THE ESSENTIAL KAFKA: DEFINITION, DISTENTION, AND DILUTION IN LEGAL RHETORIC

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I. INTRODUCTION

Dissenting in a 2001 case involving Title III of the Americans with Disabilities Act and its potential extension to the world of professional sports, United States Supreme Court Justice Antonin Scalia rejected the majority's conclusion that a professional golfer was a "customer" of "competition" when practicing his profession. In doing so, he demonstrated customary verve by exposing what he referred to as the Court's "Kafkaesque determination that professional sports organizations, and the fields they rent for the exhibitions, are 'places of public accommodation' to the competing athletes, and the athletes themselves are 'customers' of the organization that pays them."[1] Moreover, he dismissed the majority's

> Alice in Wonderland determination that there are such things as judicially determinable "essential" and "nonessential" rules of a made-up game; and its Animal Farm determination that fairness and the ADA mean that everyone gets to play by individualized rules which will assure that no one's lack of ability (or at least no one's lack of ability so pronounced that it amounts to a

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[1] PGA Tour, Inc. v. Martin, 532 U.S. 661, 705 (2001). For more on the significance of the definitional arguments in this case, see Edward Schiappa, *What is Golf?: Pragmatic Essentializing and Definitional Argument in* PGA Tour, Inc. v. Martin, ARGUMENTATION & ADVOC., Summer 2001, at 18, 18 (stressing that definitions are a "form of rhetorically induced social knowledge" that are "the result of a shared understanding of the world that is the product of past argument and a resource for future argument").

disability) will be a handicap. The year was 2001, and "everybody was finally equal."[2]

While this passage also references Lewis Carroll, George Orwell, and Kurt Vonnegut, Jr., the focus of this Article is the first allusion: the rhetorical invocation of Franz Kafka in a legal argument and particularly the lexical meaning(s) and significance of such appeals as they are employed for descriptive and prescriptive purposes in the writings of American jurists, advocates, and analysts.[3]

To place this query within the terms of the above passage, what does Justice Scalia's rhetorical appeal to *Kafka* contribute to his legal argument?[4] Obviously the Justice is critical of the Court's "determination," but what is it about the majority opinion that renders it especially *Kafkaesque*, as opposed to simply unfortunate, misguided, inappropriate, bizarre, or any other adjective that might be chosen? One would not expect that such a descriptor was randomly selected from his vocabulary (this was not a "blue," "smelly," or "Nebraskan" determination, for example), and so it is safe to assume that "Kafkaesque" was deemed to be an appropriate rhetorical modifier here. But why? Even assuming an inclination toward literary frames of reference, Justice Scalia could have presented this as a "Grisham-esque"[5] or "Wolfe-ian"[6] "determination," to pick but two popular 20th century authors whose works have

[2] *Martin*, 532 U.S. at 705 (quoting KURT VONNEGUT, JR., HARRISON BERGERON (1961)).

[3] *See* James W. Chesebro, *Definition as a Rhetorical Strategy*, PENN. SPEECH COMM. ANN., 1985, at 5, 10 ("In a word, a definition is a strategy. Consciously or unconsciously, definitions prescribe and advocate. Definitions create the reality humans encounter.").

[4] As a way of framing this study in terms of a literary allusion that is even more common in popular discourse, consider the frequency with which one hears that some policy, practice, or forecast is "Orwellian." Obviously the reference is to the writings of George Orwell (*see, e.g.*, GEORGE ORWELL, ANIMAL FARM (1946); GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949)), but the invocation of the author's name as an *adjective*—"Orwellian," "Orwell-like," and even allusions to "Big Brother"—has extended well beyond the narrative confines of his fiction and often seems to serve as shorthand for *any* perceived institutional or structural overstep, or any intrusion into an individual's asserted autonomy, whether a function of an invasive *state* entity or not.

One might, for example, think of the CBS reality television show "Big Brother," which certainly involved perpetual observation and constricted privacy, but which was a purely private, for-profit, and *voluntary* arrangement between the networks and the residents of the house.

[5] *See, e.g.*, JOHN GRISHAM, THE FIRM (1992).

[6] *See, e.g.*, TOM WOLFE, THE BONFIRE OF THE VANITIES (1988).

addressed legal themes.[7] But he chose Kafka—as have 387 other legal writers over the last four decades or so—which suggests that there *is* something rhetorically distinctive, salient, and significant about references to Franz Kafka in legal arguments.[8] The nature of this significance is our focus here, and the domain of this distinction, we will see below, comprises what I will refer to as the "essential" Kafka: aggregated modes of meaning that *define* Kafka in application, but which also facilitate the phenomenon of *distention* in usage and ultimately *dilution* in meaning.[9]

To be clear, the intention of this Article is not to offer some new textual interpretation(s) of Kafka's work. Recent and compelling appraisals of his

[7] In the same vein, consider the regularity with which one hears or sees references such as "Catch-22" (*see* JOSEPH HELLER, CATCH-22 (1999)), "Brave New World" (*see* ALDOUS HUXLEY, BRAVE NEW WORLD (1969)), "Dickensian" (*see, e.g.*, CHARLES DICKENS, BLEAK HOUSE (Random House 2002)), "Machiavellian" (*see, e.g.*, NICOLO MACHIAVELLI, THE PRINCE (Quentin Skinner & Russell Price eds., Cambridge U. Press. 1997)), "Freudian Slip" (*see, e.g.*, SIGMUND FREUD, THE INTERPRETATION OF DREAMS (Ritchie Robertson ed., Joyce Crick trans., Oxford U. Press 1999)), or "Lilliputian" (*see* JONATHAN SWIFT, GULLIVER'S TRAVELS (Alberto J. Rivero ed., W.W. Norton & Co. 2001)) used in casual conversation or writing to portray situations, behaviors, events, or elements of modern life.

[8] On why attention to rhetorical supports is so essential to an understanding of legal argumentation, see Sanford Levinson, *The Rhetoric of the Judicial Opinion*, *in* LAW'S STORIES 187, (Peter Brooks & Paul Gewirtz eds., 1996) (arguing that "[j]udicial opinions are rhetorical performances," and noting that one of the important effects of such opinions is to persuade an audience and demonstrate "a certain authority over it"); Robert J. Hume, *The Use of Rhetorical Sources by the U.S. Supreme Court*, 40 LAW & SOC. REV. 817 (2006) (stressing that "the language of court opinions can be as important as the disposition of cases," because opinions can persuade, build coalitions, and earn support).

[9] The literature on "essentialism" and its critics is vast and both beyond and distinct from the scope of this Article. It is important to stress here that my use of "essential" pertains not to the concept as it has been discussed since the time of Plato (in the notion of "Forms," for example), but rather to an *applied* "essence," or core of *usage* as communicants adopt the frame for rhetorical purposes. Whether or not there is an abstract or metaphysical "essence" to Kafka is not my concern here. As such, I prefer the explanation set forth by Richard Robinson: "Essence, then, is just the human choice of what to mean by a name, misinterpreted as being a metaphysical reality." RICHARD ROBINSON, DEFINITION 155 (Oxford 1954). But for a more traditional definition of essentialism, see SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY 120 (2d ed. 1994) (defining the term as the "doctrine that it is correct to distinguish between those properties of a thing, or a kind of thing, that are essential to it, and those that are merely accidental"); Douglas Walton, *Persuasive Definitions and Public Policy Arguments*, 37 ARGUMENTATION & ADVOC. 124 (2001) (noting that Essentialism is the idea that "words have a precisely determined objective meaning").

writings abound,[10] and interest in his works has only grown amidst the legal and political context of the current "War on Terror."[11] Rather, this study proceeds in a different direction: divining meaning not from the primary texts, but rather from the actual manner in and by which Kafka is *invoked* by those who refer to him for rhetorical purposes in the legal arena, the particular realm with which he is most often associated.[12] And thus, what this examination offers is an aggregate, inductive, and lexical[13] cataloging of actual *usage* as a way of arriving at what we might call an "applied" Kafka,[14] or what Kafka means in practical terms to those who draw upon his work for rhetorical purposes in legal arguments.[15]

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[10] *See, e.g.*, ERNEST PAWEL, THE NIGHTMARE OF REASON (1984); RONALD SPEIRS & BEATRICE SANDBERG, FRANZ KAFKA (1997); Jane Bennett, *Deceptive Comfort: The Power of Kafka's Stories*, POL. THEORY, Feb. 1991, at 73; Jane Bennett, *Kafka, Genealogy, and the Spiritualization of Politics*, 56 J. POLITICS 650 (1994); Fredrick DeCoste, *Kafka, Legal Theorizing and Redemption*, MOSAIC, Dec. 1994, at 161; Panu Minkkinen, *The Radiance of Justice: On the Minor Jurisprudence of Franz Kafka*, 3 SOC. & LEGAL STUDIES 349 (1994).

