

**AN EXAMINATION INTO THE INFLUENCE OF FRANZ KAFKA ON  
AMERICAN JURISPRUDENCE**

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This paper seeks to explore and explain some of the key ways in which judicial opinions in the United States cite the works of the 20th century author Franz Kafka. A Westlaw search shows that the name “Franz Kafka” appears in 54 federal and state court opinions. “Kafkaesque” is used in 363 federal and state court opinions. “The Trial” appears in 207 cases in the same paragraph as “Kafka.”

There are two principal contexts in which Kafka is used in judicial opinions. It should be noted that these contexts often blend together and are not necessarily distinguishable. The first context involves any deprivation of due process. In such cases, Kafka’s novel *The Trial* is cited, too, and a circumstance of the main character, Joseph K., is usually compared analogously to the situation of the individual who is deprived of due process. These cases may involve police or government abuse of an individual’s civil rights, or a violation of the rules of court.

The term “Kafkaesque,” in the second context, is used to illustrate a scenario in which a government rule, or rules at issue, is needlessly complex to the point of being illogical. These situations can involve an individual overwhelmed by a web of government regulations, such as an immigrant trying to avoid deportation.<sup>2</sup> “Kafkaesque” is most frequently used to describe arbitrary use of government power, and can be used to characterize an argument as illogical.

These two contexts can blend together, because when a person is deprived of due process, as in the case of Joseph K. in *The Trial*, it may also be “Kafkaesque” in the sense that the individual is incapable of defending himself against an arbitrary and overwhelming government. The term “Kafkaesque” is also defined as “of Kafka,” “or relating to his work.”<sup>3</sup> Therefore, the circumstance of Joseph K. is by definition, “Kafkaesque.”

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<sup>2</sup> *Singh v. Reno*, (1999) 182 F. 3d 504, 510 (7th Cir.)

<sup>3</sup> “Kafkaesque.” Merriam-Webster Online Dictionary. 2008. Merriam-Webster Online. 9 November 2008. <<http://www.merriam-webster.com/dictionary/Kafkaesque>>

### The Use of *The Trial*

In *The Trial*,<sup>4</sup> the protagonist, Joseph K., is arrested one morning without warning and without being informed of his crime. Throughout the story, K., although allowed to go about his normal routine, attempts in vain to defend himself. His trial and all related proceedings take place in secret without his participation, and the more he seeks to learn about his case, the more confounded he becomes. He is faced with a senselessly complex, farcical legal system in which he is forced to confront an endless number of low-ranking bureaucrats, none of whom are able to inform him of his crime. Throughout, he assumes that his arrest is a mistake because he has not committed a crime. However, his trial moves forward with an unstoppable momentum. In one of the more famous episodes, K. is wandering throughout a large tenement house hopelessly searching for the courtroom in which his “initial inquiry” is to take place. When he finds the courtroom, the Examining Magistrate is so uninformed that he believes K. to be a house painter. The story culminates with K. being taken away by two executioners, led to a quarry, and put to death. At no point in the story is he informed of his crime.

*The Trial* is one of the most analyzed works of 20th century literature. The story and its author are unique in many aspects. Notably, Kafka did not complete *The Trial*; its chapters were arranged posthumously by Kafka’s friend, Max Brod.<sup>5</sup> Kafka was a German-educated, secular Jew who lived in the Czech Province of the Austro-Hungarian Empire.<sup>6</sup> Kafka was educated in the law and worked for a state-run insurance institute in the area of risk-assessment.<sup>7</sup> His writing style, described by literary critics as concise and unpretentious, invites a wide array of interpretations.<sup>8</sup>

*The Trial* and other works of Kafka are seen by some critics as anticipating the Nazi regime and the horror of Gestapo arrests.<sup>9</sup> The circumstance of Joseph K. is also easily compared to the sham trials carried out by any number of totalitarian regimes. Other critics see the trial of Joseph K. as being reflective of the guilt that Kafka felt in his own life for cutting off his engagement with his fiancée, as well his struggles as a writer.<sup>10</sup> For some judges in modern

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<sup>4</sup> Franz Kafka, *The Trial* (first published 1925, 1998 ed).

<sup>5</sup> Angel Flores and Homer Swander, *Franz Kafka Today* (1977). p. 127.

<sup>6</sup> Meno Spann, *Franz Kafka*, (1976). p. 17.

<sup>7</sup> George Dargo, ‘Reclaiming Franz Kafka, Doctor of Jurisprudence’ (2007) 45 *Brandeis L.J.* 495, 496.

