historically had an affinity for Kafkan themes,[119] this study suggests that actors from a range of points on the political spectrum have invoked Kafka for rhetorical purposes in their legal writings. At the level of the United States Supreme Court, for example, and as we saw at the beginning of this Article, Kafka has been invoked by Justice Antonin Scalia.[120] But, so too did Justice Thurgood Marshall,[121] Chief Justice William Rehnquist,[122] and Justice Sandra Day O'Connor[123] refer to Kafka in rulings, meaning that Supreme Court Justices of the libertarian-conservative (Scalia), left-liberal (Marshall), traditional conservative (Rehnquist), and pragmatic conservative (O'Connor) varieties have each turned to this author for rhetorical support in advancing a legal argument.[124] Perhaps such a range in ideological utility reflects the timelessness and transcendence of the author's messages, but such a development also necessarily invites some measure of instability in that a previously established political association—giving the audience some frame of reference or interpretive cue—has now dissipated as the term has come to be employed by actors with political visions and agendas that are often in direct *conflict* with one another.

In a different sense, the expanding Kafka is evident in that while the term is generally directed at the *state*, or one of its arms or appendages, it is also routinely invoked to portray the scene created by bumbling security guards at Bloomingdale's;[125] it has been used to depict the way that a hospital fails to offer due process to one of its physician-employees—subjecting him to a "Kafkaesque 'kangaroo court[;]'"[126] it may speak to the shady dealings of a university president;[127] and, it might refer to a situation wherein an individual was met with three years of Kafkaesque responses by General Motors, meant to

[119] *See, e.g.*, Michael Löwy, *Franz Kafka and Libertarian Socialism*, NEW POL., Summer 1997, at 120.

[120] PGA Tour, Inc. v. Martin, 532 U.S. 661, 705 (2001).

[121] Dobbert v. Wainwright, 468 U.S. 1231, 1242 n.1 (1984).

[122] Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 557 (1978).

[123] Gardebring v. Jenkins, 485 U.S. 415, 423 n.10 (1988).

[124] For more on the ideological dispositions of the Justices of the U.S. Supreme Court, see JEFFREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002). For distinctions between varieties of "conservatism," see THOMAS KECK, THE MOST ACTIVIST COURT IN HISTORY (2004); MARK TUSHNET, A COURT DIVIDED (2005).

[125] T. O'Brien, *Charge it to Bloomies*, 136 N.J.L.J. 1670 (1993).

[126] Silver v. Castle Mem'l Hosp., 497 P.2d 564, 575 (Haw. 1972).

[127] Linkage Corp. v. Trustees of Boston University, No. 914660B, 1995 WL 909556, at *17 (Mass. Super. Mar. 28, 1995).

prevent him from returning to work.[128] Or, it might even appear in the discussion of a defendant-doctor who is forced to perform an emergency Caesarean section on a plaintiff, but who—upon the death of the fetus and stillborn birth—is sued for allegedly inflicting physical injury, ironically on account of his "failure to perform a Caesarean section," the very procedure that gave the plaintiff a cause of action.[129]

2. Enervation

Moving from a sense of bloat to internal erosion, certain trivial and/or offhand invocations have the effect of enervating Kafka through lethargic or misdirected appeals. Note for example how the following commentary (an address to a gathering of antitrust lawyers) attempts to draw a connection to Kafka's short story, "The Metamorphosis." "I would like to begin my presentation this morning by talking about people," the author writes, who are "high ranking corporate officials."[130] "Close your eyes and picture these clients," he continues, they "wear conservative clothes," "are bright and energetic," "come to work in large offices in big buildings located in ever larger cities," are "aggressive, fierce competitors," and "tend to be workaholics."[131] After setting the stage with this imagery, the author then suggests that under such conditions "occasionally a true Kafkaesque metamorphosis occurs, and it occurs overnight."[132] He continues,

> [a]t 8:00PM, our clients come home, close the doors and take off their three-button suit; and this metamorphosis begins. By morning it is complete. The door of the home opens and out walks this same individual clad in bright plaid pants, a short-sleeved shirt resplendent with a little alligator or maybe a polo pony, and to complete the transition, a wild straw hat rests jauntily on a somewhat bald plate.[133]

Certainly there are multiple interpretations one might draw out of a story involving a man's overnight morphing into a bug, but a transformation it seems *not* to accommodate is lawyers changing their clothes and donning "bright plaid pants" and shirts with "polo" ponies.