[11] *See, e.g.*, Deborah Sontag, *Who is this Kafka that People Keep Mentioning?*, N.Y. TIMES, Oct. 21, 2001 (Magazine), at 54.

[12] As we will see below in Part II, Kafka was a doctor of jurisprudence and his most famous work, *The Trial*, involves the plight of Joseph K. as his case is heard by a mysterious and obtuse court system.

[13] *See* ROBINSON, *supra* note 9, at 35 (Lexical definitions are those which seek to explain "the actual way in which some actual word has been used by some actual persons." Such definitions are "a form of history" in that they refer to "the real past" and tell us "what certain persons meant by a certain word at a certain less or more specified time and place.").

[14] And thus this study attends not to the abstract or conceptual possibilities of a rhetorical entity, but rather the rhetorical prospects of meaning "on the ground," focusing to the written and spoken expositions of members of the legal community who appeal to Kafka in their contemplations of the state, bureaucracies, rules, structures, and orders. *See* JOHN CONLEY & WILLIAM O'BARR, JUST WORDS: LAW, LANGUAGE, AND POWER 139 (1998) (noting that the approach of law and language studies has been to work "from the bottom up, beginning with descriptions of linguistic practices and working gradually toward a capacity to test political claims").

[15] Despite the prevalence of such adjectival allusions in our discourse, there has been no study that attempts to divine the generally *applied* meaning of Kafka in this way. Previous scholarship has asked some related questions, though the parameters of these studies were alternatively more specific and more general. On the more specific side, one commentator has previously analyzed how judges *directly* refer to and discuss one of Kafka's works, *The Trial*, in judicial opinions. Scott Finet, *Franz Kafka's Trial as a Symbol in Judicial Opinions*, LEGAL STUD. F., Vol XXI 1998, at 23, 23. And, on the more general side, recent scholarship has examined how mentions of Kafka appear in judicial opinions, though the purpose of this survey was primarily to demonstrate ways that judges have stylistically appealed to Kafka garnish their prose. *See* Parker B. Potter, Jr., *Ordeal by Trial: Judicial References to the Nightmare World of Franz Kafka*, 3 PIERCE L. REV. 195, 196 (2005).

The data supporting this investigation include all accessible federal court opinions[16] and opinions from courts at various levels in the fifty states and territories, as well as legal briefs filed for cases heard by the United States Supreme Court,[17] and media designated as "Legal News"[18] periodicals by the Lexis-Nexis Academic database. Considering invocations in their four predominant iterations ("Kafka," "Kafkaesque," "Kafkan," and "Kafkian"), this examination involved an analysis of 1,069 court rulings, orders, and judgments (450 at the federal level and 619 at the state level), seventy-three Supreme Court briefs, and 468 articles from legal periodicals, for a total of 1,610 documents.[19] A content scrutiny of each legal writing established the *relevant*

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[16] The search was conducted via the "Lexis-Nexis Academic" database, covering invocations from January 1963 to July 2005, and including as sources of material all United States Supreme Court rulings; rulings from the First through Eleventh Circuit Courts of Appeal, plus the D.C. Circuit Court of Appeals, the Federal Circuit Court of Appeals, and the Temporary Emergency Court of Appeals; decisions issued by U.S. District Courts in the fifty states, the District of Columbia, the District Court for Puerto Rico, the District Court for the Virgin Islands, the District Court for Guam, the District Court for the Mariana Islands, and the Court of International Trade (from November 1980 to the present), as well as the Judicial Panel on Multi-District Litigation (from 1968 to the present) and the Special Court, Regional Rail Reorganization Act of 1973; U.S. Court of Customs & Patent Appeals cases; U.S. Court of International Trade cases (from November 1980 to the present); U.S. Tax Court cases, Memorandum Decisions & Board of Tax Appeals decisions; U.S. Court of Appeals for Veterans claims (from December 1989 to the present); U.S. Customs Court cases (through October 1980); U.S. Commerce Court cases; and Armed Forces Court of Appeals and Courts of Criminal Appeals rulings.

[17] Lexis-Nexis Academic covers U.S. Supreme Court briefs from January 1979 to the present, including Merit Briefs for cases granted cert. and Special Masters as of the 1993–1994 Term and all briefs granted certiorari, joint appendices, and selected special masters prior to the 1993–1994 Term. Unfortunately, briefs filed for the circuit courts of appeals and district courts are not available through this database.

[18] The "Legal News" search option includes coverage of 276 periodicals, newsletters, bulletins, and reports oriented toward legal topics and issues. Specific titles include, e.g., *American Bar Association Journal*, *The American Lawyer* and *Legal Times*.

[19] Sifting through the search results, I disregarded all cases and materials wherein one of the parties, attorneys, etc. was named "Kafka," or otherwise where the individual referenced was not the Czech author. Importantly, I also did *not* count instances wherein one of the forms of "Kafka" was mentioned in a *quoted* passage—unless it was clear that the author included the passage mentioning Kafka with the clear intention of making a rhetorical point with the passage *because* of its inclusion of Kafka. My concern is not indiscriminate *appearances* of Kafka; rather, I am interested in occasions wherein the author (the judge, advocate/attorney, or legal correspondent) intentionally *invokes* Kafka, meaning that he or she chooses to appeal to the author or his work to make a point about the topic at hand.

number of invocations in state-level court cases as 139,[20] with 136 invocations at the federal level, and 113 collectively between legal periodicals and Supreme Court briefs, for a total of 388 pertinent allusions to Kafka in American legal arguments.

As the parameters of this study would suggest then, a central assumption guiding this research is that definitions, language, and frames in argument matter greatly.[21] Arguments are designed to *persuade*, after all, and while persuasion has a readily available and broad array of lay meanings,[22] for scholars

[20] To illustrate the why and how of this winnowing process, consider that of the twenty-four Connecticut state cases that include "Kafka" in some form in the full text of the opinion, fifteen of them merely quote a passage from a previous case (State v. Cosby, 6 Conn. App. 164, 174 (Conn. App. Ct. (1986)), that employs the phrase "Kafkaesque academic test" when discussing the Evans Doctrine (pertaining to whether objections not made at trial can be raised on appeal). The subsequent fifteen cases quote the passage from the controlling case as they consider similar questions of law, but they do not emphasize the embedded literary modifier or draw any particular significance from the adjectival invocation itself. Thus, the original case would be construed as a relevant invocation because that court deliberately chose to employ Kafka to make a point—but the subsequent fifteen cases, which cite the passage for purposes other than the specific invocation of Kafka, would not be included. This is not to say that all passages from previous opinions that include Kafka are not counted, but the appeal must be primary—that is, intentional as opposed to incidental—or what we might call "Kafka in the first instance."

[21] *See* JOHN CONLEY & WILLIAM O'BARR, RULES VERSUS RELATIONSHIPS (1990) (examining both *how* litigants talk and *what* they say as a means of understanding how various parties contribute by linguistic means to outcomes). Schiappa, *supra* note 1, at 18 ("Particularly when definitions become part of law or public policy, they can have rather significant consequences. In short, definitions *matter*." (citations omitted)); Martin Landau, *On the Use of Metaphor in Political Analysis*, 28 SOC. RES. 331 (1961) ("Analysis is a function of the language we employ, and frequently 'our thoughts do not select the words we use; instead, words determine the thoughts we have.'") (quoting William Embler, *Metaphor and Social Belief, in* LANGUAGE MEANING AND MATURITY 125 (S.I. Hayakawa ed., 1954)). In this vein, consider that "[w]hen attorneys and Supreme Court Justices metaphorized 'revolutionary' ideas into 'flames,' 'fire,' 'sparks,' and 'poisons,' and those advocating such ideas as 'snakes,'" the consequence was to direct society's thinking "not by the force of argument at hand, but by the interest of the image in our mind." Haig Bosmajian, *Fire, Snakes, and Poisons: Metaphors and Analogues in Some Landmark Free Speech Cases*, 20 FREE SPEECH Y.B. 22 (1982). Such images pervade our "normal conceptual system," George Lakoff and Mark Johnson have argued in their seminal study of metaphors, precisely "[*b*]*ecause* so many of the concepts that are important to us are either abstract or not clearly delineated in our experience (the emotions, ideas, time, etc.)," and thus we must understand them "by means of other concepts that we understand in clearer terms (spatial orientations, objects, etc.)." GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 115 (1980) (emphasis added).