<sup>8</sup> Angel Flores and Homer Swander, *Franz Kafka Today* (1977). p. 145.

<sup>9</sup> Meno Spann, *Franz Kafka*, (1976). p. 98.

<sup>10</sup> Stanely Corngold, *Franz Kafka The Necessity of Form* (1988). p. 239-241.

American jurisprudence, *The Trial* serves as a compelling example of how a corrupt judicial system can confound and overwhelm a helpless defendant.

*The Trial* is often used by Judges to give effect to opinions of cases in which individuals are victimized by government. In *B.B. v. Department of Children and Family Services*,<sup>11</sup> two children were removed from the custody of their mother after the death of a sibling. The mother filed a demand for a trial on the dependency proceeding, but the trial was denied indefinitely pending the investigation into the death by the Sheriff's Office, which had admitted that its investigation was at a stalemate.<sup>12</sup> The situation of the mother was worsened by the denial of her discovery request for information pertaining to the death of her child, on the grounds that it pertained to an ongoing criminal investigation.<sup>13</sup>

The Court described the case as a “tragic Kafkaesque scenario,” where a mother’s children were taken away without her being afforded a trial or given an opportunity to examine the evidence held against her.<sup>14</sup> It quoted the following passage from *The Trial*, which describes the nature of the proceeding against Joseph K.:

“In no other Court was legal assistance so necessary. For the proceedings were not only kept secret from the general public, but from the accused as well. Of course only so far as this was possible, but it had proved possible to a very great extent. For even the accused had no access to the Court records, and to guess from the course of an interrogation what documents the Court had up its sleeve was very difficult, particularly for an accused person, who was himself implicated and had all sorts of worries to distract him.”<sup>15</sup>

The Court is able to draw upon the horror that K. faces as a result of being kept in the dark from the charges and evidence held against him. K.’s ‘trial’ is the hellish ordeal of being an accused living with the threat of conviction, imprisonment or worse for no stated reason.<sup>16</sup>

In *In re J.M.*, a woman was involuntarily committed to a psychiatric care hospital on the basis of a defective warrant.<sup>17</sup> A court then ordered her held for

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<sup>11</sup> (1999) 731 So. 2d 30, 32-33 (Fla. 4th DCA)

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 32.

<sup>14</sup> *Id.* at 33.

<sup>15</sup> *Id.*

<sup>16</sup> Robert B. Kershaw, ‘Kafka’s The Trial: An Enigma Encountered’ (2008) 41 DEC Md. B.J. 66, 70.

<sup>17</sup> (1996) 454 Pa. Super. 276, (PA. Super. Ct.).

an additional 90 days without conducting a hearing on the evidence that supported the extended commitment.<sup>18</sup> The Appellate Court held that her due process rights were violated when the commitment was extended without an independent review of the evidence being conducted by the trial Court.<sup>19</sup>

The Court stated that “to her, the experience of the literary figure, Joseph K. became very real.”

“You can't go out, you are arrested.” “So it seems,” said K. “But what for?” he added. “We are not authorized to tell you that. Go to your room and wait there. Proceedings have been instituted against you, and you will be informed of everything in due course.”<sup>20</sup>

The Court was able to use the arrest of Joseph K. analogously to the situation of the women whose involuntary commitment was being extended without an independent review of the evidence supporting the commitment. Both K. and the woman were deprived of their freedom by an external, impersonal force in a seemingly unorthodox manner.

In *The Trial*, K. is visited in his room on the morning of his thirtieth birthday by two warders, and—still in bed—is told he is under arrest.<sup>21</sup> He is puzzled by the event because the warders refuse to identify themselves as public officials, and initially believes the matter to be a joke.<sup>22</sup> However, the arrest marks the end of his personal freedom.

In *Rafeedie v. INS*, the U.S. Immigration and Naturalisation Service (INS) used a “special summary proceeding” to exclude a permanent resident from re-entry into the United States.<sup>23</sup> The Attorney General relied upon confidential information and issued an order of exclusion and deportation without allowing Rafeedie an opportunity to cross-examine witnesses, to consider the government's evidence, or to appeal the decision.<sup>24</sup> The INS invoked the summary procedure because of allegations that the Rafeedie was a high-ranking member of a terrorist organization. Because the process did not allow him to confront the INS or the evidence against him directly, the District Court

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<sup>18</sup> *Id.* at 289.

<sup>19</sup> *Id.* at 289 - 290.

<sup>20</sup> *Id.* at 290.

<sup>21</sup> Franz Kafka, *The Trial* (first published 1925, 1998 ed). P. 4.

