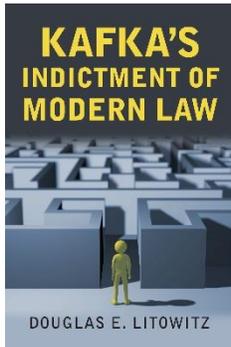


BOOK REVIEW



KAFKA'S INDICTMENT OF MODERN LAW

by Douglas E. Litowitz

University Press of Kansas. 208 pp. 2017

Aha! The perfect person has written the perfect book for which many of us, lo these many years, have been waiting. Douglas E. Litowitz, who has a Ph.D. in philosophy, and who is also a law professor and practicing attorney, has capped a longtime interest in Franz Kafka by dissecting the gloomy writer/lawyer's fiction and sharing his findings and analysis with us. In the end, he formulates, as you can tell from the title, a thesis with regard to Kafka's overall view of the law.

The book is highly accessible (he first summarizes the essential stories where law is the focus, and then offers his interpretations), a pleasure to read, and animated throughout by the author's intimate engagement with the subject, sense of humor, and healthy cynicism. On the other hand, it will have helped if the reader listened carefully back during Political Science 101. In lieu of that bygone effort, resort to Wikipedia for refreshers about Weber and Hegel may well be required.

Kafka (1883-1924) is best known for the short story, *The Metamorphosis* (feckless salesman turns into a beetle) and the novella *The Trial* (feckless (and innocent) bank clerk arrested, harassed, and executed, never having learned of the charges against him). I can still see the AP English students in high school carrying around their exotic-looking copies.

These works, and others as well, depict unfortunate protagonists trapped by their circumstances and/or stymied by an inscrutable and intransigent bureaucracy. For this reason, the phrase "Kafkaesque," a favorite of journalists and other provocateurs, has come to mean, in the words of one lawyer/commentator, "the enforcement of rules of procedure to the point of irrationality... the conversion of the simple into the complex the inexorable bureaucratic legal process grinding the helpless individual the irrational combined with staying power.... the nightmare become real.... statutes, rules, codes, and regulations that are a tangle of prolixity ... the law [in short] overwhelming all reason in its relentless devotion to rationality."¹

Interestingly, Litowitz does not focus on *The Trial* as much as he does Kafka's lesser known novel, *The Castle*. There, the protagonist is K., a surveyor who has purportedly been summoned for a job by the governmental leaders of a remote town. The seat of government is the "castle" of the title, and the unfortunate K. spends the entire book seeking to gain admission to the same to establish his credentials and commence his work. If *The Trial* is the classic depiction of an innocent victim railroaded – well, *killed* – by an impersonal and arbitrary judicial system, *The Castle* is the consummate depiction of frustration with incomprehensible and inaccessible bureaucracy. To this writer, *The Trial* has always seemed like a nightmare (I know that's a cliché), whereas *The Castle* seems like an epic, surreal long dream (we've all had one), the principal feature of which is utter confounding of one's intentions.

¹ Jacob A. Stein, *Kafkaesque*, THE WASHINGTON LAWYER, p.48 (January 2001).



By examining these works, and several of Kafka's short stories and parables, Litowitz is convinced that Kafka was in essence a nihilist who thought the promise of law – specifically “modern law” – a complete failure. In his view, Kafka was communicating this view, that is, an indictment, via his legal fiction.

Litowitz, importantly, uses the phrase “modern law” to refer to the 19th century idea that law, instead of being grounded in superstition, religion, or tradition, is in fact grounded (or should be grounded), in reason:

“[M]odern 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 based 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 law was supposed to guarantee basic rights within a public framework where all citizens could be fairly 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....

Kafka, he says, was convinced via his own experience that these noble suppositions were untrue. Litowitz, indeed, discerns no fewer than five counts of this indictment. Modern law:

1. has come unmoored from any normative (rule-based) grounding and has become self-justifying. The underlying purposes and moral bases of the law are in fact “lost in a haze” of procedural and technical rule “fetishism.”
2. is “inherently dystopian.” While the law in the present day is supposed to be accessible (after all, we are all said to be charged with knowledge of the same), law in fact “is a solipsistic universe ruled by a few putative insiders who don't realize that they too are actually outsiders because the law and the legal apparatus are empty; they are guardians of an empty tomb....”
3. purportedly provides due process before an arrest, and punishment after a trial, but this becomes “hideously inverted such that the presumption of guilt is dominant, and punishment is arbitrary yet inevitable.”
4. “fails to accept the ambiguity of texts.” While law is supposed to be accessible, in fact it requires interpretation “so that the ostensible clarity of law is based on a faulty concept of language....”
5. “falls back on laughable rituals and appeals to authority.” Law in the modern

era, Kafka is said to have believed, “devolves into a joke, a humorous charade that belies its sanctimonious rituals and self-congratulatory arrogance, which are an attempt to cover up its deficiencies.”

