

A CRITIQUE OF THE LAW:
AN INTERSECTION BETWEEN LAW AND LITERATURE

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ABSTRACT

Franz Kafka spent his life writing, using it as a productive outlet to express sentiments on his personal life as well as notions on the functioning government, the Austro-Hungarian Empire. Born in 1883, Kafka lived in the midst of the regime's power. It was not until during his pursued careers as a banker and law student that Kafka gained knowledge, and thus opinions, on bureaucracy and law. However, it was not until his work was published after his death by a close friend, Max Brod, that the world learned about his insights on the problematic nature of the Austro-Hungarian Empire. His writing, once being a disclosed hobby, became a publicly studied work possessing varying literary techniques, such as absurdism. Identified through close reading and an understanding of the philosophy of law, it becomes clear that Kafka's work critiques positive law, a legal system focused on solely the implementation of the law and favors natural law, a system where morality and law work in tandem.

The power of language and its importance is obvious; in order to have relationships, to learn, to ultimately survive, one must consider the mightiness within the words we speak and the ideas we write. Franz Kafka embraced the capacity language can cultivate when procured, becoming enlightened through writing. Every theory or mental conundrum consuming him would reach a resolution in the form of ink and paper. It was through this creative process that Kafka found a seamless way to present both a story and a conceptual problem. He had many shifting identities throughout his life, a Jew whose native tongue was German and born in Prague, studied chemistry, received a doctorate in law, only later to work for a bank and insurance company. However, this man of many hats became knowledgeable about the functioning world in a legal and bureaucratic sense and became concerned with the law's conceptual problems.

Kafka's *The Trial* comments on the life-altering effects of the government—an ambiguous, all-powerful sovereign. Kafka narrates what seem to be exaggerated circumstances that yet are made realistic by following the protagonist, Josef K (K.) and his experience with the unjust legal system of the Austro- Hungarian Regime. The injustice against K. is evident promptly within the first page of the novel as he is woken up one morning and arrested for a crime he is unaware of committing. When K. asks the arresting officers the nature of the crime, the officers refuse to offer any information and simply order him to wait for more instruction. The complicated and unclear legal procedure prevents K. from learning the specifics of the crime; K. is ultimately prosecuted without a trial. Kafka uses K.'s trial to draw attention to society's ignorance of the government, specifically the legal system, as well as the bureaucracy's lack of principles and unwillingness to inform its citizens of its imposed laws. Kafka explains the flawed legal system through the narrative tactic of absurdism: the concept of using unrealistic

scenarios to subtly comment on an underlying issue or principle (Lowy 108). Functioning within the narrative tactic of absurdism, Kafka comments on the indecency of the law by distinguishing the moral and systematic flaws present in the philosophical categories of natural law and positive law.

1.1 Summary of *The Trial*

The Trial follows the protagonist Josef K. (K.) and his criminal trial as he faces insurmountable hindrances constructed by the latent government. The novel opens with K. waking up to two officers informing him of his arrest. The officers tell him that from this point forward, he is under investigation; they do not inform him of his accused crime or any details regarding his trial. From the beginning of the novel, Kafka writes candidly of the wrongful accusations pressed upon K. Kafka writes, "Someone must have slandered Josef K., for one morning, without having done anything wrong, he was arrested" (3). The officers tell him he can perform his current obligations and daily tasks such as attending work. The chapter ends with the officers leaving K. his unresolved questions. Some time passes before K. learns that his trial would begin the upcoming Sunday however, similar to how the rest of his trial would proceed, he receives limited details regarding the trial's logistics. For instance, when K. arrives at the set location for the proceedings, it is unofficially marked, functions as an apartment building with many floors and is adjacent to identical apartment buildings making it impossible to distinguish the proper building. The beginning of K.'s trial forecasts that a verdict of freedom is an absurd and unreachable idea.

While at the proceedings, K. stands before the examining magistrate—the judge of whether a criminal’s guilt is upheld or overturned. The magistrate quickly begins to scold K. for his late arrival despite K.’s never being told an official time to arrive. K. expresses his frustration to the magistrate, informing him of the court’s inadequate behavior and conveys that the proceedings are confusing, unfair and unclear: “What has happened to me is merely a single case... it is typical of the proceedings being brought against many people. I speak for them, not for myself” (46). K. continues to assert his frustration, proclaiming that his unwarranted arrest is standard in how the bureaucracy is run—arresting innocent people with no opportunity for defense. K.’s pointed outburst attracted the attention of the courtroom and the examining magistrate; K. continued:

There can be no doubt that behind all the pronouncements of this court, and in my case, behind the arrest and today’s inquiry, there exists an extensive organization. An organization that not only engages corrupt guards, inept inspectors, and exports as well a system of judges of all ranks, including the highest, with their inevitable innumerable entourage as assistants, scribes, gendarmes, and other aides, perhaps even of this extensive organization, gentleman? It consists of arresting innocent people and introducing senseless proceedings against them, which for the most part, as in my case, go nowhere. Given the senselessness of the whole affair, how could the bureaucracy avoid becoming entirely corrupt? It’s

impossible to even the highest judge couldn't manage it, even with himself (50).

The magistrate becomes irritated with K. 's complaints and the chapter finishes with the magistrate informing K. that he has destroyed any promise for an positive ending to his trial. At the end of the novel, K. walks to his death with never having a proper trial. Throughout the text, like events occur as K. attempts to discover the reason for his arrest but fails as a consequence of the many legal barricades. The novel concludes with the reader questioning whether K. was decided guilty and executed for a nameless yet accused crime.

The above quote functions is emblematic of *The Trial* which tells the story of an innocent man's legal labyrinth and his confrontation with a system of injustice. Through the use of narrative tactics like passive voice, Kafka sets a precedent for the novel's overall theme of vagueness and the inability to identify who bears responsibility within the government. While Kafka presents the narrative as fiction by creating absurd scenarios for the protagonist K., the trial is representative of the non-fictional, Austro-Hungarian Empire's criminal justice system. For this reason, readers of the story would be misguided if failing to consider the relevance of the time period and its influence over Kafka and his writing in *The Trial*.

1.2 German Jurisprudence and Its Influence

The Austro- Hungarian's dictatorship influenced Kafka to write *The Trial*, making it pertinent to understand the history of the regime and its functions. Kafka was born during the reign of the Austro-Hungarian Empire and while he was born in Prague, he both spoke and wrote

in German. *The Trial* has been translated into many different languages however, the translations can be, at times, imperfect for translated words specific to the German language. For instance, while the closest translation in the English language is *The Trial*, meaning one singular legal proceeding, the German title is *Prozefs* referring to the legal proceedings which dictate whether there is enough evidence to warrant a trial.

The translation of German to English also fails to acknowledge the difference between an American reader's understanding of jurisprudence and a German reader's understanding of jurisprudence; the meaning of the novel, in some senses, changes. For instance, the arresting process of a supposed criminal is vastly different from the now-fallen Austro-Hungarian—the most obvious difference being that American jurisprudence assumes innocence and brings evidence of guilt and the Austro-Hungarian Empire does the opposite by directly assigning guilt. Under the tyrannical regime, information regarding the arrest was withheld: “The suspect is permitted only limited access to an attorney since...the examining magistrate in his inquisitorial role is interested not in proving the guilt of the suspect but in establishing truth” (Ziolkowski 226). The accused does not receive any information on the specifics of the accusation or if the accusations will be upheld to prove guilt.

Additionally, the Empire offered limited information to the public of the legal system in general. These “hidden” legal proceedings are mirrored in *The Trial*, as Kafka applies this characteristic to K.'s trial:

K. must not overlook the fact that the proceedings are not public,
they can be made public if the court considers it necessary,
but the Law does not insist upon it. As a result, the court records,

and above all the writ of indictment, are not available to the accused and his defense lawyers (Kafka 113)

More specifically, the stages of the Austro-Hungarian legal system are also relevant for grasping Kafka's text. Without acknowledgment of these stages, the novel is simply an unfamiliar and confusing sequence of chaos. The secrecy of the legal system that seems so absurd to the reader (like K. never learning what crime he was arrested for) is only a mere exaggeration of existing problems within the reality of Austro-Hungarian law.