<sup>22</sup> *Id.*

<sup>23</sup> (1988) 688 F.Supp. 729 (D.D.C.)

<sup>24</sup> *Id.* at 736.

granted Rafeedie a preliminary injunction that barred the government from employing the summary proceeding.<sup>25</sup>

The Appellate Court affirmed the decision of the lower Court and remarked that Rafeedie, like Joseph K. in *The Trial*, was “in the untenable position of being forced to prove that he was not a terrorist in face of the Government's confidential information: It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.”<sup>26</sup>

The Court in the following case cites to *The Trial*, in the context of a situation in which a discovery rule has been violated, to invoke the unjustness of a situation in which a person is unable to adequately present their case because they have not been allowed to see the evidence held against them. In *Bulen v. Navajo Refining Co., Inc.*, the defendants knowingly violated the rules of discovery by withholding requested documents and falsifying discovery responses.<sup>27</sup> The Court drew upon *The Trial* in order to explain the importance of the rules of discovery:

“In Franz Kafka's short story *The Trial*, the main character K. was arrested for a crime. See Franz Kafka, *The Trial* (Willa & Edwin Muirtran., Schocken Books 1984) (1914). K. did not know of what crime he was accused. K.'s struggle, at least in part, was a result of the fact that he could not discover the necessary information to defend his case. During K.'s first interrogation, the following exchange occurred:

Emboldened by the mere sound of his own cool words in that strange assembly, K. simply snatched the notebook from the Examining Magistrate and held it up with the tips of his fingers, as if it might soil his hands, by one of the middle pages so that the closely written, blotted, yellow-edged leaves hung down on either side. “These are the Examining Magistrate's records,” he said, letting it fall on the table again. “You can continue reading it at your ease, Herr Examining Magistrate, I really don't fear this ledger of yours *though it is a closed book to me ....*” (emphasis added).<sup>28</sup>

“K.'s attempt to defend himself is, as the Appellants describe it, a “nightmare” because K. is prohibited from accessing information about his case. This is precisely the nightmare discovery rules were developed to alleviate. The purpose of the Montana Rules of Civil Procedure is to “secure the just, speedy, and inexpensive determination of every action.” If anyone in this case is guilty

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<sup>25</sup> Id.

<sup>26</sup> 880 F. 2d 506, 516.

<sup>27</sup> (2000) 301 Mont. 195, 196 (Mont.)

<sup>28</sup> Id.

of creating a *Kafkaesque* nightmare, it was the Defendants, who refused to comply with the Rules of Civil Procedure and refused to disclose information necessary for the proper preparation of the Plaintiffs' case."<sup>29</sup>

In the scene in which the Court quotes, K. becomes enraged by the Magistrate's inability to provide him with any information regarding his charge. By examining *The Trial* under the theory of reification, under which a concept is treated as an object, the entire legal process that K. is subjected to is mechanical and therefore incapable of taking into account his protestations.<sup>30</sup> When K. presses the Magistrate to answer some of his questions, the Magistrate responds "you are laboring under a great delusion. These gentleman here and myself have no standing whatever in this affair of yours, indeed we know hardly anything about it, I can't even confirm that you are charged with an offense, or rather I don't know whether you are. You are under arrest, certainly, more than that I do not know."<sup>31</sup> The Magistrate's statement demonstrates a blind obedience to authority.<sup>32</sup>

Courts have also found the lack of presence or inadequacy of an interpreter at a criminal trial worthy of comparison to Joseph K. In *Mendiola v. State*, the defendant claimed that he should be granted a new trial because he did not have a competent interpreter during his initial trial.<sup>33</sup> The Court determined that his interpreter was adequate, and the dissenting judge saw fit to explain the importance of a translator for a criminal defendant:

"A defendant who is subjected to ineffective translation must "guess" at what is going on around him. An atmosphere is created where the defendant is hindered in effectively assisting his own defense, a milieu worthy of Kafka but unworthy of this Court's imprimatur:

Naturally, therefore, the records of the case, were inaccessible to the accused and his counsel, consequently one did not know with any precision, what charges to meet; accordingly it could be only by *pure chance* that it contained really relevant matter. Evidence could be *guessed* at from the interrogations. In such circumstances the Defense was naturally in a very ticklish and difficult position." *Id.* at 166.

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<sup>29</sup> *Id.*

<sup>30</sup> Patrick J. Glen, 'The Destruction and Reification of the Law in Kafka's "Before the Law" and *The Trial*,' (2007) 17 S. Cal. Interdisc. L.J. 23, 59-60.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> (1995) 924 S.W. 2d 157 (Tex.App.-Corpus Christi).