[22] *See, e.g.*, Diana C. Mutz et al., *Political Persuasion: The Birth of a Field of Study, in* POLITICAL PERSUASION AND ATTITUDE CHANGE 1 (1996). On "persuasion" as an "artistic"

this process represents "*human communication designed to influence the autonomous judgments and actions of others*,"[23] with the purpose of "effect[ing] the internalization or voluntary acceptance of new cognitive states or patterns of overt behavior through the exchange or messages."[24] Persuasion's centrality to the law is obvious: within an adversarial legal model, advocates are supposed to effectively lobby for their clients' interests,[25] and are supposed to, in essence, "conceive and structure a true story . . . that the trier of fact is most likely to believe or adopt."[26] And so, we direct our attention to the process and significance of the way the Kafkan frame functions as a "communication device"[27] in legal rhetoric and facilitates definition, distention, and dilution over time.

Considering what is "essential" about Kafka in *this* way—that is, as he is actually conceived of and referred to in legal writings, and with a classification of techniques and tendencies of various persuasive appeals—is central to any effort to better understand the qualities of argument generally, but this consideration is especially central to, the prospects for a more refined understanding of and appreciation for the constitutive characteristics and consequences of legal rhetoric.[28] Cast in this light, understanding how legal actors

process, holding much in common with "effective selling" in fact, see LIEF CARTER, CONTEMPORARY CONSTITUTIONAL LAWMAKING: THE SUPREME COURT AND THE ART OF POLITICS 15–16 (1985).

[23] HERBERT W. SIMONS WITH JOANNE MORREALE & BRUCE GRONBECK, PERSUASION IN SOCIETY 7 (2001).

[24] MARY JOHN SMITH, PERSUASION AND HUMAN ACTION 7 (1982). My use does *not* require that persuasion necessarily "*change* an attitude in response to a message advocating a particular position or point of view." Joanne Miller & Jon A. Krosnick, *News Media Impact on the Ingredients of Presidential Evaluations: A Program of Research on the Priming Hypothesis, in* POLITICAL PERSUASION AND ATTITUDE CHANGE 79, 79 (Mutz et al. eds., 1996) (emphasis added).

[25] *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155–56.

[26] Steven Lubet, *The Trial as a Persuasive Story*, 14 AM. J. TRIAL ADVOC. 77, 78 (1990–1991). *See also* WILLIAM RIKER, THE STRATEGY OF RHETORIC 9 (1996) (coining and elaborating on the notion of "heresthetic" to describe "the art of setting up situations—composing of alternatives among which political actors must choose—in such a way that even those who do not wish to do so are compelled by the structure of the situation to support the heresthetician's purpose. . . . The line between heresthetic (manipulation) and rhetoric (persuasion) is wavy and uncertain."); *see also* WILLIAM RIKER, THE ART OF POLITICAL MANIPULATION (1986).

[27] *See* W. LANCE BENNETT & MARTHA FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 7–8 (1981) ("Stories are everyday communication devices that create interpretive contexts for social action. . . . The interpretive power of stories take on special significance in the courtroom.").

[28] For seminal studies on the relationship between language and law, see, e.g., WILLIAM BISHIN & CHRISTOPER STONE, LAW, LANGUAGE, AND ETHICS (1972); PETER GOODRICH, LEGAL

refer to Kafka is about much more than Kafka; it is about the practical "essences" and (d)evolution of those terms, tropes, concepts, and signifiers[29] that constitute legal argument, as well as the processes and implications in the development of the lexicon that frames the critical legal, political, and policy discussions of our day.[30]

The remainder of this Article will accomplish several objectives. Section II will offer an introduction to Franz Kafka as an author and social critic, with a summary of his life, literature, and legacy. With this as a backdrop, we will then consider, in Section III, the principal findings of this study, beginning first with the categorization derived from an inductive analysis of the rhetorical intentions and context of the 388 authors who have invoked Kafka in legal writings. Within this universe of invocations, we will see that ninety percent of references can be classified as occurring within one of three modes, representing appeals to "Authority," "Absurdity," and "Predicaments," respectively. Following this, in Section IV, we will consider the phenomenon I refer to as "distention," manifest in four primary forms: expansion, enervation, discordance, and conflation in rhetorical appeals to Kafka. Finally, in Section V, we will consider the implications of this distention, with particular attention to the dilution that occurs within the perimeter of practical reference (i.e. the

DISCOURSE (1987) (arguing that legal language is a social practice); PETER GOODRICH, LANGUAGES OF LAW (1990); E. Allan Lind & William M. O'Barr, *The Social Significance of Speech in the Courtroom*, *in* LANGUAGE AND SOCIAL PSYCHOLOGY 66 (Howard Giles & Robert St. Clair eds., 1979); DAVID MELLINKOFF, THE LANGUAGE OF THE LAW (1963); WILLIAM M. O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM 2 (1982) (examining courtroom communication as a means of understanding "the importance of form and to seek insight into the role of language in the legal process"); SUSAN PHILIPS, IDEOLOGY IN THE LANGUAGE OF JUDGES 11 (1998) (noting that "to understand how meaning is produced, it is necessary to examine actual discourse . . . ." which was for her purposes, in the form of transcripts of tape recordings of trial court judges); Bonnie Erickson et al., *Speech Style and Impression Formation in a Court Setting*, 14 J. EXPERIMENTAL SOC. PSYCH. 266 (1978); John M. Conley, Willam M. O'Barr, and E. Allan Lind, *The Power of Language: Presentational Styles in the Courtroom*, 1978 DUKE L.J. 1375.

[29] On the evolution of meaning and its consequences for society, see JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING, x (1984) (stressing that "language is not stable but changing," and is "perpetually remade by its speakers, who are themselves remade, both as individuals and communities, in what they say").

[30] *See* ANTHONY AMSTERDAM & JEROME BRUNER, MINDING THE LAW 166–67 (2000) (observing that the choice of language matters greatly because it can "precipitate or quash debate, locate the fronts along which debate might be joined, and establish what positions we will take, what arguments and commitments we will make or avoid in the course of debating," while acknowledging the importance of assessing the ways in which language "poses, defines, structures, and connects (or isolates) issues and the ways in which language averts, blurs, preempts, and conceals issues").

various modes of invocation) when examples such as those reviewed in Section IV are introduced into debate and constitute precedent for rhetorical maneuvers downstream.

II. AN INTRODUCTION TO FRANZ KAFKA

A. *Biography*

Franz Kafka was born to a middle class family in Prague in July, 1883[31] and in many ways lived the subject—and sentiments—of his stories. Receiving the degree of Doctor of Jurisprudence from Karl-Ferdinand German University in 1906,[32] Kafka went to work briefly for an insurance company and then pursued one of the few careers open to Jews at the time: employment as an attorney for the Worker's Accident Insurance Institute for the Kingdom of Bohemia,[33] a "semi-governmental body which dealt with the insurance of workers against industrial accidents and conducted inspections of factories to ensure that they complied with safety standards."[34] This experience at the state agency that was responsible for supervising the worker's compensation scheme in Prague and allowed Kafka to see firsthand the pettiness of a bureaucracy and likely had a profound effect on the writing he committed himself to in the evenings.[35] Kafka endured this experience until he became disabled from tuberculosis in 1922, the disease which took his life in 1924 at the age of 40.[36]

B. *Literature*

Having never achieved fame for his writing during his lifetime, nor even finishing those works considered to be his signature literary contributions,[37] Kafka specifically requested that his work not be published upon his death, though his friend and executor, Max Brod, violated this wish.[38] Most of the posthumous attention that Kafka has received centers on two (of his three)

[31] KLAUS WAGENBACH, KAFKA 2 (Ewald Osers trans., 2003).

[32] *See* Martha Robinson, *The Law of the State in Kafka's* The Trial, 6 ALSA F. 127, 128 (1982).

[33] Samuel Wolff & Kenneth Rivkin, *The Legal Education of Franz Kafka*, 22 COLUM. J.L. & ARTS 407, 409, 411 (1998).

[34] WAGENBACH, *supra* note 31, at 64.

[35] *See* Wolff & Rivkin, *supra* note 33, at 410–11; D. Litowitz, *Franz Kafka's Outsider Jurisprudence*, LAW & SOC. INQUIRY, Jan. 2002, at 103, 109–110.