The Austrian legal process happened in four stages: investigation, accusation, defense, and verdict. It is clear, then, that under this legal process, one is firstly accused and following the accusation, one must work to remove said accusations. As previously identified, reading through the lens of the American legal system, Kafka's ambiguity throughout the text (though it is amplified through the narrative tactic of absurdity) can be classified as unreasonable and unfair. However, when reading through the lens of an Austro-Hungarian Legal system, it becomes clear that even the citizens within the Austro-Hungarian Empire did not have knowledge of the government and the legal system. Further, Kafka merges the law's procedural component with notions of right and wrong by writing a fictional, though accurate depiction of the proceedings. Kafka incorporates instances of irrationality for dramatic effect to allow for fundamental "legal principles to seem somehow absurd" (Ziolkowski 230). This absurdity is exemplified in K.'s characterization, as he is consistently confused and frustrated as well as the officials within the government, deeming the whole bureaucratic process as nonsensical:

If [the law] consists of arresting innocent people and

introducing senseless proceedings against them, which...
go nowhere. Given the senselessness of the... affair, how
could the bureaucracy avoid becoming entirely corrupt
(Kafka 117)

Kafka describes K.'s interaction with the law as "senseless" and "corrupt" throughout the narrative. It becomes obvious, then, that Kafka is criticizing the flawed character of the law rather than the logistics of how the regime implemented the law. Put otherwise, the Austro-Hungarian legal system carries out "a justice that pursues its quarry without remorse until it achieves victory"; it was not intended for fairness but rather intended for punishment (Ziolkowski 233).

1.3 Kafka's background and his familiarity with Justice System

Kafka's interest in the legal system was cultivated during his enrollment in eight semesters of a law curriculum, after which he gained the title of Doctorate in Jurisprudence. Throughout Kafka's time in the legal field, he focused on "Austrian civil law and procedure, general and Austrian constitutional law, economics and trade law and administrative law, criminal law and one the history of the philosophy of law" (Ziolkowski 225). It is relevant to note that Kafka was particularly influenced by professor Hans Gross, who was noted for his ideas regarding the following view: "it is not the crime but the criminal who is the proper object of punishment" (Ziolkowski 225). Kafka's narrative is responsive to the question of crime and punishment; K.'s punishment was presumably blunt murder: "The hands of one man were right

at K.'s throat, while the other thrust the knife into his hear and turned it there twice" (Kafka 231). With murder being the most severe punishment, an assessment of fairness and rightness thus arise while considering the trial and punishment of the character K.

Kafka's studies in legal structures expanded beyond the administering of punishment by also studying other dictatorships and how they governed. Outside of the classroom, there are records indicating that Kafka attended biweekly meetings with a group known as "Philosophers' Circle" with Oliver Kraus, who was also interested in the field of law and ethics. Kraus, however, differed from Kafka in that he was firmly against the intersection of law and morality. It was through these open debates that Kafka formulated his opinions about the law and its flawed nature. Kafka was further inspired by the ideas of Napoleon, who directed that a code should be available for all citizens to comprehend, including illiterates such as peasants. This considerate carrying out of the law ensured unanimous understanding of the rules and regulations in their full degree (Ziolkowski 225). Kafka explores the Austrian contradiction of Napoleon's theory by never informing K. about any of the formal processes of the trial.

Kafka's legal opinion broadened as he went on to intern with the provincial criminal court in Prague. While interning, Kafka learned how the Austrian criminal court functioned and made use of this familiarity by writing it into the plot of K.'s trial. Though *The Trial* is a fictional work, the truth circulating within it can legitimize Kafka's opinion on the functioning legal system; by tacitly portraying realistic violations of the law, K. uses the plot of the fictional character K. as a vessel for the regime's encompassing injustice. The truth in Kafka's commentary becomes evident in scenes such as K.'s initial arrest. The arresting officers enter into K.'s home with no warning or warrant— an action written as inviolable in Article 9 of the Austrian criminal code. The code makes clear that the treatment K. 's faces is impermissible, yet

the government disregards this and takes full control over the criminal's trial. The Austrian criminal code comes to life again when K. protests his arrest, stating that he is unaware of his crime. The code states, "No one can claim innocence on the basis of ignorance of the existing criminal law" (Ziolkowski 230). After reviewing the Austrian code of law, it is evident that what is apparently unjust is both the nature of the legal system and its failure to uphold and consider its citizens' rights. By continuously employing the Austrian code of criminal procedure, *The Trial* presents itself as a narrative that is based on realistic legal procedure yet is also metaphysical in "alienating what is legally obvious" (Ziolkowski 230). Put otherwise, what Kafka writes as a dystopia is only a version of reality. It can be rightly assumed, then, based upon Kafka's interaction with the law before the writing of *The Trial*, that the referenced legal proceedings in the narrative are accurately recounted.

1.4 Natural Law

The philosophy of law categorizes the way the legal system functions under two distinctions: natural law and positive law. The two kinds of law differ in how the law should be upheld. Natural law evaluates the legal system by considering morality whereas positive law focuses only on the law themselves and how they are organized; morality is not considered. By separating the law in this way, a clear distinction arises in how the ruling government considers its peoples.

Natural law "provides a name for the point of intersection between law and morals" (Wacks 1). This evaluation of natural law allows for an apparent distinction between what *exists* (i.e., laws) and what is *good* (i.e., things that are immoral and moral). Further, consideration of

the law in this way allows for an evaluation of rightness, or what is morally good, and wrongness, or what is morally evil, stemming from a range of perspectives in religion and culture. The universal application of morality, both “unchanging and everlasting” (Wacks 3), began with the Roman lawyer Cicero (Wacks 3). Cicero argues that natural law is identifiable as a higher law because natural law is founded on reason, a concept aligning with stoic philosophy¹.

Another view of natural law comes from the Catholic Church, which evaluates the law through the lens of a higher power, God, and the Bible. St. Thomas Aquinas wrote the most well-known exposition of natural law, *Summa Theologiae*, which separates law into four categories: eternal law, natural law, divine law, and human law (Wacks 4). Each law adopts a different definition— eternal law is “divine reason known only to God”, natural law is “the participation of the eternal law in rational² creatures”, divine law is “revealed in the scriptures” and human law is “supported by reason and enacted for the common good” (Wacks 4). Aquinas argues under the theory that the only kind of law that is worthy of abiding by is a law that is either natural or divine. Put otherwise, “a government that abuses its authority by enacting laws which are unjust (unreasonable or against the common good) forfeits its right to be obeyed because it lacks moral authority” (Wacks 4). This ‘common good’ can be identified in God’s teachings or divine law. Therefore, those who believe that the law is unjust according to the divine law can refrain from abiding by the law. However, it is to be noted Aquinas does not offer direction on whether one should revolt if the law is unjust; rather, he simply states that the law can be refused if it goes against God’s word. This acknowledgement of morality in the law, though first

¹A form of stoicism was adopted by the Romans which argues that a law without reason is invalid (Wacks 3).

² A rational creature, or a human, is a being that uses reason

interpreted through the word of God, became essential in the eyes of the church, setting precedent for ruling governments when using morality in lawmaking.

Locke takes Aquinas' argument a step further, encouraging revolt against the government if the law seems immoral; under this view, it is acceptable to overthrow tyranny. Locke argues for members of society to abide by a social contract, which states that one should have their natural rights preserved: "life, liberty and the enjoyment of private rights" (Wacks 4). For this reason, Locke argues for limited government interference, meaning individual liberty should be at the forefront of lawmaking.

In the 20th century, natural lawyers and philosophers were able to use natural law as a means to "provide a benchmark for positive [systemic] law" (Wacks 2). Trials such as the Nuremberg Trials after the crime of genocide used natural law to punish the genocidal acts of the Nazi soldiers and identify the actions as crimes against humanity. While the crimes committed did not go against the penal system, the soldiers violated humanitarian rights pointed out through the establishment of natural law.

1.5 Positive Law

Positive law, on the other hand, is systematic in nature and focuses on how laws are enforced and abided by; in other words, a legal positivist identifies laws as existing independently of human enactment. Unlike natural law, positive law has no connection between law and morality; the two ideas are separate and do not permit correlation or causation. Instead, laws must be followed because they are put in place to be followed (Wacks 18). Some of the

most recognized legal positivists who theorized that law and morality are incompatible included Thomas Hobbes, John Austin, Jeremy Bentham, and H.L.A. Hart.

