CONTENTS

KAFKA'S INDICTMENT OF MODERN LAW

Introduction: An Outline of the Project

The Two Aims of This Book

The first half of this book is *expository*. The second half is *interpretive*.

The first half attempts to identify, categorize, and summarize all of Kafka's fiction about law and legal systems. This includes all of his published and unpublished works that deal squarely with the law as a central motif, as well those stories that might be described as law-related for dealing with subjects that indirectly touch on law, such as matters that are political, administrative, and quasi-judicial. I will refer to this corpus of texts as "Kafka's legal fiction."

It's surprising that no one has done the housekeeping task of assembling all of Kafka's legal fiction in one place. But when it comes to Kafka, the secondary literature tends to focus exclusively on one or more selected pieces of fiction chosen by a scholar to support a particular point about some specialized aspect of law, without taking account of his legal writings as a whole. My project cuts against the grain by assembling all of Kafka's legal fiction and then asserting that there is a common, central message.

In other words, I suggest that we begin anew, by laying the relevant texts on the table and examining them as a whole to see if there is a metamessage running through this body of work. To inform this effort, I also look at certain aspects of Kafka's life that influenced the fiction, such as his legal education, his work as a lawyer, his interactions with other lawyers and authorities, his pen-and-ink drawings, and his involvement in a family-owned asbestos business.

By the time the reader has finished the expository part of this book, she will have a list of all the stories that bear on law, classified in a core-and-periphery schematic in terms of how centrally they bear on the topic of law, and she will have an understanding of how these stories were informed by Kafka's life. This sets a common ground from which we can move forward to discuss whether Kafka's legal fiction contains an overarching theme or metamessage about law.

The second, interpretive part of the book sets forth my position that Kafka's legal fiction does indeed contain a single overriding theme, to wit: modern legal systems cannot make good on their stated pretensions, and worse, they often embody the opposite of their promises. Kafka's depressing message is that modern people are put in an impossible double bind, where they expect and demand their full rights under the law, only to discover that the promise is illusory and the law is empty. Their dogged insistence on getting a day in court, finding justice, and setting matters straight only leads to an interminable nightmare of horizontal shifting within a legal maze, rendering their fate absurd, farcical, and tragicomic. My interpretation is set forth in a series of "indictments"—that is, a series of distinct ways that modern law fails by its own standards.

Here we must be careful to distinguish the writer from his texts. Kafka, the *man*, was a highly competent lawyer who functioned within the legal system and championed some progressive ideals, particularly in the areas of workers' compensation, insurance reform, and treatment for soldiers with mental injuries. He was consistently promoted at the state-sponsored workers' compensation agency where he spent the majority of his adult life. He was neither a revolutionary nor a "cause lawyer" devoting his life to putting the system on trial; if anything, his personal life was rather bourgeois. But Kafka, the *writer*, was an extreme skeptic about progress in the law, and he was also silent about the emancipatory and progressive elements within modern law. It does not go too far to say that he was a legal nihilist.

I say that Kafka was a nihilist because his fiction appears to reject the more nuanced positions found among contemporary critics of modernity (for example, Jürgen Habermas, Jeffrey Alexander, and Anthony Giddens), who acknowledge that there is a dark side to modernity and modern institutions such as law, but this dark side can be offset by countervailing advancements and emancipations that are themselves reflected and facilitated by modern law itself. Kafka's fiction does not square with Habermas's notion that modernity (and by extension, modern law) is "an unfinished project," or as Alexander says, that modernity is a Janus-faced dialectic of good and evil, a struggle of reason and barbarism.[1] Kafka is far more pessimistic. He

did not write a single story where a person finds justice or is able to successfully navigate the law. When it comes to his legal fiction, we have to take seriously his admission that his work is a reflection of everything *negative* in his time but lacking in the extreme negativity that can turn the corner toward a positive program of emancipation;[2] his work is negative enough to reject any hope, but doesn't take the next step of offering any redemption. Even when we compare Kafka's writings to past legal theories that have been deemed excessively nihilistic—for example, legal realism, critical legal studies, Marxism, and deconstruction—we still discover that each of these contains a germ, however tenuous, that can point toward a countervailing positive movement in modern law. Kafka's legal fiction is more nihilistic. He does not, for example, make the claim that there is a difference between "the law on the books" and the "the law in action";[3] instead he asserts that there is no consistent law in action, period.

