

# FRANZ KAFKA, LAWRENCE JOSEPH, AND THE POSSIBILITIES OF JURISPRUDENTIAL LITERATURE

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## I. INTRODUCTION

What does a tubercular Czech Jew, born and raised in Prague, who died in June 1924, have in common with a Maronite Catholic of mixed Lebanese and Syrian descent, born and raised in Detroit during the 1950s and 1960s, and who currently haunts the streets of twenty-first century New York City? If the Czech Jew is Franz Kafka and the Maronite Detroitier is Lawrence Joseph, there are far more similarities than one may expect considering the expanse of time and space separating their lives and experiences.<sup>1</sup> Both studied and eventually practiced law: Kafka in the context of insurance, employment, and workers compensation, and Joseph with the international law firm of Shearman & Sterling.<sup>2</sup> Kafka was a short story writer and novelist while Joseph is an acclaimed poet and novelist.<sup>3</sup> In both of their literary works, law and legal themes are often at the center of their writings. Nonetheless, the writers differ significantly in how they depict the law in their works.

Joseph's writing on the law, especially his novel and exposé *Lawyerland*, is intimately connected with the practice and experience of law in the late twentieth and early twenty-first centuries.<sup>4</sup> Although the anecdotes and vignettes presented in *Lawyerland* draw back the curtain of the law and expose it to the light of the non-lawyer world, there is nothing inherently bizarre or absurd about the world of *Lawyerland*. *Lawyerland* is a work of realism, not necessarily nonfiction, as the prefatory reader's note

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1. For biographical information on Kafka and Joseph, see Patrick J. Glen, *The Deconstruction and Reification of Law in Franz Kafka's "Before the Law" and The Trial*, 17 S. CAL. INTERDISC. L.J. 23, 27–33 (2007); *Lawrence Joseph Faculty Profile*, ST. JOHN'S UNIV. SCH. OF LAW, <http://www.stjohns.edu/academics/graduate/law/faculty/Profiles/Joseph> (last visited Oct. 10, 2011).

2. See sources cited *supra* note 1.

3. See sources cited *supra* note 1.

4. See, e.g., LAWRENCE JOSEPH, *LAWYERLAND* (1997).

makes clear: it is a truthful work, even if not a factual work.<sup>5</sup> Clothed in this guise, this work has been pivotal—as no review has failed to note—in fully understanding the operation, shortcomings, inconsistencies, and contradictions of law and its practice in contemporary America. In short, *Lawyerland* is a book that clearly and emphatically takes aim at the law and lawyers, even as it disavows any intent to explicate or rationalize what it finds. Thus, the law of *Lawyerland* is a recognizable law, even if this law leaves a great deal to be desired.

The law of Kafka, on the other hand, bears little resemblance to the regimented system and practice depicted in *Lawyerland*. As Judge Richard Posner stated, “‘Law’ in Kafka’s fiction is, for the most part, not law as we think of it, a system of rules; it is malevolent whimsy.”<sup>6</sup> Based on this view and interpretation of Kafka’s law, Judge Posner has consistently argued that whatever Kafka’s writings might be about, they do not, in any meaningful way, engage in questions pertaining to the law or legal themes.<sup>7</sup> Regarding Kafka’s unfinished novel, *The Trial*, Judge Posner argues that the use of law acts only as a frame of reference or symbolic lens through which other, more personal, themes may be explored and refracted.<sup>8</sup> *The Trial* is not about a trial, nor is it about due process, criminal procedure, or

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5. *Id.* at A Note To The Reader.

6. Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431, 1432 n.8 (1986) [hereinafter Posner, *A Reply to Professor West*].

7. See, e.g., RICHARD A. POSNER, LAW & LITERATURE (rev. & enlarged ed., 1998) [hereinafter POSNER, LAW & LITERATURE]; Posner, *A Reply to Professor West*, *supra* note 6; Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1986) [hereinafter Posner, *A Relation Reargued*].

8. See, e.g., POSNER, LAW & LITERATURE, *supra* note 7, at 134 (“People often think that the point of *The Trial* is how awful it is to be arrested, charged with an unspecified offense by a secret court whose inscrutable proceedings tend to drag on interminably, and then clandestinely and summarily executed; that in short it is a book about the perversion of legal justice. I don’t read it so.”); Posner, *A Reply to Professor West*, *supra* note 6, at 1447 n.42 (“Reading *The Trial* . . . you cannot believe that the ‘court’—with its rickety tenements, erotic overtones, and functionaries with funny clothes—has much to do with government, notwithstanding Kafka’s borrowings of many details of Austro-Hungarian criminal procedure . . . [The court] seems nothing so worldly as an organ of state power.”); Posner, *A Relation Reargued*, *supra* note 7, at 1358 (“Most scholars . . . do not think that the novel’s legal aspects have more than a symbolic significance . . . The literary significance of *The Trial* is unlikely to derive from its descriptions of Austro-Hungarian criminal procedure. Very few of Kafka’s readers have any interest in Austro-Hungarian criminal procedure or, for that matter, in due process of law (the failure to notify the protagonist of the charge against him and to accord him a proper hearing before his execution are, of course, flagrant violations of due process . . .”).

law at all; for Judge Posner, “[t]he heart of *The Trial* lies elsewhere . . . in K.’s futile efforts to find a human meaning in a universe, symbolized by the court, that has not been created to be accommodating or intelligible to man but is arbitrary, impersonal, cruel, deceiving, and elusive.”<sup>9</sup> Likewise, Kafka’s famous parable *Before the Law* is not simply about a man coming to find the Law, but about “a universe in which all is unintelligibility, dislocatedness, alienation, [and] human isolation.”<sup>10</sup> Similarly, *In the Penal Colony* is only ostensibly concerned with the lack of due process and execution.<sup>11</sup> The story is not a jurisprudential allegory, but rather is concerned with the isolation of the officer in his attempts to bring others into line with his view regarding an elaborate mechanized killing machine and its benefits.<sup>12</sup> Judge Posner’s reading of Kafka’s writings on the law is neatly summed up by Robin West, professor of law and philosophy at Georgetown Law: “These stories just *can’t* be telling us something about *law*, because law is a ‘system of rules,’ and what Kafka describes is more like ‘malevolent whimsy.’”<sup>13</sup>

Judge Posner, of course, is not alone in critiquing the readings of Kafka’s work that have focused on the legal themes in those writings to the exclusion of other possible interpretations. But his limiting interpretation is not the dominant one in academia. Professor West, for instance, has used Kafka’s writings to critique Posner’s own economic accounts of law and legal institutions.<sup>14</sup> Regarding *The Trial*, Justice Anthony Kennedy of the United States Supreme Court stated that it “is actually closer to reality than fantasy as far as the client’s perception of the system,” and that “[i]t’s supposed to be fantastic allegory, but it’s reality. It’s very important that lawyers read it and understand this.”<sup>15</sup>

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9. POSNER, LAW & LITERATURE, *supra* note 7, at 135.

10. *Id.* at 135–36.

11. *Id.* at 129.

12. *Id.*

13. Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449, 1452 (1986) (internal citation omitted) [hereinafter West, *Submission, Choice, and Ethics*].

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

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

What accounts for these differences of opinion about Kafka's work? Of course, reasonable minds may differ, but is there something more fundamental at play that results in a sharp dichotomy being drawn in interpretations of Kafka's writings on the law? First, Judge Posner's interpretations of Kafka often seem incorrect and fail to take into account the work as a whole. For instance, his interpretation of the officer's isolation and inability to convince others of his position in *In the Penal Colony* fails to account for what is perhaps the story's most important aspect—the phrase, “Be Just!” that the officer passes on himself.<sup>16</sup> Second, regardless of whether or not Judge Posner's interpretations are conceivable or permissible, he offers no compelling rationale for limiting the range of interpretations of Kafka's works to nonlegal, philosophical, and sociological interpretations. This is especially troubling considering that Kafka's life was spent studying and practicing law. Any attempt to minimize the importance of Kafka's own experiences and background to his writing, and to, essentially, ignore the many mentions and depictions of law, is nothing other than “reading by political fiat,”<sup>17</sup> unsupported by an objective engagement with the text.

Finally, and most importantly in the context of the instant Article, the different views of Kafka held by Judge Posner, on the one hand, and Justice Kennedy, on the other, are the result of perspectival differences in their approach to the texts under review. Judge Posner's view is academic, judicially oriented, and prejudiced at the outset toward a very specific understanding of law—law as a well-ordered system of rules, capable of operating rationally, efficiently, and justly. His view is from the bench, from the interior of a system he has spent the majority of his life acting within, and thus gives an interpretation of law as one initiated into its mysteries. Most importantly, from this perch, law is something objective and definite—not amorphous, mysterious, or absurd. Justice Kennedy is no less one of the initiated than Judge Posner, yet his statement clearly evinces a perspective distinct from Judge Posner's—that of the litigant or other legal subject. Justice Kennedy's quote reflects a transference of perspective, a disrobing of sorts. By offering this specific view of Kafka, Justice Kennedy is not quoted as “Justice Kennedy,” or even as a lawyer, but rather as one outside the system desperate to understand and operate

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16. See FRANZ KAFKA, *In the Penal Colony*, in THE METAMORPHOSIS, IN THE PENAL COLONY, AND OTHER STORIES 191, 219 (Willa Muir & Edwin Muir trans., Schocken Books 1995) (1948) [hereinafter KAFKA, *In the Penal Colony*].

17. West, *Submission, Choice, and Ethics*, *supra* note 13, at 1452.

within the system of law. His quote arises from the perspective of the man from the country, humbly waiting unto death before the Door of the Law,<sup>18</sup> or Joseph K., sitting bewildered in his landlady's sitting room charged with a phantom crime by a mysterious entity.<sup>19</sup> Law in this view is subjective, superficial, mysterious, arbitrary, and absurd. If there is a system from this perspective, it is not ordered, but chaotic.

The important point here is that the law is the same in either case—it is only the view that has changed. The same system manifests itself differently when experienced in different veins, whether it is the judge interpreting and applying the law, the lawyer arguing the law, or the litigant subjected to the law. Judge Posner and Justice Kennedy's interpretations of Kafka are complementary, not contradictory; they represent two sides of the same coin. Likewise, Kafka's writings on the law are complementary to Joseph's writings on the law, specifically, *Lawyerland*.<sup>20</sup> The starkest differences in the way Kafka and Joseph depict the law can be interpreted as simply perspectival shifts in the description of the same system. Kafka approaches law from the outside looking in, as the anxious litigant bowed at the knees before "The Law," whereas Joseph approaches law from the inside, as the lawyers and judges of the court view and experience the law, in all its mundane detail. Reading Kafka and Joseph together highlights the competing and superficially exclusive characterizations of the law that may arise from multiple perspectives of the same context. Thus, where a judge or lawyer may not deem law a system of "malevolent whimsy,"<sup>21</sup> a litigant appearing before that judge very well might see it as such, even though there is no objective difference in the law to which they are each referring. The difference is one both of experience and perspective.

The main focus of this Article is to provide a reading of Kafka and Joseph that synthesizes their works, culminating in a unitary but multifaceted interpretation of law. To this end, Section II addresses Kafka's main writings on the law, including *The Trial*,<sup>22</sup> *Before the Law*,<sup>23</sup> *The*

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18. In *Before the Law*, Kafka uses "the Law" to refer to a place; references in this Article to "the Law" with the word law capitalized should be construed accordingly. See FRANZ KAFKA, *Before the Law*, in THE COMPLETE STORIES 3–4 (Nahum N. Glatzer ed., 1946) [hereinafter KAFKA, *Before the Law*].

19. See generally FRANZ KAFKA, THE TRIAL (Breon Mitchell trans., Schocken Books 1998) (1925) [hereinafter KAFKA, THE TRIAL].

20. JOSEPH, *supra* note 4.

21. Posner, *A Reply to Professor West*, *supra* note 6.

22. KAFKA, THE TRIAL, *supra* note 19.

*Problem of Our Laws*,<sup>24</sup> and *The Knock at the Manor Gate*.<sup>25</sup> These texts present law as an absurd and shrinking presence, which seems to always be something outside the grasp of the litigant. Section III presents Joseph's "truthful novel" *Lawyerland* and offers a complementary reading of Kafka and Joseph. The absurd and shrinking presence of the law in Kafka is given form and substance in Joseph; the curtain is drawn back from the shadowy and mysterious confines of "the court," divulging the shifting truth and moral ambiguity of "Lawyerland." Finally, Section IV places this interpretation of Kafka and Joseph in the broader context of the law and literature movement, and specifically argues that certain literature can constitute a coherent jurisprudence. This fact is accentuated by the distance between most modern subjects of the law and the judges, courts, and other traditional foci of jurisprudential thinking. As experienced law devolves ever farther from the heights of the Supreme Court and other high appellate courts, it is less obvious that any coherent and traditional jurisprudential account of law can be given. It is in this gap that the possibilities of jurisprudential literature become most clear as a fictive, but truthful, narrative of the law that may come closest to capturing the law's essence.