[128] GMC v. Smith, 602 S.E.2d 521, 534 (W. Va. 2004).

[129] Johnson v. Verrilli, 134 Misc. 2d 582, 585 (N.Y. Sup. 1987).

[130] Steven Fellman, *Antitrust Compliance*, 57 ANTITRUST L.J. 209, 209 (1988).

[131] *Id.*

[132] *Id.*

[133] *Id.*

Consider, as well, the slightly less arrant invocation offered up by a legal correspondent commenting on his experience at a recent trade show: "I stumbled out of the LegalTech show in New York a few weeks ago with a somewhat unsettling insight. Although they would never admit it, many of the large legal technology vendors want to be like Mike. Not Mike the basketball player. But Mikrosoft [sic]. Enough Kafka."[134]

The focus of the article from which this passage is drawn involves the potential for legal research software makers (e.g. Lexis/Nexis or Westlaw) to have the same market dominance as the Microsoft Corporation. With the con that this is "[e]nough Kafka" the author would appear to be suggesting that the result is ridiculous or absurd in some generic sense, though the actual association to *Kafka*, or even typical Kafkan situations or characters, is at best unclear and indeed as I will argue in Section V, *unfortunate* in what it portends for the nature of such invocations in general.

The same tendency is evident in a different legal commentator's assessment of the United States Supreme Court's decision in the case of *Sutton v. United Air Lines, Inc.*,[135] a case requiring interpretation of the Americans with Disabilities Act—legislation designed among other intentions to afford "otherwise qualified" disabled individuals an opportunity to fairly compete for employment. The Court's "Kafkaesque ruling," the author suggests, "is the best example I can recall of how judges can apply their jurisprudence with minutious [sic] attention—and completely miss the spirit of the law,"[136] because while the Petitioners (Sutton and Hinton) "were well-trained and experienced enough to win certification by the Federal Aviation Administration"[137] and had been invited by United Airlines to take a flight-simulator test, company officials later determined that the women's congenital myopia precluded them from employment with the airline in that "company policy requires applicants to show *uncorrected* visual acuity of 20/100 or better."[138] "A classic case of disability discrimination, no?," the commentator wonders, answering his own question with:

> Well, not for the Gang of Nine who reviewed *Sutton*. Justice Sandra Day O'Connor found that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment, including, in this instance, eyeglasses and contact lenses. In other words, this Supreme Court feels that if you can remedy myopia with glasses, you cannot use the ADA to stop an airline from refusing to give you a job because you are myopic. To put a finer point on it: You can remedy your disability, but you can still suffer job discrimination because of your disability. Pretty Orwellian, no?"[139]

Obviously, the author is critical of the Supreme Court's legal reasoning and statutory interpretation in this case, but beyond the generic critique and effort to disparage, one wonders what element of the situation is particularly "Kafkaesque," as opposed to simply "wrong," "illogical," "convoluted," or any other adjective that may convey one's dissatisfaction (Along the same lines, what renders the opinion especially "Orwellian?"). Certainly the Supreme Court is a state entity and it did endeavor to concretize an abstract problem and render a tangible interpretation to ambiguous language, but this relatively minimal set of preconditions hardly seems sufficient to warrant the adjectival association with Kafka's fiction.