Jeremy Bentham was the first and most prominent legal positivist to analyze the law and the legal system, placing legal procedure at the center. Bentham views the law straightforwardly, meaning “it identifies the existence of law with patterns of command and obedience that can be ascertained without considering whether the sovereign has a moral right to rule” (Green and Adams). Further, Bentham argues that one of the most essential parts of law-making is for it to be reliable, standardized and systematically dealt with— to do this, the law must be written. Bentham is also receptive to Francis Bacon’s view on the law, which focuses on how the law should be displayed reasonably and logically. This idea is comparable to the Napoleonic code, which ensures the law is known by all its abiders.

Bentham takes a more extreme approach than his predecessor Bacon and another legal positivist, John Austin. Austin argues that the only adequate laws are commands that come directly from the sovereign and any other command is only used in the general sense and is not a law. Bentham creates further complexity to this argument by focusing on the ‘logic of the will’ and assigns a strong deciding role to the sovereign, specifically judges. Bentham also makes clear that laws must be dictated and separated, distinguishing between sanctions and commands--sanctions are imperative laws and commands are permissive laws. However, laws must be both penal (just the sanctions) and civil (just a law). For this reason, laws identified as civil laws alone are by his classification incomplete.

H.L.A. Hart argues using a modern legal theory, studying analytics and linguistics of the law. Hart asks questions such as, what does it mean to have a *right*? Though Hart is a positivist, he adopts a distinct perspective, one unlike Bentham and Austin, by asserting that the law must

consider the social practices of the community. Hart argues that in order to implement laws, the law must be understood as a “social phenomenon”. Hart investigates the following human conditions: human vulnerability, approximate equality, limited altruism, limited resources and limited understanding. While Hart's view may seem to have features similar to natural law, he is instead arguing these human weaknesses are kept safe by the law. However, Hart still makes clear that the law is not based on morals ; law is an organization of rules (Wacks 22).

Positive law and natural law produce a clear division in the way one recognizes the function of the legal process. Positivists align with a system that abides by a clear separation of powers, utilizes a judicial apparatus administered through rules, and guarantees civil liberties (Litowitz 71). Evaluating law in this way, morality separate from the law, is the converse approach of natural law. Natural law considers aspects of the law that reach beyond rules and regulations, and considers morality. Though both natural law and positive law focus on critiquing the most productive way for a society to function, positive law and natural are fundamentally different: law without morality and law with morality.

Relevant to Kafka’s narrative, the reader can certainly identify that though a positive law system takes into consideration accessibility and principles which should be “logically arranged and publicly available” (Litowitz 71), the Austrian criminal proceedings are lacking in this expectation amongst others. The Austro-Hungarian Empire did not demonstrate an interest in its citizens and its overall well-being, rather merely its functionality. Further, throughout Kafka’s narrative, a reader is adjured to respond and think, “Well, that’s not fair!” “That seems unreasonable!” “They can’t simply do that, that seems wrong!” And rightfully so: Kafka is writing a narrative that is unnervingly realistic. Moreover, these reactions are attributes that natural law considers and that positive law does not. Though Kafka reaches beyond the mere

order in which laws are carried out and created, the reader must still become fully aware of the flaws in the legal system driving *The Trial's* narrative for proper context.

Despite the accuracy of Kafka's critique of the legal system in *The Trial*, he also works to affirm his opinion on the flaws by exposing why the legal system should be amended and is ultimately unreasonable. Kafka's alignment with natural law is found in the many applications of legal absurdity as well as the very drastic ending—a man killed for a crime without a trial. Kafka presents the character K. who “is subjected to an ethical form of judgment that lies beyond the scope of jurisdiction of positive law” (Banakar 465). The presentation of K. and his struggle within the penal system (i.e. positive law) reveals Kafka's commentary on how the legal system is erroneous and its need for moral consideration within the law. Additionally, Kafka speaks directly about moral principles, specifically when evaluating K.'s standing within the criminal law system, noting, “You don't have to consider everything true, you just have to consider it necessary. A depressing opinion, said K. Lies are made into a universal system” (Kafka 223). This language of universal principles is the same language used to describe natural law. Moreover, Kafka ends the novel with the unconscionable punishment of K.'s death. It is possible that this extreme punishment for a crime that was undiscovered by K. can be classified as cruel and unusual punishment. Kafka writes, “[I]t's in the nature of this judicial system that one is condemned not only in innocence but also in ignorance” (Kafka 40). He goes on later to speak more of the flawed penal system, insinuating the lack of humanity within the law:

Here the disadvantage of a court system that was grounded from its very beginnings in secrecy came to the fore [...] because [the officials are] constantly constricted by the Law both night and day,

they have no proper understanding of human relationships and in such cases they feel that lack keenly (Kafka 74)

In a system where justice cannot fairly be attained, Kafka notes that those subject to the law, a law in which citizens have no ability to categorize their role within it, provides the reader with a license to criticize what is fair and morally.

1.6 Kafka's Criticism of the Law: Alignment with Natural law

What Kafka is essentially targeting is what has been distinguished as modern law: “manifestation of “modernity” and “a historical epoch and an intellectual orientation” (Litowitz 68). Kafka was particularly interested in the process of change by studying the evolution of beliefs and practices .The concept of modernity is now understood as ““The Enlightenment Project”— the application of law and governance” (Litowitz 68-9). This process was to encourage function and clarity of the social world. If order could be attained through this process, human rights such as “freedom, autonomy, and security” would obviously follow. For Austrian jurisprudence, this meant that “German jurists were to understand the law as a science and to codify this systemic knowledge into a giant rational system modeled on natural science” (Litowitz 69). Despite the order emphasized in modern law, it is “supposed to be conceptually grounded in fixed principles of moral and political legitimacy, discernible by reason” and ‘sit atop morally acceptable commitments” (Litowitz 69). Instead of being built on “principles of natural law and inalienable rights”, it was instead a logical system driven by a master code. This master code then is easily understood in Litowitz’s example in his article “Kafka’s target— Modern Law”: “For example, so long as people believe that inheritance of private property is

morally justified, it makes sense to have a probate code that sets forth a scheme for how a decedent's estate should be distributed" (70). The law is obvious and unwavering under the code; the principles upon which the law stands is a compilation of defined policies. However, as Litowitz identifies, there are two encroaching issues, the first being that these said principles lose their meaning and use over a period of time and the second being that the law resonates louder than the principles, eventually ignoring the principles on which the law was built: the morality portion of the law. Kafka challenges these flaws aggressively by unmasking the latter: functioning laws become non-functioning when legal procedure expands, and as a result, ignores the original intention for the creation of the law. Moreover, Kafka argues that the instilled values forced upon citizens through a modern law system ultimately ignore the values and exploit the law to punish rather than uphold. For this reason, the law is "a series of contradictions" (Litowitz 74). This idea of confused legality can be put bluntly: Kafka is not talking about a lack of rules and regulations as the theory of positive law requires but instead talking about an especially defective system. Litowitz summarizes Kafka's conceptualization of the system by writing:

It [the system] is caused by an overabundance of rules...caused by not the lack of reason, but rather a certain kind of malignant reason. We have reason, we have law, we have courts, we have procedures, and yet we still have massive injustice, alienation, and chaos (74).

Litowitz's interpretation of Kafka's articulated mentality throughout *The Trial* is an indirect response to why Kafka's narrative is not a positivist text, but rather a naturalist text; it is a text exposing the confusion of a logically functioning system but not a morally functioning system.

1.7 Examples found in the Literature: Evidence of Law without Natural Law

1.7.1 The Arrest

The Trial works successfully as a tactic to comment on the government by the way it engages the reader in storytelling and relays a statement of injustice. One of the many ways emphasizes his argument through his own unique form of absurdism, or the Kafkaesque³, found in multiple scenes throughout the text. For instance, the interrogation scene is one of the most obvious examples of this absurdism; he uses plain language to describe unlikely events. Kafka writes laughable sentences like the following: “Sundays had been chosen for the inquiries to avoid disturbing K.’s professional life” (Kafka 35). The idea of catering to K.’s convenience is senseless. Further, Kafka continues with the Kafkaesque by omitting needed information for K.’s trial and by only giving him a location but not a time. Other characters, even those who are in charge within the government, also play a role in maintaining the ambiguous theme. When K. arrives at the building where his trial will take place, the people of the court are unaware of who K. is or what his trial is regarding (Kafka 21). By not offering any details on how the trial will proceed, the reader can become a part of the aggravating and maze-like obstacles Kafka presents; the uneasiness evoked from a story told with limited information operates as an additional way to expose the flaws of a criminal law system that likewise gives limited information.

