

Fourth Edition

BEFORE THE LAW

AN INTRODUCTION TO THE LEGAL PROCESS

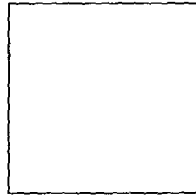


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An Introduction to the Legal Process

FOURTH EDITION



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Preface

Before the Law: An Introduction to the Legal Process is an introduction to the liberal arts study of law. Its aim is to develop inquisitive, intellectual capacities in the reader. The book contains varied material taken from many sources, ranging from court opinions through sociological, psychological, and anthropological analyses of legal phenomena, to historical and philosophical approaches to law. The book also includes literary views of law in selections from fiction and poetry.

Just as the contents of the book are varied, so are its applications. Although the Table of Contents displays an arrangement primarily oriented toward institutional structures and functions, the materials are susceptible to many other arrangements. A historical or political approach, for example, might result in an entirely different arrangement, perhaps one built to take advantage of current events. A systems approach might focus on legal processes, and a sociological approach on legal actors — with a variety of possible orderings of the readings under either approach. The editors encourage teachers to experiment with the book's contents to take advantage of individual interests and expertise. We hope that the index may facilitate such experimentation.

This fourth edition of *Before the Law* contains a substantially increased array of editorial comment at the start of each chapter and section. Some conclusive comments are also provided. These comments spur the reader to think critically about the selections, to compare selections with one another, and to reflect on larger issues spanning several selections. In keeping with the aim of a broad, nondoctrinaire approach, these comments are written with an eye toward preserving the open-textured quality of the book, while nonetheless guiding and orient-

ing the reader to the existing arrangement of materials. In this way, the themes of the text as a whole are developed without an overly didactic approach.

CHANGES IN THE FOURTH EDITION

In addition to expanded editorial comments, the fourth edition offers a completely new chapter on the rapidly emerging field of nonadversary conflict resolution, with articles and case studies that focus on the essential aspects of this element in American legal culture. Other chapters have been revised, updated, and reorganized to reflect new developments and experience gained in using the previous editions.

Chapter One "An Overview of Legal Theory" provides a survey of some of the major explanations of law and its purposes, and includes illustrative cases and materials for testing these sometimes contradictory versions of legal reality. Chapter Two "The Police" includes new readings on the history of the exclusionary rule, the discretionary powers of police officers, and the role of the police in modern society. Chapter Three "The Legal Profession and the Legal System" has been revised to include a greater emphasis on lawyer-client interactions, the changing gender balance in the legal profession, and the relationships between social hierarchies, legal education, and lawyer specialization. Chapter Four "Juries and Community Participation in the Legal Process" includes substantial new material relating jury nullification to civil disobedience, and adds social science research data on the effect of jury deliberation rules. The materials on jury selection are updated, and a case is included dealing with drug screening as a form of trial without jury. Chapter Five "Conflict Resolution" is the new chapter on dispute

resolution. Chapter Six "Images of Law" has been extensively revised to sharpen the focus on rules and reason, and state and society. New material has been added on the relation of law to economic power, and on the role of force involved in law enforcement. A concluding editorial comment draws together the varied materials of the book into an overview of major themes.

DISTINCTIVE FEATURES

One key pedagogical feature of the book is the manner in which the arrangement of readings provokes questioning and discussion and precludes simplistic conclusions to difficult issues. Our intention is to juxtapose selections in such a way as to demonstrate the open-ended quality of law and legal knowledge. There is never any attempt to reduce an area of law to "black letter" answers. Law is demonstrated as a continually changing, multifaceted phenomenon, responding to social, political, and economic forces, and evolving in different ways in different cultures and historical eras.

This thought-provoking quality of the book's editorial structure is reinforced by notes, questions, and short excerpts after each major reading. These provide suggestions for contemplation and discussion, as well as elaborations on particular points. As in previous editions, references for additional reading are provided at the conclusion of each chapter.

In short, this book supports a problem-solving, or inquiry-method, approach to teaching about law. Whether the book is supplemented by films, presentations, or other readings, or is the sole item in the syllabus, *Before the Law* pro-

vides the basis for exploring legal issues as a facet of liberal arts education.

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J.J.B.
E.K.
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J.R.