For additional evidence of the same general drift and gradual distention, one could look as well to a series of recent briefs submitted in cases before the United States Supreme Court. In an argument opposing the University of Michigan's affirmative action plan in admissions, for example, one advocate offered a criticism of the plan by comparing it to a recent Ninth Circuit Court of Appeals decision which, according to the author, "demonstrates the modern-day dangers of Kafkaesque social engineering in a multi-racial society."[140] For the same sort of antecedent application, note the appeal to Kafka in a brief opposing the execution of the mentally retarded, wherein the author argued that recent notorious cases have "focused national attention on the plight of individuals with mental retardation who may face capital punishment," and who then averred that "[t]he potential for such a Kafkaesque miscarriage of justice has accentuated the moral consensus already in place, and heightened the sense of urgency about enacting protective legislation."[141] Finally, in a case dealing with racial gerrymandering, one advocate's invocation of Kafka suggested that "[t]he DOJ's [Department of Justice's] assertion that districts the

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[134] *Corrections Policy*, AM. LAW., Mar. 2003, at 1.
[135] 527 U.S. 471 (1991).
[136] Jorge Aquino, *A Myopic Ruling*, RECORDER, July 2, 1999, at 4.
[137] *Id.*
[138] *Id.*

[139] *Id.*
[140] Brief of the Asian-American Legal Foundation as Amicus Curiae in Support of Petitioners at 4, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 152363.
[141] Brief of the American Ass'n on Mental Retardation et al. as Amici Curiae in Support of Petitioner at 29 n.41, McCarver v. North Carolina, 533 U.S. 975 (2001) (No. 008727), 2001 WL 648605.

State 'continues to draw' (i.e. in 1992) should serve as an 'appropriate benchmark' for determining whether a district is highly irregular or bizarre is almost Kafkaesque."[142]

Beyond the fact that these legal advocates clearly intend for the adjective "Kafkaesque" to support their criticism(s) of the policies or laws in question, there appears to be no actual connection to any of Kafka's fiction or typical themes. "Social engineering" (whatever that means) may or may not be a good thing—and whether or not affirmative action even constitutes such "engineering" is a separate question entirely—but the addition of the modifier making it "*Kafkaesque* social engineering" is especially curious. Further, while the execution of the mentally retarded surely implicates serious moral questions, the same concern pertains to the notion of a "*Kafkaesque* miscarriage of justice." Is the allusion set forth simply because Joseph K. was denied "justice" throughout *The Trial* and eventually executed? Or because of an attempted connection to the more general portrait of the barbarity of state-administered murder in "In the Penal Colony?" Perhaps "Kafkaesque miscarriage of justice" is meant to suggest a "miscarriage of justice akin to one found in Kafka's fiction?" But, if so, why is Kafka assumed to have the rhetorical monopoly on accounts of injustice—such that "miscarriages of justice" are now tantamount to "*Kafkaesque* miscarriages of justice?" Under such conditions, how could anything *particular* be "Kafkaesque" if the *universal* vision of "miscarriages of justice" is, in effect, the same?

Finally, it is just as unclear how or why "Kafkaesque" is meant to color our assessment of the Department of Justice's policy on drawing lines for racial balance in electoral districts. As used in the brief, the invocation of Kafka seems to have been intended to serve as an exaggerated synonym for "bizarre." But as was the case with "miscarriages of justice," if the invocation is essentially a generic attachment then it is no longer especially evocative of or faithful to what we might think of as a "pure" or distinct appeal to Kafka. This is not to say that there is not a place for such allusions, whether for stylistic or substantive purposes (Indeed, "Huxleyan"[143] might be a perfectly suitable rhetorical referent when discussing some sorts of "social engineering," or "Dickensian"[144] if one were speaking particularly of "miscarriages of justice" dealing with children.). Rather it is simply to demonstrate the tendencies that

[142] Brief of Appellees at 18 n.17, Miller v. Johnson, 515 U.S. 900 (1995) (Nos. 94-631, 94-797, 94-929) 1995 WL 134910.

[143] *See* HUXLEY, *supra* note 7.

[144] *See* DICKENS, *supra* note 7.

have emerged with a slippery pen when legal writers seek to add rhetorical value contexts or claims that may not endure them.