[36] Litowitz, *supra* note 35, at 109.

[37] *See* WAGENBACH, *supra* note 31, at 2; Wolff & Rivkin, *supra* note 33, at 412.

[38] WAGENBACH, *supra* note 31, at 146; *see* RONALD GRAY, FRANZ KAFKA 2–3 (1973).

novels, *The Trial*[39] and *The Castle*[40] (with *Amerika*[41] being the third, less famous novel) and two of his short(er) stories, "The Metamorphosis" and "In the Penal Colony."[42]

Dealing as it does with a host of legal themes, *The Trial* is by far Kafka's most well known work and also the source that has received the most scholarly attention. In this story, Joseph K.,[43] the chief clerk at a large bank, is roused from bed on the morning of his thirtieth birthday and told by the two guards who seize him and inform him that he is under arrest, though on charges which are never explained and in a manner that seems to presume guilt from the start. After an initial interrogation in his home by an examining magistrate, K. is told that he is under arrest, but that he may continue with his profession and affairs, which he does until he is informed that his case will be heard on Sunday in a courtroom in an apartment building in the outlying suburbs.

Much of the novel deals with K.'s efforts to learn of the nature of his charges, the secretive proceedings of the courts, and the arduousness of gathering information about one's case or condition when one has no knowledge of the purported offense or even the authorities sitting in judgment.[44] Meanwhile, we see that the "central irony" of *The Trial*, in the words of one commentator, is that "[o]nly by admitting his guilt can Joseph K. be 'saved' by the Law"[45]—and thus the Law is paradoxically set forth as both the oppressor *and* liberator. Eventually K.'s case is taken up by a prominent attorney, Huld, an effort thought to be essential in negotiating with a court system that nobody really understands and one that does not actually read the petitions put before it by those allegedly being "tried" for (undisclosed) "offenses."

Near the end of the novel, K. finds himself in a conversation with a priest, who is also the prison chaplain, and is informed that, after extensive review, the

[39] *See* FRANZ KAFKA, THE TRIAL (Breon Mitchell trans., Schocken Books 1998).

[40] *See* FRANZ KAFKA, THE CASTLE (Mark Harman trans., Schocken Books 1998).

[41] *See* FRANZ KAFKA, AMERIKA (Micheal Hofmann trans., Schocken Books 1996).

[42] FRANZ KAFKA, *The Metamorphisis*, *in* THE COMPLETE STORIES & PARABLES 89 (Nahum N. Glatzer ed., Schocken Books 1983).

[43] Those familiar with Kafka's work will recall that he uses only the initial for the surname in this work and it is the protagonist's *only* name in *The Castle*.

[44] The German title was "Der Prozess" or "The Process"—a title which in many ways better captures Kafka's vision in this work: that of an overwhelming set of procedures and practices that are simultaneously ongoing and obscurant. Minkkinen, *supra* note 10, at 353, notes that this is the German title and the fact that this is a more apt description is just something that scholars seem to accept as a matter of fact drawn from that title.

[45] Steven Carter, *Kafka's* The Trial, EXPLICATOR, Fall 2002, at 39, 40.

case is not going well. Here, the priest recounts a story of profound symbolic meaning for K.'s condition and the process of law generally. In the parable, published separately as "Before the Law," the "door" to the law (manned by a "doorkeeper") remains closed to the old man from the country who desires admittance. Eventually the old man dies at the foot of the door, begging all the while merely to have access to the power of the law. Finally, one year after K.'s initial arrest, two agents of the law take him to a quarry, strip him of his shirt, and (after he refuses to kill himself) stab him through the heart with a knife—killing him "[l]ike a dog."[46]

In his other major novel, *The Castle*,[47] K., a land surveyor, arrives in a village near a castle under the auspices of a job assignment. The thrust of the novel involves K.'s perpetual efforts to seek information about his task and the bureaucratic bumbling he experiences as he encounters various individuals from the village and as he seeks to meet those officials associated with the castle who seem to have little to offer in the way of information or direction. Through interactions with a variety of characters along the way (e.g. Frieda, Barnabas), all of whom seem to have an irrational and curious fear of said officials, K.'s quest serves as an allegory for the modern state with its structures of power that are simultaneously ubiquitous and aloof, indispensable in our daily lives, yet still imposing (as a castle) and encouraging of submission under a shroud of mystery.

In one of his better known stories, "The Metamorphosis,"[48] Kafka describes the predicament of Gregor Samsa who wakes up one morning to find that he has turned into an insect. Samsa does his best to carry on with his life as usual, but his employer is disenchanted with his new condition and his family is less than accepting of him in this form. Overcome with feelings of alienation, anomie, and despair, Samsa is banished to his room. When he tries to escape, his father throws apples at him, one of which becomes embedded in his back, rots, infects him, and leads to his wasting away.

Finally, Kafka's other relatively famous short story, "In the Penal Colony,"[49] involves a man known as "the explorer" who witnesses an execution at a tropical penal colony carried out by an apparatus consisting of three pieces: a bed of cotton (onto which the victim is strapped); a "designer" that holds an

[46] KAFKA, *supra* note 39, at 231.

[47] KAFKA, *supra* note 40.

[48] KAFKA, *supra* note 42.

[49] FRANZ KAKFA, *In the Penal the Colony*, *in* THE COMPLETE STORIES & PARABLES 140 (Nahum N. Glatzer ed., Schocken Books 1983).

intricate writing mechanism; and a "harrow" of sizable needles to be used in carving the sentence into the flesh—a practice that morbidly reveals the result to the condemned *while* he dies the slow and painful death pledged to him. The twelve hour procedure is administered by "the officer" and much of the story focuses on the tension between the officer, who is deeply committed to the process and particular mechanism of punishment, and the explorer, who finds the practice to be primitive and outmoded. Eventually, in an effort to legitimize the apparatus, the officer puts himself within the machine and programs a "sentence" of "[b]e just."[50] But once the machine malfunctions, the officer is stabbed to death in the head and the explorer later learns that the designer of the machine, "the Old Commandant," had long ago been discredited, leaving only such true believers as the officer—the administrator of executions—to be killed by his own device of death.

C. *Significance*

Interpretations of Kafka's writings are vast and varied and, as such, any summary discussion of his significance must necessarily omit certain insights and issues. With this caveat, and in light of the short summaries provided above, a few topics, themes, and assessments are worth noting in this space. As Albert Camus[51] suggested in a succinct assessment of the Czech author's style and ultimate significance, "[t]he whole art of Kafka consists in forcing the reader to reread"[52] as he or she attempts to make sense of the surreal—and yet all too *real*—scenarios at the heart of most Kafkan allegories. Situating the regular amidst the ridiculous would appear to be a signature Kafkan move and thus one critic has suggested that Kafka was particularly adept at capturing the problems of the "representative man" consumed by the anxieties of a modern age.[53] Indeed, "[t]he common experience of Kafka's readers," suggested Hannah Arendt,

> is one of general and vague fascination, even in stories they fail to understand, a precise recollection of strange and seemingly absurd images and descriptions—until one day the hidden meaning reveals itself to them with the sudden evidence of a truth simple and incontestable.[54]

In a sense more specific to the context of this Article, Kafka's stories, while fanciful and allegorical, are also frighteningly keen in their anticipation of the modern bureaucratic state and especially the complexity of the legal system.

On this point, U.S. Supreme Court Justice Anthony Kennedy insists that *The Trial*, for example, "is actually closer to reality than fantasy as far as the client's perception of the system."[55] "It is supposed to be fantastic allegory," Justice Kennedy continues, "but it's reality" and thus he stressed that it was "very important that lawyers read it and understand this."[56] In the same vein, as Ewick and Silbey[57] noted in their study of the experiences of ordinary citizens within the legal system in New Jersey, the practical realities imagined by Kafka's "Before the Law" are quite evident and embody the Kafkan sentiment that "law houses itself in monumental buildings of marble and granite and arranges its agents behind desks, counters, and benches," while expressing itself "in a language that is arcane and indecipherable to most citizens."[58] The upshot of this, Ewick and Silbey continue, is that "Kafka represents this image of law" or notion that "there is no law without embodying it in human action, that the structure of doors and doorkeepers relies on, even while it denies, human agency."[59]

In this respect, Kafka has lasting significance, as Cynthia Ozick suggests, because his work represents our era in its "anomie, depersonalization, afflicted innocence, innovative cruelty, authoritarian demagoguery, technologically adept killing."[60] Amplifying this theme, James Conant suggests that, at best, our world is only a small step removed from the consternation and perpetual vexation envisioned by Kafka.[61] Indeed, he writes, what makes us particularly apprehensive of Kafkan scenarios is that "our lives are not without moments in

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[50] *Id.* at 161.