Introduction

Before the Law: An Introduction to the Legal Process is an unusual textbook. It does not pretend to be the “last word” on the subject. Instead, it raises questions and leaves many topics open-ended. *Before the Law* is not written in linear fashion from beginning to end. Instead, it presents an array of perspectives, any of which may be the start of a discussion leading to other readings.

This book is intended to inspire its readers to think. To this end, the materials and their arrangement are provocative. They criticize accepted ideas, raise questions about values, and provide glimpses into the difficult choices underlying the everyday operation and historical development of the legal system. What one writer or one case may assert is set next to a different assertion by another author or case. The result is that the book reads like a dialogue rather than a monologue. Each selection is presented as part of a discussion, even if its author has written it as though its facts are unquestionable.

The editors of this book regard law as an ongoing process in society. Law itself may speak with the authority of the state, but its meaning and content are as changeable as the political, social, and economic forces of the society. Any reader who comes to this book with expectations of finding legal answers to legal questions — such as “When can the police arrest?” or “What is the liability of the manufacturer for injury to the consumer?” — will probably be disappointed, although there are selections that deal with such specific questions and answers. But the reader who comes to this book hoping to understand the nature and functions of law in society will probably be satisfied. For this is a book in *legal studies*, designed to reach those who are interested in law, with or without a pressing legal problem or the intention to make a career in law.

This book is therefore not simply a legal text. More than being a book *in* law, it is a book *about* law. It is designed to encourage a variety of approaches to the study of law: political, sociological, anthropological, historical, literary, and philosophical. All of these facets are represented in readings throughout the chapters. Some selections are written by famous authors, and many readings come from works by scholars who are recognized as experts in their fields. A few selections are excerpted from popular magazines. The legal materials include court decisions and law review articles. But whatever their sources, the readings are always arranged to present aspects of law in the broad context of culture and

history. No legal issue is presented only as a technical rule to be memorized. Rather, each issue is shown as part of a process of law operating in society.

To help you reach for these broad perspectives, we have provided comments before and sometimes after each chapter and section. These editors' comments describe the major themes in the readings, and help orient and guide you. In addition, we have included many notes and questions specifically relating to the selections. These notes include suggestions to prompt discussion and contemplation, and may also provide short excerpts about particular points. We encourage you to use the notes and questions in working with the ideas presented in the main selections.

The comments, notes, and questions provide a basis for you to criticize, understand, and discuss each reading by itself and in conjunction with other readings. It is important to remember, however, that the readings may contain issues other than those pointed out by the editors. Our approach is to provide many starting points and connecting themes, and to prompt your own curiosity and intelligence to be a guide to further inquiry.

A list of Suggested Additional Readings is appended to each chapter. These are meant to be useful to readers who wish to pursue further the major ideas raised in the chapter. Since bibliographical information is provided for each reading in the book, including excerpts in the notes and questions, readers interested in a fuller review of the original sources can look them up at their library. You are encouraged to use the Contents and the Index to seek additional information on a topic, and to find further correlations among selections.

This is the beginning of the book. From here you may go to any other part of it. But first, you may wish to read the Foreword to Chapter One, which follows this Introduction. In the Foreword you will find the source of the book's title in a parable told by a character in a novel by Franz Kafka. The parable itself is written as a teaching about law, about the confusion and contradiction that seems to exist within and around it. We do not know what specific legal question was troubling the man in the story, but we are forced to see the trouble he has in finding a solution to his question.

The Foreword explores the meaning of the parable in a way that demonstrates how this book works: raising questions, suggesting answers, exploring alternatives, and ultimately leaving the final answer open. Like Kafka's protagonist, you may be left with a melancholy feeling after reading this. Perhaps you too would rather have simple answers to the questions you ask about law. On the other hand, you may react to this story as you would to a dream: its logical meaning eludes you, but the power of its imagery inspires much thinking and prods you to further inquiry.

If you are the type of reader who wants to know how the book ends before you really start, you may wish also to look at the Conclusion to Chapter Six. There you will find an overview of the central philosophical themes — about human nature and the nature of society — that run like threads through the fabric of this book. You will not find a conclusion that tells you “who dunnit,” but a conclusion that tells you how it is possible to go on with the study of law even when that study is more difficult and troubling than you had expected.