³ “A nightmarish world” in which “sinister impersonal forces control human affairs” (Twentieth Century Words); to a pointless, rational organization, with tortuous bureaucratic, and totalitarian procedures, into which the bewildered individual has stayed” (Lowy 106)

1.7.2 “The Flogger” (i.e. Whipping)⁴

Kafka presents a complex representation of the law that speaks to more than just the way the laws are written or enforced, pushing the reader into natural law standards to evaluate it; his inclusion of morality is present in another anecdote in the chapter, “The Flogger”. As K. is leaving work one day, he hears a noise coming out of a lumber room. To K.’s confusion, he sees his arresters and one taller man, dressed in leather: the Flogger. The Flogger explains that the government officials are being whipped because of K.’s earlier complaints about their conduct during his initial arrest. Feeling guilty, K. attempts to save the men suffering by pleading with the Flogger: “Be reasonable...I don’t even consider them guilty; it’s the organization that’s guilty” (Kafka 83). Though K. feels responsible for the men and the unreasonable punishment they are going to endure, he leaves the lumber room when it becomes clear that his attempt to stop the Flogger has failed. As many other clerks of the bank walk past the room, K. justifies the noise by frantically saying the disruption is just a dog howling. As the scene evolves further, K.’s internal guilt culminates, and he eventually acknowledges that his bribe to get the Flogger to leave the men alone could have been more convincing or that he could have offered himself up instead.

At this point, the subsequent questions may arise: why would Kafka introduce a chapter about unreasonable punishment and evident moral guilt? And moreover, why is K.’s conscience recognizable in this scene to ask why K. feels guilty even though he wasn’t responsible. What Kafka seems to be suggesting is that the law—and its repercussions—elicit an emotional and physical response in both the men being whipped as well as K. The pain derived from this

⁴ In some translations, the title is translated into “The Whipping” and identifies the flogger as ‘the whipper’

treatment of the law enforcers proves that though the Flogger is abiding by the implemented rules and regulations of the government, the punishment is neither proper nor fair. K.'s reaction to the abuse of power mimics the concern for unwarranted laws and displays the emotional turmoil and frustration that can result from following a purely positive law system that disregards what is just.

Additionally, Kafka shows his belief in natural law through K.'s written internal debate when trying to categorize the event's circumstances as right or wrong; as a result, Kafka presents a question of moral responsibility within the law and beyond it. The reader finds K. unable to undertake the repercussions of such an extreme act as Kafka writes, "It tormented him that he could not stop the flogging" (84). Further, K. is bothered by the inhumanity of the Flogger shown in his unconcern for the arresters when whipping them. K. describes one man's screams as nonhuman, thinking to himself, "That scream that Franz expelled rose steady and unchanging, scarcely human, as if it came out of a tortured instrument" (84). However, despite K.'s internal struggle with what happened to the men, he still chooses to dismiss his wrongdoing:

K. peered down intently, trying to penetrate the darkness of a corner...It tormented him that he had been unable to prevent the flogging, but it wasn't his fault; if Franz hadn't screamed— of course it must have hurt terribly, but at critical moments you have to control yourself— if he hadn't screamed, K. could very probably still find some way to convince the flogger.

K. is contemplative about the role of the justice system and the harm that it causes yet he fails to take responsibility for his guilt and rather pushes his blame onto the Flogger.

K. goes on throughout the rest of his workday but not without thinking again of the flogging incident. Kafka writes, "The next day K. still couldn't get the guards off his mind; he had difficulty concentrating on his work, and in order to finish up he had to stay at the office slightly longer" (85). These penetrating thoughts nagging K. present an idea that is two-fold, the first being that the law is relentless in its ability to affect one's daily life and emotional well-being as K. struggles to understand his guilt. The second part of the idea hidden within K.'s thoughts is that without morality steering decision making, whether it be within the law or outside of it, there are evident repercussions that often cause harm. Conclusively, the chapter demonstrates that an amoral mentality has destructive implications in many senses, even in a legal system that is logistically functioning.

Kafka constructs this scene based upon a moral dilemma. The absence of morality in those enforcing the law runs parallel to K.'s inability to dictate right, or morally good actions, and wrong, or morally evil actions. The application of the law is in the hands of officials who seem blinded by a system of punishment and rules. The missing moral component is further made evident by the juxtaposition of the flogging in the lumber room and the monotony of K.'s workplace; a place of structure becomes tainted by horrific abuse and unfairness. Further, while K. carries the truth of the government's mistreatment, the rest of the employers are ignorant of the system that they obediently follow. The chapter ends by K. walking past the same room where the flogging happened. K. notes his disorientation regarding the previous day's events but then quickly notices that everyone else is consumed with day-to-day affairs. K. struggles with this normalcy, slamming the door to the room shut and pounding his fists against it, in tears (87).

He then instructs the assistants to clean out the closet, eventually heading home with his mind likewise cleared as if to forget the injustice he witnessed (87).

Beyond the unreasonable retribution the flogger performed against the men, the loss of morality within the legal system becomes even clearer when the guards proclaim their innocence. The Flogger (i.e. government official) acknowledges the men's innocence and still disregards it; he is bound to a law which incentivizes abuse for any action which does not abide by overarching legal principles. Kafka uses the technique of dehumanization by labeling the Flogger by his occupation; without naming the Flogger, Kafka ignores the person performing the action to achieve a sense of generality. Further, this veil of ignorance allows the reader to recognize the Flogger for only his actions. Instead, Kafka is forcing the reader to understand a man only as a government official. As a result, readers are focusing more on K.'s questioning and the Flogger as a heartless enactor within the penal system.

1.7.3 “Cathedral”

Kafka continues to explore natural law in the chapter “Cathedral” involving an evaluation of morality beyond the law. Kafka places an emphasis on detail in this chapter, from the gloomy and ominous weather, to the lighting, paintings and furnishing. By no coincidence, K. was chosen to showcase the city to the bank's major client and decides that the cathedral is a worthy spot to see. In anticipation for the client's arrival at the cathedral, K. is led into a universe of ambiguity, continuing Kafka's theme of disarray and confusion consistent throughout the text. To begin, K. starts to walk around the cathedral and approaches a painting of a figure keeping guard in front of Christ's tomb. His observation of this painting is interrupted by one of the

cathedral keepers, or sextons, when the sexton gestures to him to come toward her. Yet as K. follows her, she keeps moving further away. Frightened by this vague interaction, K. dismisses her and becomes distracted with another puzzling characteristic of the church: an extremely small pulpit, unfit for a human to comfortably fit. Just as K. notices the time reaching 11 o'clock, the time at which he is supposed to meet his client, a sermon begins, and the priest approaches the small pulpit. Despite K.'s attempt to leave without being noticed, the priest directly points out K. and begins a parable.

The parable is about a man stuck at the gates of the Law⁵ being guarded by a doorkeeper. The doorkeeper tells the man that though he can enter through the gates, he should be aware that there are many doors after he enters the gates before him. Knowing this, the man before the gates chooses to wait and decides that, instead, he will wait for permission to enter the gate. The man obsesses over the doorkeeper, believing that this is the only way for him to move forward and have the gates open. As time goes on, the man becomes senile and insane due to his intense obsession, his eyes eventually going blind. When about to die, he asks the doorkeeper why no one else has requested to enter through the gates except for him. The doorkeeper responds with the same response as many years before, saying, "No one else could gain admittance here, because this entrance was meant solely for you. I'm going to go and shut it now" (217). This bleak and vague sentence is the closing of the parable.