## II. IMMANENCE AND ABSENCE IN KAFKA'S WRITINGS ON THE LAW

Franz Kafka died relatively young, leaving behind a correspondingly slim body of work.<sup>26</sup> Within the texts published both during his lifetime and after his death, there are only a handful that directly implicate depictions of the law or legal themes, while a second set of writings addresses issues tangentially related to the law.<sup>27</sup> This Section will examine the writings that most clearly raise jurisprudential questions, including Kafka's unfinished novel *The Trial*, the parable *Before the Law*, and the two short stories *The Knock at the Manor Gate* and *The Problem of Our Laws*. The depiction of law and the legal system is by no means identical across this range of stories or across Kafka's writings on the law more

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23. KAFKA, *Before the Law*, *supra* note 18.

24. FRANZ KAFKA, *The Problem of Our Laws*, in THE COMPLETE STORIES 437 (Nahum N. Glatzer ed., 1946) [hereinafter KAFKA, *Problem of Our Laws*].

25. FRANZ KAFKA, *The Knock at the Manor Gate*, in THE COMPLETE STORIES 418 (Nahum N. Glatzer ed., 1946) [hereinafter KAFKA, *Knock at the Manor Gate*].

26. Douglas E. Litowitz, *Franz Kafka's Outsider Jurisprudence*, 27 LAW & SOC. INQUIRY 103, 115–16 (2002).

27. See Glen, *supra* note 1, at 33 (listing Kafka's texts and their relations to the law); Litowitz, *supra* note 26, at 116.

generally. Nonetheless, there are characteristics that Kafka's law can be said generally to possess based on a review of these writings, lending support to the claim that there is a coherent jurisprudence lurking beneath the surface of his fiction. Kafka's law is portrayed from the outside looking in, from the perspective of the anxious litigant either caught in the legal system or seeking to gain admission thereto. In the course of the Kafkaian subject's interactions with the legal system, the law is most accurately characterized as an absence or a fleeting presence. It rarely becomes manifest, and those officials and entities connected with the law tend to confuse the issue rather than elucidate it. Yet despite this desultory view of the law from the litigant's perspective, there is a striking amount of legal practice and action that actually takes place in Kafka's writing. This action is itself fleeting or secretive, however, always happening just out of earshot in the room next door. It is this absolute immanence of the law, hiding under the surface of Kafka's writings and just beyond the reach of his protagonists, coupled with the experience of absence felt by these litigants, that is the main import of his writings on the law. Law can be both everywhere and nowhere at the same time; the experience is subjective and depends on the positioning of the subject himself. A review of Kafka's texts will make this point more definitively.

*The Trial*, published posthumously by Max Brod, Kafka's friend and executor, and *Before the Law*, a short parable published during Kafka's lifetime and recounted in *The Trial*, are Kafka's most famous writings depicting the law.<sup>28</sup> The protagonist of *The Trial*, a bank clerk named Joseph K., is arrested one morning in his apartment by an unknown authority, while the narration intimates that he has done nothing wrong.<sup>29</sup> No charge is leveled against him and the warders and inspector that conduct his initial interview hint that they would not be privy to knowledge of such a charge even if it had issued.<sup>30</sup> Even his arrest seems absurd—although he is under arrest he is informed by the inspector that he is free to go about his life as before.<sup>31</sup> K. attempts to do this, but subsequently gets pulled further into the orbit of the shadowy "court."<sup>32</sup> The following Sunday, K. attends an interrogation by the court which takes place in a

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28. See Glen, *supra* note 1, at 33.

29. KAFKA, *THE TRIAL*, *supra* note 19, at 3.

30. *Id.* at 14.

31. *Id.* at 16–17.

32. See *id.* at 20–35.

large attic space in a tenement building.<sup>33</sup> Before a packed audience and after a comical miss-start by the examining magistrate, who asks K. whether he is a painter, K. launches into a harangue of the court and its officials.<sup>34</sup> During the course of K.'s verbal pyrotechnics, half of the audience seems to be warming to his theme,<sup>35</sup> but when he subsequently jumps from the podium to come to the aid of an accosted woman at the back of the hall, he realizes that the entire audience is composed of court officials and that presumably the crowd behind him was placed there simply to goad him on.<sup>36</sup>

K. returns to the "courtroom" the following week, despite not being ordered to appear, only to find the hall empty.<sup>37</sup> He strikes up a conversation with the wife of an usher of the court who permits him to enter the hall and examine the papers on the examining magistrate's desk—an obscene drawing and an erotic novel.<sup>38</sup> It is then that the woman is again accosted by a law student, the same individual who had grabbed her the preceding week, and is carried away up the stairs of the tenement to the examining magistrate.<sup>39</sup> The woman's husband returns home from an errand and offers to take K. on a tour of the court's offices, which occupy the attics of that same tenement.<sup>40</sup> After a respiratory attack, brought on by the confined space and dingy air of the offices, K. manages to leave the tenement and vows never to return to that courtroom.<sup>41</sup>

Several increasingly absurd scenes follow. One night at the bank, upon hearing sighs coming from behind the door of what he believed to be a utility closet, K. finds the two warders who initially informed him of his arrest being whipped by a man in a black mask—a "whipper" of the court.<sup>42</sup> Their punishment followed K.'s accusations against them during his speech at the courtroom.<sup>43</sup> K. hurriedly closes the closet door when one lets out a shriek upon being whipped, but the following night he finds the

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33. *Id.* at 35, 38–39.

34. *Id.* at 44–51.

35. *Id.*

36. *Id.* at 51–53.

37. *Id.* at 54.

38. *Id.* at 54–61.

39. *Id.* at 61–65.

40. *Id.* at 65, 68.

41. *Id.* at 71–79.

42. *Id.* at 80–81.

43. *Id.* at 81.

exact same scene—the two warders in the closet with the whipper poised above them.<sup>44</sup> K. also is led to the unofficial “official” court painter, Titorelli, who lives in a cramped attic studio and is perpetually plagued by a group of girls who also belong to the court.<sup>45</sup> It is from Titorelli that K. learns a definite acquittal is impossible: his only options are an indefinite postponement of any verdict by constant filing of documents, or a procedural maneuver whereby the charges against him will be ostensibly dropped but always subject to reinstatement upon the whim of any official who comes into contact with his papers.<sup>46</sup> During this time, K.’s uncle, who has learned of his predicament through his daughter, also comes to see K. and travels with him to see Huld, an attorney of the court and an old friend of the uncle’s.<sup>47</sup> While visiting this attorney, the pair comes into contact with the chief clerk of the court who is hiding in the corner of the lawyer’s bedroom when they arrive.<sup>48</sup> Any advantage this meeting could bring is ended when K. exits the room and begins a sexual liaison with Huld’s domestic help.<sup>49</sup> At a subsequent meeting, unhappy with the course of his proceeding, Huld is fired by K., but only after the lawyer humiliates another client in front of him by hinting that the man’s case has not even officially begun despite five years’ time and the exhaustion of the man’s fortune.<sup>50</sup>

In the penultimate chapter of *The Trial*, K. agrees to accompany an Italian client of the bank to the city’s cathedral to view the artwork contained therein—a ruse by the court to put K. into contact with the court’s priest.<sup>51</sup> When K. expresses his belief that he can trust the priest and speak openly with him, a rare trait among those officials he has encountered, the priest tells K. that he is deluded and then recounts the parable *Before the Law*.<sup>52</sup> In the parable, a man from the country comes to the door of the Law, which as the story goes, always stands open.<sup>53</sup> Arriving at the door, however, the man encounters a doorkeeper who

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44. *Id.* at 84, 86–87.

45. *Id.* at 139–47.

46. *Id.* at 152–62.

47. *Id.* at 88, 95–97.

48. *Id.* at 102–04.

49. *Id.* at 104–10.

50. *Id.* at 166–98.

51. *Id.* at 199–212.

52. *Id.* at 212–17.

53. *Id.* at 215.

denies him immediate entrance, hints that the man may be able to enter at a later time, and then stands aside giving the man free rein to enter despite the ostensible prohibition.<sup>54</sup> The man declines to do this after being told by the doorkeeper that there are subsequent doors, guarded by successive doorkeepers, each of whose visage is more horrible than the preceding.<sup>55</sup> Rather, the man accepts a stool proffered by the doorkeeper and takes a seat beside the open door.<sup>56</sup> Here, he passes the years of his life, attempting in every manner possible to gain entrance to the Law, but always being denied admission by the doorkeeper.<sup>57</sup> Finally, as the man from the country approaches death and sees a radiance streaming from the interior of the Law, he asks the doorkeeper why, in all the years, while he has been waiting here no other person has come to the door.<sup>58</sup> Bending close to the man from the country, the doorkeeper answers, “No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it.”<sup>59</sup> After debating the meaning of this parable and failing to reach any satisfactory interpretation of the story, K. leaves the priest and the cathedral behind.<sup>60</sup>

The ultimate chapter takes place nearly one year to the day after K.’s arrest by the court.<sup>61</sup> K. is taken from his apartment by two men, executioners associated with the court, and led through the city to a stone quarry on its outskirts.<sup>62</sup> There, K. is stripped of his shirt and set against a large rock as his companions begin to pass a long, double-edged knife between them with “nauseating courtesies.”<sup>63</sup> The failings of the preceding year pass through K.’s head—untried procedures, possibilities that had not been pursued, and his inability to penetrate the court or even encounter a judge—as the knife is finally plunged into his breast.<sup>64</sup> And with his dying breath, K. cries: “‘Like a dog!’ . . . as if the shame of it must outlive him.”<sup>65</sup>

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54. *Id.*

55. *Id.* at 215–16.

56. *Id.* at 216.

57. *Id.*

58. *Id.* at 216–17.

59. *Id.* at 217.

60. *Id.* at 217–24.

61. *Id.* at 225.

62. *Id.* at 225–29.

63. *Id.* at 230.

64. *Id.* at 230–31.

65. *Id.* at 231.

The immediate experience of law in these two stories is one of absence. The man from the country wastes his life sitting before the door of the Law, dying without gaining admission.<sup>66</sup> K. is never told why or with what he has been charged, is never granted a proceeding before a judge, is not offered a realistic opportunity to defend himself, and is eventually executed without even a modicum of due process.<sup>67</sup> Despite being ostensibly concerned with the law, in both of these stories the law—aptly termed “The Law”—is absent and outside the reach of the protagonists. Yet despite this experience of absence suffered by K. and the man from the country, beneath the surface of both of these stories there is a tremendous amount of activity occurring that implicates the law and legal system. Law is an absence for K. and the man from the country, but law is most certainly not absent from these stories.

In *Before the Law*, the man does see the radiance streaming from behind the door shortly before his death, indicating that whatever form the interior of the Law may take, there actually is an interior—something behind the door that the man could have reached.<sup>68</sup> The doorkeeper himself offers a concededly bare description of the interior, where successive doors open onto successive expanses of the Law, each guarded by a doorkeeper.<sup>69</sup> The law may be an absence in the man’s experience, but it does, in fact, exist.

Likewise, in *The Trial*, some incident, real or imagined, sets in motion the processes of the court. These processes include the initial charge, the arrest, the interrogation, the meeting with the priest, and ultimately the execution. Presumably, each is also accompanied with debate and dialogue between those officials concerned. Kafka continually hints at these conversations and the internal machinations of the legal system, lending them concreteness in the context of the narrative, even as the law remains an absence in K.’s specific experience. The usher’s wife notes how the examining magistrate writes late into the night concerning cases and how the assembly before which K. was initially interrogated became extraordinarily animated following his abrupt departure.<sup>70</sup> Frau Grubach attempts to alleviate K.’s anxiety the evening of his arrest by telling him

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66. *Id.* at 215–17.

67. *See generally id.* at 3–231.

68. *Id.* at 216.

69. *Id.* at 215–16.

70. *Id.* at 53, 59–60.

that from her conversations with the warders, the charge did not seem particularly serious.<sup>71</sup> The law student bitterly remarks that K. should have been detained pending his proceeding, as he had urged, rather than left free, indicating some significant debate prior to the arrest as to whether a defendant should be detained or remain free despite the arrest.<sup>72</sup> The lawyer, Huld, indicates that he is aware of K.'s case, perhaps in some detail, and was actually discussing it with the court's chief clerk prior to their initial consultation.<sup>73</sup> Even Leni, K.'s mistress, gains certain important information about his case to which K. never becomes privy.<sup>74</sup> It is not that there is no law or process in K.'s case, it is simply that all relevant discussions are taking place out of his presence and earshot; in a sense, always in the room next door or beyond that one lead he failed to pursue. This is further bolstered by the fact that there are a staggering number of individuals who seem to be aware of the charge and nature of the case against K., from his cousin and uncle, to the tradesman, to the manufacturer, the employees at the bank, and the painter. K. may not be informed, but he seems to be the only uninformed individual in all of *The Trial*.