My own verdict on Kafka's legal fiction—set forth in the conclusion of this book—is that Kafka's take on modern law is flawed. He misses the emancipatory power of modern law and the internal dialectic of control and freedom played out in the law, which sometimes comes down on the side of freedom, emancipation, and vindication of rights. To say—as I do—that modern law has a bright side is not to take anything away from Kafka's achievement of capturing the other, darker side of modern law better than any other author who comes to mind, including Dickens, who wrote *Bleak House*, a massive novel about how a single case in probate court destroys everyone connected to it. For Dickens, at least there is a court, a judge, lawyers, and some kind of legal system; it may be slow and corrosive, but at least it exists. Kafka's characters never even make it to court.

Personally speaking, Kafka's pessimism resonates with me, especially on dark days. I have seen the underside of modern law, both in my personal life and in my professional life as a lawyer in Chicago. I have seen the frightened and crippled looks on the faces of regular people who find themselves summoned to Cook County Courthouse for a lawsuit. I have no illusions that the law is a permanent bulwark against totalitarianism or racism or anarchy, nor do I revere the judiciary or its pretenses, and I see how the law can be bent and twisted to the point of ridiculousness, making me ashamed to be a lawyer, and shooting waves of embarrassment through me when I have to stand up and explain a nonsensical rule of law to my students. This makes me a sympathetic critic of Kafka. I see where he is headed, and I often agree with him, but my considered position is that he takes nihilism to an untenable extreme.

To support my interpretation that Kafka's legal fiction is a sustained cri-

tique of modern law, I have to specify what I mean by "modern law." I devote a whole chapter to this, but for now let me say that "modern law" denotes the highly rationalized legal systems that emerged within industrialized Western societies in the nineteenth century, including the Austro-Hungarian legal system of Kafka's day. Modern law was supposed to replace the medieval and premodern legal systems built upon the divine right of kings and subject to the whims of judges. Instead of these empty traditions and superstitions, the legal system would be founded on rational laws grounded in Enlightenment assumptions about reason, truth, selfhood, and justice. Modern legal systems were supposed to guarantee basic rights within a public framework where all citizens could be fully apprised of their rights. Even if particular laws were unfair, the law as a whole could be characterized as clear, publicly available, impartial, fair, and rule-governed. This was the view of modern law that Kafka learned in law school, and it is this perspective that we still teach our law students and that our statesmen and judicial officials herald as an achievement of world-historical proportions. And—here is the catch—this is precisely the view of law held tenaciously and indignantly by the protagonists in Kafka's legal fiction, and it is this optimism that destroys them. Kafka's message is that modern persons carry these expectations to the bitter end, and the more they seek the law and demand justifications for its failures, the faster they plummet to their own death by exhaustion or violence.

Kafka's literary project was to problematize, satirize, undermine, and destabilize modern law and its apologists and flatterers, to show that modern legal systems give rise to horrible and unintended absurdities. Again and again, Kafka's legal fiction raises the question of whether modern legal systems are truly an advance over premodern systems, where people were subject to the whims of emperors, the caprices of luck, or the misty and circular machinations of oracles and priests. Modern law has its own set of problems that are just as bad. In modernity, law becomes so complicated that it is rendered unknowable and unnavigable, creating a condition of legal alienation where no one understands legal doctrine or legal procedure, rendering the law just as subjective and arbitrary as in premodern times. Kafka didn't write a single story where the legal system was clear, nor did he write a single story from the perspective of a legal insider such as a judge or a lawyer. Most of his fiction takes place in societies where the law is uncertain or nonexistent, and this fact is discovered by a person who expects the law to fulfill its promise. These are stories of disappointment without redemption.

Beneath the darkness is a strong current of black humor. Everything

that he wrote about law centers on a hapless person who carries the fatal disease of modernity: he earnestly believes the rhetoric surrounding the guarantees and protections of modern legal systems. This very belief is their undoing. In other words, they believe that there can be found a clear body of law that will be applied by an independent judiciary; they believe that the courts will be accessible; they believe that they are due a fair hearing on the merits; they believe that courts should be places of solemn order; they put their faith in lawyers and court officials; they demand a consistent and clear explanation of why they are being treated in a particular way; and they pursue their rights with relentless determination. To their shock, they find out too late that they will not have their day in court, that their paths will always meander sideways and never forward, and that what awaits them is not a legal hearing on the merits of their case but purgatory, lawlessness, or death. This is the modern predicament—we are condemned to believe in modern law, yet we constantly find it ephemeral, an ideological concept that evaporates when we need it. Law is not a Kantian regulative idea toward which we strive imperfectly, nor some Hegelian unfolding of historical spirit, nor a practical method of limiting state power; it is rather a tool of abject power in the hands of people who do not care about us. The ideal of modern law is comforting—it allows us to go about our lives until that fateful day when we are called to the law and realize that its promises are empty, its officials are self-serving, its logic is circular, and its endless procedures lead nowhere.