K., frustrated with the story's ending, asserts that the parable must mean that he should ignore the court and its relentless obstacles. The priest responds to K.'s interpretation by telling him it is wrong and that while the doorkeeper seems unfair for not telling the man why he is

⁵ Throughout the parable, Kafka capitalizes Law. This style choice could be interpreted as a reminder for the reader that the Law is a proper noun; put otherwise, it is an entity that is powerful and all knowing, worthy of outward identification

waiting there, he is in fact just following his duties as a doorkeeper. It is also possible, the priest adds, that the doorkeeper is just doing his assigned job perfectly and was unaware of how his role as a doorkeeper could cause emotional anguish. Most importantly, he tells him that both men, the man waiting and the doorkeeper, decide each other's positions at the gates. If it were not for the man waiting at the gates, the doorkeeper would not be forced to look over him and similarly, if the doorkeeper was not guarding the gates, the man would have no reason to wait. Finally, the priest adds that because the parable symbolizes the legal system, K. cannot criticize it because this would, in turn, mean he is criticizing the law— to criticize the law is unallowed and unacceptable. Before he leaves K., he identifies himself as the first in command of the court's function.

The beginning of the parable runs parallel to K.'s trial. For instance, though K. can go to work and walk the streets 'freely', free is a relative term. This idea of restricted freedom is evident when K. is asked by the vice president to enjoy a day on the boat, but K. is forced to decline because of his unclear legal proceedings (37). Likewise, in the parable, the man is also confined by the abstract barrier, the gate; though he is told that it is possible to enter the gates, he is warned that if he does, he will be presented with many other doors.

Additionally, it is not to be overlooked that this parable is told in a cathedral and by a priest— both are a part of an entity that is built on ideals and lessons on how to be moral and good. A sense of irony exists when knowing the priest is also the director of a legal system motivated by rules that are extreme and wrong. Moreover, what becomes more puzzling is that though the priest also plays a large role in an amoral system, he seems to believe in a system that rules with humanity, arguing that the doorman is patient, polite, and sensitive to the man at the gates. The priest even goes on to say, "all this [the doorkeeper's actions] points towards feelings

of compassion” (219). Essentially, the priest is speaking of benevolence when enforcing the law. Therefore, the parable seems more like a paradox, provoking the reader to question why a priest who preaches about morality also adopts a role in the law which is purely technical and focused on functionality.

1.7.4 Additional Evidence

These two chapters are not the only two instances where Kafka draws the reader to the moral questions of the character K. and the government system. Though much of the novel works to focus only on the absurdity within the law, Kafka also intertwines basic moral dilemmas and human consideration. Throughout the story, readers seem to be inclined to feel frustration and sympathy for the character K.; he is presented with many difficulties within his trial. However, K. seems more flawed than vulnerable when the reader reviews his social interactions, specifically his interaction with women. In one of the opening chapters, K. is speaking with one of the other tenants within his apartment building, Fräulein Bürstner. K.'s conversation with her seems less than polite and further seems to be overly presumptuous and assuming, expecting the young woman to concede to any request he makes. K. is insistent about her allowing him entrance into her room. When she is reluctant, he becomes aggressive, responding to her with expressions like, “You’re tormenting me” and later goes on to say, “Just remember...this may be unpleasant for you, but you’re in no danger” (32). K., though he does reference her possible involvement with his case and assures her that she will not be involved, comes off as both suggestive and motivated; K.’s laughable attempt to calm down Fräulein Brustner was not out of concern for her but rather out of his own infatuation. He goes on to

inform her that he is convincing and because of this, if she tries to say that their interaction was anything but pleasant, he will deny it with the support from other women such as Frau Grubach, K.'s landlady, stating: "If you want to spread around I assaulted⁶ you, that's what...[she] will be told without losing confidence in me, that's how devoted she is to me" (32). K. shows unconcern for others and his relationships and yet again, just as he does in the chapter, "Flogger" ignores his responsibility in the situation; K. relies on his ability to persuade and lie at all costs. K. later seizes Fraulein Brustner by her wrist and kisses her on the mouth ("and then all over her face, like a thirsty animal lapping greedily" (33)) and treats her as a lesser means to an end. This interaction with Fraulein Bürstner shows that K.'s moral compass—his ability to sense the rightness or wrongness of an act—is unsound. Kafka's literary choice to identify K. as misogynistic makes morality even more relevant throughout the text by presenting moral questions that have moral implications. Feelings of disapproval for the reader in more than one circumstance highlights what a world looks like without morals.

K.'s highly questionable and incentivized actions with others is not only evident with Fraulein Bürstner. While in the cathedral and speaking with the priest, he attempts to argue that he can use women to manipulate the outcome of his trial, saying,

If I could get a few of the women I know to join forces and work for me, I could surely make it through. Particularly with this court, which consists almost entirely of skirt chasers. Show the examining magistrate a woman, even at a distance, and he'll knock over the courtroom table and the defendant to get to her first (213).

⁶ This interaction between the two characters should only be interpreted as a verbal conversation

Kafka presents K. as a morally flawed character who has little consideration for anything except for the outcomes of his own trial. Though he slightly considers the well-being of the men who were whipped, he quickly justifies his way out of feeling burdened. K.'s character and morality can be questioned when peering into his interactions with other characters throughout the novel. Kafka's exploration of K.'s morality further speaks to what readers discern as morally right and morally wrong, aligning with natural law. Ultimately, Kafka is suggesting that the law does not really see or comprehend actual moral failings.

Through morality's lingering presence in *The Trial*, it is fitting that the ending of the text ends with a list of K.'s moral questions. Taken in the middle of the night of his thirty-first birthday, K. is forced by two men to walk out of his apartment to his presumed death. Along the way to this unknown spot, K. questions the past year of his life and the people involved. Firstly, he believes he sees Fraülein Bürstner, the woman whom he treated animalistically. K. states that his sighting of Fraülein Bürstner was due to "simply not to forget the reminder she signified for him" (228). This vague sentiment is not later explained, yet the reader can assume that **his** interaction with Fraülein Bürstner brought about feelings of remorse for K. as his interaction with her is one of his final thoughts before death. At the destination where K. is to be killed, K. sees a faint human figure stretching itself out of the window. The sighting of the human figure prompts K. to ask a series of indirect moral questions:

“Who was it? A friend? A good person? Someone who cares?
Someone who wanted to help? Was it just one person? Was it
everyone? Was there still help? Were there objections that had

been forgotten? Logic is no doubt unshakable, but it can't withstand a person who wants to live (231).

Kafka ends the chapter⁷ with the most compelling evidence to demonstrate his argument for law functioning with both moral and functional considerations. While the questions above can be read at surface level, as if to ask who the man in the window was and his role in K.'s death, the questioning becomes general when K. asks, "Was it everyone?" Inserting this general question allows an application of ambiguity throughout the list of questions and also encourages an open ended answer. The questions seem to be asking whether the man, just as K. does, represents all those who participate in the flawed legal system within the Austro-Hungarian regime. Moreover, Kafka specifically critiques the use of pure logic, as positive law does, only concerning itself with how the law is implemented and structured. Kafka notes that while logic may be a concrete mode of thinking with no variables changing its effects, it is not practical when considering the quality of life of those who are structured by logic, or, put otherwise, the law.

1.8 Conclusion of Evidence

Through each of these productive instances, the question of natural law is poking through and drawing attention to the missing link between morality and law. Each of these presented

⁷ It is now known that Kafka's *The Trial* was not a finished work. Though the reader, as it is often decided amongst scholars, can assume the K. dies at the end of the novel, it is not a verified conclusion. Further fragments of *The Trial* have been found, which urges many scholars to consider that Kafka had intended to continue the text.

stories are in violation of human morality and consideration— K.’s discussion of the cathedral, his contemplation of right and wrong in the whipping scene and his interaction with women. K. consistently finds himself in a situation that is neither black nor white; rather, the situation creates a grey area which forces one to decide on their own merit and moral judgement how to proceed. This grey area is precisely what calls attention to natural law. If the functionality of the government were to be purely about instances of right and wrong, positive law would work seamlessly— there would be no questioning and full adherence to the law. However, when referencing the evidence above, the functionality of the law implies otherwise. The law, and moreover those whose lives are affected by the law, are not obvious (i.e. black and white). Natural law obligates the government to consider the chaotic quality of the world. Father, Kafka uses the lack of natural law to suggest that the positive law system is not working within the Austro-Hungarian Regime. However, as Kafka’s work has become a reference for both literary technique and the philosophy of law, one may assume that his critique of the law may be considered more broadly.