These conversations about the law, and relationships with the law, take place within an extensively described system of law. The law is multilayered and hierarchical, indicating some process of appeal from initial determinations of guilt. The process of determining guilt is based on an initial charge, successive interrogations, and some final verdict, after which punishment will be exacted. The court even has some mechanism in place to train lawyers, apparently an apprenticeship, as the existence of the law student and his mentor make clear. Staffing these various levels of the court's bureaucracy are a dizzying array of officials and administrators, including priests, executioners, warders, whippers, low officials, clerks, ushers, investigators, examining magistrates, and judges. Recognizing its own opaque nature, the court ironically possesses even an "information officer" to provide information, because the "judicial system is not very well known among the general population."<sup>75</sup>

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71. *Id.* at 23.

72. *Id.* at 63.

73. *Id.* at 100–02.

74. *Id.* at 170–72.

75. *Id.* at 76.

Thus, it is not the absence of law that is so striking about *The Trial*, but how much law there actually is when one glances just beneath the surface of the narrative. This absence is perspectival and arises on account of the orientation of the story. Seeing everything from K.'s perspective, one is immediately struck by how little of the law actually comes into play in determining his case. Yet seen from a different angle, even one as innocuous as Leni's, the picture might look significantly different. There may be very simple reasons why K. was charged and arrested. There may be simple explanations for the court's most egregious actions. What stems this possibility of truth is not the nature of the court itself or the pettiness of its officials, but K.'s failure to penetrate the law—to enter its door. Without this entrance, one is left wanting for an objective assessment of the authority that ultimately takes K.'s life.

Another Kafka short story, *The Knock at the Manor Gate*, presents a similar depiction of law and authority as *The Trial* and *Before the Law*. In *The Knock at the Manor Gate*, a brother narrates a story concerning a walk that he and his sister took one day in the country.<sup>76</sup> During the course of their walk, the pair passes a large manor house where the sister may or may not have knocked at the gate; the text is ambiguous on this point.<sup>77</sup> Nonetheless, the brother and sister continue walking into the local village where they immediately notice the villagers coming out of their houses to warn the pair that they will be charged and interrogated, although their crime is not made clear.<sup>78</sup> The sister becomes worried, but the brother remains calm, neither having an idea as to what they might have done to cause offense or lead to an investigation.<sup>79</sup> The narrative climate shifts, however, when they turn to see horsemen riding into the complex of the manor house, then back out again in the direction of the village.<sup>80</sup> At this point, the brother sends his sister on and when the armed horsemen reach him, the brother is “asked” to enter a farmhouse.<sup>81</sup> His nonchalance quickly vanishes:

I still half believed that a word would be enough to free me, a city man, and with honor too, from this peasant folk. But when I had stepped over the threshold of the parlor the judge, who had hastened in front and was already

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76. See KAFKA, *Knock at the Manor Gate*, *supra* note 25, at 418–19.

77. *Id.* at 418.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 418–19.

awaiting me, said: “I’m really sorry for this man.” And it was beyond all possibility of doubt that by this he did not mean my present state, but something that was to happen to me.<sup>82</sup>

Kafka describes the parlor in stark terms, bringing to mind a cell of some sort—there is an iron ring on the wall, possibly for shackles, a pallet and table in the middle of the room, and a cold, flagstone floor.<sup>83</sup> The brother recounts nothing further, as the conclusion of the story abruptly shifts focus to the present and the rhetorical question: “Could I still endure any other air than prison air? That is the great question, or rather it would be if I still had any prospect of release.”<sup>84</sup>

The immediate experience of the law in *The Knock at the Manor Gate* is again one of absence. It is not clear, for instance, what the nature of the manor’s authority is in the region or by what rights it exercises that authority. The charge against the brother and, ostensibly, the sister is never made clear; it might be the knock at the gate or it might be some other real or imagined transgression. The process, if any, afforded the brother is also left unstated, and it is not clear whether he himself has ever been apprised of the reasons for his incarceration. The sharp jump in the narrative to the present lends support to a reading whereby the man is never given notice of the charges nor an opportunity to defend himself, and is simply held indefinitely on a phantom charge.

Yet as with both *The Trial* and *Before the Law*, there is an underlying reality to the situation that is obscured by the brother’s perspective. Something happened which constituted a transgression of a law or norm. This is made clear not only by the fact that the armed horsemen are called for and sent after the pair, but by the initial gesticulations of the townsfolk after the couple entered the village.<sup>85</sup> The brother may be ignorant of what has occurred, but the villagers are clearly aware that something has happened that will lead to some sort of investigation.<sup>86</sup> This is further bolstered by the judge’s statement upon entering the parlor.<sup>87</sup> The judge is well aware of the transgression, as well as the consequences attendant upon

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82. *Id.* at 419.

83. *Id.*

84. *Id.*

85. *Id.* at 418.

86. *Id.*

87. *Id.* at 419.

that transgression.<sup>88</sup> Finally, there must be some basis for the continued confinement of the brother, either some process that unfolded in the parlor or some decision made by the manor or an official associated therewith.<sup>89</sup> Thus, while the charge, process, and authority at issue in this story are left deliberately obscure on account of the narrative perspective in which the events unfold, a whole world lurks just beneath the superficial surface that the brother's narrative recounts. It is his perspective that limits the account, not necessarily any shortcomings of the system.

The unknowability of law reaches its apogee in Kafka in *The Problem of Our Laws*.<sup>90</sup> In a fictional country, the laws are unknown to the populace at large and are known only to those who are charged with administering them—the nobility.<sup>91</sup> This state of affairs does not necessarily raise any issues of due process or fundamental fairness, as the laws are “scrupulously” administered and the interpretations of those laws have themselves become canonical.<sup>92</sup> The problem lies not in the application or interpretation of this unknown body of law, but rather solely in the fact that the populace does not know the laws, for “it is an extremely painful thing to be ruled by laws that one does not know.”<sup>93</sup> Although the exact parameters of the law remain a mystery to the populace, it has been deduced in broad form by successive generations of commentators who have observed and recorded the actions of the nobility.<sup>94</sup> Others, however, hold that there is no body of law as such, but that the “[l]aw is whatever the nobles do.”<sup>95</sup> In any event, many more years or centuries of observation will be necessary in order to fully deduce the law.<sup>96</sup> At the time when the law is fully understood, it will then belong to the populace and not solely the nobility.<sup>97</sup> For the moment, though, only the nobility and its inherent authority can be said to exist for sure.<sup>98</sup>

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88. *Id.*

89. *Id.*

90. *See generally* KAFKA, *Problem of Our Laws*, *supra* note 24, at 437–38.

91. *Id.*

92. *Id.* at 437.

93. *Id.*

94. *Id.* at 437–38.

95. *Id.* at 438.

96. *Id.*

97. *Id.*

98. *Id.*

In this story, the law is absent in one explicit sense and potentially absent in another, more profound, way. First, the populace does not know the law, and thus does not enter into its experience or interpretation.<sup>99</sup> Second, according to some, there may be no law at all, just the unfettered discretion and actions of the nobility.<sup>100</sup> This second conception of the absence of law cannot easily be reconciled with the rest of the story. It is averred that the laws are scrupulously administered, lending support to the conclusion that the nobility, whatever else it may do, operates within certain bounds.<sup>101</sup> Further, over the course of centuries, broad outlines of the law have been discerned by members of the populace indicating that there is some framework of rules within which the actions of the nobility and, by extension, the populace at large must take place.<sup>102</sup>

Even discounting the assertion that the law is simply the actions of the nobility, there is still a perspectival absence at issue in *The Problem of Our Laws*. It is an absence not identical to the preceding stories, as the absence itself does not contribute to violations of due process or absurd consequences. In fact, Kafka makes clear that the laws are scrupulously applied by the nobility, even if the laws were established to safeguard the nobility's own interests, and that there is little leeway for interpretation left in the application of the laws.<sup>103</sup> Thus, the harm to the populace is conceived of not as an active sort of harm, but in the style of a benevolent paternalism; it is the lack of knowledge itself that is the harm rather than any consequences that stem from that lack. The narrator-citizen's dismay in being ruled by a definite, though unknown, law is neatly echoed by Judge Learned Hand: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians."<sup>104</sup> Despite this dismay and the initial lack of knowledge concerning the law, the population is moving towards a greater understanding of the law—something that does not occur in the preceding stories. From a perspective outside the law, and beginning with no knowledge of its interior, the populace has, over the course of time, begun to piece together the nature of the law that governs them by observing the actions of the authority in every possible circumstance.<sup>105</sup> This period of

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99. *Id.* at 437.

100. *Id.* at 437–38.

101. *Id.* at 437.

102. *Id.* at 437–38.

103. *Id.*

104. LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958).

105. KAFKA, *Problem of Our Laws*, *supra* note 24, at 437–38.

observation must inevitably continue, as new situations will arise where knowledge of what has occurred before may not be of assistance in determining how the nobility will react. Nonetheless, inevitably the populace will continually make progress in developing a fuller understanding of the law and thus will enter into its shared experience with the nobility. Accordingly, not only does there appear to be an objective law underneath the surface of this story, but also the conclusion is hopeful that the law will eventually become intelligible to those it is instituted to govern.

Pieced together from the separate fabric of these stories, Kafka's jurisprudence seems empty. The protagonists of his stories have no real experience or engagement with the law; the citizens of *The Problem of Our Laws* come closest to engaging with the law, but even their experiences are based on conjecture and observation, not direct communion with the system. Yet even as law is manifest as absence for the Kafkian litigant, there is law in all of these stories, sometimes more, other times less sketched and defined. The citizens in *The Problem of Our Laws* have the broad outlines of the rules that govern them, and expect to come closer and closer to the truth of the law as the years pass. The law exists for the man from the country, streaming radiantly from its sanctuary, even as he remains outside its purview. In *The Trial*, K. is charged, investigated, and executed based on the invocation of some law and the judgment of some legal system. There must be some rationale behind the anxiety of the villagers in *The Knock at the Manor Gate* and the brother's eventual indefinite detention.

The disconnect between the law as experienced by the protagonist and the law's apparent objective and mundane existence is at the heart of the question of Kafka's jurisprudence. This question begins as a "why": Why are the apparent subjects of the law kept outside its purview? Why is the man from the country never admitted to the law, or why is the brother never apprised of the charges against him nor provided with an opportunity to defend himself? For what reasons are the laws kept from the populace? Why is K. not provided with answers regarding the charge against him and his inquiries concerning the court? Behind every fantastical answer to these questions lies an ordinary response. A procedural rule may not have been followed correctly or the terms of legal invocation may have otherwise

been jumbled.<sup>106</sup> In *Before the Law*, perhaps the man from the country misunderstood his rights at the door of the Law and sat idly by when he could have taken what he wanted. In K.'s case, the law may have been found behind one more door, perhaps before the phantom judge and courtroom he imagines at the point of his execution.<sup>107</sup> The law may not have retreated before K.'s advances, but simply been one step beyond the point he was able to reach. And, of course, K. and the brother in *The Knock at the Manor Gate* may have actually been guilty of something and justly punished—the absence of an explanation in the narratives does not foreclose this possibility.

These are all potential answers to the question of why the law is kept remote from the Kafkian subject, but they represent only conjecture or possible interpretations. The fact is that any answer to the question of “why” hides behind the same door that keeps the law concealed. There is no answer within the texts because an answer would itself betray the vision of law that Kafka presents. Kafka's jurisprudence, written from the perspective of the anxious litigant, unassuming villager, and ordinary citizen, is defined by its alienation of the subject. The law does possess an objective reality, and may very well be highly systematized and scrupulously applied, but it is a law that never truly embraces those brought before it. If this is the case, Kafka cannot give any definitive answer to the questions of “why” raised by these stories, as the response would draw back the curtain and reveal the ordinary machinery propelling the narrative. While the curtain remains drawn, he can, however, provide hints of what lies just beyond the edge of the story. Yet even with the curtain drawn, one may be able to sneak backstage and steal a glance at the narrative engine; it is this idea that provides a segue from Kafka to the late twentieth century world of Lawrence Joseph and *Lawyerland*.

### III. KAFKA IN LAWYERLAND

Whereas one has to chase Kafka's law down an endlessly multiplying series of dim corridors, the law in *Lawyerland* pulses from the very first page and quickens in cadence as the book builds towards its abrupt and, for

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106. See Dominique Gros, *Le “Gardien De La Loi,” Selon Kafka*, 14 LAW & LITERATURE 11, 23 (2002). See also Glen, *supra* note 1, at 37–38 (exploring rationales behind the apparent exclusion from the law of the man in *Before the Law* and K. in *The Trial*).