[51] ALBERT CAMUS, THE MYTH OF SISYPHUS AND OTHER ESSAYS (Justin O'Brien trans., Vintage Books 1991).

[52] *Id.* at 124.

[53] FREDRICK KARL, FRANZ KAFKA: REPRESENTATIVE MAN XIX (1991).

[54] HANNAH ARENDT, ESSAYS IN UNDERSTANDING, 1930–1954 70 (Jerome Kohn ed., Harcourt, Brace & Co. 1994).

[55] Terry Carter, *A Justice Who Makes Time to Read, and Thinks that All Lawyers Should, Too*, CHI. DAILY L. BULL., Jan. 26, 1993, at 108.

[56] *Id.* at 108.

[57] PATRICIA EWICK & SUSAN SILBEY, THE COMMON PLACE OF LAW (1998).

[58] *Id.* at 106.

[59] *Id.*

[60] Cynthia Ozick, *The Impossibility of Being Kafka*, NEW YORKER, Jan. 11, 1999, at 80.

[61] James Conant, *In the Electoral Colony: Kafka in Florida*, 27 CRITICAL INQUIRY 662 (2001).

which our world can suddenly seem to be trying awfully hard to imitate his."[62] And so, Conant stresses,

> Kafka's genius lies in his ability to depict that stratum of the uncanny in which the strangeness of the uncanny has to do with the ways in which making sense can sometimes seem to be the one thing that the things of our world are unable to do—and the terrifying character of that stratum has to do with our ability to recognize this species of strangeness as all too familiar.[63]

Finally, as many scholars have observed, Kafka is frequently associated with themes involving irony or paradox, or those endeavors frustrated by official ineptitude or impediments but which are still undertaken with apparent resignation and the tacit consent of the characters. On this, Guyora Binder and Robert Weisberg[64] suggest that Kafka's work reflects the realistic detail essential to convey "one of his characteristic aesthetic effects," which is the positioning of the absurd within the "compulsive routines of a social world ordered by the pursuit of an inconspicuous normality."[65] To wit, George Steiner notes in the Introduction to *The Trial*, "[i]n more than one hundred languages, the epithet 'kafkaesque' attaches to the central images, to the constants of inhumanity and absurdity in our times."[66]

III. THE ESSENTIAL KAFKA

A. *Development*

The first invocation of Kafka to appear in *any* form seems to have come from Cecil Day Lewis in 1938, describing Edward Upward's novel, *Journey to the Border* as "Kafkaesque in manner,"[67] though it would be nine more years before Edmund Wilson would write that "Kafka's novels have exploited a vein of the comedy and pathos of futile effort which is likely to make 'Kafkaesque' a permanent word."[68] Certainly one of the impediments to the spread of Kafka's influence—and hence invocations—at this time was the fact that none of his novels were published until after his death; nor did his books even sell

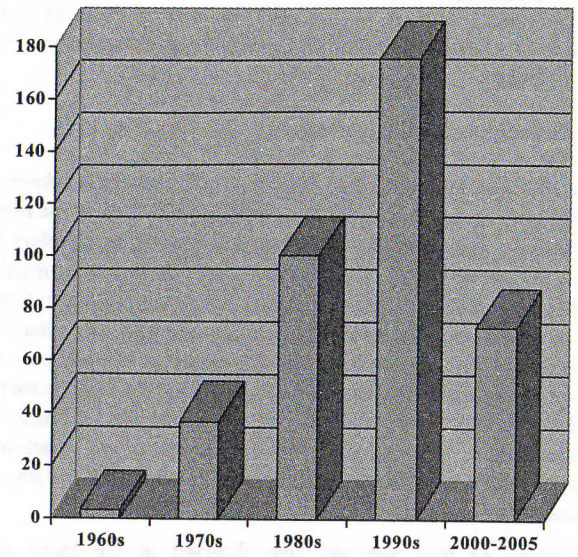
[62] *Id.* at 663.
[63] *Id.*
[64] GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW (2000).
[65] *Id.* at 287.
[66] George Steiner, *Introduction* to KAFKA, *supra* note 39, at vii.
[67] Richie Robertson, *Introduction* to WAGENBACH, *supra* note 31, at x.
[68] *Id.*

more than a few hundred copies through the 1930s.[69] One would expect that this was due in some sense to the censorship imposed on Kafka's works in Europe. The Nazis banned his books in Prague[70] and, as late as 1946, French Communists published an inquiry entitled "Must Kafka Be Burned?," which was a treatise suggesting that his work was a form of "black literature" expected to have a demoralizing effect on society.[71] After 1940, however, sales of his works increased greatly, as did his fame, such that by 1966 the paperback edition of *The Trial* had sold 200,000 copies.[72]

Still, it was not until 1963, nearly forty years after his death, that Kafka's name was finally invoked in an American court opinion.[73] Following this, there would be only two more references in state or federal court opinions in the 1960s, though as Figure 1 indicates, the total number of invocations of Kafka from *all* relevant sources (court opinions, briefs, and legal news articles) exploded in the 1970s, growing to 37, followed by 100 in the 1980s, 175 in the 1990s, and, as of July 2005, 73 since the turn of the millennium—for a total of 388 over approximately a forty year period, distributed relatively evenly between state-level court opinions (139), federal-level court opinions (136), and instances of legal commentary and advocacy (113).[74] See Figure 1.

[69] *Id.*
[70] *Id.* Indeed, it was not until 1957 that the first Czech translations of his *Collected Works* were published in Prague. *See* Litowitz, *supra* note 35, at 104.
[71] GRAY, *supra* note 38, at 6.
[72] Richie Robertson, *Introduction* to WAGENBACH, *supra* note 31, at vii.
[73] *See* United States v. Hughes, 223 F. Supp. 477, 481 (S.D.N.Y. 1963).
[74] It is important to note, however, that the Lexis database employed in this research does not allow for searches of Supreme Court briefs prior to 1979 and coverage of most legal news outlets begins in the 1980s and early 1990s. However, if the number of invocations in court opinions is any barometer, as I assume it is, then we would not expect more than a handful of references anyways.

Figure 1: Invocations of Kafka by Decade
* Includes all sources and forms of invocation



B. Rhetorical Modes

As a way of making sense of Kafka's meaning as he is invoked—that is, applied in legal arguments—we turn now to a discussion of what I have classified as the primary rhetorical modes of invocation, theoretical categories devised to explicate appeals to Kafka throughout the body of references. As we will see, these modes account for ninety percent of Kafkan allusions within American legal writings. While this categorization offers thematic arrangements that are neither mutually exclusive nor exhaustive, the structure below does offer the predominant rhetorical dimensions in which appeals to Kafka appear: (1) Authority, (2) Absurdity, and (3) Predicaments.[75]

[75] Some invocations fell entirely outside the Authority, Absurdity, or Predicament frames or any combinations therein. Importantly, these allusions to Kafka were on point—that is, they were not references to attorneys named "Kafka" and did not incidentally appear within quotations by others invoking Kafka. Still, in these instances, the author and his adjectival forms were employed for alternative, digressive, tangential, or gratuitous purposes. Consider as an example the following wherein the dissenting judge disagrees with the majority's distinction drawn between the "foot-length noise makers in this case" and the "conventional sort of husher or white noise maker employed in most courtrooms of the Superior Court" and surmises that "apparently because the devices might have been of a different, diabolical sort capable of inflicting acoustical torture over time—maybe a relic from Kafka's penal colony—the suit is allowed to go forward." Larijani v. Georgetown Univ., 791 A.2d 41, 45 (D.C. 2002) (Farrell, J., dissenting). In such a case the mention of Kafka is a legitimate invocation given that "In the Penal Colony" *does* deal with torture, but at the same time, it does not add much to the statement or the larger argument and does not seem to aspire toward much rhetorical significance.