2.1 Introduction

Through a natural law lens, punishment is a feature of the law that is vulnerable to criticism. It seems reasonable to say that punishment does not abide by a compass of morality. In *The Trial* the idea of unfair punishment and lack of morality becomes apparent when K.'s trial ends with his presumed death. Throughout his life, Kafka contemplated and obsessed over the function of the penal system, specifically focusing on the role of punishment. A year before Kafka wrote *The Trial*, he wrote the inspired short story, "In the Penal Colony". Like *The Trial*, Kafka uses the concept throughout of a nightmarish world in which no one—neither the reader nor characters within the story—is aware of what drives the inhumane functioning of the penal system. This text portrays the law's missing moral concepts by focusing on the carrying out of the law and its gruesome effects. I will demonstrate that "In the Penal Colony", Kafka exposes punishment as another flawed function of the positive law theory by asserting that while a system may have rules and punishment, it fails as a government system because it lacks the necessary aspect of natural law: morality

2.2 Overview

Kafka's "In the Penal Colony" describes torture and critiques its efficacy as punishment. The story is about a Traveller who arrives at a penal colony to judge the colony's punishment method, the apparatus. The Traveller meets the Officer and the Soldier who run the apparatus and try to persuade the Traveller that the apparatus is the right form of discipline. Similar to *The Trial*, Kafka writes as a minimalist without sacrificing literary impact. Indeed, this technique of using one-dimensional language to describe gruesome torture is arguably more successful than if

than if Kafka has elaborated. Kurt Fickert's "A Literal Interpretation of 'In the Penal Colony'" critiques Kafka's work, noting that the best way to appreciate Kafka's writing style is in its "literalness". This literalness that Fickert points out is acknowledging Kafka's plain yet crafty syntax. Moreover, "In the Penal Colony" complements *The Trial* because the stories provide a complex interpretation of how legal implementation positions itself within a world skewed by societal structures and questionings of morality:

Kafka is dealing... with human guilt and punishment in a sphere removed from the domain of civil justice, ... a fact which may be deduced from the exotic setting, the mysterious properties of the machine and its mystical capacity to purify its victims, and the proselytizing zeal of the officer, whose filial relationship to the former ruler of the colony and creator of the machine is apparent (Fickert 33).

Kafka examines each character's role within a system of punishment and how their defined role implicates them in acting morally. Further, the short story presents the reader with ideas of punishment and urges them to evaluate each character's role within punishment. In doing so, Kafka presents another facet of law, punishment, that requires morality and proves that without morality's influence, there are unwarranted physical harm and failure to uphold human rights.

2.3 Summary of "In the Penal Colony"

The short story begins with the two characters, the Officer and the Traveller, looking at a device or “apparatus” used for punishment in the “penal colony”. The apparatus is unique in the way it tortures the criminal by “writing” through prickling and poking of needles an illegible inscription of the commandment (i.e. law) which the condemned person violated. What is more arbitrary than the use of the apparatus is that there is no trial or information about the law for the condemned to respond to by way of defense.

The Officer describes the details of the apparatus thoroughly, leaving out no details in how the machine mangles and manipulates the body; it is made up of three parts, the Bed, the Inscriber, and the Harrow, each part functioning in an intricate way to ensure pain and punishment. Further, the Officer explains to the Traveller that not only is the apparatus “specially prepared” and put together, it is also put to use in a public way; in past years, people once gathered around the apparatus to watch a condemned person being punished. As the apparatus and its details are being explained to the Traveller, a criminal, or the Condemned Man, is entrapped in the apparatus waiting for his sentencing with a Soldier standing nearby to wait for his instruction to begin the punishment. The Condemned Man allegedly did not honor his captain and disobeyed his orders. His inscription on his skin from the apparatus would read: “Honour your superiors”.

Eventually, the Traveller becomes increasingly more disgusted and disapproving of the penal colony’s punishing system. What began as a dislike displayed through a frown turns to utter horror. The Officer soon notices the shift in the Traveller’s opinion of the apparatus and impresses upon the Traveller his role in the continuation of the apparatus. Since a previous Commander created the apparatus, it was now the role of the Traveller to offer his input by either advocating or criticizing the apparatus. Unsettled, the Traveller makes clear to the Officer that he does not support the apparatus. Knowing that the new Commander already dislikes the apparatus

as well, the Officer ceases advocating for the apparatus, knowing it was hopeless; the Officer is aware that the continuation of punishment through means of torture will be overturned. He then lets the Condemned Man down from the apparatus and hooks himself up to the contraption himself. Although the machine, when properly functioning, should only harm the criminal, a complication ensues during the Officer's punishment and instead kills him, leaving a splattered, bloody mess. The Traveller is overwhelmed by his responsibility in the Officer's death and his role in the future of punishment within the colony. In haste, the Traveller runs away to his boat to leave the colony with the released Condemned Man and Soldier running after him in attempts to get on board the boat as well.

2.4 Other Interpretations

Many critics draw interpretations of the "In the Penal Colony", one of which is based upon Kafka's need as a writer to explore his own internal agonies. By embracing his narratives as his mental outlet, Kafka put to paper his deepest sentiments and in doing so, created a story of torment and torture against a man accused of an infraction. This particular understanding of Kafka focuses on his viewpoint on the cruel nature of the world presented in life versus death. One critic places attention to Kafka's meaning of death and why he refers to a machine as an execution method. The critic argues it is likely that Kafka believes "man must withstand the ultimate (*absolute*) catastrophe" (Fickert 31). This argument is made clear in the way that the Officer dies a cruel and unexpected death at the hand of his prized possession, the apparatus (Fickert).

Other critics view the narrative through a biblical lens. This view is unsurprising as there are influences of religion in Kafka's other works such as *The Trial* and its "Cathedral" chapter. The Biblical symbols in Kafka's short story are undeniable and become further verified when

reviewing Kafka's personal religious interaction and practice of Judaism. Throughout the short story, Kafka labels a book that articulates the beliefs, construction, and implementation of the apparatus as the "Old Testament"⁸. The Officer references the "Old Testament" on multiple accounts by stating the following remarks about the sentence for the Condemned Man: "Guilt is always beyond a doubt." Further, he places blame by ultimately asserting that "human existence is characterized by guilt and sinfulness" (Fowler 115). One's guilt must not only be mentally manifested but physically embodied as well. Likewise, in the Hebrew tradition and Bible, particularly in the Old Testament, there is an emphasis on guilt, sinfulness, and punishment. Kafka presents the question of guilt in "In the Penal Colony" as well as he uses the Condemned man as an example of what happens when you violate the law (i.e. sin) and is pronounced guilty. Further, Kafka's work includes features of the Hebraic tradition by also referencing the God of Genesis, creator of the earth, which critics argue to be the equivalent of the Officer, who is the creator of the apparatus: "this parallel suggests that the world, like the torture machine, was created to induce the suffering necessary for the expiation of human guilt" (Fowler 115). This interpretation allows for the reasonable conclusion that Kafka aligns with how the Hebrew tradition understands guilt.

There is also a profound reference within the text of the way that the Hebrew tradition uses the body as the site to locate and process guilt. Kafka seems to adopt this belief as well, since he uses the apparatus, a machine that physically inscribes the law onto the body, as a means of punishment; guilt is imprinted on the body and is similarly used as a physical receptacle to process it. For this reason, it is reasonable to read the short story in relation to the

⁸ The Old Testament, though a book in the Christian biblical canon, bases itself off the 24 books of the Hebrew Bible.

Hebraic ideologies that Kafka interacted with in his own life as a practicing Jew and similarly uses the body to consider guilt.

Still another interesting approach views the characters and their roles in a psychoanalytic way. Through this interpretation, each of the characters plays a different role of the human psyche: “the offending soldier is the instinctual self within the psyche, the Executing Officer is the duplicate of the former Commandant or primary superego, and the Explorer is the conscious ego of the artist” (Webster). Put otherwise, the point is that Kafka uses each character to explain how categories of the brain may initiate varying behaviors such as how your instinctual self will likely act more straightforwardly while your superego will likely act authoritatively.

While there is not one interpretation more accurate than the next for Kafka’s unique storytelling, for purposes of this paper I will purely be focusing on the nature of the legal system and its effects on those who are in power as well as those who must succumb to those in power. The evaluation of text will be done through a legal and ethical lens and serve as additional evidence of Kafka’s natural law view. “In the Penal Colony” displays that a system of absolute punishment and absent morality will fail and be inadequate to maintain structure.

