



BEFORE THE LAW

An Introduction to
the Legal Process

Third Edition

BONSIGNORE KATSH D'ERRICO PIPKIN ARONS RIFKIN

BEFORE THE LAW

An Introduction to the Legal Process

THIRD EDITION

John J. Bonsignore

Ethan Katsh

Peter d'Errico

Ronald M. Pipkin

Stephen Arons

Janet Rifkin

Department of Legal Studies

The University of Massachusetts at Amherst



Houghton Mifflin Company • Boston

Dallas • Geneva, Ill. • Hopewell, N.J. • Palo Alto

Cover photograph by Gabrielle Keller.

Copyright © 1984 by Houghton Mifflin Company. All Rights Reserved.

No part of this work may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying and recording, or by any information storage or retrieval system, except as may be expressly permitted by the 1976 Copyright Act or in writing by the copyright owner. With the exception of non-profit transcription in Braille or reproduction in large type for the visually handicapped, Houghton Mifflin Company is not authorized to grant permission for further uses of copyrighted selections reprinted in this text. Permission must be obtained from the individual copyright owners as identified herein. Requests for Houghton Mifflin material should be addressed to Permissions, Houghton Mifflin Company, One Beacon Street, Boston, MA 02108.

Printed in the U.S.A.

Library of Congress Catalog Card Number: 83-81678

ISBN: 0-395-34317-8

BCDEFGHIJ-H-8987654

Preface

The upswing of interest in law by students from every department of the university has made the continuing development of new materials for study mandatory. It is not enough to demonstrate what would-be business people, writers, engineers, or hotel-keepers need to know in order to use law. What is needed is to answer the first questions people commonly have about law and to explore the fundamental significance of law in society.

What is law? Nearly every person can think of at least a one- or two-line statement of the nature and functions of law. Examples of such statements would include the following:

1. Law consists of rules and regulations of the state for the governance of society.
2. It's who you know—let's face it, the law is what judges, lawyers, and police say it is.
3. Law protects what is of value in society.
4. Law is a means to make society run more smoothly through the recognition and securing of rights.
5. Law is a means of oppression—it is designed to preserve the economic, political, and social position of the haves at the expense of the have-nots.
6. Law is whatever the people want it to be.

Despite the rich possibilities for general, critical inquiry that these statements might inspire, law study until comparatively recently has been almost exclusively concerned with professional training. Now, fortu-

nately, there has been an awakening to the idea that in a democratic society, studying the law and the legal process is just as fundamental as studying economics, history, or physics.

There is no one correct way to approach this awesome challenge, but we believe that most first thoughts about law concern actors in the legal system—judges, police, lawyers, jurors, jailers, and so on. There is also a recognition that law has a central importance in shaping values, hence, the high sentiment from people of all political persuasions about such issues as law and order, drugs, sexual preference, abortion, environmental pollution, and so on.

We have tried to preserve the best of the previous editions of this book while making some logical extensions and adding new material that covers additional aspects of the subjects of each chapter. Some chapters have been substantially reorganized. The transdisciplinary orientation of the previous editions has been deepened and materials normally found in introductory law texts, such as cases, have also been expanded. We hope that a variety of scholar-teachers who might be at the edge of their own disciplines will see law as a useful vehicle for the study of contemporary society.

The chapters need not be studied in the order given in the text. Some teachers may choose to start with the broad issues raised by the material in the last chapter; others may prefer to provide their own framework for organizing the material. We share the sentiment of C. S. Lewis, who said about books:

It is impossible that we should ever know the whole meaning of our own works. And the meaning we never intended may be the best and truest one. Writing a book is much less like creation than it is like planting a garden or begetting a child; in all three cases we are only entering as one cause into a causal stream which works, so to speak, in its own way.

It may come as no surprise that the six authors of this book have never used it identically. Doris Lessing, speaking in the same vein as C. S. Lewis, provides a rationale: "[T]he book is alive and potent and fructifying and able to promote thought and discussion only when its plan and intention are not understood, because that moment of seeing the shape and plan and intention is also the moment when there isn't any more to be got out of it." To the extent that textbooks approach this literary goal, they have some chance of becoming a more engaging genre.