Foreword

Before the Law *Franz Kafka*

"Before the Law stands a doorkeeper on guard. To this doorkeeper there comes a man from the country who begs for admittance to the Law. But the doorkeeper says that he cannot admit the man at the moment. The man, on reflection, asks if he will be allowed, then, to enter later. 'It is possible,' answers the doorkeeper, 'but not at this moment.' Since the door leading into the Law stands open as usual and the doorkeeper steps to one side, the man bends down to peer through the entrance. When the doorkeeper sees that, he laughs and says: 'If you are so strongly tempted, try to get in without my permission. But note that I am powerful. And I am only the lowest doorkeeper. From hall to hall keepers stand at every door, one more powerful than the other. Even the third of these has an aspect that even I cannot bear to look at.' These are difficulties which the man from the country has not expected to meet; the Law, he thinks, should be accessible to every man and at all times, but when he looks more closely at the doorkeeper in his furred robe, with his huge pointed nose and long, thin, Tartar beard, he

decides that he had better wait until he gets permission to enter. The doorkeeper gives him a stool and lets him sit down at the side of the door. There he sits waiting for days and years. He makes many attempts to be allowed in and wearies the doorkeeper with his importunity. The doorkeeper often engages him in brief conversation, asking him about his home and about other matters, but the questions are put quite impersonally, as great men put questions, and always conclude with the statement that the man cannot be allowed to enter yet. The man, who has equipped himself with many things for his journey, parts with all he has, however valuable, in the hope of bribing the doorkeeper. The doorkeeper accepts it all, saying, however, as he takes each gift: 'I take this only to keep you from feeling that you have left something undone.' During all these long years the man watches the doorkeeper almost incessantly. He forgets about the other doorkeepers, and this one seems to him the only barrier between himself and the Law. In the first years he curses his evil fate aloud; later, as he grows old, he only mutters to himself. He grows childish, and since in his prolonged watch he has learned to know even the fleas in the doorkeeper's fur collar, he begs the very fleas to help him and to persuade the doorkeeper to change his mind. Finally his eyes grow dim and he does not know whether the world is really darkening around him or whether his eyes are only deceiving him. But in the darkness he can now perceive a radiance that streams immortally from the door of the Law. Now his life is drawing to a close. Before he dies, all that he has experienced during the whole time of his sojourn condenses in his mind into one

From *The Trial* by Franz Kafka, translated by Willa and Edwin Muir. Copyright 1937, © 1956 and renewed 1965 by Alfred A. Knopf, Inc. Reprinted by permission of the publisher.

Franz Kafka (1883–1924) was born in Prague, Czechoslovakia, where he lived and practiced law until his death of tuberculosis. As his diaries reflect, he sometimes found his work as a lawyer incompatible with his art, but there is no doubt that law, from its imposing architecture down to its sometimes overwhelming effects on the average person, permeated all his writings. The parable "Before the Law" was not published during his lifetime; it was part of his unfinished novel, *The Trial*.—ED.

question, which he has never yet put to the doorkeeper. He beckons the doorkeeper, since he can no longer raise his stiffening body. The doorkeeper has to bend far down to hear him, for the difference in size between them has increased very much to the man's disadvantage. 'What do you want to know now?' asks the doorkeeper, 'you are insatiable.' 'Everyone strives to attain the Law,' answers the man, 'how does it come about, then, that in all these years no one has come seeking admittance but me?' The doorkeeper perceives that the man is at the end of his strength and that his hearing is failing, so he bellows in his ear: 'No one but you could gain admittance through this door, since this door was intended only for you. I am now going to shut it.'

Notes and Questions

1. The parable is both an old and an odd form of education. Parables have been extensively used for instructional purposes in both the Old and New Testaments, not to mention their use in Middle and Far Eastern religions. What makes the parable so rich as

a teaching-learning device is our inability to reduce the parable to a single point, message, or slogan. Both teachers and students are left in doubt, even after having studied the parable for some time.

The parable has other unique features as well. It cannot be dismissed as mere abstraction or as consummate vagueness that leads nowhere. By the time we might be inclined to dismiss the parable, we have become hooked. Our minds struggle to find the meaning that is at once at hand and escaping us. Each line of the parable considered separately is intelligible, but the totality slips away. One more reading might suffice, we think. Well, not quite. Perhaps a third, and so on. We can allow ourselves multiple readings, because the parable is so short and each time through we seem to gain something.

Before going further, tell what effect the parable produces in you. Are you frustrated, angry, or otherwise disturbed by the story? If so, what lies behind such unwanted feelings?