The same problem is evident when the subject and/or situation presents a *plausible* connection to events and issues in Kafka's writings, but where the legal author offers the invocation to amplify the *ordinary* in such a way that it is no longer *uniquely* reflective of the ideas, themes, and tensions for which it was likely invoked in the first place. In the following example, notice how the correspondent employs "Kafkaesque" as a basic synonym for "ridiculous" or "ironically unfortunate" in discussing the efforts of Law Professor David Dow to file an emergency affidavit in a capital punishment case:

> He spent a couple of hours drafting the form, getting it signed and rushing around Huntsville in search of a notary. When the form was ready, he found himself in a Kafkaesque scene: waiting his turn to use the slow-moving fax machine behind the front desk of a motel staffed by a clerk unwilling to bend the rules so Dow could transmit his affidavit, while the clock ticked toward execution time.[145]

As we saw above in the discussion of the modes of invocation, Kafka's work surely focuses on bureaucracies, indifference, and the resignation that comes from dealing with large institutions, structures, and organizations, but it is contestable to be sure whether the adjectival form of his name properly extends to a depiction of an individual "waiting his turn to use the slow-moving fax machine behind the front desk of a motel staffed by a clerk unwilling to bend the rules . . . ."?[146] If the "clerk" is taken to be the agent or official—or lackey—of some larger entity, institute, or conspiracy, perhaps, but the environment would seem to require more to render it a "*Kafkaesque* scene."[147]

In a similar regard, it is unclear whether Kafka is properly invoked to describe standard interrogation proceedings carried out by agents of the state. In the following example, we are told of a "Kafkaesque scene described by Monica Lewinsky's attorney of Kenneth Starr's team of FBI agents and Justice Department attorneys pressuring her in a hotel room for hours, unsuccessfully trying to persuade her to tape the president himself is truly unsettling."[148] Of course, *The Trial*, does involve a series of interrogations conducted by various

[145] Mark Ballard, *Critics Rejoice, but Pro Bono Counsel Worry as Resource Center Shuts Down*, TEX. LAW., Oct. 9, 1995, at 18.

[146] *Id.*

[147] *Id.*

[148] Editorial, *Stark Struck*, 151 N.J.L.J. 25, 26 (1998).

deputies, but the situations portrayed in this work are famed, and especially frightening, precisely because they are *not* carried out in the traditional manner: that is, in a small room, with a bright lamp, a "good cop/bad cop" routine, aggressive questioning, threatening ultimatums, two-way mirrors, etc. Indeed, the signature "Kafkaesque" interrogation, one would think, would be marked by its minimalist, obtuse, and secretive quality—with very little actual "interrogation" in the formal sense and with the individual under investigation existing in an ostensibly "free" condition (as Joseph K. was) even while his or her fate was being decided under remote and reclusive conditions.

3. Discordance

A different sort of distention is evinced by the problem of inconsistencies *within* patterns of invocation—that is, when contrasting appeals *both* seek the cover of the rhetorical Kafka. For example, both excessive delay *and* imprudent haste tend to be depicted as "Kafkaesque;" Kafka is used to suggest both oppressive state-sponsored invasions of privacy *and* official state indifference toward citizens; and, the label is applied to situations where things are assumed to be "out of whack" or do not make sense—*and* also that outcomes make complete sense to the members within a particular system of logic. As an example of such discordance, consider that in a capital punishment case Justice Thurgood Marshall argued that "[t]he 'right' of the State to a speedy execution has now clearly eclipsed the right of an individual to considered treatment of a substantial claim that he has been sentenced to death for an offense that he did not commit."[149] Justice Marshall, then continues in a footnote says that "[t]he frenzied rush to execution that characterizes this case has become a common, if Kafkaesque, feature of the Court's capital cases." [150]

In Marshall's terms then, what is "Kafkaesque" is the Court's *process*, its "frenzied rush"—an invocation of Kafka that stands in obvious contrast to the more conventional association of Kafka with periods or policies of delay, disorder, and glacial *slowness* and indecision.