Likewise in *U.S. v. Carrion*, the Court stated that “the right to an interpreter rests most fundamentally, however, on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.”<sup>34</sup>

Many courts draw upon the lack of accessibility K. had to his trial. Some critics believe that K.’s role as an outsider is a manifestation of Kafka’s status in his own life.<sup>35</sup>

Kafka was a German-educated secular Jew who lived in the Czech Province of the Austro-Hungarian Empire.<sup>36</sup> He did not fully identify with any of the groups—Germans, Czechs, or Jews.<sup>37</sup> Similar to Kafka, K. is an outsider to his trial. He is ignorant of the charges leveled against him, and he is informed that nobody understands the court structure.<sup>38</sup>

*The Trial* has been cited to where there is the appearance of arbitrariness on the part of the court. In *Mediterranean Const. Co. v. State Farm Fire & Cas. Co.*, the Judge’s clerk telephoned both parties on the morning of their hearing to inform them that the movant’s motion for summary judgment had been granted and there would be no hearing.<sup>39</sup> Despite this, counsel for both sides appeared, but were denied permission to argue the merits, object to the evidence, or respond to the other side’s papers.<sup>40</sup> On appeal, the Appellate Court determined that denying oral argument creates the appearance of impropriety:

“It is in the nightmare world of Franz Kafka’s *The Trial* where Josef K. was left wondering, “Where was the Judge whom he had never seen?”<sup>41</sup>

Similarly in *Rose v. Superior Court*, the lower Court denied the defendant an evidentiary hearing on his motion for ineffective assistance of counsel.<sup>42</sup> The Appellate Court determined that the lower Court had merely skimmed over the defendant’s petition so quickly that could not have given it proper consideration.<sup>43</sup> It stated that: [the defendant] Rose, like Kafka’s condemned prisoner, Josef K., has been left to wonder, “Where was the Judge whom he had never seen?”<sup>44</sup>

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<sup>34</sup> (1973) 488 F. 2d 12, 14 (1st Cir.).

<sup>35</sup> Douglas Litowitz, ‘Franz Kafka’s Outsider Jurisprudence,’ (2002) 27 Law and Soc. Inquiry 103.

<sup>36</sup> *Id.* at 104.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 129.

<sup>39</sup> (1998) 66 Cal.App.4th 257, 261 (Cal. 4th DCA).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 785.

<sup>42</sup> (2000) 92 Cal. Rptr. 2d 313 (Cal. App. 2 Dist.).

<sup>43</sup> *Id.* at 321.

<sup>44</sup> *Id.*

The excerpt which the Court uses, “where was the Judge whom he had never seen?” is taken from the final scene of the story, in which K. is executed. Some critics believe that K.’s trial was symbolic of Kafka’s engagement to Felice Bauer.<sup>45</sup> Kafka felt that Bauer stood in the way of the life he wanted, to spend as much time writing as he pleased.<sup>46</sup> Kafka’s trial, it follows, was his engagement to Bauer, and the only relief from the sense of being on trial would come when the death sentence was passed.<sup>47</sup>

Kafka has also been cited when explaining the limits of government intrusion against the individual’s right to privacy. In *Creamer v. Raffety*, at issue was a City’s blanket policy of conducting both a strip search and a cavity search on any person arrested and held overnight in the City’s jail.<sup>48</sup> In holding that the scope of such a policy was overly broad, the Court explained that:

“[Such a policy] creates a Kafkaesque scheme whereby Mr. Creamer or any other misdemeanant could suffer a massive intrusion upon the right to privacy in the future at the hands of law enforcement personnel stretching the limits of their discretion to release and acting on little or no justification.”<sup>49</sup> “In *The Trial*, Franz Kafka described the archetypal encounter of the ordinary mortal with the capriciousness and irrationality of modern bureaucracies.”<sup>50</sup>

Some critics suggest that Kafka’s depiction of a world controlled by a cruel and arbitrary force is traced to his relationship with his domineering father.<sup>51</sup> On one occasion, Kafka describes in a journal entry, the traumatic childhood experience of being carried out on to the balcony by his father and being locked there for hours.<sup>52</sup> Kafka explained the experience as emblematic of his relationship with his father.<sup>53</sup> The act relates to Kafka’s work as an arbitrary punishment at the hands of an unchallengeable authority.<sup>54</sup>

In *State v. Palamia*, the defendant was detained illegally and held for 18 hours without being told of the reason for his arrest, and without being allowed to contact anybody.<sup>55</sup> The police later discovered that the defendant had an

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<sup>45</sup> Ronald Hayman, *Kafka: A Biography* (1981). P. 183-184.