What is Kafka telling you about law? Has he drawn a pleasant or an unpleasant picture? In what settings, legal or otherwise, might his lessons be applicable?



Kafka follows the parable of the man from the country and the doorkeeper with a discussion of the parable between a priest and a character named simply K. In doing so, Kafka gives us as much to think about as he resolves. Impishly, but like a great teacher, he both helps us and opens new questions at the same time.

Dialogue Between a Priest and K. *Franz Kafka*

"So the doorkeeper deluded the man," said K. immediately, strongly attracted by the story.

"Don't be too hasty," said the priest, "don't

take over an opinion without testing it. I have told you the story in the very words of the scriptures. There's no mention of delusion in it."

"But it's clear enough," said K., "and your first interpretation of it was quite right. The doorkeeper gave the message of salvation to the man only when it could no longer help him."

"He was not asked the question any earlier," said the priest, "and you must consider,

too, that he was only a doorkeeper, and as such he fulfilled his duty."

"What makes you think he fulfilled his duty?" asked K. "He didn't fulfill it. His duty might have been to keep all strangers away, but this man, for whom the door was intended, should have been let in."

"You have not enough respect for the written word and you are altering the story," said the priest. "The story contains two important statements made by the doorkeeper about admission to the Law, one at the beginning, the other at the end. The first statement is: that he cannot admit the man at the moment, and the other is: that this door was intended only for the man. But there is no contradiction. The first statement, on the contrary, even implies the second. One could almost say that in suggesting to the man the possibility of future admittance the doorkeeper is exceeding his duty. At that moment his apparent duty is only to refuse admittance, and indeed many commentators are surprised that the suggestion should be made at all, since the doorkeeper appears to be a precisian with a stern regard for duty. He does not once leave his post during these many years, and he does not shut the door until the very last minute; he is conscious of the importance of his office, for he says: 'I am powerful'; he is respectful to his superiors, for he says: 'I am only the lowest doorkeeper'; he is not garrulous, for during all these years he puts only what are called 'impersonal questions'; he is not to be bribed, for he says in accepting a gift: 'I take this only to keep you from feeling that you have left something undone'; where his duty is concerned he is to be moved neither by pity nor rage, for we are told that the man 'wearied the doorkeeper with his importunity'; and finally even his external appearance hints at a pedantic character, the large, pointed nose and the long, thin, black Tartar beard. Could one imagine a more faithful doorkeeper? Yet the doorkeeper has other elements in his character which are likely to advantage anyone seeking admittance and which make it comprehensible enough that he should somewhat exceed his duty in suggesting the possibility of future admittance. For it cannot be de-

nied that he is a little simple-minded and consequently a little conceited. Take the statements he makes about his power and the power of the other doorkeepers and their dreadful aspect which even he cannot bear to see — I hold that these statements may be true enough, but that the way in which he brings them out shows that his perceptions are confused by simpleness of mind and conceit. The commentators note in this connection: 'The right perception of any matter and a misunderstanding of the same matter do not wholly exclude each other.' One must at any rate assume that such simpleness and conceit, however sparingly indicated, are likely to weaken his defense of the door; they are breaches in the character of the doorkeeper. To this must be added the fact that the doorkeeper seems to be a friendly creature by nature, he is by no means always on his official dignity. In the very first moments he allows himself the jest of inviting the man to enter in spite of the strictly maintained veto against entry; then he does not, for instance, send the man away, but gives him, as we are told, a stool and lets him sit down beside the door. The patience with which he endures the man's appeals during so many years, the brief conversations, the acceptance of the gifts, the politeness with which he allows the man to curse loudly in his presence the fate for which he himself is responsible — all this lets us deduce certain motions of sympathy. Not every doorkeeper would have acted thus. And finally, in answer to a gesture of the man's he stoops low down to give him the chance of putting a last question. Nothing but mild impatience — the doorkeeper knows that this is the end of it all — is discernible in the words: 'You are insatiable.' Some push this mode of interpretation even further and hold that these words express a kind of friendly admiration, though not without a hint of condescension. At any rate the figure of the doorkeeper can be said to come out very differently from what you fancied."

"You have studied the story more exactly and for a longer time than I have," said K. They were both silent for a little while. Then K. said: "So you think the man was not deluded?"