Figure 2: Rhetorical Modes of Invocation

	Involving and Implicating:	*Particularly characterized by the following qualities:*
Authority	apparatuses, structures, institutions, & designs of power	a. Invasiveness b. Withdrawn c. Insularity d. Ineptitude
Absurdity	presumptions, values, order, & principles of society	a. Perversion b. Inversion c. Incongruity d. Irony
Predicaments	conditions, situations, experiences, & processes	a. Inescapability b. Inscrutability c. Incomprehensibility d. Inanity

1. Authority

The "Authority" mode generally implicates the formal instantiation of power: its apparatuses, structures, institutions, and designs. Invocations of Kafka in this vein typically pertain to bureaucracies—usually, but not always, *state* bureaucracies—and generally involve interactions or engagements with the rules, procedures, and forms of institutionalization that define the modern state. More specifically, as we will see explicated below, such appeals are characterized by an emphasis on (a) *invasiveness*, (b) a *withdrawn* nature, (c) *insularity*, and (d) *ineptitude*, examples of which we will now consider in greater detail.

a. Invasiveness

With respect to invocations emphasizing the *invasiveness* of authority—or the way that structures of power tend to know of our activities and affairs (even if arriving at this information by subtle, discreet, and even unknown methods)—recall the following invocation, famously uttered by a nominee for the U.S. Supreme Court. While transcripts of such proceedings are not formally within the scope of this project, Justice Clarence Thomas's prepared statement at the culmination of the Judiciary Committee hearing on his confirmation powerfully portrays the sense of invasion implied by invocations of Kafka in this vein. Indicting the activities and motives of those opposing him, Thomas asserted:

> I have endured this ordeal for 103 days. Reporters sneaking into my garage to examine books I read. Reporters and interest groups swarming over divorce papers looking for dirt. Unnamed people starting preposterous and damaging rumors. Calls all over the country specifically requesting dirt. This is not American; this is Kafkaesque.[76]

b. A Withdrawn Nature

On another level, invocations within this mode also tend to indict authority and its agents as being *withdrawn*—that is, as callous and with a generally unforthcoming nature that prompts (and even promotes) delays, confusion, and endless shuffling between points of interaction with its avatars of administration. And thus, the "official indifference" demonstrated by "shunting the citizen in Kafkaesque fashion from agency to agency" and the "willful immobility" evidenced even when victims seek restitution from the department that originated the error from the start[77] typifies the sort of aloofness and dismissal experienced in encounters with authority.

But, one also finds Kafka invoked to criticize the indifference associated with even the most routine functions of bureaucracies. "In the case at bar," one court noted in this vein, "HRS eventually and correctly determined that appellant was eligible for medically needy assistance and correctly accorded Ms. Kurnik the hearing to which she was entitled even though a decision had

[76] *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 102d Cong. part 4, 22 (1991) (statement of Judge Clarence Thomas).

[77] White v. California, 17 Cal. App. 3d 621, 634 (Cal. Ct. App. 1971).

already been made that appellant was eligible for the benefits she sought."[78] And thus:

> 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.[79]

c. Insularity

A third discernible subtheme within this mode is the aura of *insularity*, or a sense that Authority is behind the "door" as the citizen sits "before the law," to borrow from Kafka's own metaphor.[80] What this breeds, as scholars have noted,[81] is a sort of "us" and "them" dichotomy—a divide between "insiders," or those "in the know," and "outsiders," or those unable to get information, access, or answers. Portraying this insularity, one commentator notes that "[w]e live in a society enmeshed in a web of dauntingly complex law and procedure [wherein] [e]ven a simple eviction can be a labyrinthine legal nightmare [and] [n]egotiating the corridors of social security can be downright Kafkaesque."[82] *Government* agencies, as this typical invocation suggests, are construed as almost intentionally obdurant; deliberately difficult, "walled off," and imposing to those who seek their counsel.

But invocations of this sort are also directed at the more global characteristics of (seemingly) impenetrable power, whether such control is entrenched in a state apparatus or a similarly insulated quasi-public or private offshoot. A decision by Justice David Boehm of the Supreme Court of New York illustrates this presence with respect to a claimant's case against the Credit Bureau of Rochester.[83] Noting that the defendant "makes out over 50,000 credit reports a month, of which only two percent are authenticated as accurate or up to date as of the date of mailing," Boehm stressed that

[78] Kurnik v. Dept. of Health and Rehab. Servs., 661 So. 2d 914, 916–17 (Fla. Dist. Ct. App. 1995).

[79] *Id.* at 917.

[80] KAFKA, *supra* note 39, at 213–22.

[81] *See, e.g.*, Litowitz, *supra* note 35, at 104. Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 386–87 (1985).

[82] Joseph Calve, *Seize the Moment*, CONN. L. TRIB., Jan. 25, 1993, at 35 (Table 1).

[83] Nitti v. Credit Bureau of Rochester, Inc., 84 Misc. 2d 277 (N.Y. Sup. Ct. 1975).

"[c]onsequently, the defendant's credit report of the plaintiff repeatedly conveyed the same incorrect, obsolete information to credit institutions in the area in what the jury must have viewed as a calculated disregard of the plaintiff's many efforts to have his report corrected."[84] "Time and again," he continued:

> [P]laintiff came to the defendant's office and went over the same credit information with the defendant's employees, pointing out the errors, all to no purpose. Time and again he tried to have the defendant update and correct its report of him; he pleaded, he lost his temper, all to no avail. Like a character in Kafka, he was totally powerless to move or penetrate the implacable presence brooding, like some stone moloch, within the castle.[85]

Here the connection is drawn to Kafka's depiction of K.'s quest for answers from that institution of insular authority perhaps best portrayed in *The Castle*. Significantly, the "totally powerless" individual is caught—both in need of assistance from the Bureau and stymied by a series of structures designed to hold him at bay, in limbo, and thus subservient.

d. Ineptitude

A fourth and final variant within this mode relies on Kafka to imply a general ineptitude or incompetence on the part of incarnate forms of authority—those incompetent individuals and bloated agencies whose "bureaucratic error[s]" invite "the Kafkaesque plight of a hapless citizen."[86] Or, in the same vein, we might see that what is typical of such a "Kafkaesque journey through a labyrinth of administrative bungling" is the situation where "[p]etitions 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."[87] Certainly other subthemes are implicated as well in the contemplation and criticism of the "red tape" of modern bureaucratic structures and designs, but the above four represent the most salient appeals to Kafka in the vein of authority.

[84] *Id.* at 281.
[85] *Id.* at 281–82.
[86] Denton v. United States, 638 F.2d 1218, 1218 (9th Cir. 1981).
[87] Meadows v. Lewis, 307 S.E.2d 625, 644 (W. Va. 1983) (Table T1).

2. Absurdity

The "Absurdity" mode relates to the presumptions, values, sense of order and principles that are widely held, if not universal, in society and upon which our institutions and sense of the world are constructed. In this sense then, the "absurd" essentially involves the disruption or dislocation of our basic tenets and assumptions, leading quite often (in terms of the patterns of invocation) to what are deemed "Kafkaesque" conditions or results—wherein things are "out of whack," "don't add up," strike a surreal quality, and leave us off balance. Of particular interest to us here, when legal writers appeal to Kafka in this regard, they do so in order to stress one of four basic variants: (a) *perversion*, (b) *inversion*, (c) *incongruity*, and (d) *irony*.

a. Perversion

Regarding the first form within this mode, we can see that *perversion* portrays a bizarre or outlandish set of circumstances, in a general sense, though more specifically it pertains to a sequence of events or assumptions that strike us as wrong or inappropriate. Consider, for example, the following passage from an opinion by the United States Bankruptcy Court for the Northern District of Illinois.[88] Here, Judge Robert Ginsberg notes that "Franz Kafka or Lewis Carroll would be proud of an argument that it was necessary, for the good of the secured creditor, that the debtor, over the objection of the secured creditor, use up large amounts of the secured creditor's cash collateral in a futile reorganization effort . . . ."[89]

b. Inversion

In a second form, absurdity may be characterized by an emphasis on *inversion*, or a phenomenon whereby assertions, assumptions, or values appear to have been "turned on their head." Axioms may no longer apply, logic may not dictate its usual deductions, and reasoning and discerning capacities may fail to arrive at the expected answer (Here, for example, 2 + 2 does *not* = 4.). And thus, "[s]uffice to say that any rule of procedural law that allows one to be sued for conduct in which one has not engaged because one is 'expected' to do the wrong thing in the future is Kafkaesque,"[90] as one California Court of

[88] *In re* Chi. Lutheran Hosp. Assoc., 89 B.R. 719 (Bankr. N.D. Ill. 1988).
[89] *Id.* at 729 n.12.
[90] Lee v. Bank of Am. Nat'l Trust and Sav. Ass'n., 27 Cal. App. 4th 197, 206 (Cal. Ct. App. 1994).