Writing in an appeal to this more common affiliation, (then) Associate Justice William Rehnquist alludes to Kafka in a case dealing with the scope of judicial review over the Atomic Energy Commission and its licensing of nuclear power plants:

[149] Dobbert v. Wainwright, 468 U.S. 1231, 1242 (1984).
[150] *Id.* at 1342 n.1.

> Consumers Power first applied in 1969 for a construction permit—not even an operating license, just a construction permit. The proposed plant underwent an incredibly extensive review. The reports filed and reviewed literally fill books. The proceedings took years, and the actual hearings themselves over two weeks. To then nullify that effort seven years later because one report refers to other problems, which problems admittedly have been discussed at length in other reports available to the public, borders on the Kafkaesque.[151]

The problem of distention is thus evident. When a label or reference has come to be invoked by the communicants within a particular domain, in their effort to depict one sort of phenomena, *and* employed by others within the same community to portray precisely the *opposite*, then we have a kind of discordance that has the effect of both stripping the concept itself of consistency in rhetorical association, and depriving the audience of the sort of interpretive referent that would otherwise facilitate the reception of the argument.

4. Conflation

A final example of distention in invocations of Kafka takes the form of conflations of Kafka's themes with those works of other authors with similar styles and/or presumptive sentiments. For example, in an article criticizing the lack of consistency between states regarding the definition and professional role of paralegals, one correspondent argued that paralegals should contact their local association, write emails, call their congressmen, and take action. They need not, the author explained, "wander confused as Alice, fearing UPL [unauthorized practice of law] charges in a Kafkaesque wonderland."[152] In this merging of allusions, one wonders what it is that a "Kafkaesque wonderland" is meant to suggest. Lewis Carroll's famous work[153] certainly conveys the (il)logical workings of that fantasy world—and a review of Kafka's fiction would undoubtedly strike many of the same chords—but in its conflation of the two distinct literary associations, such an endeavor both occludes the descriptive potential of *both* invocations and diminishes the rhetorical effect they might have achieved had they not been condensed in such a fashion.

[151] Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 557 (1978).
[152] Lindsey Martin-Bowen, *Paralegals: Who are You? It Depends on Where You Work*, LEGAL INTELLIGENCER, May 6, 1999, at 5.
[153] LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS (Modern Library 2002).

Where such conflations are most excessive however is (as we have seen in several examples above), in the forced marriage of Franz Kafka to George Orwell. Although the two authors might be read by individuals interested in the same sorts of things; while they might be cited by those concerned with the same tendencies within various social and political structures; and while they might have enjoyed each other's ideas at the proverbial "dinner party," it is important to stress that these writers are *not* interchangeable as authors, or in their adjectival form as descriptors. To be sure, "[i]t may be tempting to imagine Kafka's presence behind Orwell's *Nineteen Eighty-Four*," Ritchie Robertson observes, "but this grim, obsessive dystopia lacks both Kafka's ambiguity and his humour . . . [.]"[154] And yet, with some exceptions, when the two authors are referred to in the same breath, they are often depicted in a manner akin to the following example wherein a court stresses that it "does not sanction intentional police intrusions into the lives of innocent citizens" because it is "well aware of democratic peoples' aversion to that type of Orwellian or Kafkaesque police activity."[155]

Recall, as well, the passage pertaining to the Supreme Court's decision in the case involving the two female pilots and their disability claim and the correspondent's breezy insistence that the situation was both "Kafkaesque" and "Orwellian."[156] These examples convey the sense that if something is "Kafkaesque," it is also *necessarily* "Orwellian"—and vice versa—which amounts to an assumption that would seem to dilute the meaning of *both*. Certainly situations *could* portray both, but in assuming the two to be indistinguishable for referential purposes, then they have both been deprived of the recognition they deserve for their distinct prophecies. More to the point, such indiscriminate conflation suggests that the two are some sort of "dynamic duo," whereby "two is better than one" in that the author desires to land a more profound rhetorical punch by adding the second layer of invocation in hopes that the tandem allusion will ipso facto depict and decry any decision, action, or activity that strikes the author as wrong-headed, misdirected, or fearful.