107. KAFKA, *THE TRIAL*, *supra* note 19, at 230–31.

a non-lawyer, absurd conclusion. But what is *Lawyerland*? It is a fictive piece of nonfiction, or, as more elegantly worded in Joseph's introduction:

[*Lawyerland*] is a work of nonfiction. It consists of exchanges among lawyers about law and lawyers, and, in many instances, the names, circumstances, and characteristics of the persons and places portrayed have been changed . . . *Lawyerland* is truthful rather than factual, but solidly based on facts. There was no other way to write it. Those readers who are also lawyers will especially appreciate why.<sup>108</sup>

The question of whether the book is nonfiction or fiction is unimportant in the context of Joseph's assertion that it is truthful—truthful in its depiction of the legal system, the process of law, and the character of those disparate individuals who engage in the practice of law. The assertion of truthfulness perhaps gets one closer to the reality of the matter in any event, as any lawyer knows that facts often conceal an underlying truth.

*Lawyerland*'s truthfulness unfolds as interviews with lawyers in New York City, some whom the interviewer knows personally, and some to whom he has been directed by associates.<sup>109</sup> This frame of reference provides the counterpoint to Kafka's depiction of the law. The law is no longer experienced by the litigant—the outsider seeking answers or vindication of his rights—but by those who operate within its authority. *Lawyerland* is a book about law from the perspective of the law and lawyers. It is a glimpse into the room next door, or behind the curtain, and thus serves to elucidate the processes Kafka buries under the superficial absurdity of his writings. Nonetheless, readers opening *Lawyerland* in order to find a clear explication of what the law is, how it develops, how and why it is applied in certain circumstances, or any other permutation of these questions, will be sorely disappointed. There is no lucid description of the law in general or in the specific situations within which the lawyers of *Lawyerland* operate. This fact is one of the most important aspects of *Lawyerland* as it points to the same disconnect between The Law and the practice and experience of law that Kafka explores in his writings. It is perspective again that becomes of the utmost importance, but the perspective of the reader has shifted by moving from Kafka to Joseph.

In the opening interview of *Lawyerland* the reader is introduced to Robinson, a vulgar, fast-talking criminal defense attorney who has viewed

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108. JOSEPH, *supra* note 4, at *A Note To The Reader*.

109. *See generally id.* at 3–225.

the criminal justice system from both sides of the table.<sup>110</sup> He recounts his defense of a young man, the son of immigrants, who had decided to commit burglary.<sup>111</sup> The main problem was that the apartment he decided to burglarize belonged to an Assistant United States Attorney (“AUSA”).<sup>112</sup> The AUSA hears the sounds of someone attempting to break in through the window, takes his wife from the room with instructions to get the baby and go into the hall, and waits for the burglar by the window with a handgun.<sup>113</sup> When the young man finally comes through the window, the AUSA is ready, grabs him by the head, and beats it against the wall several times.<sup>114</sup> Finally, the AUSA has the young man arrested.<sup>115</sup> The young man’s misfortune of burglarizing the apartment of a federal prosecutor is, however, unfortunately compounded by the fact that the AUSA’s brother-in-law is an Assistant District Attorney (“ADA”) at the Manhattan District Attorney’s office.<sup>116</sup> The ADA has the case assigned to one of the best prosecutors in the office, a woman “who’s better-looking and more charming than the best of the male peacock jury ass-kissers, and twice as smart. One formidable lawyer who very well knows how to use everything to her advantage.”<sup>117</sup> This prosecutor throws the proverbial book at the would-be burglar: “Attempted murder in the second degree, attempted robbery in the first degree, reckless-fucking-endangerment in the first degree, burglary in the first degree, criminal trespass in the first degree. Plus—I can’t even remember them all—a slew of boilerplate offenses for concealing a deadly weapon.”<sup>118</sup> Robinson gets the case and wants to plead, but the prosecutor makes clear that she is going to take it to trial on the lodged counts.<sup>119</sup> The case gets assigned to a trial judge who, it turns out, knows both the prosecuting ADA as well as the AUSA “victim.”<sup>120</sup> Rather than pursue the case in court, Robinson utilizes this information.<sup>121</sup>

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110. *Id.* at 3.

111. *Id.* at 7–16.

112. *Id.* at 7–8.

113. *Id.* at 8.

114. *Id.* 8–9.

115. *Id.* at 9.

116. *Id.*

117. *Id.*

118. *Id.* at 10.

119. *Id.* at 10–11.

120. *Id.* at 16.

121. *Id.*

In his own discreet way, he passes it through various circles that he knows about the relationships between the prosecutors, the victim, and the judge, and that he will not be afraid to be more vocal regarding this information.<sup>122</sup> The young man is sprung after nearly a year in Riker's Island jail, but Joseph never states whether charges were actually brought, whether he was convicted and served this year pursuant to a sentence, or whether he was simply released without any charges ever having been filed.<sup>123</sup>

As presented by Robinson, there is very little that is surprising about this story. The laundry-list version of the charges against the burglar, although certainly out of the ordinary in cases with similar substantive facts, is directly attributable to his misfortune of choosing the wrong apartment to burglarize. Both the prosecutors and Robinson have no illusions on this point. The decision by the prosecutor to pursue this case to trial rather than plead is also a result of the existing relationships between the various prosecuting parties and the AUSA. The assignment of the case to a judge who knows all of the parties at the prosecutor's table may elicit a groan, but it is not surprising considering the young man's string of luck. The burglar is ultimately released, apparently with no charges filed, but this is a function of Robinson's ability to move within the system, not a function of the law taking its general course through the courts. There are problems, to be sure, with the foregoing depiction of the legal system, but there is nothing odd or mysterious about it, even if much depended on chance and misfortune.

Yet to say there is nothing odd about this story is to miss the question of how it implicates the law. Where is the law in the unfolding of Robinson's dilemma? The legal actors are clear enough—the prosecutors in the District Attorney's office, Robinson as defense counsel, and the judge. The victim is clear as well, although he is not presented in an overly sympathetic light. The criminal violation is not left to doubt, as the young man did attempt to burglarize an apartment. The charges against the youth are also based on New York state law, even if the actual statutory provisions are not cited or mentioned. The law and the legal system pervade Robinson's recounting of this story, but curiously have little to do with its course. The charges, even if one or two may have been valid as a legal matter, stem from the relationships between the victim and the

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122. *Id.*

123. *Id.*

prosecuting attorneys, not from a fair reading of the underlying facts of the case. The decision to proceed to trial is also influenced by these relationships, not because of any compelling facts or circumstances that make this burglary “worthy” of a court date. Even the ultimate disposition of the case, the young man’s freedom, occurs as a result of the interaction of certain relationships. Robinson clearly knows and understands the web of connections that link the AUSA-victim to the prosecuting attorney and the trial judge to both; and Robinson can make this information generally known. The burglar presumably obtains his freedom in reaction to this implicit threat, not by a judgment of any court or legal official. Law, in the case of this burglar, is nothing more than the prism through which these various relationships are reflected. The burglar is charged in the way he is because of these relationships—he fails to obtain a plea only because of these relationships, and he is ultimately freed based on these relationships and his attorney’s ability to operate within the system of relationships. The law is a passive presence, even as it ostensibly takes center stage.

Even if the law is, in some sense, at work in this story, how does the whole experience look from the perspective of the youth, a really dumb kid who can only offer grunts in response to Robinson’s questions?<sup>124</sup> In the process of breaking into an apartment, but without even setting two feet into the room, much less taking anything, he is beaten, and taken into custody.<sup>125</sup> He is detained for a period of nearly a year with a lengthy list of charges pending against him.<sup>126</sup> Most of the charges, even if colorable under the relevant statutory provisions, seem at the least a stretch on the underlying facts. And he is ultimately released from jail having never been before a court and having never had an adjudication of his guilt.<sup>127</sup> It is hard to believe that he would look back on his experience and characterize the law as Judge Posner’s system of rules rather than concur with Justice Kennedy’s assertion that Kafka’s depiction of the law is far closer to the truth for the litigant.<sup>128</sup>

This opening vignette gives flesh to the statement by a subsequent interviewee, Federal District Court Judge Celia Day, that the “real power

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124. *Id.* at 10.

125. *Id.* at 8–9.

126. *Id.* at 10.

127. *Id.* at 16.

128. *See* Posner, *A Reply to Professor West*, *supra* note 6; Carter, *supra* note 15.

exists outside the courts.”<sup>129</sup> Judge Day’s observation fits the main component of Kafka’s own jurisprudence, that the relevant action in Kafka’s writings on the law is always taking place just out of sight, in that next room that seems just beyond reach. In Robinson’s story, the charges are levied via a secretive collaboration amongst the burglary victim, the brother-in-law, and the prosecutor, which occurs outside the confines of the law. Likewise, it is Robinson’s maneuvering in the law’s various social spaces that ultimately secures his client’s release. The general prescription to look outside the law for its authority, as well as Robinson’s own maneuverings within the law, are not unlike what occurs in *The Trial*, where K. is told to play a similar role. K. seeks answers in the places one would least likely associate with authority within the court—Titorelli, the painter; Leni, K.’s mistress and Huld’s maid; Block, the tradesman; the lowly usher; and the usher’s wife. It is by the exploitation of these various relationships that K. hopes to gain knowledge of his own case, and perhaps even obtain his exoneration. It also does not require a stretch of the imagination to superimpose the backroom facts of Robinson’s story onto K.’s own experiences within the law. K. is never apprised of the charges against him—perhaps they are the product of a personal vendetta, or overblown in the same manner that the young burglar’s charges proved to be. His execution ultimately may have been on account of his failure to exploit the various relationships he made during the course of his proceedings, more than any failure to prosecute his case or marshal the evidence. Perhaps if he had obtained the services of a Robinson, rather than a Huld, he would have penetrated to that final room where his fate hung in the balance. As it stands, however, K.’s failure and the course of his proceedings can be rationalized to a high degree based on the parallel experiences of Robinson and his unfortunate client.

Whereas one is left to guess at what is happening behind Kafka’s closed doors, Joseph transports the reader to exactly that locale. The vignettes and anecdotes of *Lawyerland* present a backstage view of the law that supplements or, more aptly, displaces the audience’s normal view of how the law, legal system, and lawyers operate. Traditional jurisprudence focuses on broad issues of the nature and development of law, which in turn center on judicial issues, the development of judicial review, and constitutional law in the Supreme Court.<sup>130</sup> In this conception, law is clear

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129. JOSEPH, *supra* note 4, at 78.

130. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*. (1997)

and orderly, implicating a textual provision that is then placed before judges who render an interpretation that becomes the ruling law of the land. Procedurally, there are no mysteries regarding the course and outcome of the case, and even if there is disagreement on the substantive outcome, the reasons can be clearly stated and assessed through a comparison of opinions. *Lawyerland's* rejection of this popular conception of law and jurisprudence inheres in the response of Carl Wylie, a transactional lawyer, to the question of what he thinks the law is.<sup>131</sup> The interviewer notes that Justice Oliver Wendell Holmes, Jr. had termed the law a “great anthropological document,”<sup>132</sup> which launches Wylie on a derisive riff regarding the Supreme Court’s decision in *Romer v. Evans*,<sup>133</sup> and the general role of the Supreme Court in the legal landscape of the practicing lawyer: “I haven’t read [the decision]—I am never going to read it, are you? Who ever reads Supreme Court opinions?”<sup>134</sup> The rhetorical question implies that the Supreme Court is set up as a remote presence from the practice of Wylie and most attorneys. The rule of law as enunciated or penned by the Court may become the law of the land and serve to order certain relationships, but its reasoning is often a point of irrelevance to practitioners who are ultimately concerned with the end result. Although the Court’s decisions are binding nationally, its influence can extend no further than the circumstances and situations in which it is deciding cases. Accordingly, despite its Olympian heights in the American legal hierarchy, the Court is of less practical significance than the discussions and decisions that are taken at the lower, base levels of contemporary legal practice.

The traditionalist conception of jurisprudence is a narrow one that leaves much of legal reality on the outside of legal experience. *Lawyerland* presents an antithetical view of the law by focusing on its actual practice, as opposed to its study, and the everyday in-the-trenches practice of law, as

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131. *Id.* at 31–32.

132. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 444–45 (1899) (“It is perfectly proper to regard and study the law simply as a great anthropological document. It is proper to resort to it to discover what ideals of society have been strong enough to reach that final form of expression, or what have been the changes in dominant ideals from century to century. It is proper to study it as an exercise in the morphology and transformation of human ideas. The study pursued for such ends becomes science in the strictest sense.”).