Kafka seems to argue that a person will suffer proportionally to the extent that he believes in the system. As we will see, his best-known short story about law, the parable "Before the Law," is about a man who wishes to enter the law and believes that it should be accessible to everyone, but his entry is prohibited by a gatekeeper, and he ends up waiting for admission until his death. He is paralyzed by his belief in the system. In Kafka's best-known novel, *The Trial*, a man is summarily examined at his home without a warrant and without specific charges being filed, then is told to appear for an examination at an attic courthouse where no judge can be found, and ends up dependent on a useless lawyer, twisted into impossible directions by alleged court officials, and ultimately executed without ever being formally charged with a crime. He propels his case forward out of earnest righteousness, but his demand for the protection of modern law merely earns him the resentment of everyone in the system. In the novel *The Castle*, a purported land surveyor enters a village ruled by a Castle bureaucracy and spends his days shuffling among subservient villagers who are alienated from the Castle. Unlike these submissive villagers, he stubbornly insists on

recognition by the Castle, until he becomes a vagrant and pariah in the village and never reaches the Castle. In stories like "The Problem of Our Laws," the people are not even sure if there is a legal system in the first place or whether it is an elaborate fiction; in stories like "The Refusal," the villagers are so accustomed to having their requests refused without explanation by a lowly official that they begin to take pleasure in the assurance that they will be denied. In the rare instances when a protagonist gets to speak at a tribunal, such as in the short story "The Stoker," he fumbles incoherently, too filled with rage to speak.

This, then, is my interpretation of Kafka's legal fiction. But the two aims of this book are conceptually independent. A reader can appreciate my expository effort while insisting that I have misread Kafka's legal fiction. I welcome disagreement. My goal is simply to turn the conversation to a more global or metaperspective on Kafka's legal writing.

A Literalist Reading

Unlike that of most scholars, my reading of Kafka is literalist. When he uses the word "law," I take him to mean "law," that is, positive law as a set of rules. Since he does not refer to particular laws of his time (say, the laws of Austro-Hungary or the Czech Republic), I do not take him to be referring to these particular laws.

This may seem hardly worth mentioning, but in fact my approach is atypical in the voluminous secondary literature on Kafka's writings on law. There are literary critics with stronger credentials than myself, who know Kafka better than I do, and they have put forth some ingenious readings where Kafka's use of the term "law" is polyvalent. In their readings, Kafka uses the term "law" to refer to religious and moral laws, or Oedipal laws, or the laws of fiction as a genre, or an indictment of bourgeois law in the Marxist sense, or as a commentary on the specific laws enacted in Austro-Hungary during Kafka's lifetime. As Jacques Derrida said of Kafka, "One does not know what kind of law is at issue—moral, judicial, political, natural, etc."[4] The polyvalence has been echoed by scholars who have catalogued a short list of approaches to Kafka: psychoanalytic, religious, literary, historical, Marxist, modernist, postmodernist, postcolonial, and a host of others.[5]

I applaud multiple readings, and I am willing to go some distance with these interpretations, but when it comes to Kafka's *legal* fiction, the literalist approach seems most reasonable for one simple reason: none of the other ways of reading his legal fiction can explain why Kafka's work remains so

vital to so many different people. Kafka's popularity demands an explanation. Why do so many people all over the world read an author who wrote in the German language a century ago? Why does Kafka's legal fiction resonate with people of different historical backgrounds, of different political bents, of different religions, different genders, and different classes? Why do those of us in the common law tradition (that is, the system of precedent and stare decisis dominant in English-speaking countries) find his work compelling, even though he practiced in a civil law system dominant in other parts of the world?

Kafka's enduring popularity can be explained only by the notion that he touches a nerve in so many diverse people because they have something in common. And that one thing is that no matter where they live, they live under a modern legal system.