We would like to thank the following reviewers for their helpful comments on this edition: Gregory A. Caldeira of the University of Iowa, David Chadwick-Brown of San Diego State University, Marc G. Gertz of

Florida State University, James L. Gibson of the University of Houston—University Park, Stanley Jarolem of Long Island University—C.W. Post campus, and Eva R. Rubin of North Carolina State University—Raleigh.

We had very thoughtful reviews of the earlier editions from James L. Gibson of the University of Houston—University Park, Stephen Halpern of the State University of New York at Buffalo, William Vanderpool of Appalachian State University, and Arthur Wolfe of Michigan State University.

We also want to acknowledge the help of the University of Massachusetts Legal Studies Program.

Needless to say, we doubt there would have been a third edition without the response of teachers and students of legal studies who used our materials and suggested new possibilities for this edition.

J.J.B.
E.K.
P.d'E.
R.M.P.
S.A.
J.R.

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 question, which he has never yet put to the doorkeeper. He beckons the doorkeeper, since he can no longer raise his stiffening body. The

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 Schocken Books, Inc. from *The Trial* by Franz Kafka. Copyright © 1925, 1935, 1946 by Schocken Books, Inc. Copyright renewed 1952, 1963, 1974 by Schocken Books, Inc.

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

The parable is both an old and an odd form of education. We know of the extensive use of parables for instructional purposes in both the Old and New Tes-

taments, 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 the parable says to you. What do you find disturbing? What is Kafka telling you about law? Has he drawn a pleasant or an unpleasant picture? In how many settings, legal or otherwise, might his lessons be applicable?

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

"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:

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 Schocken Books, Inc. from *The Trial* by Franz Kafka. Copyright © 1925, 1935, 1946 by Schocken Books, Inc. Copyright renewed 1952, 1963, 1974 by Schocken Books, Inc.

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 denied 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."

Questions

1. Compare your 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?
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 countryman as an outsider. In the discussion, the priest looks more like an insider and K. an outsider. Would either the countryman 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 of the arguments of K.?
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?
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 countryman prefer?
10. In the encounter between the doorkeeper and the countryman, the rules seem to change as they are made: at first the door is denied the countryman, 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 be said that there is consistency across the entire story. The *rules* may be different, but the *result* stays constant—the countryman can never enter into the domain of law. If the law never serves the countryman, then whom does it serve?

11. With what characters—the countryman, the doorkeeper, the priest, or K.—would most readers identify? What social roles and positions are represented by these characters?

Kafka answers some of the foregoing questions with a paradox. 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.

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 Schocken Books, Inc. from *The Trial* by Franz Kafka. Copyright © 1925, 1935, 1946 by Schocken Books, Inc. Copyright renewed 1952, 1963, 1974 by Schocken Books, Inc.

ty; 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?

A final parable 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.

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 Schocken Books, Inc. from *The Trial* by Franz Kafka. Copyright © 1925, 1935, 1946 by Schocken Books, Inc. Copyright renewed 1952, 1963, 1974 by Schocken Books, Inc.

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. He 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 countryman or in the system symbolized by the doorkeeper?
5. What gives officials of law, like doorkeepers, priests, judges, and lawyers, an edge in feeling worthy enough to be entrusted with the law? Were they to feel more like ordinary people, would the problem of law be resolved?

Questions

1. It might be said that this parable calls for strong leadership, since leadership would give meaning to the couriers' messages that 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. Now that three of Kafka's writings about law have been considered, what is Kafka teaching about law?