133. *See generally* *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating a Colorado constitutional amendment prohibiting legislative, executive, and judicial action designed to protect homosexuals from discrimination).

134. JOSEPH, *supra* note 4, at 31–32.

opposed to the glamorous and rarefied roles typically accentuated by society. In the words of Pierre Schlag, a constitutional law scholar:

Lawyerland is law at the operator level. For Lawyerland's lawyers, law is something they live on the way to doing something else—serving a client, putting someone in jail, or ruling on a motion. Law is just a part of what you use to get things done. Here, the law is mundane. It inspires neither celebration nor awe.<sup>135</sup>

The law for the AUSA and his district attorney cohorts is a means to a socially sanctioned revenge, whereas the exploitation of those same relationships is Robinson's means to free his client. Singleton, an attorney in *Lawyerland* specializing in malpractice defense, responds to an associate's chagrin at settling a case where she believed that her client did nothing wrong: "I told her right or wrong has nothing to do with it. If we thought—if the client thought—it was worth the money to litigate, we would have litigated . . . . The law, I told her, is just another—and not always that important—transactional consideration."<sup>136</sup> Similarly, Martha Tharaud, a labor law specialist, points to a young Asian woman, an employee at the restaurant where she is eating, and ponders whether she even understands her legal rights and whether she would exercise them if a situation arose.<sup>137</sup> *Lawyerland* asks: What are all the Supreme Court's decisions on employment or insurance law to someone who inhabits a world where those rights are unlikely to be understood or exercised? The law provides a framework, perhaps, but it is not self-actualizing, nor is there a necessary trickle-down effect from the heights of the legal system to the basements of New York City or the noodle shops of Chinatown. *Lawyerland* depicts the law as a practical tool to be used in the appropriate circumstances, but whose efficacy should not be taken for granted.

The law, from this practical perspective, develops through its practice at the lowest levels as a function of lawyers representing clients in any and all matters. Thus, in reviewing *Lawyerland*, David Luban contended that the judiciary or legislative branches do not power the legal system:

The real engine powering [this] legal system is the nearly one million practicing lawyers, each conducting thirty or fifty or one hundred conversations a day with each other and with their clients. These conversations, not the decisions and opinions of judges, are the law. They

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135. Pierre Schlag, *Jurisprudence Noire*, 101 COLUM. L. REV. 1733, 1738 (2001).

136. JOSEPH, *supra* note 4, at 108–09.

137. *Id.* at 121–22.

form a jumble, not an ordered system—not law’s empire but law’s landfill, the dregs and dreck of legal authority on which civilization is erected.<sup>138</sup>

At this base level of the law, the power and authority reside not in the elegantly written word or boldly expressed idea, but in the simple, direct, well-placed, and potentially crass spoken word of the law’s representative—the lawyer. The depiction of law in *Lawyerland* thus operates to invert the traditional conception of the American legal pyramid by placing influence at the lowest levels of that hierarchy and relegating the grand actors of traditional jurisprudence to biting asides. In the words of Luban, a law and philosophy scholar, “[t]he cellar is where law influences client behavior, and so the cellar is actually the apex of legal authority. Judge centered jurisprudence distorts reality by proceeding on the opposite assumption.”<sup>139</sup> Law is not Justice Holmes’s great anthropological document, but the mind-numbing and exasperating chaos of Wylie.<sup>140</sup> The true home of the law is not the Ivory Towers of elite law schools, nor the Marble Palace of the Supreme Court, but the dingy and dank halls of the Brooklyn housing court, the aromatic interior of Manhattan Detention Complex, aptly and colloquially referred to as “The Tombs,” and the web of social relations which Robinson strategically uses.<sup>141</sup>

Behind the façade of chaos posited by Wylie, however, there is a system of rules and conduct that governs the relationships of the lawyers and law in *Lawyerland*. It is Wylie who asserts that there is a base line, minimal set of rules that all parties to the law must observe.<sup>142</sup> In fact, observance of these rules is the dividing line between the cynical lawyer and the cynic: the cynical lawyer acknowledges the existence of these rules and operates within them, whereas the cynic simply disregards them.<sup>143</sup> These rules aren’t clear-cut procedural guidelines, such as filing a certain number of copies of a pleading, nor substantive rules, but instead they are the gray area between representations, permissible “misrepresentations,” and outright lying. In *Lawyerland*, Judge Day asserts that the art of lawyering involves deception, spin, and a certain amount of distortion, but

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138. David Luban, *The Art of Honesty*, 101 COLUM. L. REV. 1763, 1767 (2001).

139. *Id.* at 1768.

140. JOSEPH, *supra* note 4, at 31–32.

141. *Id.* at 174–75.

142. *Id.* at 35.

143. *Id.*

that the majority of lawyers recognizes the general outline of these rules and operates within the permissible bounds of misrepresentation.<sup>144</sup>

Operating within this field of misrepresentation, however, gives rise to a peculiarly legal conception of reality and truth, which in turn skews the consciousness of the lawyer himself. In *Lawyerland*, Martha Tharaud, a law firm partner, asserts that the truth, for lawyers, lies in between what can and cannot be proven—a particularly legalistic thought that conflicts with the common belief that the truth lies in the reality of what actually happened.<sup>145</sup> This belief can itself be turned on its head by the law, according to the lawyer, Shumate, as issues of causation and liability can transform what could have happened into what did happen in the eyes of the law.<sup>146</sup> The goal of *Lawyerland*'s law is to arrive at a resolution of a given issue through the presentation of competing versions of the same event, and this task is undertaken without regard to any contradictions that a “created” version of the event may have with the actuality of that event. In the concluding interview, the interviewee notes that lawyers can keep multiple contradictions in their heads at any one point while talking as if everything is consistent.<sup>147</sup> This ability contributes to the lawyer's skewing of reality. Professor Sarah Krakoff notes:

[M]ost lawyers hold conflicting things in their heads, but without the poet's negative capability to remain content with partial understanding. Rather than assimilate the conflicts into ambiguous mysteries, as poets do, they simply alternate their realities. At one moment, one thing is true, and at another, the opposite is true.<sup>148</sup>

Joseph echoes this point both outside and within the bounds of *Lawyerland*. Elsewhere, Joseph has written that,

[L]awyers like to concentrate meaning; a lawyer's language is often dense. And if you look at law as a single language, you realize that it contains various languages within it. Think of how many different languages exist, for example, in an appellate brief that addresses a number of complicated procedural and substantive issues.<sup>149</sup>

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144. *Id.* at 72–74.

145. *Id.* at 127.

146. *Id.* at 162–63.

147. *Id.* at 221.

148. Sarah Krakoff, *Does “Law and Literature” Survive Lawyerland?*, 101 COLUM. L. REV. 1742, 1747 (2001).

149. Lawrence Joseph, *Reflections on Law and Literature (Imaginary Interview)*, 59 SASKATCHEWAN L. REV. 417, 426 (1995).

An appellate brief or trial motion entertains the same lack of negative capability highlighted by Krakoff. At one point, a pleading may vigorously contest an issue, whereas that same issue may be assumed for purposes of contesting a different issue. The pleading certainly will not note any contradiction, nor will any lawyer party to the proceedings think anything is amiss. The law promotes this perpetuation of both competing languages and contradictory presentations of reality. Joseph, this time conveying a lawyer's remembrance of a non-lawyer's view of attorneys, expresses exasperation at the fact that lawyers are always saying something other than what they mean.<sup>150</sup> This is not necessarily lying, and lawyers are not necessarily consciously manipulative; "lawyers have large shadows. Anything light . . . makes their shadows even larger."<sup>151</sup>

These ruminations return the focus to the issue of perspective. In an essay, Joseph discusses "'working rules' assembled from notes" he took when writing *Lawyerland*.<sup>152</sup> "Rule 13" is "what a lawyer, as a lawyer, senses—what a lawyer, as a lawyer, perceives—what a lawyer, as a lawyer, feels."<sup>153</sup> By focusing on the lawyer's experience of law, and by implicitly recognizing the lawyer's particular experience of the law as unique, Joseph subtly portrays the importance of perspective in constructing one's experience of the legal system. In one sense that system possesses an objective reality, being comprised of statutes, constitutions, regulations, lawyers to argue about the proper interpretation of these legal documents, and judges to render definitive rulings regarding that interpretation. Yet it cannot make sense to talk about legal experience solely by reference to the underlying reality of the legal system. Whether one views the law as a carefully ordered system of rules or malevolent whimsy is less dependent on that underlying reality than it is on how that reality is experienced. Joseph, through Robinson, offers an explicit bridge to Kafka on this point, riffing from *The Metamorphosis*,<sup>154</sup> that it would be "a form of exacting justice" if lawyers metamorphosed into prisoners, and vice versa.<sup>155</sup> The law itself will not have changed in engaging in this metamorphosis, but the

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150. JOSEPH, *supra* note 4, at 197–98.

151. *Id.*

152. Lawrence Joseph, *Working Rules for Lawyerland*, 101 COLUM. L. REV. 1793, 1793 (2001).

153. *Id.* at 1794.

154. FRANZ KAFKA, *THE METAMORPHOSIS AND OTHER STORIES* (Joyce Crick, trans., Oxford Univ. Press 2009) (1915).

155. JOSEPH, *supra* note 4, at 25–28.

perspective will shift. What may have once looked like a clear-cut application of a mandatory minimum sentence under the sentencing guidelines may look arbitrary and seem like a cruel and unusual punishment. Robinson's thought can be translated into any number of contexts—if a lawyer metamorphosed into any litigant or defendant the perspectival shift would be complete.

Kafka and Joseph provide complementary depictions of the law because of their distinct uses of perspective. Kafka's writing focuses on the experience of law by the litigant or legal outsider, whereas Joseph focuses on the lawyers and judges within the system. Together, these writings provide a comprehensive picture of a modern jurisprudence by detailing the views and experiences of all parties to the system. Before addressing the jurisprudential implications of these stories, however, it is worth examining one additional Kafka short story, *In the Penal Colony*, because this piece offers the most explicit glimpse of the internal workings of Kafka's legal machinery. In essence, *In the Penal Colony* provides Kafka's own counterpoint to his more obscure writings on the law.

*In the Penal Colony* recounts an explorer's visit to a relatively remote penal colony, where he is invited to witness the execution of a soldier.<sup>156</sup> This soldier was found asleep on duty where he was charged with guarding the door of a certain captain.<sup>157</sup> The captain, seeking to determine whether this duty was being discharged, observed the soldier sleeping on duty.<sup>158</sup> The captain lashed the soldier, at which point the soldier grabbed the captain's leg and shouted, "Throw that whip away or I'll eat you alive."<sup>159</sup> This chain of events was recounted by the captain to the officer in charge of legal proceedings on the island and the officer passed a sentence only one hour prior to the commencement of the execution itself.<sup>160</sup> For his sentence the condemned man is ordered to have "Honor Thy Superiors" etched onto his body by an elaborate machine in a manner that will eventually, after twelve hours of suffering and "[e]nlightenment," result in his death.<sup>161</sup>

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156. KAFKA, *In the Penal Colony*, *supra* note 16, at 191–227.

157. *Id.* at 198.

158. *Id.*

159. *Id.* at 198–99.

160. *Id.* at 199.

161. *Id.* at 197, 199, 202–204.

Inquiring into this chain of events, the explorer learns that the condemned soldier does not know his sentence nor his transgression.<sup>162</sup> In fact, the condemned man does not even speak the language of the officer or the colonizers of the island.<sup>163</sup> Regarding the process of conviction, the officer acts as the sole judge, and his guiding principle is that “[g]uilt is never to be doubted.”<sup>164</sup> Commensurate with such a first principle, no defense is countenanced by the officer’s procedures; the charging statement of the captain, or any other complainant, is sufficient in itself.<sup>165</sup> Succinctly stated by the officer himself:

I wrote down [the captain’s] statement and appended the sentence to it. Then I had the man put in chains. That was all quite simple. If I had first called the man before me and interrogated him, things would have got into a confused tangle. He would have told a lie, and had I exposed these lies he would have backed them up with more lies, and so on and so forth. As it is, I’ve got him and I won’t let him go.—Is that quite clear now?<sup>166</sup>

The text of the sentence, to be carved into the body of the man, is itself so complex and embellished that even on paper the explorer cannot understand the words.<sup>167</sup> This point is also deemed irrelevant by the officer, as the text of the sentence is not meant to be comprehended on paper, but through the body itself.<sup>168</sup> This enlightenment was often, according to the officer, seen on the faces of the condemned men in bygone days, although use of the execution machine has fallen into disfavor under new leadership in the colony.<sup>169</sup>

The story proceeds feverishly and fatalistically once the officer realizes that the explorer believes that his process of law and practice of execution are barbaric.<sup>170</sup> Setting the condemned man free, the officer takes his place in the machine after passing his own sentence and setting his own inscription: “Be Just!”<sup>171</sup> The machine, however, disintegrates during the course of the officer’s execution/suicide depriving him of the twelve-hour

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162. *Id.* at 197.