We continue to be fascinated with Kafka because he exposed the empty promise of modern law, and it is this emptiness that haunts all modern persons regardless of gender, ethnicity, nationality, or religion. We will lose sight of Kafka's point if we are too reductive: for example, if we see Kafka's legal writing as a reflection solely of, say, Judaism, or read him as a critic of Austrian law, or view him solely through a psychoanalytic lens. Whatever else is going on in Kafka's legal writings, the central message is about the failures and contradictions of all modern legal systems. There is a time and place to read Kafka as using "law" in a polyvalent sense, but I think the proper logical sequence is to trace out the literal reading, and then pass to more ephemeral readings.

By reading Kafka literally we can more easily explain why judges and lawyers in America continue to use the word "Kafkaesque" to describe situations arising under our legal system. We can explain why federal appellate judges like Richard Posner immerse themselves in Kafka's texts. And we can understand why Justice Kennedy of the US Supreme Court recommends that all lawyers should read Kafka, saying, "*The Trial* is actually closer to reality than fantasy *as far as the client's perception of the system*."[6]

This quote by Justice Kennedy is a backdoor indictment of the legal system, whether he meant it or not. Look again at the quote, keeping in mind that *The Trial* is a book about a man arrested without reason, who never gets to court, has a useless lawyer, and is brutally executed. Let this sink in. A senior judge on the highest court in America is saying that *this* is how Americans view the legal system. And let's look at the numbers: by the American Bar Association's own figures, lawyers are only 0.4 percent of the population, which means that the other 99.6 percent of the population are "clients" who see the law the way that Kafka presents it—a series of dead

ends, disappointments, illegitimacies, and ruinous delays. This sets up the tragicomic dynamic of Kafka's legal fiction, where the protagonist believes that he is owed his day in court, that he is owed a rational procedure leading to a decision on the merits, and he pushes this belief until he finds the horrible truth, which is that the law is an empty promise, a dead god. These men are victims, but there is something comical in the earnestness with which they demand (and expect) their rights. We—the reader—suspect that they are insisting on rights and procedures that the system cannot deliver, and we cannot help but feel sorry for these victims even as we laugh at their meandering path toward defeat.

Popular legal fiction from genre leaders such as Scott Turow and John Grisham has one thing in common: it holds out the promise that there is some justice to be had, if not in the case at hand, then in the future. Justice may be hard to find, it may be obscured by corruption and influence peddling, but there is always some hope that the legal system can be navigated and some chance of vindicating oneself in court. In most of these novels, there is a crusader, a truth, a vindication of justice or a clear indictment of the justice system, and a courtroom drama in which the system is itself put on trial.

Kafka will have none of that. Kafka sees disappointment as central to our dilemma as modern persons. We are misled to believe that beneath the law there is legitimacy, autonomy, due process, deliberation, access, fairness, and notice—and so we expect these things. But this expectation is precisely what leads to our downfall. James Hawes captures the point in his book on Kafka:

> What makes us feel so sympathetic to Kafka's characters is that they—like us, his readers—*think* they live in a world that is run on grounds of morality and rationality, a world where there is some connection between what we *deserve* and what we *get*. They expect a mysterious bureaucracy to be accessible . . . or a court to be fair . . . or an argument to be settled by appeals to factual truth. . . . He takes us so far with his deluded heroes that we all but accept their delusions. We find ourselves, too, longing for the code to the Door of the Law, for the Absolute Acquittal, the pass to the Castle, the Father's approval, and the Emperor's message.[7]

This is what makes Kafka's legal fiction so horrifying. By a cruel twist, if we ask for the law to make itself real, we only expose its unreality, and that makes us an intolerable pariah and an outcast.

The Failures of Contemporary Law

At this point, some readers (especially in America, which is steeped in rhetoric about the superiority and integrity of our legal system) may object that Kafka's take on modern law is wildly off the mark. After all, we are repeatedly told by our public figures that we have the best legal system in the world and that we adhere strictly to the rule of law; indeed, this is our major contribution and intellectual export to other nations.

For a person who has been trained to think in such laudatory ways about our legal system, it can be difficult to read Kafka as a critic of the system as it *currently* exists. Many will grudgingly concede that Kafka's legal fiction was a prescient depiction of a dark episode of modern law in the mid-twentieth century, marked by the Nazi legal system and the Soviet show trials, but that is where Kafka's critique ends. In other words, he predicted a nightmare that came true in his corner of Europe (let us remember in this connection that many of his family members and friends died in concentration camps and his work was restricted and censored in his own country, first by the Nazis and then by the Communists), but, so this view holds, his critique no longer applies to the quotidian functioning of our American legal system. In other words, we have come through the tunnel, and Kafka's legal fiction can be relegated to a negative utopia and not a contemporary critique. This is a comforting thought, perhaps too much so. But if I am correct, Kafka's critique does not apply merely to dark episodes of the past or to extreme outbreaks of lawlessness, but also covers the ordinary injustices and disappointments that are countenanced and facilitated by contemporary law. This is why his writing is still current.