V. DILUTION

As the communications scholar Edward Schiappa has argued, "What is needed is a recognition that definitions are human made, not found; constructed, not discovered." As such, he continues, "the question arguers should

[154] Richie Robertson, *Introduction* to WAGENBACH, *supra* note 31, at xi.
[155] McElroy v. United States, 861 F. Supp. 585, 592 (W.D. Tex. 1994).
[156] Aquino, *supra* note 136.

be asking is not 'What is X?' but rather 'How *ought* we use the word X?' or 'What should be described by the word X?'"[157] Moreover, as Peter Sederberg adds, definitions are "tools, not truths," with "value determined in use, not in terms of their approximation of some transcendent ideal."[158] And thus, the data and analysis to this point have looked to the construction of a definition—albeit broad and multifaceted—of Kafkaesque *as applied*. We turn next to the problem of dilution in meaning that follows, I will suggest, from the distention occurring within definitional parameters.

A. *Causes*

We begin first with a consideration of causes. Certainly one contribution to the distention evident in appeals to Kafka is that it is only in rare circumstances that one finds an actual *citation* to the literature (as opposed to allusions to the legacy) that may serve as some sort of specific textual support for a legal author's assertion. Indeed, of the 388 total invocations of Kafka, only thirty-two (8.2%) involved a direct mention (in the body or in the notes) of an actual text or specific passage. When such a reference was made, it is not surprising that the large majority of such appeals (twenty-three of the were to *The Trial*—that Kafkan text with the most overt "legal" theme. The upshot of this is of course that 351 (92%) are nonspecific in their appeal to Kafka—which is not to say that they are inapt or misplaced per se, but only to stress that the *method* of invocation (that is, the mere insertion of the surname as an adjective to color some account) at least allows for, if it does not in fact *encourage* the various examples of distention noted above.

A second factor worthy of discussion (though one would not want to posit too much in this way at the risk of pedantry, priggishness, and exclusion)[159] would be the very real possibility that the fundamental problem is that invocations of Kafka are made by legal writers *who have never read Kafka* and thus lack any actual familiarity with the author to which they are referring. It is at least worth considering in this vein whether the appeal to Kafka actually functions as little more than a garnish for rhetors hoping to dress up their

[157] Edward Schiappa, *Arguing about Definitions*, 7 ARGUMENTATION 403, 413 (1993).
[158] PETER C. SEDERBERG, THE POLITICS OF MEANING 94 (1984).
[159] *See* PETER GOODRICH, READING THE LAW 187 (1986) (observing that one of the principal effects of legal discourse "is that of limiting communication to a restricted and specialized audience," wherein "using a language and arguments that are incomprehensible to the majority of the population, the rhetorically correct forms of legal address or of formal legal discourse work to exclude participation in the law and act as barriers to communication . . . .").

argument or position in more erudite garb. To this end, the inclusion of such a modifier or frame of reference may be an effort to appear more sophisticated by associating it with literary works that are thought to be part of Western society's intellectual canon.

A third possibility draws upon the second, but diverges in terms of motives—resting less on presumptions of ignorance than on strategic authorial intention. In this sense, there may be genuine value in *resisting* precision in usage, in papering over inconsistencies or ambiguities, and in facilitating the sort of capaciousness that comes in the course of distention. In other words, for purposes of crafting an argument in a judicial opinion or in preparing one's materials for advocacy before a court or the broader legal community, one could argue that there is strategic value in *not* ascribing a particular meaning to such an allusion, but instead allowing one's audience to impute *their own* meaning to the term. What such a move does, of course, is to allow the author/speaker to invoke powerful imagery or, in this case, adjectives, without having to define one's use of a term or concept—in essence shifting the communicative burden to the audience and enjoying the benefits of either popular ignorance of an allusion's proper meaning or an incapacity or unwillingness of one's listeners/readers to demand greater precision.