163. *Id.*

164. *Id.* at 198.

165. *Id.* at 198–99.

166. *Id.* at 199.

167. *Id.* at 202.

168. *Id.* at 202–04.

169. *Id.* at 204–09.

170. *Id.* at 217.

171. *Id.* at 217–19.

process of inscription and the enlightenment he had purportedly seen on so many other faces.<sup>172</sup> In the end, the explorer quickly escapes the island after visiting the grave of the former commandant and inventor of the execution machine.<sup>173</sup>

*In the Penal Colony* and *The Trial* differ only inasmuch as they provide distinct perspectives on the identical issue. K. and the condemned man, for instance, share many similarities—neither knows the charge against them and neither has been provided with a meaningful opportunity to answer and defend the charge. Unlike K., the condemned man escaped execution, but neither has clarity about what actually transpired. There is no semblance of due process in either case and, for the defendants in both, the legal system is incomprehensible and secretive; to K. it is incomprehensible for unknown, systemic reasons, and to the condemned man on account of the language barrier and the nature of the legal process conceived by the officer.

Just as there are compelling bases to deem K. and the condemned man interchangeable in these works, the officer easily can be conceived of as a court functionary operating within the universe of *The Trial*. The officer discharges his obligations as a legal officer, although similar to the court, he does so in a secretive manner outside the presence of the defendant. Like the court, he presumes the guilt of the defendant and follows actions derived from that initial presumption—the necessity of punishment derives from the bare fact of the accusation itself. Regarding process, the officer also does not tolerate any defense to the charges, just as the court does not provide any official avenues for a defense. Finally, the redemptive moment in both stories involves contact with the physical body. In *The Trial*, it is K. who is expected to grab the knife and make the final plunge, presumably on an understanding of the sentence passed and the reasons for it.<sup>174</sup> For the condemned man, that final enlightenment comes when the sentence is felt on the body itself, through the torturous process of the inscription.<sup>175</sup> In broad outlines, then, the officer gives a human face and explanation to the mysterious inner workings of the court. It is not an explanation that will likely soothe concerns over the nature of law and process in *The Trial*, but it is an explanation that takes that depiction of law outside the scope of

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172. *Id.* at 221–25.

173. *Id.* at 225–27.

174. KAFKA, *THE TRIAL*, *supra* note 19, at 230–31.

175. *See* KAFKA, *In the Penal Colony*, *supra* note 16, at 197–204.

malevolent whimsy or mere arbitrariness. There are concrete and rational reasons for what occurs, even if one can justly condemn the nature and application of the process.

The difference between the law as depicted in *The Trial* and *In the Penal Colony* is thus perspectival, not substantive. Whereas K. provides a view of the law from the perspective of the condemned man, the officer provides the complementary view from the perspective of the law itself. Where there is mystery, disorder, and chaos from one view, from the opposite view the system appears simple, well ordered, and scrupulously applied. K. is condemned by an authority operating just out of his reach, just as the officer condemns the soldier without bothering to inform him of the charge or sentence. The absence of law in K.'s case can be explained by the processes of the officer in the colony, whereby there is not an absolute absence of law, but a calculated decision to conduct a system in a certain way. The law of *The Trial* is not, in comparison, malevolent whimsy, but an actual system of rules, albeit a system that is incomprehensible or inaccessible to the defendant himself. The law is not, however, objectively malevolent or tragically whimsical. Rather, it is the perspective of the individual that dictates the view or interpretation of the law in these stories. To the officer nothing seems more rational than the processes he employs in dealing with transgressions on the colony; a different system seems incomprehensible to him, and would inevitably lead away from clarity and truth. Nothing seems more daunting, absurd, and ridiculous than the law to K., trapped on the outside and uninitiated into the peculiarities of its rules and processes. Whatever else may be said about the law in these cases, it is far from extraordinary.

This reading of *In the Penal Colony* does not somehow definitively establish that Kafka's writings on the law must be read as jurisprudential allegories, or that the law is even what is at issue in these texts. Yet Kafka's own depiction of a functioning, albeit arbitrary, legal system in this story does support looking beyond the surface of his other writings on the law to determine what might be lurking behind the superficial appearances. An argument has been made here that Joseph provides the appropriate framework for what lies behind the curtain in Kafka's texts. The implications of that argument are the subject of the following section.

#### IV. THE POSSIBILITIES OF JURISPRUDENTIAL LITERATURE

Judge Posner's critique of using Kafka to gain some further understanding of the law or legal process focuses on how dissimilar

Kafka's depiction is from contemporary understandings of law.<sup>176</sup> The lack of recognition of law in the writings of Kafka, as he understands it, leads Judge Posner to the conclusion that these texts have no importance to legal debate. Contrary to Judge Posner's position on Kafka, no commentator has doubted the role and significance of law in *Lawyerland*. Rather, the concern is whether law and literature, as a project, survives the depiction of law that Joseph offers. In her contribution to the *Columbia Law Review* symposium on *Lawyerland*, Krakoff noted two distinct trends within the broader law and literature movement.<sup>177</sup> The first holds that "literature, by cultivating the literary imagination and thereby inducing empathy, can have a salutary effect on judging and lawyering. This position can be summarized as follows: Literature can help law become more humane and just."<sup>178</sup> The second asserts that,

[L]aw is inherently literary, and . . . law can become its best self only if we fill its gaps with a cultivated comprehension of our literary heritage . . . [I]ts essence is the belief that law's salvation lies in the liberal arts educated, literary sensibility . . . Law is already part of, and should be informed by, the literary canon.<sup>179</sup>

*Lawyerland* threatens both of these positions:

[O]ne hardly steps away from reading *Lawyerland* with a more acute sense of empathy for any particular group. Rather, the overwhelming feelings the lawyers in *Lawyerland* engender are alienation and despair. Regarding the second claim, when considered collectively, the qualities of the lawyers in *Lawyerland* are such that they (truthfully) blur the boundaries between law, life, and art, making it impossible, or at the very least unworkable, to claim a distinct aesthetics for law-as-literature from which societal norms can be gleaned.<sup>180</sup>

If Krakoff is correct in her assertions then, according to her,

[T]he questions posed by law and literature are potentially obsolete. Law is part of the fabric of our literature, but not in the way [James Boyd] White means. It is, the way it is now: crass, vulgar, disjunctive, dissociative. Law, like art, can only be what it is now. If this is the case, then the normative

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176. See POSNER, LAW & LITERATURE, *supra* note 7, at 134–35; Posner, *A Reply to Professor West*, *supra* note 6, at 1447 n.42; Posner, *A Relation Reargued*, *supra* note 7, at 1358.

177. Krakoff, *supra* note 148, at 1742–43.

178. *Id.* at 1742.

179. *Id.* at 1742–43.

180. *Id.* at 1743.

aspirations of [Martha] Nussbaum and others are also in trouble: Literature and poetry are Lawyerland, so what could we possibly hope to educate judges about that they don't already know?<sup>181</sup>

Krakoff's critique has much to recommend to law and literature, but it is not fatal to it, even on its own terms. The characters of *Lawyerland* are for the most part un-empathetic, but that alone does not represent a defeat for the normative aspirations of Nussbaum or Robin West. The normative appeal of Atticus Finch in *To Kill a Mockingbird*<sup>182</sup> is simply reversed in the context of *Lawyerland*; the reader or lawyer is shown a glimpse not of who they may want to be, or could be, but of the lawyer they might shudder to become. Normativeness need not be positive, and the fact that a distinctly negative normative impulse is present in *Lawyerland* simply means that the focus must shift—not that law and literature needs to be thrown out with the chaff. As to Krakoff's second critique, if *Lawyerland* is poetry and literature, and at the same time is representative of the aesthetic world in which judges and lawyers operate, then there is strength to her assertion that the legal community may not benefit from broader exposure to the liberal arts. *Lawyerland* does not exhaust the range of aesthetic opportunities that could define the unitary life of a judge, lawyer, or common citizen. It does not stand definitively in the category of "poetry" or "literature" any more than any piece that came before it, nor does it somehow limit the experiential range of legal actors. For example, to say a judge may be exposed to the parade of horrors that is the law of *Lawyerland* is not to say he or she cannot benefit from broader exposure to literature, or that this broader exposure would be unable to conversely reflect back into his professional life in a positive sense.

Beyond potential concerns with Krakoff's interpretation of *Lawyerland* and its implications for law and literature, however, is a more fundamental shortcoming—the two "schools" of law and literature she notes are themselves not exhaustive of how the law and literature movement has been pursued. The most fundamental omission in Krakoff's essay is the conception of literature as jurisprudence—the assertion that the appearance of law in literature may have something meaningful to say about law as a system.<sup>183</sup> This is a narrow category within law and

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181. *Id.* at 1749.

182. See HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

183. See generally Robin West, *Literature, Culture, and Law—at Duke University* (Georgetown Law Faculty Working Papers No. 75, 2008), available at <http://ssrn.com/abstract=1201867>.

literature and is not dependent on the appearance of law alone in a text. Rather, to constitute a literary jurisprudence, the text must explore the contours of law itself in a systematic fashion. In the words of Luban, writing in the same symposium issue of the *Columbia Law Review*, “Lawyerland, nonfiction, is a work of art and artifice about law, what we might call jurisprudential fiction—a book that uses the techniques of fiction to explore the true nature of law.”<sup>184</sup> So, too, Kafka’s writings on the law do not present the law as a superficial actor in the narrative, but are themselves attempts to come to terms with the law as an authority, force, and system. For this reason, both writers present jurisprudential narratives.

The possibilities of jurisprudential literature should be clear as jurisprudence, literature, and philosophy have intersected for as long as each discipline has existed. In the last two centuries alone, some of the most influential thinkers have used narrative forms to express philosophical ideas. Albert Camus and Jean-Paul Sartre teased out the limits of existentialism through works such as Camus’s novels *The Stranger*<sup>185</sup> and *The Plague*,<sup>186</sup> Sartre’s play *No Exit*,<sup>187</sup> and his prose works, including the *Roads to Freedom*<sup>188</sup> trilogy and *Nausea*.<sup>189</sup> C.S. Lewis supplemented his purely theological works with a narrative theology, embodied in *The Great Divorce*<sup>190</sup> and *The Screwtape Letters*.<sup>191</sup> Friedrich Nietzsche often employed the narrative form in expressing his philosophy, most famously in his parable of the madman contained within *The Gay Science*,<sup>192</sup> but also in *Thus Spake Zarathustra*.<sup>193</sup> Soren Kierkegaard, likewise, utilized the literary form and literary prototypes to convey the at-times absurdity of

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184. Luban, *supra* note 138, at 1765.

185. ALBERT CAMUS, *THE STRANGER* (Matthew Ward trans., Vintage Books 1989) (1942).

186. ALBERT CAMUS, *THE PLAGUE* (Matthew Ward trans., Vintage Books 1991) (1942).

187. JEAN-PAUL SARTRE, *NO EXIT AND THREE OTHER PLAYS* (Vintage Books 1989) (1946).

188. JEAN-PAUL SARTRE, *THE AGE OF REASON* (Eric Sutton trans., Vintage 1992) (1945); JEAN-PAUL SARTRE, *THE REPRIEVE* (Eric Sutton trans., Vintage 1992) (1945); JEAN-PAUL SARTRE, *TROUBLED SLEEP* (Eric Sutton trans., Vintage 1992) (1949).

189. JEAN-PAUL SARTRE, *NAUSEA* (Lloyd Alexander trans., New Directions 2d prtg. 2007) (1938).

190. C.S. LEWIS, *THE GREAT DIVORCE* (HarperCollins 2001) (1946).

191. C.S. LEWIS, *THE SCREWTAPE LETTERS* (HarperCollins 2001) (1942).

192. FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* (Bernard Williams ed., Josefine Nauckoff trans., Cambridge Univ. Press 2001) (1887).

193. FRIEDRICH NIETZSCHE, *THUS SPAKE ZARATHUSTRA* (Walter Kaufmann trans., The Viking Press 1966) (1885).

modern existence. For example, Abraham and Isaac in *Fear and Trembling*<sup>194</sup> and *Either/Or*<sup>195</sup> convey this absurdity. At the root of the enlightenment was Voltaire's *Candide*,<sup>196</sup> a biting satirical attack on contemporary philosophical forms.