To see this point, and to reinforce why Kafka's writings remain relevant, let's look briefly at a few recent developments in modern law in America that can only be described as Kafkaesque. Please keep these in mind during your reading of this book.

Mass Arrests. In Baltimore, Maryland—in a single year—108,000 arrests were made in a city with a population of 640,000 persons.[8] The offenses included dropping a candy wrapper on the street and sitting on the steps of a relative's house.[9] Other large cities like Austin, Texas, have adopted "take no chances" policies where people can be arrested for drunk driving while having a 0.00 percent alcohol level.[10] During large (and constitutionally protected) street protests, police simply cordon off groups of protestors and arrest them, or pepper spray them for "disturbing the peace."[11] Although the US Constitution specifically allows for citizens to gather peaceably and seek redress from the government, virtually any significant protest is met

with military-level response because the Pentagon has been supplying police departments with armored vehicles, grenade launchers, shields, heavy ammunition, and even bayonets.[12]

Discretionary Stops. In cities like Chicago, the police can stop anyone at any time to fill out a "contact card" with the person's name and defining characteristics (physical description, tattoos, gang affiliations), even if there are no charges and no cause for stopping the person. In Chicago alone, the police wrote 600,000 contact cards in the first ten months of 2013 and stopped 250,000 people in the summer of 2014, according to the American Civil Liberties Union. Police insist that the information is given voluntarily because any person is free to walk away from a uniformed police officer, but it creates a pervasive sense that anyone can be stopped for any reason at any time. The information is placed into a massive database.[13] The Chicago police are now using a supercomputer to predict who will commit a crime in the future and visiting this person in the hope of preventing a *future* crime.[14]

Domestic Spying. The National Security Agency, empowered by a secret court under the Foreign Intelligence Surveillance Act, presumably acting under a mandate to provide security to Americans, has been keeping secret records of Americans' phone calls and their online activities (including online games), and when whistleblower Edward Snowden revealed this massive and unwarranted invasion of privacy, he was excoriated by elected officials and forced to defect.[15] It is now well settled that the government and the police apparatus have warrantless access to all of our communication, regardless of whether we are suspected of wrongdoing, and that the persons running this security apparatus have lied to Congress that it does not conduct warrantless spying on US citizens. President Obama referred to the secret court—where only one side is allowed to appear (namely the government)—as "transparent."[16]

Black Sites. In many cities, people are picked up by the police for alleged violations, then taken to private "black sites" where they can be held without charges, beaten, threatened, and denied access to counsel. In a single Chicago location, 7,000 persons were detained over an eleven-year period, without access to lawyers, some held in isolation, shackled, and abused.[17]

Indefinite Detentions. The National Defense Authorization Act of 2012 contains provisions allowing the government to indefinitely detain anyone "who was a part of or *substantially supported* al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."[18]

This law was challenged by journalists who were rightfully afraid that merely conducting an interview with "evildoers" might be deemed a violation of federal law and trigger indefinite detention. A federal trial judge agreed with them that the law was overbroad, but the decision was quickly appealed by the government and then reversed, reinstating the law. Experts cannot reach an agreement on whether this law would allow US citizens to be held indefinitely without a hearing merely for donating money to an organization that is (unknown to the donor) on a secret list; in federal court proceedings, the US government refused to opine as to whether the very act of journalism itself might be considered support of the enemy sufficient to trigger indefinite detention of the journalist.[19] This is no idle threat when many defendants have to wait seven years between arrest and trial,[20] while others are simply held for years—sometimes in solitary confinement—without a trial.[21]

Wiretapping. A federal appellate court held that a person could sue the government for illegal wiretapping only if the victim can prove that she was specifically wiretapped, but the list of persons who were wiretapped must remain a state secret.[22] In other words, you can sue for unconstitutional invasion of privacy only if you can establish that you were wiretapped, but you are never allowed to know if you were wiretapped except in the rare case where a person is charged with a crime that reveals the content of the wiretap; the rest of us who are wiretapped never get to know; this Catch-22 was left untouched by the Supreme Court. Similarly, the FBI maintains a "No Fly" list, but the government has no mechanism for removing an erroneously named person from the list. So a person has no way to know if she is on the list, no forum in which to appeal being placed on the list, and the Department of Homeland Security admits that the list is composed almost entirely of innocent people who have names similar to persons who truly belong on the list.[23] When a hacker broke into the database of a government contractor and found that the Federal Bureau of Investigation was fraudulently infiltrating various protest groups to fish for information tying the protestors to alleged terrorist activity, thereby mislabeling them as criminals, the hacker was sent to prison and chastised for "total lack of respect for the law."[24] Yet the hacker who showed this "disrespect" for the law by exposing the truth explained to the Court that there was no way to expose government abuse other than to go around the law. As he told the judge:

> Could I have achieved the same goals through legal means? I have tried everything from voting petitions to peaceful protest and have found that those in power do not want the truth to be exposed. . . . We

> are confronting a power structure that does not respect its own system of checks and balances, never mind the rights of its own citizens or the international community. . . . I took to the streets in protest naively believing our voices would be heard in Washington and we could stop the war. Instead, we were labeled as traitors, beaten, and arrested.[25]

Torture. In connection with the treatment of prisoners captured in the Afghanistan and Iraq wars (or rather, "conflicts"), the Department of Justice wrote a secret memorandum redefining the word "torture" to exclude any procedure commonly understood as torture—no matter how violent or gruesome—so long as the torturer subjectively believed in his own mind that he was not committing torture.[26] This redefinition allows the government to claim that it does not engage in "torture," only "enhanced interrogation." Key members of the president's inner circle held secret meetings where agents of the Central Intelligence Agency demonstrated "enhanced interrogation" techniques that would be imposed on so-called enemy combatants, a newly invented category of persons who could be held indefinitely. In this way, the United States has redefined its way out of the Geneva Convention.[27]

Authorities without Authority. Many governmental agencies now do the exact opposite of what they are supposed to do. The Comptroller of the Currency, a federal agency created to control *abuses* by banks (such as rein in excessive fees and predatory lending), promulgated new rules specifically to exempt banks from prosecution for predatory lending. Instead of protecting the customers from banks, it was protecting the banks from customers.[28] Similarly, the Environmental Protection Agency argued before the Supreme Court that it lacked the authority to regulate greenhouse gases that are destroying the environment, while it simultaneously prevented the State of California from enacting its own stringent tailpipe emissions standards.[29] Even the head of the Justice Department said that he hesitated to pursue financial crimes conducted on a massive scale because they might have a chilling effect on the economy; in other words, some banks are "too big to fail" and "too big to jail," while for regular persons, there is no hesitancy to jail.[30]

Assassinations. During President Obama's tenancy, it was revealed that he reviewed a "kill list" on "Terror Tuesday," when he authorized unmanned drone attacks in foreign countries where we are not at war, in some cases targeting US citizens who have not been charged or tried in a court of law. All persons in the "strike zone"—including US citizens and children—are

considered enemy combatants by virtue of being near the targeted person. The *judicial* determination of whether the summary execution of such people is consistent with their due process rights is deemed satisfied, according to a Justice Department memorandum, by informal internal deliberations in the *executive* branch. That is, a US citizen who is killed by an unmanned drone without any right to a hearing has received his constitutional due process if the president says so: "In other words, it's due process if the president thinks about it."[31]

Autocratic Rulings. The Supreme Court made a ruling that essentially selected a winner in the 2000 presidential election, then added a note saying that its decision is nonbinding in the future. Supreme Court decisions are by definition precedential, and this was a special exception. Similarly, presidents have gotten in the habit of appending "signing statements" to bills that they sign, announcing that they have no intention of having the executive branch enforce certain aspects of the very legislation that they are signing into law. The American Bar Association says that the use of signing statements means that "the President is effectively usurping the power of the legislative branch," essentially allowing a single person to decide which laws shall be enforced.[32]

Corporate Persons. The Supreme Court now recognizes corporations as persons with rights to free expression and virtually unlimited political contributions. And business law, at the highest levels, is now a dizzying mixture of tax avoidance schemes and paper entities, many of which are allowed to, for example, change their residency to Ireland to avoid massive tax liabilities, while natural persons cannot. Meanwhile, in a return to Dickens's England, a person can be jailed for failure to pay a debt, creating a specter of debtors' prisons in modern America.[33]