B. Consequences

But although the above may help to explain *why* invocations of Kafka have taken the paths documented in this Article, our discussion of this issue rightly shifts at this point to a consideration of the concerns and implications that the above tendencies generate within the course of legal arguments and advocacy.[160] For one thing, while one would want to resist reductionism, I suggest here that some degree of parsimony, consistency, and clarity is necessary if we are to effectively articulate and absorb legal arguments. That is, in the same way that the theory that aspires to explain *everything*, ultimately explains *nothing*, if all—or too many (or the wrong)—things are *potentially* "Kafkaesque," then no thing is *particularly* "Kafkaesque," which for all intents and purposes is to withdraw a powerful article from our rhetorical currency because it has been so distended as to be without distinct rhetorical value.

[160] *See* DOUGLAS WALTON, THE NEW DIALECTIC: CONVERSATIONAL CONTEXTS OF ARGUMENT 3 (1998) (advocating a "new framework of rationality for thinking," one that is "pragmatic in nature," meaning that "arguments are evaluated as correct or incorrect insofar as they are used either to contribute to or to impede the goals of dialogue").

Put differently, as this Article has sought to stress in several ways, the words that comprise our arguments also constitute the prospects and possibilities of our world.[161] To wit, language matters and thus words must be reserved to some degree for specific contexts and/or situations if definitions are to remain a "resource for future argument."[162] Consider that if an objective of arguments is communication and understanding, then *good,* for example, cannot also mean *bad*; red cannot be synonymous with green; flat cannot simultaneously be round; and so on. To underscore this point, consider the way that such concerns pertain to a word like "holocaust." Historians, to pick but one academic discipline, would note that given the twentieth-century context of this term and its most conventional association with the systematic executions carried out the by Nazis in World War II, this term is not—and *should* not be—interchangeable with the more generic notions of "atrocity" or "devastation." Murders might take place—even mass murders, conducted execution style—but would or should such offenses rise to the rhetorical level of "holocaust?" If the answer is "no," then *why* is this the case? Is it not because such a term is freighted with meaning that is and should necessarily be reserved for select situations, rendering it applicable only to the appropriate contexts, in the interest of both descriptive precision (of the event) and prescriptive prospects (for future events)? By this logic, one does a disservice to such notions by indiscriminately correlating them with *any* negative occurrence or implication, however horrendous. Consider the same consequences for "Kafkaesque."

One might also consider the usage of terms like "jihad," which one tends to hear mentioned in loose reference to Islam, fundamentalism, and infidels, generally, but which has a much more refined, even "proper," meaning for students of religion who understand that it is not simply *any* act of aggression putatively carried out in the name of God. "Genocide" is also worthy of contemplation along these lines, for reasons similar to those discussed above. A standard dictionary definition tells us that this term stands for the "deliberate and systematic destruction of a racial, political, or cultural group,"[163] but whether atrocities past or present *actually* amount to "genocide" is the subject of considerable debate, precisely *because* the word holds such significance, implies such intent and motive (think of the debate between Turks and Armenians regarding the events of 1915–1917) portrays the alleged offender in such an indisputably negative light, and likely invites a global response (think

[161] *See* Schiappa, *supra* note 157, at 404 ("Definitions are rhetorical in the sense that they function as strategies of social influence and control.").

[162] Schiappa, *supra* note 1, at 18.

[163] MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 486 (10th ed. 1995).

of the situation in Darfur) that might not otherwise be initiated. "Genocides," like "holocausts," are not mass murders; they are something more profound and portentous.

In similar fashion, words like "tragedy," "utopia," "dystopia," and "fascist" are commonly invoked in the course of argument, though each also has a fairly distinctive "proper" meaning that can tend to be diluted through excessive or importune applications.[164] Thus, the danger here, as Walton has observed, is that "the definition of a term, once it has been repeated enough so that it has an impact on the way the controversy is expressed, can have a powerful rhetorical effect on public policies and views."[165] And so, what overuse or misuse of particular terms engenders then is the situation wherein invocations amount to a cry of "wolf" when the conditions may not warrant such rhetoric—perhaps leaving the "cry" unheeded when situations arise that are distinctly Kafkan and call for his reference in serious legal arguments.

