, not dependent on or lost in a supposed social reality or any part of it. With the opening being held apart from this reality and being unreliant on any pre-existent differentiation, there is an equality before the law – unlike the condition of the shrunken denizens in *The Trial*. Being insistently apart also imports impartiality into the process. This again is in stark contrast to the world of corruption and expedience, of pervasive partiality in *The Trial*. Yet, a final ‘yet’, there cannot be this enduring opening without the promise and possibility of a determinate closing, a closing that in *The Trial* eludes the process to the point of its becoming non-existent. The opening and the closing fuse in our being drawn into the emanant radiance of the law – “a radiance that streams forth inextinguishably from the door of the Law” (1988: 216).

## References

- Banakar, B. (2010) “In Search of Heimat: A Note on Franz Kafka’s Concept of Law”, *Law & Literature*, 22: 463-490.
- Benjamin, W. (1973) “Franz Kafka: On the Tenth Anniversary of His Death” (111- 40) and “Max Brod’s Book on Kafka” (141- 48), in W. Benjamin, *Illuminations*, London: Fontana/Collins.
- (2005) *Selected Writings, Volume 2: Part 1, 1927-1930*, Cambridge MA: Harvard University Press.
- Blanchot, M. (1992) *The Step Not Beyond*, trans. L. Nelson, Albany: State University of New York Press.

- Brod, M. (1995) *Franz Kafka: a biography*, trans. G. Humphreys Roberts and R. Winston, Boston: Da Capo Press.
- Citati, P. (1990) *Kafka*, trans. R. Rosenthal, London: Secker & Warburg.
- Cixous, H. (1991) *Readings: The Poetics of Blanchot, Joyce, Kafka, Kleist, Lispector, and Tsvetayeva*, trans. B. Andermatt Conley, Minneapolis: University of Minnesota Press.
- Cixous, H. and Clement, C. (1986) *The Newly Born Woman*, trans. B. Wing, Manchester: Manchester University Press.
- Derrida, J. (1992) "Before the Law", trans. A. Ronell and C. Roulston (183-220), "The Law of Genre", trans. A. Ronell (223-52), in *Acts of Literature*, New York: Routledge.
- (1997) *Politics of Friendship*, trans. G. Collins, London: Verso.
- (2002) "Force of Law: The 'Mystical Foundation of Authority'", trans. M. Quaintance, in *Acts of Religion*, New York: Routledge.
- Gasché, R. (2002) "Kafka's Law: In the Field of Forces Between Judaism and Hellenism", *MLN*, 117: 971-1002.
- Kafka, F. (1983) *The Castle*, trans. W. and E. Muir, in *The Collected Novels of Franz Kafka*, London: Penguin.
- (1988) "An Imperial Message" (4-5), "The Judgement" (77-88), "In the Penal Colony" (140-67), "The Great Wall of China" (235-48), all trans. W. and E. Muir, "The Refusal" (263-67), trans. T. and J. Stern, "The New Advocate" (414-15), "The Problem of Our Laws" (437-38), both trans. W. and E. Muir, "Advocates" (449-51), trans. T. and J. Stern, in *The Collected Short Stories of Franz Kafka*, London: Penguin.
- (1998) *The Trial*, trans. B. Mitchell, New York: Schocken Books.
- Lawson, M. (2012) "Crime's grand tour: European Detective Fiction", *The Guardian*, 26<sup>th</sup> October 2012. Online. Available <<http://www.theguardian.com/books/2012/oct/26/crimes-grand-tour-european-detective-fiction>>
- Leon, D. (2001) *Friends in High Places*, London: Arrow Books.
- Mann, J. (2006) *The Mystery Writer*, London: Allison & Busby.
- Marcus, L. (2003) "Detective and literary fiction", in M. Prestman (ed.) *The Cambridge Companion to Crime Fiction*, Cambridge: Cambridge University Press.
- Messent, P. (2013) *The Crime Fiction Handbook*, Oxford: Wiley: Blackwell.
- Michaud, J. (2013) "Hardboiled Existentialism", *The New Yorker*, September 9, 2013. Online. Available <<http://www.newyorker.com/books/page-turner/hardboiled-existentialism>>

- Minkkinen, P. (1994) "The Radiance of Justice: On the Minor Jurisprudence of Franz Kafka", *Social & Legal Studies*, 3: 349-363.
- Mitchell, B. (1998) "Translator's Preface", in Kafka (1998) above.
- Murray, N. (2004) *Kafka*, London: Little, Brown.
- Rachman, S. (n.d.) "Edgar Alan Poe and the Origins of Mystery Fiction", *Strand Magazine*.  
Online. Available <<http://www.strandmag.com/poe.htm>>
- Ramshaw, S. (2003) "Bearing the 'wild heart': The Cixousian 'feminine' and the quest for law's origin", *The Australian Feminist Law Journal*, (19: 11-27).
- Rushdie, S. (2007) "Heraclitus", *Granta: The Magazine of New Writing*, 100: 263-74.
- Scaggs, J. (2005) *Crime Fiction*, Abingdon: Routledge.
- Skeat, W. (1963) *Concise Etymological Dictionary of the English Language*, New York: Capricorn Books.
- Stevens, W. (2006) "The Snow Man", in *Collected Poems*, London: faber and faber.

## Notes

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- <sup>1</sup> ‘Ratiocination’ here is purloined from Poe’s reference to his “tales of ratiocination” (see e.g. Rachman n.d. ).
- <sup>2</sup> Instances by now would be beyond calculation. For a recent extensive yet brief sampling see Lawson (2012), and somewhat more expansively Messent (2013: esp. 50-59 and e.g. 198-207).
- <sup>3</sup> The version used here is the Schocken edition translated by Breon Mitchell (1999). Page numbers without more in this part will refer to this edition.
- <sup>4</sup> Not only that, as he is dying K. observes how his executioners “drew near his face, leaning cheek-to-cheek to observe the verdict” somehow embedded in him (1999: 231).
- <sup>5</sup> My use of the masculine pronoun is an assumption. The feminine would be more appropriate – something implicitly confirmed later.
- <sup>6</sup> In this section bracketed number without more are references to “In the Penal Colony” referenced here.
- <sup>7</sup> There is also a mention of the old Commandant’s having “ladies” with him (153), but no mention of their being influential. This is accommodated later.
- <sup>8</sup> Despite Benjamin’s marginalizing of law’s significance in Kafka, he did have much to say about Kafka and law that could be aptly and more extensively pursued here. However, that ‘much’ is such a mix of the ridiculous and the profound that it would, in the present setting, take reams to untangle and adapt it. For a beautifully nuanced substitute there is Gasché (2002).
- <sup>9</sup> The range in German for *vor* would include the meanings covered here, and much more. Thanks to Hannah Franzki for guidance on this.
- <sup>10</sup> For a luminous engagement with the thought of Cixous on this point see Ramshaw (2003). Derrida would help by adding that “[i]n French, the feminine determines a semantic contagion that we cannot forget (1992: 206).