<sup>46</sup> *Id.* at 184.

<sup>47</sup> *Id.*

<sup>48</sup> (1984) 145 Ariz. 34, (Ariz. 2nd Div. App.).

<sup>49</sup> *Id.* at 920-921.

<sup>50</sup> *Id.* at 921.

<sup>51</sup> *Id.* at 184.

<sup>52</sup> Ernst Pawell, *The Nightmare of Reason: A Life of Franz Kafka* (1997). P. 18.

<sup>53</sup> *Id.*

<sup>54</sup> Ronald Hayman, *Kafka: A Biography* (1981). P. 184

<sup>55</sup> (1983) 124 N.H. 333 (N.H.).

outstanding warrant.<sup>56</sup> The Court stated that the probable cause established by the outstanding warrant was the product of the illegal arrest, and “it is antithetical to the principles of a democratic society to seize someone and hold him for 18 hours, while shopping around to see if a reason exists for the detention. *See* Franz Kafka, *The Trial* (1937).”<sup>57</sup>

### The Use of the Term: “Kafkaesque”

Kafka’s vision of a threatening and pointless bureaucracy was first encapsulated in the English word “Kafkaesque,” in 1946.<sup>58</sup> *Merriam Webster* defines “Kafkaesque” as meaning “of, relating to, or suggestive of Franz Kafka or his writings; *especially*: having a nightmarishly complex, bizarre, or illogical quality.”<sup>59</sup> *Encarta* defines it as “overly complex in seemingly pointless, impersonal, and often disturbing way.”<sup>60</sup> Kafka biographer Jeremy Adler states that the adjective “Kafkaesque” “denotes nightmarish situations, an all-pervasive bureaucracy, looming totalitarianism, infinite hierarchies, and a deep existential angst.”<sup>61</sup>

Some scholars suggest that the complex and illogical world Kafka creates was influenced by his employment in a semi-governmental insurance company, the Workers’ Accident Insurance Institute, in the heavily-bureaucratic Austro-Hungarian Empire.<sup>62</sup> The company was created by broad and ambitious social legislation aimed at regulating relations between capital and labor, as well as the relationship between the State and the worker.<sup>63</sup> The legislation resulted in part, in corruption and inefficiency.<sup>64</sup>

Kafka’s principal task at the institute was the processing of employee appeals against the assignment of their firms to certain risk categories, legal information for enterprises, and measures for the prevention of accidents.<sup>65</sup> His work gave

<sup>56</sup> *Id.* at 336.

<sup>57</sup> *Id.* at 338.

<sup>58</sup> Klaus Wagenbach and Ritchie Robertson and Ewald Osers, *Kafka, Life and Times* (2003). P. x

<sup>59</sup> “Kafkaesque.” *Merriam-Webster Online Dictionary*. 2008. Merriam-Webster Online. 9 November 2008. <<http://www.merriam-webster.com/dictionary/Kafkaesque>>

<sup>60</sup> “Kafkaesque.” *Encarta World English Dictionary*. 2007. Microsoft Corporation. 9 November 2008. <[http://encarta.msn.com/dictionary\\_/kafkaesque.html](http://encarta.msn.com/dictionary_/kafkaesque.html)>

<sup>61</sup> Jeremy Adler, *Franz Kafka* (2001). P. 4.

<sup>62</sup> Klaus Wagenbach and Ritchie Robertson and Ewald Osers, *Kafka, Life and Times* (2003). P. ix

<sup>63</sup> Ernst Pawell, *The Nightmare of Reason: A Life of Franz Kafka* (1997). P. 183.

<sup>64</sup> *Id.*

<sup>65</sup> Klaus Wagenbach and Ritchie Robertson and Ewald Osers, *Kafka, Life and Times* (2003). P. 66.

him exposure to questions concerning government, administration, bureaucracy, and the law—themes that are present in *The Trial*.<sup>66</sup>

Some critics suggest that Kafka's prose was developed by writing reports for The Worker's Accident Institute.<sup>67</sup> The precise and distinctive style present in his fictional works is also present in his official reports regarding industrial accidents, injuries and compensation claims.<sup>68</sup> His descriptive precision and awareness of consequences are attributes of both his professional work and his writing.<sup>69</sup> The period in which Kafka worked at the institute was also his most prolific period as a writer.<sup>70</sup>

Kafka was not immune to run-ins with the institute's management despite being highly regarded among fellow employees.<sup>71</sup> Kafka, on one occasion, filed a thorough and well drawn out complaint with the company board of directors (of which there were more than 20), seeking to obtain higher wages for the institute's draftsmen.<sup>72</sup> Such an experience may have helped Kafka depict bureaucracies in his works.