Appeals judge surmised, because endorsing guilt-by-*anticipation* upends our legal norms of evidence and presumption of innocence.

Within this mode, Kafka might also be invoked when a court determines that internal mechanics, procedural dynamics, or its own institutional expectations have been—or potentially could be, as in the following case—inverted. Stressing as much while writing in concurrence and dissent, and noting that the majority had predicted "requiring a reason to be aligned with its related finding would turn the trial court into an episode of *The Twilight Zone*,"[91] Judge Karpinski of the Court of Appeals of Ohio, Eighth Appellate District, insisted in dissent that:

> On the contrary, to require anything less turns the appellate court into a Kafkaesque episode in which the burden falls on appellate judges to divine the nexus between a finding and all the facts in a record. In other words, if the trial court is not required to provide the nexus, this burden would fall on the reviewing court. The reviewing court, therefore, would not be reviewing a specific reasoning process; it would be walking around with a divining rod.[92]

Seemingly drawing on *The Trial*, this invocation of Kafka appears to stress that such an "episode" occurs whenever some notion of all-knowingness might be attached to or presumed of courts.

c. Incongruity

In a slightly different sense, absurdity may more directly stress the *incongruity*, wherein something is deemed "Kafkaesque" because of occurrences that took place out of order or their expected sequence, but especially if they are lacking in proportion or correspondence between points of comparison (A 100-year sentence for shoplifting might be deemed "Kafkaesque," for example, due to the lack of congruity between the "crime" and the "time."). Such would seem to be the sentiment in the following legal commentary on the passage of "Megan's Law":

> New Jersey's notoriously thin skin has been rubbed raw from a pair of brutal child rape murders, and what do we have to show for it? Collective paranoia, which the Legislature has translated into longer terms for sex crimes; a Kafkaesque redefinition of mental illness (in order to justify indefinite civil commitment); [and a variety of other provisions].[93]

The reworking of the legal definition of a psychological or sexual disorder in an effort to permanently incapacitate those offenders retroactively affected by the amended classification was thus "Kafkaesque" for this critic given the official restructuring of previous conceptions to match present concerns, irrespective of the "fit" that may link the two.

d. Irony

Finally, this mode is characterized by the implication of *irony*, especially manifest as invocations of Kafka stressing the consequences—usually unintended—of official policies and procedures and the bizarre results that follow from abidance to the internal logic of the system itself. Invoking Kafka in this light, United States District Judge Deborah Batts spotlights the absurdist tendencies of the U.S. federal sentencing guidelines, observing that "if taken literally, section 924(c) [defining any felony crime punishable under the Controlled Substances Act as a 'drug trafficking crime'] elevates all drug felonies to drug trafficking felonies ([requiring a] 16 or 12 level enhancement) and doesn't allow for any drug felony to be treated merely as an aggravated felony ([requiring an] 8 level enhancement)."[94] "At best, then," she reasons:

> [A]nd applying the definitions contained in the statutory sections referenced in § 2L1.2, a drug felony could only be reduced to a 12 level enhancement so long as the sentence imposed was 13 months or less. On the facts of this case, since the Defendant was sentenced to 1–3 years by the State, he would be booted up to the 16 level enhancement that the Government itself concedes is not applicable. This is Kafkaesque.[95]

That Judge Batts chose to invoke Kafka in this opinion (where "wrong," "unjust," "crazy," "unfortunate," "nonsensical"—or even simply "ironic," itself—could have been used instead) is instructive of the general invocational tendencies of appeals to Kafka in this domain in that it clearly intends to add a particular flavor and distinct rhetorical turn that an invocation of Kafka is (best) suited to provide.

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[91] State v. Leach, No. 82836, 2004 WL 637769, at *6 (Ohio Ct. App. Apr. 1, 2004).
[92] *Id.*

[93] John Furlong, *Rx for Avenel, Minor Surgery, Therapy*, 147 N.J.L.J. 899 (1997).
[94] United States v. Ramirez, No. 01 CR 888(DAB), 2002 WL 31016657, at *2 (S.D.N.Y. Sept. 9, 2002).
[95] *Id.*

3. *Predicaments*

The "Predicaments" mode primarily involves conditions, situations, experiences and processes, especially those that ensnare individuals in circumstances that restrict them, but which are also well beyond their control and capacity for change. One might imagine something like a morass (as opposed to a labyrinth, for example), in that it better conveys a sense for the struggling, and yet still-*sinking* quality of such conditions. Or, to offer a different metaphor in the service of the same notion, invocations within this mode might stress a kind of centrifugal force that consumes and confines individuals, such as when Peter Neufeld, co-founder of "The Innocence Project" (which works to free those on death row), described those inmates being released in light of DNA evidence as having been "caught in this Kafkaesque vortex" which overtakes and overwhelms them in the criminal justice process.[96] In this vein then, invocations portraying predicaments as Kafkaesque do so by stressing more specifically the (a) *inescapability*, (b) *inscrutability*, (c) *incomprehensibility*, and (d) *inanity* of situations.

a. *Inescapability*

Regarding *inescapability*, we see the "stickiness" and impediments to motion that suggest a kind of indefinite sentence or incurable condition, wherein individuals are unable to extricate themselves from surroundings that confound them. In the following example, note the way in which Judge Hirsch of the Supreme Court of New York invokes Kafka to represent the plight of a landlord caught, significantly, in the webbing spun by both public policies *and* private resistance. "In way of clarification, at this point," the Court explains, "we have a situation in which the landlords, who are in violation of the law because of the 'illegality' of their basement apartment, cannot evict their tenant to remove the violation."[97] Moreover,

> [t]hey cannot obtain rent even at the reduced rental, as the tenant simply refuses to pay, and to add to the Kafkaesque situation, they are obligated to supply their unwanted "guest" with free gas, electricity and hot water. For six and one-half years this injustice has been perpetuated. The tenant has been tenacious both in her refusal to remove herself and in her refusal to pay rent for the apartment she occupies. The landlords are frustrated in their inability to register the premises as a multiple dwelling and thwarted by the inflexibility of statutory technicalities.[98]

[96] S. Cohen & D. Hastings, *DNA Highlights Stolen Lives in Prison*, 3 WEST. MASS. L. TRIB. 1 (2002), *available at* http://www.truthinjustice.org/truefreedom.htm.

[97] Corbin v. Harris, 92 Misc. 2d 480, 483 (N.Y. Sup. Ct. 1977).

b. *Inscrutability*

In a different sense, *inscrutability* is central to the contemplation of predicaments in that situations deemed "Kafkaesque" are often the function of a formal policy (or even an informal indifference) precluding the promulgation of rules, laws, policies, and operational guidelines. Thus, not only are such predicaments inescapable, but the individuals engulfed in them cannot even determine what they have done, who is responsible for the detention, or how they could remedy the situation. Inscrutability then has to do more with the meager disclosure of information and the general policy—or at least practice—of keeping the affected parties "in the dark." Using Kafka to depict such unforthcoming tendencies, Judge Brody writing for the Superior Court of New Jersey addressed the case of a prison inmate appealing an adverse determination in a disciplinary proceeding, explaining that "[a]ppellant contends that he was unable to defend himself against the charges because the authorities did not disclose any of the evidence, claiming it to be 'confidential.'"[99] And yet, she continued:

> The record of the proceedings does not contain a factual description of the evidence on which hearing officers and the assistant superintendent relied or their evaluation of its worth. Thus appellant was put in the Kafkaesque predicament of having to defend against evidence that was totally undisclosed, and we are unable to review the adjudication because the record is incomplete.[100]

As with *The Trial*'s Joseph K., the appellant in this case found himself in the position of fighting to even be *told* what it was he was fighting to defend himself against—and thus, the lack of revelation and shroud of mystery in such instances conspire against the individual seeking exculpation.

But inscrutability might well be evinced within Kafkan predicaments of a different form, such as when implications and consequences are clear to—or at least logically deduced by—those with a special knowledge of the legal system itself. Those "in the know," be they judges, prosecutors, or defense counsel,

[98] *Id.*

[99] Fisher v. Hundley, 572 A.2d 1174, 1175 (N.J. Super. Ct. App. Div. 1990).