Lack of Access. The average person currently earns roughly $25 per hour before taxes, while the median hourly rate for a lawyer is $350 per hour, and this gulf means that most Americans cannot afford a lawyer.[34] It is true that lawyers will take certain types of cases on a contingency basis (that is, paid from the recovery, if any), but most cases have to be paid as the case progresses. Most ordinary matters involving divorce, contract disputes, and criminal defense require cash payment, which is why some surveys show that nearly 80 percent of parties are without lawyers in family court cases, a statistic (among others) that prompted the *Atlantic* to ask, "Is there such a thing as an affordable lawyer?" and to assert, "One of the most perplexing facts about our perplexing legal market is its failure to provide affordable services for just about anyone but rich people and corporations."[35] But with a majority of Americans holding little or no savings, legal representation

for the bulk of people is limited to legal aid, which has been severely cut by state and federal governments. Most people in America cannot afford a lawyer, and if they find one, they will have to go deep into debt to have the most basic representation. Speaking personally, I have walked through the Cook County Courthouse in Chicago and been stopped by poor people who pull at my sleeve and shove documents into my face, pleading, "Help me!" The much-heralded notions of "justice for all" and "equal justice under the law" are belied by vast and burgeoning income inequalities. This forces litigants to either refrain from bringing a claim, risk bankruptcy to hire a lawyer, or throw themselves into a maze that they have no way to navigate. And make no mistake, it is a maze. Each judicial circuit and each court is a fiefdom, with multiple departments, branches, separate forms, local rules, timetables, and publication requirements. These are puzzling enough for lawyers and simply impossible for laypeople. The massive delays make a mockery of the legal system. On this point, the Supreme Court recently had to engage in preposterous verbal gymnastics to redefine the word "trial" to assert that the constitutional right to a "speedy trial" allowed a fourteen-month delay between a man's trial and his sentencing, presumably even if his sentence was less than fourteen months.[36] In cases like this and many others, the law is bent in ridiculous directions to fit the woefully inadequate legal system, instead of being used as a sword to fix the system.

The Incarceration Apparatus. America has 5 percent of the world population but 25 percent of its prisoners. It has an incarceration rate five to ten times higher than other Western democracies. According to the latest available statistics from the Department of Justice, one in thirty-five Americans is in prison, in jail, on probation, or on parole.[37] There are now more people under "correctional supervision" in America than were in the Gulag Archipelago under Stalin.[38] Even *Time* magazine pointed out that the State of California has built one college campus versus twenty-one prisons in the last thirty-five years, forcing a journalist for the mainstream publication to conclude, "The results are gruesome at every level. We are creating a vast prisoner underclass in this country at huge expense, increasingly unable to function in normal society."[39]

This Modern Dream

It would be easy to multiply further examples, but what is the point? The American legal system is riddled with problems that cut against the promises of liberty, freedom, common welfare, public safety, and the right to be left alone. Instead we find secret government memoranda, il-

licit wiretapping, illogical and subjective definitions of ordinary terms, blatant assassination of innocent persons, government agencies that act in diametric opposition to their mandates, courts and presidents proclaiming their own decisions nonbinding, a business system that virtually no one can comprehend, lawyers who people cannot afford, courts that take forever to reach, a president who instructs the executive branch not to enforce the laws that he signs, and a runaway police apparatus, all sitting atop an economic system where lawyers are overpriced and inaccessible. And all of this is on top of a legal system where the content of the law is tilted toward the powerful economic and political forces who can lobby the lawmakers, so that even if a person can get to court on a simple contract dispute, there is a strong likelihood that the applicable law will have been influenced against her by corporate lobbyists.

Here is a quote, and I want the reader to pause for a moment and speculate on who said it: "The whole system of justice in America is broken. The entire legal system is largely structured to be labyrinthine, inaccessible, and unusable."[40]

Who said this—a rebel, an outlaw, a convict, a psychopath?

No. It's from Harvard Law School's Professor Laurence Tribe, who taught President Obama, who clerked at the US Supreme Court, who has argued dozens of cases before the Supreme Court, who had Supreme Court justices as his assistants when they were law students, and who served as senior counselor to the US Department of Justice. If this reasonable man—a highly educated oracle of the law and a consummate *insider*—says that the legal system is broken, then something must be drastically wrong.

Another way of saying this is that the law fails on its own terms. Not according to some inherent standard of natural law, or some idealized vision of law drawn from an abstract concept of human essence, but from its own promises. Internally, it cannot live up to itself.