Judges often use the term "Kafkaesque" to paint a bureaucracy, often within a government agency, as arbitrary and oppressive. In *Hunt v. Indiana Family and Social Services*, the owner of a day care center's license was revoked on the basis of an unsubstantiated charge of child abuse.<sup>73</sup> The Agency refused to remove the charge from Hunt's record despite an Administrative Law Judge's order against the Agency.<sup>74</sup> An official with the Agency explained that he did not believe the administrative law judge's decision to control whether the record would be expunged, and instead relied upon the decision of the social worker who determined the charge of abuse to be valid.<sup>75</sup> The Court stated that, "given these circumstances, the Court can understand Mrs. Hunt's feelings of being caught in a *Kafkaesque* nightmare of unchecked bureaucratic power-if the facts are as the Hunts allege."<sup>76</sup>

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<sup>66</sup> Jeremy Adler, *Franz Kafka* (2001). . P. 48-49.

<sup>67</sup> George Dargo, 'Reclaiming Franz Kafka, Doctor of Jurisprudence' (2007) 45 *Brandeis L.J.* 495, 496.

<sup>68</sup> *Id.* at 510.

<sup>69</sup> *Id.* at 514.

<sup>70</sup> *Id.* at 509.

<sup>71</sup> Ernst Pawell, *The Nightmare of Reason: A Life of Franz Kafka* (1997). P. 188-189.

<sup>72</sup> Reiner Stach, *Kafka, The Decisive Years* (2005). P. 284.

<sup>73</sup> (2007) 2007 WL 2349626 (S.D. Ind.)

<sup>74</sup> *Id.* at 1.

<sup>75</sup> *Id.* at 4.

<sup>76</sup> *Id.* at 5.

In *Abdel-Mubti v. Ashcroft*, the U.S. Immigration and Customs Enforcement Agency (ICE) held the petitioner, an alien, in detention for two years pending a final order of deportation.<sup>77</sup> The Agency claimed that it was holding the petitioner because he failed to cooperate with the INS' efforts to remove him.<sup>78</sup> However, the record established that the petitioner had provided the Agency with all the necessary documentation needed to deport him.<sup>79</sup> The Court stated that:

“The record establishes that Petitioner provided ICE with his birth certificate, including his parents' names, and his region of origin, and made substantial efforts to obtain travel documents. Yet in a *Kafkaesque* exchange that began with Petitioner's November 25, 2002 custody review and culminated with a post-hearing request that he complete a form that was completed and submitted to Israel on November 20, 1975, ICE persists in its demand that he produce something more. While ICE is empowered to prosecute and detain those who withhold information, absent some reasonable basis for its apparent suspicion that Petitioner is lying or withholding information, the law does not authorize ICE to continue Petitioner's detention until he supplies answers it likes.”<sup>80</sup>

In *Ngwanyia v. Ashcroft*, the petitioners, immigrants who had attained the status of “asylees,” brought action asserting, in part, that the government had failed to provide the them with the documentation necessary to allow them to work while in the United States.<sup>81</sup> Federal law provided that the government must authorize the asylees to engage in employment, and to provide the asylees with the documentation to reflect that authorization.<sup>82</sup> An employer could not hire the asylees without the documentation, which was in the form of a simple government document.<sup>83</sup> The Court was not persuaded by the government's responses to the petitioner's claims, and stated:

“In the face of these simple statutory commands, Defendants have established procedures that verge on the *Kafkaesque*. Defendants provide “no one particular form of an endorsement of employment authorization.” Rather, the type of document an asylee receives-and the length of time for which it is valid-

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<sup>77</sup> (2004) 314 F.Supp.2d 418 (M.D.PA.)

<sup>78</sup> *Id.* at 427.

<sup>79</sup> *Id.* at 430.

<sup>80</sup> *Id.*

<sup>81</sup> (2004) 302 F.Supp. 2d 1076, (D.Minn.).

<sup>82</sup> *Id.* at 1084.