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

Contents

Preface xi

Foreword xiii

Before the Law *Franz Kafka* • xiii / The Problem of Our Laws *Franz Kafka* • xviii /
Couriers *Franz Kafka* • xix

Chapter One A Theoretical Overview 3

Assembly Line *B. Traven* • 4

1 Legal Reasoning 12

The Bramble Bush *Karl N. Llewellyn* • 13 / State v. Pendergrass • 15 / Joyner v.
Joyner • 17 / State v. Black • 19 / State v. Rhodes • 20 / State v. Mabrey • 23 /
The Bramble Bush *Karl N. Llewellyn* • 24 / State v. Oliver • 26

2 Law and Official Discretion 28

The Judging Process and the Judge's Personality *Jerome Frank* • 29 / A Forgery Case • 36 /
A Case of Robbery and Rape • 42

3 Law and Values 43

The Queen v. Dudley and Stephens • 44 / The Human Fetus as Useful Research
Material • 52 / Cook v. State • 53

4 Law and Conflicting Interests 55

The Case of the Spoiled Chiles *Laura Nader* • 58 / Susquehanna Fertilizer Co. v.
Malone • 59 / Madison v. Ducktown Sulphur, Copper & Iron Co. • 61 / Georgia v.
Tennessee Copper Co. • 66 / Ohio v. Wyandotte Chemicals Corp. • 69

5 Law, Status, Wealth, and Power 73

Streich v. General Motors Corp. • 75 / The State *V. I. Lenin* • 78 / From Day Clean to
First Dark *Kenneth Stampp* • 81 / Thornton and Wife v. The Suffolk Manufacturing
Company • 85 / Fibreboard Paper Products Corp. v. NLRB • 91 / NLRB v. Yeshiva
University • 98

6 Law and Popular Will 106

The Cheyenne Way *Karl N. Llewellyn and E. Adamson Hoebel* • 108 / Law and Authority *Peter Kropotkin* • 112 / IRS Response to the Illegal Tax Protester Movement • 119 / United States v. Carlson • 126 / United States v. Carlett • 130

Conclusion • 134

Suggested Additional Readings • 135

Chapter Two The Police 139

Shooting an Elephant *George Orwell* • 140

1 A Citizen's Perspective 145

Police Questioning of Law Abiding Citizens *Charles A. Reich* • 145 / Brown v. Texas • 155

2 Legal Perspectives 158

A. Police-Citizen Encounters • 158 / Terry v. State of Ohio • 158 / Commonwealth of Pennsylvania v. Harry Mims • 167 / Delaware v. Prouse • 174 / People v. John • 181 / B. The Exclusionary Rule • 184 / Why Suppress Valid Evidence? *Malcolm Richard Wilkey* • 185 / The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police? *Bradley Canon* • 187

3 The Media Perspective 192

Television, the Law, and the Police *Stephen Arons and Ethan Katsb* • 193

4 Discretionary Justice 200

Arrest: The Decision to Take a Suspect into Custody *Wayne R. LaFave* • 201

5 A Societal Perspective 203

The Police Role in an Urban Society *Bernard L. Garmire* • 205 / The Iron Fist and the Velvet Glove *Center for Research on Criminal Justice* • 209 / Jammed Tokyo's Crime Rate Is Far Below New York's *Sydney H. Schanberg* • 214 / People v. Zelinski • 218

Suggested Additional Readings • 223

Chapter Three The Legal Profession 227

1 The Lawyer in Society 229

The Temper of the Legal Profession in the United States *Alexis de Tocqueville* • 231 / The Impact of Social Backgrounds of Lawyers on Law Practice and the Law *Jack Ladinsky* • 235 / Lawyers C. *Wright Mills* • 244

2 Legal Education 251

The Trouble with Law School *Scott Turow* • 252 / Law School: Caught in the Paradigmatic Squeeze *John J. Bonsignore* • 257 / The Ordinary Religion of the Law School Classroom *Roger C. Cramton* • 262 / The Sorcerer and His Magic *Claude Levi-Strauss* • 269

3 The Lawyer in the Legal System 272

The Ethics of Advocacy *Charles P. Curtis* • 272 / The “Fight” Theory versus the “Truth” Theory *Jerome Frank* • 279 / The Practice of Law as Confidence Game *Abraham S. Blumberg* • 285 / “I Have Nothing To Do With Justice” *James Mills* • 292 / Trickster, Hero, Helper: A Report on the Lawyer Image *Marvin W. Mindes with Alan C. Acock* • 307

4 The Lawyer and Social Reform 310

Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change *Marc Galanter* • 311 / At the Edge of Law *John J. Bonsignore* • 323