Jurists have likewise used the narrative form to illustrate various jurisprudential points.<sup>197</sup> Ronald Dworkin's mythic judge "Hercules," striving valiantly for right answers to even the most intractable jurisprudential quandaries, fits within this tradition.<sup>198</sup> So, too, would Judith Jarvis Thomson's famous article on abortion, which sought to defend the practice through analogical reasoning.<sup>199</sup> To read literature as implicating, addressing, and answering jurisprudential questions follows on these traditions of the narrative form, acting as a medium through which systemic thought may be conveyed. It is with these traditions in mind that Joseph's *Lawyerland* and Kafka's legal writings must be weighed and measured.

The import of such literature, however, has been obscured by the development of highly formal contemporary jurisprudence and constitutional fetishism. These developments have largely severed the practice of law from the law of the academy. This disconnect between legal practice and jurisprudence is highlighted by the appearance of law in both *Lawyerland* and Kafka's writings, and is implicit in Judge Posner's criticism that the law of Kafka, by not appearing as a "system of rules," is not law at all.<sup>200</sup> Concededly, Joseph and Kafka have little in common with the titans of twentieth century jurisprudence. Legal Philosopher John Austin and his command theory of the law certainly do not fit within the context of either author.<sup>201</sup> Any sovereign seems nonexistent in Kafka,

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194. SOREN KIERKEGAARD, *FEAR AND TREMBLING* (Stephen Evans & Sylvia Walsh eds., Sylvia Walsh trans., Cambridge Univ. Press 2006) (1843).

195. SOREN KIERKEGAARD, *EITHER / OR* (Victor Eremita ed., Alastair Hannay trans., Penguin 1992) (1843).

196. VOLTAIRE, *CANDIDE OR OPTIMISM* (Burton Raffel trans., Yale Univ. Press 2005) (1759).

197. See Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985).

198. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105–30 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*].

199. See Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

200. See Posner, *A Reply to Professor West*, *supra* note 6, at 1432 n.8.

201. See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfred E. Rumble ed., Cambridge Univ. Press 1995) (1832).

where the law pervades everything without being directed from anywhere, whereas Joseph's lawyers openly mock those actors sitting at the apex of American legal authority. The "Grundnorm" of Austrian Jurist and Philosopher Hans Kelsen similarly seems either beyond reach (in Kafka), or non-existent (in Joseph).<sup>202</sup> Any "rule of recognition" would seem to be striving futilely for an object within both Kafka and Joseph.<sup>203</sup> Where are the valid legal norms in the context of Robinson's story?<sup>204</sup> In what sense would the rule operate where the pronouncement of valid norms is itself a point of irrelevance for legal actors, such as in Wylie's derisive rant on the Supreme Court?<sup>205</sup> Can any judgment on the validity of the relevant legal rules be made in Kafka's writings, where it is not even clear what those rules are? Interpretivist legal theories also run on the rough shoals of Joseph and Kafka.<sup>206</sup> In Joseph, the concept of law may inhere in its practice, but the depiction of that practice leaves little room for claims regarding a confluence of law and morality, and even less for any normative argument based on that practice. Finally, *Lawyerland's* depiction of law seems an outright rejection of natural law theory, whereas the "is/ought" dilemma takes center stage in Kafka's writings on the law.<sup>207</sup>

Joseph and Kafka do not present the reader with a clearly systematized conception of jurisprudence, nor do they focus their sights on the rarefied apex of their respective legal universes. Joseph's characters, specifically Wylie, belittle the decisions of the Supreme Court, questioning whether anybody even reads them.<sup>208</sup> The higher courts, grand justices, and great lawyers of Kafka's legal system still engender awe, but simply as tales of a bygone gilded age.<sup>209</sup> This is in stark contrast to the constitutional fetishism that informs so much of contemporary legal scholarship. Since James Bradley Thayer's 1893 essay, *The Origin and Scope of the American*

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202. See generally HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., Univ. of Cal. Press 1967) (1934) (explaining that the hypothetical "Grundnorm" is that norm from which derives the authority of the other, hierarchical norms within a given legal system).

203. See H.L.A. HART, *THE CONCEPT OF LAW* 97–107 (1961).

204. JOSEPH, *supra* note 4, at 7–11, 16.

205. *Id.* at 31–32.

206. See generally DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 195; RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985); RONALD DWORKIN, *LAW'S EMPIRE* (1986).

207. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 36–42 (1980).

208. JOSEPH, *supra* note 4, at 31–32.

209. See KAFKA, *THE TRIAL*, *supra* note 19, at 154, 158, 179–80.

*Doctrine of Constitutional Law*,<sup>210</sup> a veritable “who’s who” of legal scholars have engaged in the design of grand theories of constitutional law and judicial review. Justice Holmes described the design and history of the common law;<sup>211</sup> Herbert Wechsler, legal scholar and former director of the American Law Institute, proposed neutral principles to guide the increasingly charged field of constitutional adjudication;<sup>212</sup> and Alexander Bickel, a noted constitutional law scholar, advocated for the passive virtues<sup>213</sup>—nearly four decades before Cass Sunstein, another noted legal scholar, championed judicial minimalism.<sup>214</sup> Judicial review has also become the focus of much legal debate in the past decades, engaging legal scholars such as Charles Black,<sup>215</sup> John Ely,<sup>216</sup> and Larry Kramer,<sup>217</sup> in an attempt to justify or criticize courts’ authority to strike down the enactments of Congress.

“Academic legal thought, as a matter of its own form, characteristically represents law as formal, ideational, appellate court focused, judge-centric, and normatively inspired.”<sup>218</sup> In essence, the law of the academy is the law of Judge Posner—a system of rules that, by definition, excludes malevolent whimsy, arbitrariness, and capriciousness. Law need only be applied to certain factual situations. The fact that reasonable minds may differ on that application does not undercut law’s objective pretensions. Kafka obviously moves far beyond this conception of law in his own writings, where law is portrayed as fickle, mysterious,

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210. See generally James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

211. See generally O.W. HOLMES, JR., *THE COMMON LAW* (1881).

212. See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

213. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–98 (1962). See generally Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

214. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); Cass R. Sunstein, *The Supreme Court 1995 Term Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

215. See CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* (1960).

216. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

217. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

218. Schlag, *supra* note 135, at 1739.

and unbound by any conventional understanding of “rules.” Likewise, “the very style of *Lawyerland*, its informal language, its focus on self and context, its grim and accursed visions, its compromised moralities, and its flamboyant emotional registers all lead away from the ways in which academic legal thought frames and represents law.”<sup>219</sup> If the writings of Kafka and Joseph lead away from conventional legal discourse, where do they lead? Do the visions of each lead to a coherent and constructive jurisprudence, or is the law simply arbitrary and malevolent? Is there something of worth to be gleaned from these descriptions, or are the legal universes of Kafka and Joseph simply playgrounds for a nihilistic, destructive jurisprudence?

To the first question, a coherent jurisprudence can be derived from Kafka and Joseph and, consistent with the first two Sections of this Article, this jurisprudence is based on a complementary reading of both authors’ literary writings on law. To the second question, this jurisprudence is not destructive or nihilistic, but constructive, vaguely interpretivist, and, most importantly, realist.

Kafka and Joseph are jurisprudential *littérateurs* on account of how they present the law in their legal writings. Law is not simply a plot point and the legal actors are not simply characters through which the story progresses. Both writers attempt to address the nature of law, although this fact is somewhat obscured by their presentations. Kafka’s jurisprudence is hidden behind the absurdity of the legal worlds he constructs, whether in *The Trial*, *Before the Law*, or *The Knock at the Manor Gate*. Yet, as made clear when the curtain is withdrawn in *In the Penal Colony*, there is a system of law in place, which has its own rules, its own actors, and its own subjects.<sup>220</sup> Even if Kafka’s writings often fail to offer any meaningful explication of the system he constructs, they do represent attempts to come to terms with the nature of the law to which each of his diverse characters is ultimately subjected. In this sense, his writings are eminently jurisprudential. Likewise, despite the anecdotal and episodic structure of *Lawyerland*, the interviewees each attempt to come to terms with the nature of the legal system within which they are operating. These episodes, when compiled and read together, produce an examination of the nature of law. It is because of this broad attempt to deduce the nature and content of law that Kafka and Joseph are jurisprudential writers, and for the same reason,

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219. *Id.*

220. *See generally* KAFKA, *In the Penal Colony*, *supra* note 16, at 191–227.

why their writings can be read as specifically advancing jurisprudential thinking.

Characterizing Kafka and Joseph as jurisprudential writers, however, leaves open the question of the nature of their jurisprudential visions. For both, written, codified, and decisional law is simply the frame of reference through which legal reality passes. The traditional founts of law—statutes, regulations, and reported decisions—are so unimportant to Kafka that there is never explicit mention of any of these sources. Even in *In the Penal Colony*, it is not clear on what basis the officer concludes that the condemned has transgressed a norm—is it a statutory or regulatory prescription, or an informal norm inherent in the conduct of the colony? Kafka never elucidates this point, even as he gives his clearest depiction of a legal system in operation. Joseph does address a number of traditional legal sources and norms, but these are never presented center stage. Wylie gives his dismissive view of the Supreme Court and its decision in *Romer v. Evans*,<sup>221</sup> but nobody ever discusses how Supreme Court decisions affect their practices or why those decisions have significance to the legal community. Tharaud, the labor law attorney, ponders whether the girl serving her has any idea about the range of legal protections to which she may be entitled—both generally as an employee and specifically in the case of an accident or unfair termination.<sup>222</sup> New York state statutes are implicated by Tharaud’s thinking, but are ancillary to the question of the exercise—whether this girl could or would exercise those rights that the law ostensibly bestows upon her. Elsewhere, Singleton’s young associate plaintively asserts that her client has done nothing wrong to warrant agreeing to a settlement, an assertion that implicates questions of liability and causation, and any number of potential statutory, regulatory, and common law standards—only to be rebuffed that right or wrong have little to do with the settlement.<sup>223</sup> Of course, if right and wrong have little to do with the settlement, than the various statutory and regulatory standards, and, by extension, the law itself, has little to do with the settlement.

Yet to say that the law has little to do with the settlement already assumes a definition of what constitutes the law. That assumption, in the context of contemporary legal thinking, holds that the category of law is exhausted by positive law—statutes, regulations, decisional law, and other

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221. JOSEPH, *supra* note 4, at 31–32.

222. *Id.* at 121–22.

223. *Id.* at 108–09.

administrative adjudications. By placing these grounds of law to the side, however, both Kafka and Joseph reframe the issue of what constitutes law by focusing on the practice of lawyering and the application of law. Revisiting the words of Schlag in reference to Joseph, “Lawyerland is law at the operator level. For Lawyerland’s lawyers, law is something they live on the way to doing something else—serving a client, putting someone in jail, or ruling on a motion. Law is just a part of what you use to get things done.”<sup>224</sup> From this assertion, however, Schlag does not make the next leap, which is to tease out the jurisprudential implications of Joseph’s depiction of law. Law exists only as it is applied by legal actors or manipulated in the course of unfolding legal relationships. Traditional forms of law are indeed mundane in the context of *Lawyerland*, and of almost no importance to Kafka, but that does not make law itself mundane, as law refers to something entirely different from statutes and regulations and Supreme Court decisions. Law, as understood by Kafka and Joseph, arises from the intricate web of relationships conditioned by the existence and perpetuation of the legal system. Codes and regulations are simply sources that attempt to frame these relationships, but the law does not sprout into existence until these sources are utilized, applied, or referenced. Law does not exist objectively as law outside its application. A statute is words on a page; a judicial decision is simply an historical marker of the resolution of a dispute. These sources hold no interest, and do not constitute law until they are implicated in a present dispute or situation, at which point the various legal actors subjected to that dispute give the law its life and content.

The jurisprudential extrapolation from Schlag’s assertion is Luban’s characterization of the root of Joseph’s legal system: “The real engine powering the legal system is the nearly one million practicing lawyers, each conducting thirty or fifty or one hundred conversations a day with each other and with their clients. These conversations, not the decisions and opinions of judges, are the law.”<sup>225</sup> The relational aspect of law is highlighted by this observation, and given flesh by Kafka and Joseph. For Joseph, the law is the interactions between the AUSA burglary-victim, his brother-in-law, and the prosecuting ADA, as well as Robinson’s well-placed innuendos regarding the root of the charges against his client, rather than the statutory provisions pursuant to which the burglar was charged.

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224. Schlag, *supra* note 134, at 1738.

225. Luban, *supra* note 138, at 1767.

Regarding Tharaud's musings on the rights of the girl who served her, the content of the law must remain empty in the abstract; if the young woman does not know her rights, she cannot exercise them in any meaningful way. Even if she knows her rights, if her employers simply do not recognize those rights, it means little to point to the text of a statute. The law can take its content and exercise its authority only if properly invoked, but it can only be properly invoked if the appropriate relationships converge.