2.4 Analysis: Natural law

As I noted in Chapter 1, Kafka uses extreme measures to point to the underlying absurdity of a government that does not aim to consider both law and morality (i.e. natural law). “In the Penal Colony” shows the consequences of an absence of natural law morality; the story builds itself on a positive law mentality by using the description of the apparatus to ironically draw attention to the lack of consideration of anything else other than the importance of enforcing rules and laws. It is to be noted that the plot functions within a simple narrative; there

is not a complicated storyline motivating the plot. Instead, Kafka uses the increasing horror of the Traveller and the unclear future of the Condemned man to highlight an amoral law imposed by the Officer and his need to preserve punishment. What is gained from the limited plot is the reader's push to consider what is missing. It becomes evident that while there is a focus on the apparatus working properly, what is not being considered is the function of the law. Kafka's opinion of the law is subtle, yet impactful as it is also effectively done in other texts like *The Trial*. Rather than directly stating his observations of the justice system, Kafka skillfully uses the characters to speak on his behalf. His commentary displays itself in instances such as the Traveller's objection of the apparatus. While the Traveller does speak clear words of disapproval, telling the Officer, "No.... I am opposed to his procedure" (14), Kafka does not prompt the Traveller to offer an explanation for his decision. Instead, Kafka allows the assumed reader's assessment of the apparatus to conclude why the Traveller's projects his disapproval of the apparatus as a means of punishment. As obvious as the wrongness of the apparatus is to the reader, it is precisely the reaction that Kafka is catapulting into focus. Kafka bleakly writes:

The Traveller had to go over to him and drag the Officer's head by force. At this point, almost against his will, he looked at the face of the corpse. It was as it had been in his life. He could discover no sign of the promised transfiguration. What all the others had found in the machine, the Officer had not. His lips were pressed firmly together, his eyes were open and looked as they had when he was alive, his gaze was calm and convinced. The tip of a large iron needle had gone through his forehead (18)

The laughable absurdity in Kafka's writing, written in *The Trial* as well, is evident in this scene. For instance, when Kafka writes the final scene with the Officer as one that is purposely graphic, he positions the Officer, so his eyes are "open" and "convinced" though his brain has a distinct obstruction, the needle—a physical portrayal of hard headedness. The Officer, consumed by a systematic mindset, is unable to see the harm of a law functioning in this way, even if it is what causes his death and is right before his eyes. A profound sense of irony is written into this line as the apparatus' avid patron was failed by its constructed purpose. Additionally, the absurdity of the machine speaks to the comparable absurdity of the Austro-Hungarian Regime's administering of punishment. Kafka exposes that, despite efforts to control the law under extreme and fearful retribution, it is barbaric and outdated. Moreover, the failure of the apparatus speaks to the overall failure of a system that only considers its logistics, evening failing those who enforce the law as the Officer dies due to the broken apparatus

2.5.1 Instances of Natural Law Mentality in the Text

Throughout the short story, Kafka indicates his opinion on positive law through punishment and the role of a justice system through the characterizations of the Officer, the Traveller and the Soldier. In *The Trial*, the chapter "The Flogging" uses the technique of dehumanization to emphasize the character's position rather than the person who is acting within the position. There are no names in this story; the characters are labeled organically: the Traveller, the Officer, the Soldier, and the Condemned Man. The tactic of dehumanization pushes the reader to identify the job titles of each of these characters and what, as persons within these roles, entitles them to act under this rule-driven colony. Further, this poses the question, often considered in moral psychology, does one's role define and limit one's ethical

responsibility? For instance, I would grant it safe to say that one would expect a priest to act to higher moral standards than your average citizen because a priest's living is, one would assume, entirely focused on promoting the good and well-being of others. However, while this example is an obvious one, the responsibility and indication of how one should act becomes ambiguous when evaluating the moral implications of a role such as a nurse. One would not be far-reaching to argue under the assumption that because a nurse's chosen profession is to help and care for others, this would also translate into their everyday lives, making them superior citizens compared to the CEO who is consumed with only monetary advances. But then the question becomes, is this assumable and, moreover, fair and reasonable? Kafka's method of labeling the characters purely by their roles seems to urge the reader to consider the proposed question.

Kafka draws attention to the above question by positioning characters in situations where they are faced with morally implicating decisions, making apparent the limitations of a purely rule functioning governance. The Traveller, a declared title and role apparently meaningless outside of the context of this text, is characterized as the voice of reason and decider of fate. Taken outside of the context of the text, a traveler would adopt a role similar to a bystander—to gather information by watching and asking questions but not deeming themselves as a knowledgeable or essential person. Both a bystander and a traveler are observers in the situation and not active participants. For this reason, Kafka positions the Traveller as the protagonist who is powerful in so far that his assessment of the penal colony is most important and credibly, the most morally and ethically aware. If the above consideration is practical, that one's role leads a bystander to expect more from those involved in the situation, the Traveller assumes the equivalent; however, the Traveller's moral and ethical responsibility becomes challenged beyond just an evaluation of the penal system but also in regards to his responsibility for the Officer's death. By dehumanizing the Traveller and categorizing him in this way within the situation,

Kafka presents the ethical question of who should be more aware and influential when opposing a system of injustice, despite or considering their assumed roles.

Kafka similarly dehumanizes the Officer, as the story takes a dramatic turn when the Traveller overrides his job as just an evaluator. The Traveller states that he cannot support the apparatus despite the desperate plea of the Officer saying to him, “No... I am opposed to this procedure” (14). Without saying anything in response to the Traveller’s refusal, the Officer releases the Condemned Man from the apparatus, undresses himself, and then attaches himself to endure his once adored creation. Kafka’s choice to expose the Officer’s nakedness demonstrates willing submission to the law’s punishment. Then, as if to physically show the failure of law without morality, the apparatus breaks and kills the Officer. The death is profound on multiple accounts—the first and most apparent being the reader’s insight into Kafka’s perspective on the law. It is by no coincidence that Kafka places the law enforcer to be at the hand of the collapse of an unforgiving system. It is realistic to believe that if the Traveller did not state his disapproval of the apparatus to the Officer, the Condemned Man would reach his tragic death rather than just the usual body inscription. Instead, the Officer endures the graphic and gruesome death. A likely interpretation may be that Kafka is insinuating that this death is a symptom of the tragic nature of law under a strict law-abiding system. Further, Kafka might also wish to convey that those who enforce such mindless punishment should, in turn, undergo the abuse themselves. Kafka creates the apparatus to be a form of punishment in the most extreme sense. Having done so, the reader is more likely to decline a legal system of torture allowed by a positive law mentality and align with a more reasonable formula of the law found in natural law. This reader conclusion is enabled by Kafka’s devised character names.

Still, despite the reader agreeing with the Traveller’s decision to end the use of the apparatus, Kafka also creates doubt for the reader regarding the Traveller’s moral responsibility

for the Officer's death. The Traveller is seen as a "judge and by force of speech remains deeply implicated in the juridical spectacle of the penal colony and... its disciplinary apparatus" (Fort 118). It is to be noted that the climax of the story is reached and then resolved after the Traveller offers his opinion: "I am opposed to this procedure... You clarified the issue for me even more, but without reinforcing my decision in any way—quite the reverse" (14). Following the Traveller's verdict, the Officer demonstrates disappointment. It is in this interaction between the two that the indication of role and moral responsibility becomes evident. Kafka writes clearly of the Traveller's feeling of moral impetus to tell the truth about the apparatus. Kafka writes, "He [The Traveller] experienced too much in his life to be able to waver here. However, while The Traveller knew he must be honest with the Officer, he also demonstrates a need to console the Officer as well, as if he knew emotional turmoil would ensue due to his honesty. The Traveller then begins justifying his response to the Officer, "You clarified the issue for me even more, but without reinforcing my decision in any way—quite the reverse. I find your conviction genuinely moving, even if it cannot deter me" (14). Regardless of The Traveller's gracious acknowledgement to the Officer, The Officer made up his mind on how he will proceed and disregards the words of the Traveller by partaking in the colony's historical use of punishment; he then attaches himself to the failing apparatus. By the Officer attaching himself to the apparatus, Kafka seems to imply that the Officer fully commits to a positive law mentality. In this way, the Officer felt that perfectly enforcing the law is the only way to govern, even if it means imposing gruesome death as punishment—an idea made obvious by stating the character's identities as the Traveller and the Officer.