[100] *Id.*

have the advantage of being fluent in the language of the law and thus while the rules might technically have been promulgated (or at least they were not hidden), the *uninitiated* are still in a predicament—a phenomenon portrayed in a case involving the classification and commitment of sex offenders in California. "Here," the dissenting judge wrote, "the record does not indicate in the slightest that defendant was told or knew he was heading toward a commitment process."[101] Indeed, he accepted a plea bargain, "pled guilty to battery—an innocuous crime in terms of its sexual connotation," and at his probation and sentencing hearing there was "no indication he was told he could contest any of the statements in the probation report recommending MDSO [Mentally Disordered Sex Offender] proceedings."[102] As such, the

> entire process smacks of an administrative web in which defendant, after having confided to a probation officer for purposes of probation, finds himself entwined as he is directed toward the state hospital. And to compound this Kafkaesque scene and to further confuse the record, the certification fails to meet the requirements of the statute itself for it does not contain the reasoning for the court's finding there was probable cause for believing defendant an MDSO.[103]

c. Incomprehensibility

And yet, if instructions or guidelines *are* revealed, as opposed to being shrouded and mysterious, they are often still *incomprehensible* to the parties implicated in the proceedings. That is, even without obscurant intentions, "Kafkaesque" might speak to the general feeling of being overwhelmed and nonplussed by codes, cultures, and contingencies. Predicaments of this variety seem to become "Kafkaesque" when language barriers preclude the individual from truly *understanding*, as opposed to merely being apprised of, the particulars of the situation, a distinction evident in a *per curiam* opinion of the First Circuit Court of Appeals. "Clearly, the right to confront witnesses would be meaningless if the accused could not understand their testimony,"[104] this court noted, while "the effectiveness of cross-examination would be severely hampered."[105] Moreover,

[101] People v. Coronado, 104 Cal. App. 3d 491, 498 (Cal. Ct. App. 1980).
[102] *Id.* 498–99.
[103] *Id.* at 499.
[104] United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973).
[105] *Id.*

> [i]f the defendant takes the stand in his own behalf, but has an imperfect command of English, there exists the additional danger that he will either misunderstand crucial questions or that the jury will misconstrue crucial responses. 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.[106]

An arguably more alarming situation exists however under conditions of *mutual* incomprehensibility—when *neither* side appears to understand the proceedings and when, as a result, the predicament hardens. Recounting a story discussed in a book by Denis Woychuk, an attorney for the criminally insane, the correspondent-reviewer in the following passage describes such a predicament. "[T]here is one reason why Woychuk and his colleagues are there in the first place," the reviewer writes, "perhaps best illustrated by the case of Mtumbo Balinka."[107] Indeed, he continues,

> Kafka could not have written it better. A Sudanese immigrant arrested on misdemeanor charges, Balinka was first sent to Riker's Island. Fearing deportation and rape, he lost control and wept uncontrollably—a not irrational response, for which he was sent to a mental hospital. There he stayed for a longer period of time than he would have had he simply been found guilty of the misdemeanor charges. In part, this was due to the fact that he had the double misfortune of barely speaking English, and then being examined in prison by the state's psychiatrist—a Korean immigrant who spoke the language even less well. Dr. Wong noted in the patient chart that Balinka "has delusions of arriving at the hospital by train." In fact what he'd said was, 'Doc, I was railroaded here.' Woychuk notes dryly: "What we had here was a failure to communicate."[108]

d. Inanity

Finally, a general sense of *inanity* pervades this mode, engendering an aura of pointlessness and lethargy as one is mired in a hopeless condition and constantly searching for answers amidst the despair. Suggesting such a sentiment, consider the allusion to Kafka in the well known case against the Kerr-McGee Corporation in the late 1970s. "[T]he record presents a Kafka-like picture of a young woman who was contaminated by an originally unknown amount of

[106] *Id.*
[107] Jonathan S. Shapiro, *Defending the Indefeasible*, AM. LAW., Apr. 1996, at 50, 51 (reviewing DENNIS WOYCHUK, ATTORNEY FOR THE DAMNED (1996)).
[108] *Id.*

plutonium that was inexplicably found in her apartment,"[109] Judge Theis writes, referring to Karen Silkwood and stressing that she was

> fearful of a slow death from cancer, became hysterical at times, and approached a nervous breakdown as she became the focus of the federal agency and industry investigation into the incident. Because of the uniqueness of her injury, she was compelled to place herself for medical care in the custody of those whom she distrusted. The mental anxiety associated with this experience was for the jury to measure, together with whatever physical injury the jury found she suffered.[110]

IV. DISTENTION

As the preceding section has demonstrated, the "essential" Kafka is broad and diverse in invocation and intention. In other words, "Kafkaesque" (as such and in its various iterations) signifies themes and concerns that have a relatively distinct and consistent lexical meaning as applied by legal rhetors: Authority, Absurdity, and Predicaments. *Within* these modes, however, there are appeals that are curious at best and deteriorative at worst. As I will use this notion, distention represents something of a theoretical amalgam of linguistic processes and rhetorical phenomena observed by scholars in various fields. Specifically, my exploration of this distention in appeals to Kafka draws on what Geoffrey Nunberg[111] has deemed the "spandex"[112] quality of certain terms as they are used in everyday political discourse; what Giovanni Sartori[113] has referred to as the "stretching" and eventual "straining"[114] that occur to concepts as their conceptualizations expand—and where "gains in extensional coverage tend to be matched by losses in connotative precision[;]"[115] what Kenneth Burke has observed of "casuistic stretching[;]"[116] and the (ideological) "drift" noted by

[109] Silkwood v. Kerr-McGee Co., 485 F. Supp. 566, 590 (W.D. Okl. 1979).

[110] *Id.*

[111] *See* GEOFFREY NUNBERG, GOING NUCULAR: LANGUAGE, POLITICS, AND CULTURE IN CONFRONTATIONAL TIMES (2005).

[112] *Id.* at 143.

[113] *See* Giovanni Sartori, *Concept Misformation in Comparative Politics*, 64 AM. POL. SCI. REV. 1033 (1970).

[114] *Id.* at 1034.

[115] *Id.* at 1035.

[116] KENNETH BURKE, ATTITUDES TOWARD HISTORY 229 (3d ed. 1984) (describing "casuistic stretching" as the process whereby "one introduces new principles while theoretically remaining faithful to old principles"); KENNETH BURKE, LANGUAGE AS A SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD 367 (1968) (defining "terministic catharsis" as "another word

legal scholar Jack Balkin,[117] who found that "legal ideas and symbols will change their political valence as they are used over and over again in new contexts."[118] Certainly many concepts and terms evolve over time and thus the claim here is not that there is necessarily anything unique about invocations of *Kafka*, but rather to use allusions to *this* author, within *this* domain, as a case study investigation of the dilution in the integrity of a rhetorical device and its consequences for legal argumentation.

As we consider examples of "distention" in invocations of Kafka in American legal writing, we begin first with the one feature that is clear and constant across and within each mode: Franz Kafka is *always* invoked in a critical sense. "Kafkaesque," in other words, is never a compliment; nor are such iterations even neutral, but are rather unequivocally negative, irrespective of the particular argument in the service of which they are rendered. Those who are even loosely familiar with Kafka's work would expect this, to be sure, but it's worth noting in this space because it is one of the few categorical statements we can make about such allusions in this domain.

In this final section we will first review examples of Kafkan reference that have, I contend, contributed to a distention in meaning that has the ultimate effect of diluting the appeal of rhetorical effect and import. Following this discussion of distention in various forms, we will consider the implications of this case study for our understanding of definitions in legal argument more generally. Having said this, we turn now to the patterns of divergence and de_parture evident within the above general modes of invocation. Specifically we will see the drift and distention in appeals to Kafka as a function of one of four basic tendencies: (1) *expansion*, (2) *enervation*, (3) *discordance*, and (4) *conflation*.

1. Expansion

One of the developments that has facilitated what I call the "expansion" of appeals to Kafka within this domain is that while the political Left has

for 'rebirth,' transcendence, transubstantiation, or simply for 'transformation' in the sense of the technically developmental, as when a major term is found somehow to have moved on, and thus to have in effect changed its nature either by adding new meanings to its old nature, or by yielding place to some other term that henceforth takes over its functions wholly or in part").

[117] J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 871 (1993).

[118] *Id. See also* Catherine Helen Palczewski, *Contesting Pornography: Terministic Catharsis and Definitional Argument*, ARGUMENTATION & ADVOC., Summer 2001, at 1, 3 (arguing that "definitional shifts can occur when ambiguity is created within a term as a result of rhetors' simultaneous deployment of a term in multiple locations of the Burkean [Kenneth Burke] pentad, thus stretching the term to encompass more").