Suggested Additional Readings • 329

Chapter Four Community Participation in Legal Process 331

1 The Jury as a Form of Community Participation 334

A. The Jury in a Cultural Context • 334 / The Ordeal as a Vehicle for Divine Intervention in Medieval Europe *William J. Tewksbury* • 334 / Note on the History of the Jury Trial • 336 / U.S. Constitution • 338 / People v. Collins • 339 / The Trial of the Future *Bernard Botein and Murray A. Gordon* • 346 / B. The Jury as a Political Institution • 351 / Trial by Jury in the United States *Alexis de Tocqueville* • 351 / Duncan v. Louisiana • 355 / Excerpt from *The Transformation of American Law* *Morton Horwitz* • 358 / Jury Nullification—The Right to Say No *A. Schefflin* • 360 / Jury Instructions • 365 / United States v. Dougherty • 365 / C. The Waning of the American Jury • 373 / Williams v. Florida • 373 / Johnson v. Louisiana • 374 / Apodaca et al. v. Oregon • 376 / The Waning of the American Jury *Hans Zeisel* • 376 / Note on the Use of Expert Testimony in Jury Trials • 380 / Note on the Ethics of Selecting Jurors • 381 / Note on Constitutional Protection of Fair Jury Selection • 383 / D. Conscience, Individual and Collective: A Problem in Jury Deliberation • 388 / Excerpt from “Letter from Birmingham Jail” *Martin Luther King, Jr.* • 390 / The Trial of Sam Lovejoy *Stephen Davis* • 392

2 Community Participation: Other Forms, Other Cultures 399

When Two Twists Led the Cheyennes Against the Crows • 399 / People’s Court in China: Trial of a Divorce Case *Doris Brin Walker* • 402 / The Cuban Popular Tribunals *Jesse Berman* • 406 / The Relegalization of Cuba *Peter Irons* • 411 / Mediation in America • 414 / New Justice Theories and Practice *Raymond Shonholtz* • 415 / Mediating Disputes: An American Paradox *Janet Rifkin* • 420

3 Law, Community, and the Individual 423

Introduction to *Wayward Puritans* *Kai Erikson* • 423 / Cheyenne Way: Claims and Law-

Ways *Karl N. Llewellyn and E. Adamson Hoebel* • 427 / From *Law in Modern Society*
Roberto Unger • 428 / The Evolution and Development of the Chinese Legal System
Victor H. Li • 430

Suggested Additional Readings • 436

Chapter Five Punishment 439

1 Views of Punishment 441

Reflections on the Guillotine *Albert Camus* • 441 / From *Punishment and Social Structure*
Georg Rusche and Otto Kirchheimer • 445 / From *Discipline and Punish* *Michel*
Foucault • 446 / *Furman v. Georgia* • 450 / *Gregg v. Georgia* • 451 / *Lockett v.*
Ohio • 454

2 Institutionalization and Reform 458

Behavior Modification in Total Institutions *David Rothman* • 458 / *Holt v. Sarver* • 461 /
Rules and Regulations for Inmates at Cook County Jail, Chicago, Illinois • 468

3 Rehabilitation 471

Behavior Modification in Total Institutions *David Rothman* • 471 / Behavior Modification
in Total Institutions *David Rothman* • 475

4 Beyond Rehabilitation 480

Is Rehabilitation Dead? *Seymour L. Halleck and Ann D. Witte* • 480 / Sentencing Reform
and Prosecutorial Power *Albert W. Alschuler* • 486

Conclusion • 488

Suggested Additional Readings • 489

Chapter Six Images of Law and Society 491

The Masks of the Law *Peter d'Errico* • 493 / The Law Is Terror Put Into Words
Peter d'Errico • 496

1 Shaking Belief 500

In Death's Grey Land *Philip Caputo* • 500 / In the Name of the People *Tiziano*
Terzani • 507 / The Plague *Albert Camus* • 511

2 Lions and Lambs 515

Virginian Liberators *John T. Noonan, Jr.* • 515 / The Rule of Law Versus the Order of
Custom *Stanley Diamond* • 520 / Cracking the Safe *Chuang Tzu* • 533