"Don't misunderstand me," said the priest, "I am only showing you the various opinions concerning that point. You must not pay too much attention to them. The scriptures are unalterable and the comments often enough merely express the commentator's bewilderment. In this case there even exists an interpretation which claims that the deluded person is really the doorkeeper."

"That's a far-fetched interpretation," said K. "On what is it based?"

"It is based," answered the priest, "on the simple-mindedness of the doorkeeper. The argument is that he does not know the Law from inside, but he knows only the way that leads to it, where he patrols up and down. His ideas of the interior are assumed to be childish, and it is supposed that he himself is afraid of the other guardians whom he holds up as bogies before the man. Indeed, he fears them more than the man does, since the man is determined to enter after hearing about the dreadful guardians of the interior, while the doorkeeper has no desire to enter, at least not so far as we are told. Others again say that he must have been in the interior already, since he is after all engaged in the service of the Law and can only have been appointed from inside. This is countered by arguing that he may have been appointed by a voice calling from the interior, and that anyhow he cannot have been far inside, since the aspect of the third doorkeeper is more than he can endure. Moreover, no indication is given that all these years he ever made any remarks showing a knowledge of the interior except for the one remark about the doorkeepers. He may have been forbidden to do so, but there is no mention of that either. On these grounds the conclusion is reached that he knows nothing about the aspect and significance of the interior, so that he is in a state of delusion. But he is deceived also about his relation to the man from the country, for he is subject to the man and does not know it. He treats the man instead as his own subordinate, as can be recognized from many details that must still be fresh in your mind. But, according to this view of the story, it is just as clearly indicated that he is really subordinated to

the man. In the first place, a bondman is always subject to a free man. Now the man from the country is really free, he can go where he likes, it is only the Law that is closed to him, and access to the Law is forbidden him only by one individual, the doorkeeper. When he sits down on the stool by the side of the door and stays there for the rest of his life, he does it of his own free will; in the story there is no mention of any compulsion. But the doorkeeper is bound to his post by his very office, he does not dare strike out into the country, nor apparently may he go into the interior of the Law, even should he wish to. Besides, although he is in the service of the Law, his service is confined to this one entrance; that is to say, he serves only this man for whom alone the entrance is intended. On that ground too he is subject to the man. One must assume that for many years, for as long as it takes a man to grow up to the prime of life, his service was in a sense empty formality, since he had to wait for a man to come, that is to say, someone in the prime of life, and so had to wait a long time before the purpose of his service could be fulfilled, and, moreover, had to wait on the man's pleasure, for the man came of his own free will. But the termination of his service also depends on the man's term of life, so that to the very end he is subject to the man. And it is emphasized throughout that the doorkeeper apparently realizes nothing of all this. That is not in itself remarkable, since according to this interpretation the doorkeeper is deceived in a much more important issue, affecting his very office. At the end, for example, he says regarding the entrance to the Law: 'I am now going to shut it,' but at the beginning of the story we are told that the door leading into the Law stands always open, and if it stands open always, that is to say, at all times, without reference to the life or death of the man, then the doorkeeper is incapable of closing it. There is some difference of opinions about the motive behind the doorkeeper's statement, whether he said he was going to close the door merely for the sake of giving an answer, or to emphasize his devotion to duty, or to bring the man into a state of grief and regret in his last moments. But there is no lack of

agreement that the doorkeeper will not be able to shut the door. Many indeed profess to find that he is subordinate to the man even in wisdom, towards the end, at least, for the man sees the radiance that issues from the door of the Law while the doorkeeper in his official position must stand with his back to the door, nor does he say anything to show that he has perceived the change."

"That is well argued," said K., after repeating to himself in a low voice several passages from the priest's exposition. "It is well argued, and I am inclined to agree that the doorkeeper is deluded. But that has not made me abandon my former opinion, since both conclusions are to some extent compatible. Whether the doorkeeper is clear-sighted or deluded does not dispose of the matter. I said the man is deluded. If the doorkeeper is clear-sighted, one might have doubts about that, but if the doorkeeper himself is deluded, then his delusion must of necessity be communicated to the man. That makes the doorkeeper not, indeed, a swindler, but a creature so simple-minded that he ought to be dismissed at once from his office. You mustn't forget that the doorkeeper's delusions do himself no harm but do infinite harm to the man."