The ongoing efforts of the United States government in waging the "War on Terror," for example, afford us an excellent opportunity to consider invocations with clear and direct relevance to the ideas set forth in Kafka's fiction. As the advocacy group Human Rights Watch put it in a recent report, for example,

> [s]ince the attacks of September 11, 2001, at least seventy men living in the United States—all Muslim but one—have been thrust into a Kafkaesque world of indefinite detention without charges, secret evidence, and baseless accusations of terrorist links. They have found themselves not at Guantanamo Bay or Abu Ghraib but in America's own federal prison system, victims of the misuse of the federal material witness law in the U.S. government's fight against terrorism.[166]

If there is anything that *is* assuredly and appropriately "Kafkaesque," it would be a situation of indefinite detention, where one is not formally charged, where one is obstructed in seeking counsel, where various machinations keep

[164] One might also imagine a similar sort of problem, particularly in legal writings, when we see the assumption made that all "slopes"—standing for the angle of descent that a practice or policy purportedly establishes—are "slippery," implying an inevitable degeneration if a certain course of action is followed. *See* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); Eugene Volokh, *The Mechanisms of a Slippery Slope*, 116 HARV. L. REV. 1026 (2003); DOUGLAS WALTON, SLIPPERY SLOPE ARGUMENTS (1992).

[165] Walton, *supra* note 9, at 126.

[166] *Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11*, HUM. RTS. WATCH, June 2005, at 1.

an individual from having his or her "day in court," and where, all the while, one is being secretly and separately "judged," either in a formal sense (by the state) or more informally by the community of observers who are invited to infer guilt based on the status or mark of the putative offender. Whether or not one agrees with the position and policies of the Bush Administration, one would be hard pressed to argue that those incapacitated at Guantanamo Bay, or individuals such as Jose Padilla[167] (an American citizen detained for three years without being charged), are *not* in a distinctly "Kafkaesque" predicament.

At the same time, while historical events (e.g. 9/11) further develop the potential for on-point invocations—meaning that the rhetorical Kafka can and *should* extend to new situations.[168] Such events also lay the groundwork for the distention that *undermines* efforts such as those presented by Human Rights Watch in the above passage. To wit, the C.I.A.'s policy of "extraordinary rendition" would seem to be indisputably "Kafkaesque," but simply having to present more documents in order to get a driver's license or being called aside for a pat-down by airport screeners would *not* seem to rise to the same level, however much such an intrusion might be bothersome or even ridiculous in certain instances. Along the same lines, trivial invocations—even within practical modes of appeal—such as suggestions that altercations with Bloomingdales' security guards, lawyers in "bright plaid pants," the market share of Lexis-Nexis, affirmative action policies, or waiting for a fax machine[169]—tend to dilute the definitional integrity of the rhetorical Kafka and ultimately do a disservice to both language and law.

VI. CONCLUSION

This study of the invocations and implications of a prominent reference in legal rhetoric is revealing in many ways, though the ultimate intent is also didactic. Not so much to assume the role of "language cop" per se (though I realize it is hard to avoid the "tut-tut" tenor of the piece), but rather to rely on the empirical portrait of usage by members of the legal community as way of drawing our attention to more general concerns of communication. As a

[167] Rumsfeld v. Padilla, 542 U.S. 426 (2004).

[168] *See* ROBINSON, *supra* note 9, at 53 ("Living language is always in flux. All words in common speech are liable to change their meaning from time to time."); WHITE, *supra* note 29, at 8, 268 ("Language is in part a system of invention, an organized way of making new meaning in new circumstances." White also argues that "legal argument is an organized and systematic process of conversation by which our words get and change their meaning.").

[169] *See infra* Section IV discussing examples of "distention."

practical matter, of course, legal writers can continue to allude to Kafka indiscriminately; but my hope is that the above protestations and desire for precision will invite greater care and attention to the means and forms of rhetoric as they appear in legal arguments. Anticipating as much might be foolish—but, significantly, it would *not* be "Kafkaesque."