This last point also provides a bridge to Kafka, mirroring Dominique Gros's hypothesis that perhaps the man from the country, in seeking the law, failed to invoke some necessary procedural rule or perfect his appeal.<sup>226</sup> The content of the law in *Before the Law* remains empty and fails to take the man as its object; this could simply imply, however, that without properly entering into a relationship with the law, the law has no real presence. A relationship with the law is exactly what K. chases in *The Trial*, and it is through the least powerful actors, at least superficially, that he proceeds—Leni, Block, Titorelli. K. gains no information, only obfuscation, from the officials of the legal system. Even the priest is hardly elucidatory in his recounting of the parable and its various interpretations. The relational nature of Kafka's law is further bolstered by the possible dispositions of K.'s own trial. Ostensible acquittal places the litigant in the unsure position of possibly being rearrested or perhaps being caught in an indefinite cycle of proceedings.<sup>227</sup> Whether this takes place is dependent on who comes into contact with the case and what other contacts K. himself is able to make. If he can consistently gain the support of some judges, ostensibly he can just as consistently be acquitted again. Likewise, indefinite postponement forces the litigant to continually press his case with the officials of the law, through personal entreaties and filings, until the case becomes so bogged down in process that a disposition is not reached while the litigant is alive.<sup>228</sup> This course of conduct requires constant attention to the proceedings, as Titorelli makes clear, and constant interactions with any number of official and quasi-official servants of the law. In both situations, a premium is placed on the interactions of the individual with the officials of the law, from which arises the very concept of law within Kafka's system.

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226. See Gros, *supra* note 106, at 23; Glen, *supra* note 1, at 37–38.

227. KAFKA, *THE TRIAL*, *supra* note 19, at 157–60.

228. *Id.* at 160–61.

The law of Joseph and Kafka derives its content from relationships. Prior to being invoked, it is simply an abstract and largely empty norm. Only by being applied in concrete situations does it take upon itself a certain reality, and that reality exists only so long as the relationship lasts. This process is continually unfolding across any range of relationships and legal actors, and its transience does not undercut its immanence in those cases where it has been invoked. This focus on relationships conditioned by the traditional sources of the law is in sharp contrast to those jurisprudential writers noted earlier. Austin's command theory,<sup>229</sup> for instance, has little relevance in Kafka's universe where there is no clear source of the law to term "sovereign." One could hypothesize such a sovereign, but his existence would not fit comfortably with the remainder of the narrative, where the focus always remains on how the law intertwines itself with the relationships of those brought within its midst. Kelsen's attempts to denote a Grundnorm and "rule of recognition"<sup>230</sup> are of only passing interest to Joseph's lawyers. What matters is not whether some norm is legitimate or whether norm *y* has been properly derived from norm *x*. What matters is the application of prevailing legal norms, and the legitimacy of that application will be conditioned by the form that the relations take on that application. For Robinson's burglar, it is likely little comfort that the statutes under which he was charged were properly passed by the New York state legislature and signed into law by the governor. They are valid in that sense, and in the traditional jurisprudential sense, but that validity has little to say about the nature of law.

By moving away from traditional jurisprudence in this specific way, Kafka and Joseph also necessarily have to relocate the foci of their legal systems. The focus is no longer on courts, but rather on an endlessly multiplying series of antechambers where the law is developed and applied. In the words of Luban, juxtaposing Joseph's portrayal of the law against traditional jurisprudence, "[t]he cellar is where law influences client behavior, and so the cellar is actually the apex of legal authority."<sup>231</sup> This base level of the legal system is where most important decisions are taken, including whether or not to prosecute, how to proceed with a claim, and whether to enter into a settlement. These decisions, and the way in which they are made, are given primary focus in Joseph. The locus of these

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229. See generally AUSTIN, *supra* note 201.

230. HART, *supra* note 203.

231. Luban, *supra* note 138, at 1768.

decisions tracks Titorelli's statement to K., that he must gain influence outside the bounds of the courts—in the consulting rooms, lobbies, even Titorelli's own studio.<sup>232</sup> K. is certainly more successful in penetrating the court's curtains outside the official bounds of his proceeding, lending further credence to Judge Day's assertion that the real power does indeed exist outside the courts.<sup>233</sup> Likewise, Robinson is more successful in gaining his client's release through well-placed words on the cocktail circuit than he was in direct consultation with the District Attorney's office. It is in the crummy interior of the Brooklyn housing court and the suffocating atmosphere of Titorelli's studio that real legal decisions are taken.

In both form and focus, Kafka's and Joseph's narratives mark a sharp departure from traditional jurisprudence. Despite this, the depiction of law each offers is profoundly jurisprudential—it is a systematic investigation of the nature of law. This point aside, however, both writers not only move away from traditional forms of jurisprudence, but place into doubt whether academic jurisprudence can say anything meaningful about the nature of law at all. For one, the increasing distance between most academics and the actual world of legal practice represents a certain disconnect in how law is conceived. Schlag hints at this concern:

Lawyers and judges face real stakes (however mediated these may be). Their words are hooked up with, and they bring into play, institutional arrangements that visit legal acts on clients, parties, and third parties. The acts do land on somebody. The law of the academy, by contrast, is law in the air. It's free-floating. It doesn't land. Much as law teachers may want to pretend otherwise, their words in the classroom, in the law review article, or at the conference panel do not engage an already-in-place legal machinery.<sup>234</sup>

Thus, it is not clear that academic legal thought can keep pace with the realities of legal practice, or that jurisprudence, as presently conceived, can be of practical interest or importance outside of academia.

Even if there were an impetus to do so, however, the nature of Kafka's and Joseph's writings raise the question of how the realities of legal practice could be depicted in the systematic and distilled fashion of the

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232. KAFKA, *THE TRIAL*, *supra* note 19, at 150–51.

233. JOSEPH, *supra* note 4, at 78.

234. Schlag, *supra* note 135, at 1739.

academic. The truthfulness of Joseph's writing is beyond dispute. As Professor Philip N. Meyer wrote:

Joseph has constructed a form that allows him to depict a deeply personal internal topography of legal practice that matches my own lawyer litigation experiences. These stories also match the private war stories of many other litigation attorneys I've known when they attempt to speak about their 'private practice' of the law.<sup>235</sup>

Less readily apparent is the truthfulness inherent in Kafka's depiction of the law and legal processes, a reality recognized by Justice Kennedy and his assertion that Kafka's legal world is very close to how many litigants in the United States' various legal systems experience the law.<sup>236</sup> Even as Joseph and Kafka strip away the layers of husk to reveal the kernels of truth in legal practice, it is not clear how that underlying reality could be depicted or fully theorized within the context of academic discourse. There are veins in the critical legal studies movement that may serve to explain and formalize elements of Joseph and Kafka, including the partial minimization of traditional sources of the law, the recognition that action and reaction are properly not conceived as entirely free but are to some extent circumstance dependent, and that the interweaving of legal and political issues is unavoidable. Yet, even in melding together these strains, there are material elements of both jurisprudential visions that are left on the outside. For instance, depicting law as power is only a partial explanation of how the various legal relationships in both Joseph and Kafka interact and fill the initial void of the law's content. More fundamentally, if law as an abstract entity is largely lacking content, or at least of only secondary importance in legal proceedings, then legal power is itself only a derivative description of legal relationships which themselves are the primary ground of law. There is no law without application, and application by necessity needs subject and object. Even if critical legal studies could explain subsequent derivations from this initial relationship, it fails to provide any account for the existence of the basic principle.

From this point, it is a short jaunt to recognizing the importance of texts such as *Lawyerland* and Kafka's writings. Literary jurisprudence can fill potential gaps in legal thinking by depicting the development of law through narrative, and thereby cut closer to the truth than formal or

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235. Philip N. Meyer, *The Darkness Visible: Litigation Stories & Lawrence Joseph's Lawyerland*, 53 SYRACUSE L. REV. 1311, 1322 (2003).

236. Carter, *supra* note 15.

academic discourse. Beyond filling gaps in legal thinking, these visions may become increasingly important as legal thought as the practice of law evolves into the twenty-first century and traditional forms of jurisprudence are relegated to purely academic interest. If traditional sources of law are minimized and the interactions of relationships become even more important, it is unlikely that contemporary legal practice and thinking can be depicted in any sense but a narrative one. Beyond this, literature also has important things to say about the existing state of legal experience, as Kafka makes clear. Perspective is of the utmost importance, and viewing the law continually from a single vantage point within the system, as Judge Posner does, inevitably leaves a great deal of legal experience outside the circle of the law. A full understanding of the law must necessarily encompass divergent perspectives if it is to be true to reality. The possibilities of jurisprudential literature are thus bounded only by the exact nature of legal reality. Far from destroying law and literature as a discipline, Joseph and Kafka serve to increase its horizons by focusing on the philosophical and jurisprudential possibilities of literature. It is in this direction that law and literature should proceed in the coming decades.

## V. CONCLUSION

This Article has come to its conclusion and, accordingly, it is time to gauge what has hopefully been accomplished by its meanderings. First, it has offered a harmonious and complementary reading of two giants in the contemporary law and literature discourse, Franz Kafka and Lawrence Joseph. The works of these authors offer complementary perspectives of the legal system—Kafka's from the point of view of the litigant, Joseph's from within the system. Kafka's vision seems absurd on its own and Joseph's vision is chaotic in its own right, but read together their writings demonstrate the importance of subjective perceptions of the law and how those perceptions may color one's experience of the legal system. When read in this light, it should also be apparent why Judge Posner's assessment of Kafka must be rejected. The appearance of law in Kafka is simply that—an appearance that is heavily dependent on the perspective that he utilizes in conveying his narratives. It is Justice Kennedy's view of the importance of Kafka that prevails in this context, as he recognizes that the depiction is perspective-dependent. Law may be a system of rules, but that fact need not dictate exhaustively the experiences of those who come into contact with the law. However a judge may view the law from the bench, ostensibly interpreting clear legal texts and applying concrete legal rules,

the litigant may view such applications as arbitrary, capricious, and irrational.

Second, this Article has attempted to extract a coherent jurisprudence from the foregoing complementary reading. Law takes its content only through its application, and this application is primarily a function of the relationships in the legal system: lawyer-client, prosecutor-defendant, judge-litigant, and so forth. These relationships sit at the base of the legal system, in Luban's cellar, where the limits of its authority are teased out. Moving away from traditional conceptions of jurisprudence, Kafka and Joseph offer a realist, practical account of the nature and derivations of law in contemporary practice.

Finally, in asserting that a literary jurisprudence is possible, this Article argues that this is the direction in which law and literature should progress. Literary jurisprudence offers a better opportunity to directly and truthfully address the nature of law in its twenty-first century manifestations. Moreover, the narrative form is likely to get one closer to the truth of legal experience than are the traditional approaches of academic jurisprudence. As in the description of Kafka's and Joseph's jurisprudence, the narrative form can offer competing perspectives on the same issue without contradicting itself. In this sense, literary jurisprudence, despite its fictional form, may offer a more realistic account of contemporary legal practice than academic writing, and thus provide a solid basis from which improvements in law could be proposed.

This final point provides a single concluding observation. Schlag, at the conclusion of a jurisprudence class addressing *Lawyerland*, posed this question to his students:

Well, so what is this class? On March 15, 2000, one morning during three years of law school, we had a class where we discussed *Lawyerland*. Then we went off to UCC or corps and ad-law and the like for another year and a half? Is that it? And where does *Lawyerland* fit into this jurisprudence class? Just a sliver of raw reality wedged between Law and Economics and Neo-pragmatism?<sup>237</sup>

Schlag received no answers from his students,<sup>238</sup> but this Article has attempted to place Joseph along with Kafka, within the sphere of jurisprudence. Schlag himself offered an answer to the remainder of his query in concluding his *Columbia Law Review* essay:

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237. Schlag, *supra* note 135, at 1740.

238. *Id.*

Legal academics have some obligation to prepare law students for law practice. At a minimum, this would include not deluding or misleading them with highly romanticized or sanitized visions of law and lawyering. People who imagine that law is, in and of itself, a noble enterprise that elevates our moral community have a minimal obligation to warn law students that this imagined law—this law of beautiful souls—does not have much to do with contemporary American law practice. Beyond honoring such minimal disclosure requirements, one could, of course, go further and actually try to expose law students to some of the realities of law practice. But academics tend to shun the ugly sides of law—to the detriment of their students. Arguably, there is something ethically obtuse in sending law students out into lawyerland equipped with only a copy of Heracles' Bow or Law's Empire, miscellaneous ALI fragments, a few hundred statutes, ten thousand appellate cases, and a cheery graduation speech.<sup>239</sup>

Kafka and Joseph can both provide a hard look into the real, and sometimes surreal, world of actual legal practice. Although neither claims to hold a magical key to understanding the law or legal practice, students familiar with their writings will undoubtedly be better prepared for the realities of the world to which they seek entrance.

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239. *Id.* at 1741.