<sup>83</sup> *Id.* at 1097.

depends upon the manner in which the asylee was granted asylum and the district office handling the asylee's request.”<sup>84</sup>

In *Family and Social Services Administration v. Boise*, Boise petitioned for a reclassification of his position with the Division of Family and Children that would provide an increase in compensation.<sup>85</sup> The petition was denied by a Hearing Officer, who ruled that the classification of the petitioner's job status was *not* based solely on caseload size, in spite of facts that clearly showed the contrary.<sup>86</sup> The Appellate Court stated that the Respondents are “...exercising uncontrolled discretion in the application of indeterminable standards to facts the relevance of which would be unknown to them. Such actions are so classically arbitrary and capricious as to be *Kafkaesque*.”<sup>87</sup>

In *Kurnik v. Department of Health & Rehabilitative Services*, the a disabled person was denied reimbursement of medication by the Department of Health & Rehabilitative Services after a hearing officer determined that she had not timely applied for assistance.<sup>88</sup> Mismanagement on the part of the agency prevented the petitioner's properly filed application from being processed.<sup>89</sup> The Appellate Court stated that “appellant's *Kafkaesque* experience with that agency was characterized by no information, misinformation, unanswered letters, unreturned phone calls, unfulfilled promises, and classic bureaucratic runaround the sum total of which amounted almost to studied indifference if not purposeful neglect on the part of the agency.”<sup>90</sup>

In *H & V Engineering Inc., v. Idaho State Board of Professional Engineers and Land Surveyors*, the State Board indefinitely revoked the licenses of the petitioners, Engineers, for “misconduct in the practice of engineering” which constituted “gross negligence.”<sup>91</sup> The petitioners claimed that the action of the board violated their right to due process because the board did not adequately warn them as to what conduct would subject them to discipline.<sup>92</sup> The Court determined that the grounds upon which the petitioners were disciplined were unconstitutionally vague because nothing in the statutory definition, board rules

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<sup>84</sup> *Id.* at 1085

<sup>85</sup> (1996) 667 N.E. 2d 753 (Ind. App.).

<sup>86</sup> *Id.* at 755.

<sup>87</sup> *Id.* at 756.

<sup>88</sup> (1995) 661 So. 2d 914 (Fla. 1st DCA).

<sup>89</sup> *Id.* at 916.

<sup>90</sup> *Id.* at 917.

<sup>91</sup> (1987) 113 Idaho 646, 647 (Idaho).

<sup>92</sup> *Id.* at 649.

or regulations warned the engineers that their acts would subject them to discipline.<sup>93</sup>

The Court explained that “disciplinary standards cannot be kept secret from the professionals or the courts. In this case, the phantom of unknown standards robbed the engineers of notice as to what conduct was proscribed. As stated in another tribunal: “This *Kafkaesque* chain of secrecy is not what the Due Process Clause contemplates.”<sup>94</sup>

In *Meadows v. Lewis*, three workers who suffered injuries during employment filed a petition for a writ of mandamus seeking to force the State Worker’s Compensation Commissioner to rule on the compensability of a claim within the time frame mandated by law, pay disability awards, and pay attorney’s fees.<sup>95</sup> The Court ruled for the petitioners on all counts, stating:

“Attorneys for the petitioners in this case were forced by bureaucratic indifference to lead their clients on a *Kafkaesque* journey through a labyrinth of administrative bungling. Petitions were processed and hearings scheduled for matters upon which determinations had already been made, consequently resulting in proceedings at which only the hearing examiner appeared. Claims were periodically opened, closed, reopened, reclosed, etc., for no cognizable reason other than the commissioner’s repeated justification of “clerical error.”<sup>96</sup>

Courts often use “Kafkaesque” to characterize an argument as illogical, or one that would lead to an absurd result. In *Petties v. District of Columbia*, a case arising under the Individuals with Disabilities in Education Act, the school district argued that it was not required to give the parents prior notice of the decision to send their children to a different school, because such a move “did not constitute a change in child placement or program” under the Act.<sup>97</sup> The school board then contended that the parents could not challenge the school board’s placement of the children because under the Act, a parent must have notice of the placement in order to make a challenge.<sup>98</sup>

The Court concluded that the Act provides the parent the right to challenge any proposed changes in placement in advance of the change taking place and a right to argue that the changes proposed do in fact effect fundamental changes

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<sup>93</sup> *Id.* at 650.

<sup>94</sup> *Id.* at 651.

<sup>95</sup> (1983) 172 W.VA. 457, 468-469 (W.VA.).

<sup>96</sup> *Id.* at 476.

<sup>97</sup> (2002) 238 F.Supp. 2d. 114, 124 (D.D.C.).