"There are objections to that," said the priest. "Many aver that the story confers no right on anyone to pass judgment on the doorkeeper. Whatever he may seem to us, he is yet a servant of the Law; that is, he belongs to the Law and as such is set beyond human judgment. In that case one dare not believe that the doorkeeper is subordinate to the man. Bound as he is by his service, even at the door of the Law, he is incomparably freer than anyone at large in the world. The man is only seeking the Law, the doorkeeper is already attached to it. It is the Law that has placed him at his post; to doubt his integrity is to doubt the Law itself."

"I don't agree with that point of view," said K. shaking his head, "for if one accepts it, one must accept as true everything the doorkeeper says. But you yourself have sufficiently proved how impossible it is to do that."

"No," said the priest, "it is not necessary to

accept everything as true, one must only accept it as necessary."

"A melancholy conclusion," said K. "It turns lying into a universal principle."

Notes and Questions

1. Compare your earlier reflections about the parable with the commentaries of the priest and K. Whose come closer to your own?
2. What are the priest and K. arguing about? Who won the argument? Is there a difference between winning an argument and being right?
3. K.'s argument seems to come down to the idea that justice was denied the man from the country. Was justice done, in your judgment?
4. In the dialogue, the priest does most of the talking and K. does very little. (Follow the comments of K. all the way through to see this.) What does this imbalance in the conversation tell you? Does Kafka, the author, speak through the priest or through K.?
5. The priest seems expert and confident, whereas K. appears amateurish and tentative. What effect do these stances have on the ability of either to win the argument or to convince readers of the worth of his contentions?
6. In the parable, the doorkeeper is portrayed as a low-level insider to the law and the man from the country as an outsider. In the discussion, the priest looks more like an insider and K. an outsider. Would either the man from the country or K. have been helped by hiring a lawyer? By having studied law himself?
7. The position of the priest seems to shift as each new question is raised by K. Does the priest's argument get stronger or weaker as he goes along? What about K.'s arguments?
8. The final argument of the priest is that "it is not necessary to accept everything as true, one must only accept it as necessary." What are the implications of this contention? How does K. respond to it? Which position would you endorse?

9. It is sometimes said that bad order may be better than no order at all. Is this true? Which would you prefer? Which would the man from the country prefer?
10. In the encounter between the doorkeeper and the man from the country the rules seem to change as they are made: at first the door is denied the man from the country presumably because he has no right to enter; but later he is told that the door was intended only for him, that it was always his right to enter, in fact, it was his exclusively. Is it possible to have "order" where there are shifting rules?

However, it could also be said that there is consistency across the entire story. The *rules* may be different, but the *result* stays constant — the man from the country can never enter into the domain of law. If the law never serves him, then for whom is it?

11. With what characters — the man from the country, the doorkeeper, the priest, or K. — should most readers identify? With whom do they *want* to identify? What social roles and positions are represented by these characters?



In the next reading, Kafka answers some of the foregoing questions with an enigma; namely that law is for the few and those associated with the few, but the many do not rebel.

The Problem of Our Laws *Franz Kafka*

Our laws are not generally known; they are kept secret by the small group of nobles who rule us. We are convinced that these ancient laws are scrupulously administered; nevertheless, it is an extremely painful thing to be ruled by laws that one does not know. I am not thinking of possible discrepancies that may arise in the interpretation of the laws, or of the disadvantages involved when only a few and not the whole people are allowed to have a say in their interpretation. These disadvantages are perhaps of no great importance. For the laws are very ancient; their interpretation has been the work of centuries, and has itself doubtless acquired the status of law; and though there is still a possible freedom

of interpretation left, it has now become very restricted. Moreover the nobles have obviously no cause to be influenced in their interpretation by personal interests inimical to us, for the laws were made to the advantage of the nobles from the very beginning, they themselves stand above the laws, and that seems to be why the laws were entrusted exclusively into their hands. Of course, there is wisdom in that — who doubts the wisdom of the ancient laws? — but also hardship for us; probably that is unavoidable.