Further, the Traveller's response to his death, then, suggests a sense of responsibility to uphold morality, beyond just the judgment of the apparatus. As the Traveller watches the Officer succumb to his death, Kafka describes him as being "very upset" and yelling at both the Soldier

and the Condemned Man for help (18). And while it is arguable that the Traveller is simply responding as any person watching a gory death would, it is to be noted that Kafka makes no mention of the reaction of either the Soldier or Condemned Man. Moreover, the Traveller again defies a bystander role and takes control of the situation by urging both men to help in an attempt to free the Officer from his bloody death. Kafka tactically places the Traveller as both the hero and executioner by exposing the Traveller's apologetic undertones presented to the Officer preceding his death as well as his evident distress over the Officer's death. The split identity of the Traveller—hero and executioner—works as a juxtaposition of a moral identity versus an amoral identity. When the Traveller adopts the identity of a hero, saving the colony from further punishment by employing his moral compass (i.e. preserving human rights), he works as the protagonist of the story. However, when the Traveller adopts the identity of an executioner, he becomes the antagonist due his words being the implicated cause of the Officer's death. Beyond the moral responsibility aspect, this scene also provides the reader with an instance of the Traveller's moral conflict and as a result, exposes what can result from an imbalance between law and morality; the suspicion of Kafka's natural law view is acutely evident.

Yet again the Traveller's moral responsibility becomes evident when he attempts to return back home by jumping on a boat and leaves the Soldier and the Condemned Man chasing after him. As Kafka notes that both the Soldier and Condemned Man were hoping to leave with him, he positions the Traveller at the bottom of a staircase, staring at the two men running for their assumed plea to leave a land driven by unquestionable punishment and unforgiving consequences. Kafka writes:

The two men were racing down the steps in silence, for they did not dare cry out. But as they reached the bottom, the Traveller was

already in the boat...They could still have jumped into the boat, but the Traveller picked up a heavy knotted rope from the boat bottom, threatened them with it, and thus prevented them from jumping (19)

It is by no mistake that the way the Traveller prevents the two from getting onto the boat is by cautioning them with a form of physical punishment, an action that insinuates that the people within the colony are completely trained and incentivized by physical punishment. However, beyond this physical gesture, Kafka alludes to the connection between the Traveller and this barbaric colony which revolves around extreme punishment that is unlike where the Traveller came from—a clear yet unstated reason as to why he was brought by the New Commander. By taking the rope vigorously away from the Soldier and the Condemned Man it is as if he leaves his role as the penal colony's moral compass and is breaking the connection to a law without morality.

Most pressingly, Kafka exposes a natural law perspective by belittling characters enforcing positive law. This belittlement becomes clear when Kafka creates the Officer to behave in a childlike fashion. Throughout the entirety of the story, he is completely consumed by the apparatus and its use, similar to a child's attachment to their favorite toy—fascinated by all its intricate abilities. As the Officer climbs all over the apparatus and jumps around, the reader can picture, the reader can picture a child doing the same. The Officer is brash and rambunctious, insisting that the Traveller admire the apparatus: ““Just look at it [the apparatus]’ He jumped up the ladder, turned a wheel, and called down, ‘Watch out!’” (7). Additionally, the Officer seems to lack the ability to act professionally though he is in a position of power: “He had put his arm around the Traveller and laid his head on his shoulder” (11). The childlike behavior continues as the Officer makes comments like the following, “This is all the Commandant's fault” (9). The

Soldier, alongside the Officer, acts in a similar fashion and acts mindlessly unless told to carry out direct action. He behaves inappropriately: “The Soldier had ended his task of cleaning and had just shaken some rice pudding into the bowl from a tin” (11). The Soldier is unaffected by the events and instead is consumed by pudding, an action often performed by an immature child who is consumed only by things that involve him. The Soldier’s childish actions and strict adherence to the law make him less ethically aware and as a result, fail to move him to resist a positive law system only concerned about punishment; he instead allows the system to impose his actions for him. Kafka describes the Soldier only moving when the Officer signals him to move (8). Both the Soldier and Officer are characterized as simple-minded as if speaking to the likewise simple-minded nature of a legal system that is consumed by rules.

There are evident similarities between *The Trial* and “In The Penal Colony”, the most obvious similarity being the use of guilt as a common thread between both *Condemned Man* and *K.*. A purely penal system subjugates the characters to punishment without making them aware of the crime itself and they are put through extreme lengths to atone for their crimes. In *The Trial*, the protagonist *K.* is arrested as guilty without any knowledge as to what implicated his guilt. Further, *K.* is also taken through a maze-like series of events in attempts to declare himself innocent. However, the novel ends with *K.* never being able to have any information regarding his trial and moreover is presumably killed and declared guilty for a crime he was never informed of or aware of committing. A very similar case takes place “In the Penal Colony” where the *Condemned Man* is taken as guilty with no defense. While under this rule, similar to the emplaced laws in *The Trial*, guilt is assumed and “always beyond a doubt” (5). Under this mentality, though *The Trial* was a bit more forgiving and at the very least, teased *K.* with opportunity for a defense, the *Condemned Man* was decidedly disrespectful to his superior and was treated as guilty by means of the apparatus. The penal colony demonstrates absurdity, as

well as the Condemned Man, just as K. was, unaware of his sentence. The Traveller asks the Officer, “He doesn’t know his own sentence?” to which the Officer replies, “It would be useless to give him that information”. The Traveller, sensing the unfairness of this, then continues to push the Officer in his questioning: “But does he nonetheless have some general idea that he’s been condemned?” to which the Officer replies, “Not that either”. Finally, the Traveller explicitly states what is missing in the punishment process by affirming, “He must have had a chance to defend himself” (4). As the Traveller has been granted the deciding power for the penal colony and how it should proceed with punishment, Kafka uses him as a vessel to expose the irrational nature of a process dictated by just rules.

Furthermore, the reader can find instances like *The Trial’s* when observing the Condemned Man’s confusion and frustration as he attempts to put together what his awaited punishment may be. While strapped up to the elaborate machine, the Condemned Man investigates the apparatus by looking around with confused glares. The Traveller becomes horrified even further that a foreigner of the town is as equally unaware as those who are within the penal colony. Kafka writes:

One could see how with a confused gaze he also was looking for what the two gentlemen had just observed, but he didn’t succeed because he lacked the explanation. He leaned forward this way and that. He kept running his eyes over the glass again and again (6).

It is essential to note the action of the Condemned Man looking down at his punishment due to both the physical gap and knowledge gap between him and the Traveller and the Officer. Due to Kafka’s placing of the Condemned Man high above his observers, the reader is able to picture

the distance between himself and the law as well as its enforcers. *The Trial* also indicates a judging yet secretive relationship with the law. While K. and the Condemned Man are both able to see the effects of the law, however, it is essentially unreachable and incapable of granting fairness. Kafka describes the Condemned Man as “watching, but without understanding” (8). The scene indicates the improper disposition of this kind of law. By the end of the short story, The Traveller states, "the injustice of the procedure and the inhumanity of the execution was beyond doubt" (9). It is in the Traveller's judgment that Kafka presents his fundamental position of a natural law view. He offers a clear and outward disapproval of the way the penal colony carries out the law. In both *The Trial* and “In the Penal Colony” Kafka allows the readers to make inferences while still using resolved comments on the function of the law. By writing stories as identifiably absurd and appalling, the reader can do nothing more than to assume Kafka's pointed critique of the law's missing moral concepts.

Kafka presents the lurking issues in the positive law theory by exposing how organized punishment, a feature of positive law, fails due to it ignoring morality. “In the Penal Colony” narrates these issues by showing how severe a system can become if only considering how it is carried out. Moreover, what Kafka seems to want to convey to his readers is that the law is worthless unless it considers those who are abiding by it. People are innately wired to consider how their actions affect others and as a result, categorize harmful actions, in both the physical and mental sense, as wrong and non-harmful actions as right; philosophers have been studying this moral relationship for hundreds of years. For this reason, it seems only fair to utilize this engrained and precedented mentality throughout the law, as well. Kafka's perspective of the law embodies this idea and in turn has influenced legal decisions, specifically in the American court system, being used as a reference a considerable amount of time. So, while Kafka on the surface

seems to only be a sophisticated storyteller, his literary impact had far-reaching effects, inspiring the legal system and its structure all together.

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