<sup>98</sup> *Id.*

in the student's educational program.<sup>99</sup> The Court stated that accepting the School Board's premise would lead to an absurd result.<sup>100</sup> "It is disingenuous—indeed, *Kafkaesque* for the defendants to argue that the burden is on the parents first to identify a fundamental change in a student's educational program in order to raise the claim that there has been a change in placement even though DCPS has not provided notice to the parents of the nature of such proposed change."<sup>101</sup>

In *Williams v. Sullivan*, the petitioner brought suit after his petition for social security benefits was denied.<sup>102</sup> The Secretary of Health and Human Services claimed that the decision was simply the dismissal of the petitioner's request for a hearing, and therefore not subject to judicial review under the Social Security Act.<sup>103</sup> The petitioner claimed that his case was subject to judicial review because the action by the Secretary amounted to the reopening of a previous case.<sup>104</sup> However, the Secretary did not believe the action to be a final decision and refused to turn over the transcript which would help determine the nature of the action.<sup>105</sup>

The Court objected to the reasoning of the Secretary: "This Court finds such *Kafkaesque* reasoning remarkable. If one of the purposes of the act administered by the Secretary is to fairly award benefits actually due beneficiaries, it would seem that he would endeavor to review and make available such information as would be reasonably necessary to make such determinations possible. Additionally, government lawyers have a duty to seek justice and to develop a full and fair record."<sup>106</sup>

### **Incorrect Uses of Kafka**

Attorneys and Judges often cite to Kafka incorrectly, in an effort to dramatise an argument. In *U.S. v. Jackson*, a criminal defendant argued that the prison sentence for the offense he was charged with should be based on the amount of cocaine found on his person at the time of his arrest, as opposed to the amount of cocaine he was convicted of distributing.<sup>107</sup> Jackson argued that using the aggregate amount of cocaine he was charged with possessing is

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> (2001) 779 F.Supp. 471 (W.D. Mo.).

<sup>103</sup> *Id.* at 472.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> (1997) 121 F. 3d. 316, 321 (7th Cir.).

speculative and that basing a prison term on speculation is *Kafkaesque*.<sup>108</sup> The Court stated that “Jackson is hardly in the position of Joseph K. It is clear what offense Jackson was charged with and Jackson was given an opportunity to defend himself against those charges.”<sup>109</sup>

One author has written that the liberal use of Kafka in judicial opinions has distorted the meaning of Kafka’s works,<sup>110</sup> and may have the consequence of rendering the term meaningless.<sup>111</sup> In a law review essay, Brian Pinaire comments that Kafka has been used to describe the rush of court proceedings to execute prisoners.<sup>112</sup> This use stands in contrast to the conventional understanding of *Kafkaesque* to describe the slowness and delay of bureaucracy.<sup>113</sup>

Pinaire also notes that Monica Lewinsky’s attorney described the lengthy interrogation of his client by FBI agents as *Kafkaesque*.<sup>114</sup> This description is inappropriate because the interrogations that take place in *The Trial*, in contrast to the standard interrogation conducted by the FBI, are distinct in that they were not conducted in a standard fashion, but were marked by a secretive and obtuse quality.<sup>115</sup>

## Conclusion

*The Trial* is more than just a work of literature, but has served as a powerful warning of the dangers of arbitrary government. Kafka was able to create a compelling and terrifying world in which the government could, seemingly at random, single its citizens out for punishment in the name of the law. This is even more remarkable because Kafka, unlike Orwell, for example, was not political and did not intend for his stories to be parables.<sup>116</sup>

What makes *The Trial* all the more influential is that it is not set in any single nation, during any particular period of time. Its main character is honest, hardworking, and mostly nondescript. He is easily related to by the reader. The

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Brian Pinaire, “The Essential Kafka: Definition, Distention, and Dilution in Legal Rhetoric,” (2007) 46 U. Louisville L. Rev. 113, 151.

<sup>111</sup> *Id.* at 152.

<sup>112</sup> *Id.* at 148.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 147.

<sup>115</sup> *Id.*

<sup>116</sup> Julian Preece, *The Cambridge Companion to Kafka* (2002). P. 131-132.

story's theme transcends cultures and time. The trial of K. is as relevant today as it was when Kafka was alive.

Judges seem to have latched on to Kafka in order to demonstrate what our law is supposed to prevent. Due process and fairness are designed to prevent government over-reaching and abuse. The world of Joseph K. is an unimaginable nightmare. Judges are able to use that nightmare in order to make the point that government transparency and fairness are fundamental in our society. Without these fundamental protections, what is to prevent the average citizen from being victimized by the state?