The very existence of these laws, however, is at most a matter of presumption. There is a tradition that they exist and that they are a mystery confided to the nobility, but it is not and cannot be more than a mere tradition sanctioned by age, for the essence of a secret code is that it should remain a mystery. Some of us among the people have attentively scrutinized the doings of the nobility since the earliest times and possess records made by our forefathers —

records which we have conscientiously continued — and claim to recognize amid the countless number of facts certain main tendencies which permit of this or that historical formulation; but when in accordance with these scrupulously tested and logically ordered conclusions we seek to orient ourselves somewhat towards the present or the future, everything becomes uncertain, and our work seems only an intellectual game, for perhaps these laws that we are trying to unravel do not exist at all. There is a small party who are actually of this opinion and who try to show that, if any law exists, it can only be this: The Law is whatever the nobles do. This party see everywhere only the arbitrary acts of the nobility, and reject the popular tradition, which according to them possesses only certain trifling and incidental advantages that do not offset its heavy drawbacks, for it gives the people a false, deceptive and over-confident security in confronting coming events. This cannot be gainsaid, but the overwhelming majority of our people account for it by the fact that the tradition is far from complete and must be more fully enquired into, that the material available, prodigious as it looks, is still too meager, and that several centuries will have to pass before it becomes really adequate. This view, so comfortless as far as the present is concerned, is lightened only by the belief that a time will eventually come when the tradition and our research into it will jointly reach their conclusion, and as it were gain a breathing space, when everything will have become clear, the law will belong to the people, and the nobility will vanish. This is not maintained in any spirit of hatred against the nobility; not at all, and by no one. We are more inclined to hate ourselves, because we have not yet shown ourselves worthy of being entrusted with the laws. And that is the real reason why the party which believes that there is no law has remained so small — although its doctrine is in certain ways so attractive, for it unequivocally

recognizes the nobility and its right to go on existing.

Actually one can express the problem only in a sort of paradox: Any party which would repudiate, not only all belief in the laws, but the nobility as well, would have the whole people behind it; yet no such party can come into existence, for nobody would dare to repudiate the nobility. We live on this razor edge. A writer once summed the matter up in this way: The sole visible and indubitable law that is imposed upon us is the nobility, and must we ourselves deprive ourselves of that one law?

Notes and Questions

1. According to Kafka, what is the central problem of law and what are the obstacles to its resolution?
2. Where do doorkeepers and lawyers fit into the legal structure as outlined by Kafka?
3. If people were to come to know that law is *of, by, and for* the nobility, would they necessarily rebel?
4. Kafka says, "We are more inclined to hate ourselves, because we have not yet shown ourselves worthy of being entrusted with the laws." Does this suggest that the problem lies within people and their excessive humility or in the institutions they encounter that inhibit their assertion of autonomy? Put another way, is the problem in the man from the country or in the system symbolized by the doorkeeper?
5. What helps officials of law, like doorkeepers, priests, judges, and lawyers, feel worthy enough to be entrusted with the law? If they felt more like ordinary people, would the problem of law be resolved?
6. In this and in the previous writings, Kafka seems to talk *in circles*. Try to present his central ideas "in a straight line." Imagine, if it helps, explaining Kafka to a roommate who has not read him.

- ☐ A final selection from Kafka has the virtue of being short, but compact.

Couriers *Franz Kafka*

They were offered the choice between becoming kings or the couriers of kings. The way children would, they all wanted to be couriers. Therefore there are only couriers who hurry about the world, shouting to each other — since there are no kings — messages that have become meaningless. They would like to put an end to this miserable life of theirs but they dare not because of their oaths of service.

Notes and Questions

1. It might be said that this parable calls for strong leadership, since leadership might

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give meaning to the couriers' messages, which are now meaningless. But how would strong leadership be distinguished from the nobility, which is said to be the integral part of "The Problem of Our Laws"? Are there alternatives to the recommendation of strong leadership?

2. It is also sometimes said that people are "happy" in courier roles and would not abandon them, even if given the opportunity; but Kafka says that couriers lead miserable lives. What are the sources of misery in the courier's life? Are there alternatives to resentful acceptance?
3. In what sense are doorkeepers and lawyers couriers? In what sense are they kings? To whom or to what do they owe their "oaths of service"? Could they revoke their oaths? Should they?
4. You have considered three of Kafka's writings about law. What is Kafka's position on law?

- ☐ The philosopher Alfred North Whitehead once said that all of Western philosophy was nothing more than footnotes to Plato. It might similarly be said that all discourses on Western law might be nothing more than footnotes to Franz Kafka. If this is true, Kafka's guidance and careful observation might give students all that they will ever need for an understanding of modern legal order.



A Scholar in His Study Watching a Magic Disk.
Rembrandt van Rijn: *Faust*, c. 1652. (National
Gallery of Art, Washington. Gift of R. Horace
Gallatin.)