Litowitz devotes a chapter to each of these points. His discussions in this regard are not merely historical and academic. To the contrary, the author acts as social critic and is persuaded that Kafka’s critique is not only accurate but well-reflected in current conditions. Consider, he asks us, the legal dishonesties that led prisoners to be sent to Guantanamo; the twisting of law that permitted our government to engage in the heretofore foresworn practice of torture; and the profiling of individuals – namely African-Americans – that makes them suspects even in lieu of any wrongdoing. Litowitz himself, however, is no nihilist. Indeed, he faults Kafka for not giving modern law *some* credit for its aspirations and examples of success.

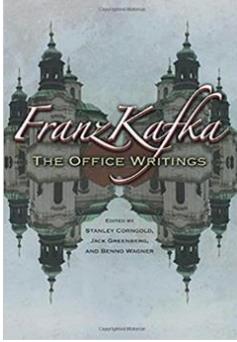
As for us.

It is no shock that some have accused the workers’ compensation system of being Kafkaesque. The system is supposed to be simple, but only the most intrepid injured worker would dare try to represent himself. Meanwhile, the protagonist in virtually all claims is a worker who maxed out his education with a high school diploma and who, pitted against a resourceful insurance company and its clever attorneys, often does not understand the intricacies of the law. And in Pennsylvania, we have had “denial” forms that *accept* claims and a rule (unlike any other state) that the signed report of the injured worker’s doctor is impermissible hearsay – even if the physician was selected by the employer – and cannot, by itself, be considered by the judge.²



The accusation, however, is largely unjustified – an individual’s encounter with bureaucracy, governmental or otherwise, may always be attended by frustration. Yet, in our field we are especially at risk of the Kafkaesque accusation because Kafka himself was a lawyer who spent his entire career in none other than the workers’ compensation field. To be specific, Kafka was employed at the Kingdom of Bohemia (later Czech Republic) state institute that provided insurance (like Ohio and Washington state) to employers to cover them for the risks of employee work injuries and deaths. While one may have heard that Kafka was a “claims adjuster,” such a characterization of his work is inaccurate in the extreme. His key duties – at which he excelled – involved such things as industrial risk assessment and safety and the handling of employer classification disputes. He seems to have been a cross between a Bureau of Workers’ Compensation lawyer and a Rating Bureau official. Kafka, in undertaking this high-level work, was not some oppressed Bartleby-the-Scrivener type. Indeed, Litowitz reports that his salary, in today’s dollars, was roughly \$80,000.00.

² The worker must, instead, at his own expense, make the physician available for cross-examination at the hearing or at a trial deposition. The typical cost of a deposition in Pittsburgh is \$3,000.00.



The author, in any event, is persuaded that some of the scenarios that Kafka created for his fiction were inspired at least in part by the encounters he experienced in his job. His opinion in this latter regard is corroborated by yet another book, *Franz Kafka: The Office Writings*,³ which compares Kafka's preserved legal memoranda to his fiction.

So, is Pennsylvania workers' compensation fairly described as Kafkaesque? Not, at least, in one sense, and not in the manner which is a major theme of Litowitz. He points out that Kafka, convinced that the law is inaccessible, "did not write a single story where a person finds justice or is able to successfully navigate the law." In fact, as another reviewer has noted, it is correct that Kafka's characters "never even make it to court.... Where was the judge [which the feckless protagonist has] never seen?"⁴

Well, with our statute's mandate that every party filing a petition be in front of a judge within thirty-five days of his or her request, that anxiety does not seem to apply. Indeed, in a remarkable irony, a critique of the Pennsylvania system has been that the worker sees the judge *too often*, obliged to "chase downtown" in the series of hearings that unfolds after this first encounter.

So, in Pennsylvania, the claimant *does indeed* make it to court and gets to see the judge. However, until the poor devil of a workman can submit his doctor's medical report, the "Kafkaesque" charge may nevertheless be merited.

David B. Torrey
June 6, 2018

³ STANLEY CORNGOLD, JACK GREENBERG & BENINO WAGNER, EDs., *FRANK KAFKA: THE OFFICE WRITINGS* (Princeton University Press 2009).

⁴ Francisco Unger, "Justice Delayed, Justice Denied," Review of Douglas E. Litowitz, *Kafka's Indictment of Modern Law*, *TIMES LITERARY SUPPLEMENT*, p.17 (April 6, 2018).