This way of looking at the law, namely as a failure, is anathema to what lawyers, law students, judges, and legal scholars have been taught. We tend to see the legal system from the perspective of insiders who know what is going on: those who enact laws, represent clients, decide cases, and participate in the system. The iconography of the system papers over its contradictions; there is a certain awe-inspiring feeling from massive marbled courthouses and judges in robes. Yet the genius of Kafka (who was, as we shall see, a legal insider) was to describe the legal system from the perspective of the people on the losing end, that is, those who are outside the system. His message is that if we are to understand the law, we cannot restrict ourselves to an internal perspective where the law is deemed *legitimate*, but

we have to see the law from the outsider perspective as *delegitimized*. This means that Kafka is a realist, in the sense that he depicts how the law appears to outsiders, or as Anaïs Nin said to her critics, "How can one spend the length of a novel making something real which appears unreal to the central character? . . . I am writing not about objective reality, which is photographic, but as people see and *feel* reality, *their* reality."[41] Similarly, Kafka's writing about law is often phantasmagoric, because he is describing how people feel when caught in our legal system, which is often a hallucinatory sense of bewilderment, desperation, and absurdity, and in that sense he is a realist no matter how strange his fiction seems.

In *The Concept of Law*, often hailed as the preeminent work of legal philosophy in the twentieth century, H. L. A. Hart tried to isolate the necessary and sufficient conditions for a legal system to exist, and he posed the question of whether the term "legal system" could properly be applied to a situation where a tiny contingent of insiders understands the law and sees it as legitimate while the vast majority see it is illegitimate and hostile, a kind of colonial situation but within a single country. He acknowledges that such a system would be undesirable and unstable because the people who are subject to the law do not share the internal perspective toward it, and they see the law as if it were a colonial imposition; in other words, they do not share the sense of legitimacy, self-rule, and autonomy that the insiders feel. But he concludes lugubriously that such a two-tiered system nevertheless satisfies his minimum standard of a "legal system"—namely that there is some group of insiders, however small, who believe in the system and have the power to enforce it. But then he adds an important proviso often ignored by legal scholars who have pored over his work—namely that such a "legal system" is fit only for a nation of sheep.[42]

I would submit that this is pretty close to the situation we have in America: a small handful of persons and entities control the legal apparatus through money and political power, and they tell us how wonderful it is, and most people believe this rhetoric until they put it to the test, at which point they find out that the system is hostile, alien, and illegitimate.

And this is precisely what Kafka depicts. Kafka's protagonists believe that the law should be legitimate, that is, grounded in basic notions of justice and due process. They seem to be functioning fine until they are thrust into contact with the legal system and decide to push the system to justify itself, to force the judges to appear, to force the lawyers and gatekeepers to explain the legal procedures, to explain the reasons for the bureaucratic foul-ups and scheduling errors. The protagonists soon find that the system cannot justify itself; it can only use raw power to overcome the questioner.

The system that promises to invoke power only after the application of reason and procedure is ultimately ungrounded and reduced to the arbitrary power that it purports to replace.

Here we are reminded of Job, who was punished by God on a dare from Satan, and who pleaded with God to show himself and explain the imposition of such misfortune on a virtuous and innocent man. When God finally appears in response to Job's pleadings (the only time this happens in the entire Bible), God tells Job that the entire matter is beyond Job's limited comprehension and that he should be chastened for having the temerity to even request a reason. That is, Job's question "Why?" is answered by God, "Because I have the power, and I don't have to tell you whether I have a reason." Some critics have seen in this parable a victory for Job, in that he at least provoked a response from God; others, myself included, don't see how this is an improvement for Job, for now not only is he afflicted, but he learns that the reason for the affliction is arbitrary and unknowable.[43]

The truth of modern law—that it is empty—always comes too late. Kafka's protagonists often die at the point of realization. In "Before the Law," a man dies of old age while waiting for permission to enter the law from a gatekeeper who is held in check by other gatekeepers; in *The Trial*, the defendant is executed without a trial "like a dog"; in "In The Penal Colony," the penal apparatus allows a criminal to learn of his crime only after the sentence is inscribed on his body with needles; in "The Problem of Our Laws," the common people are not even sure whether there is a legal system; and in *The Castle*, the protagonist is forever trying to get official recognition of his rights but can never obtain a meeting with the authorities. The breaking point in all of these stories is the juncture where justifications break down. The system runs on fictions and false promises and complicities, and so any individual who asks for justification is punished ruthlessly. And despite this disappointment in the reality of modern law, we still carry the expectations of the Enlightenment that we are a government of laws instead of men, and that behind the law is reason and justice. Perhaps this illusion is what allows us to function. Modern law is a dream we all have to dream together.