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*Political Agonism and the (Im)possibility of Law:
Kafka's Solution**

“Nothing that is not there and the nothing that is.”
(Wallace Stevens)¹

I

After abruptly setting political agonism, its constituent dimensions are matched with those of law. When, however, that match is situated in a prevalent occidental modernity, its resident law is denied positive content. The formative force of the agonic is then extended to deriving law's content negatively by way of a dystopia drawn from the works of Kafka. The dystopia becomes a posited negation of law from which, and still with Kafka's help, the content of law can be extracted as its contrary.

II

Abruptly still, Adorno provides us with a compact scene where competing works of art “enter the *agon*, each the mortal enemy of each. ...They want to annihilate one another. Not without cause did the ancients reserve the pantheon of the compatible to Gods or Ideas... .”² Updating matters, Colaguori depicts an “agonism” which “refers to a type of knowledge and rationality that underpins the logic of domination emergent out of the Western tradition of thought which conceives of a transcendence based on victory within a universal order of opposition, including the domination of nature.”³ Yet Colaguori delineates also a “positive”

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1 Wallace Stevens, “The Snow Man,” in Wallace Stevens, *Collected Poems* (London: Faber 2006), 8-9, at 9.

2 Theodor Adorno, *Minima Moralia: Reflections from Damaged Life*, trans. by E. F. N. Jephcott (London: Verso, 1978), at 75.

3 Claudio Colaguori, *Agon Culture: Competition, Conflict and the Problem of Domination* (Whitby, ON: de Sitter Publications, 2012), at 32.

agonism “seen as the discursive mechanism by which dominant political power in a democracy is challenged and kept in check through the process of constant contestation and debate.”⁴ Such agonism is “understood in this affirmative sense as the generative principle of economy, society and even natural ecology and personal growth,” even as it becomes “appropriated” by the negative and pervasively dominating agonism embedded in such as “the discourse of neo-liberalism.”⁵ As Schmitt would add, and affirm, with “political liberalism...the political is total.”⁶ But perceptions of a political totality have become somewhat more diffuse, a prominent perception being Foucault’s “governmentality” with its seeming capacity to bring together a conglomerate of biopower and disciplinary powers through which the political enters and administers life, yet does so in a way that preserves a crucial role for sovereign assertion.⁷

Returning to the *agon* that is the dissonance between notions of political agonism, a telling instance of the “positive” agonism can be found in Bonnie Honig’s feminist defence of Arendt’s political agonism.⁸ “Political theorists,” Honig notes, “and feminists, in particular, have long criticized Arendt for the agonistic dimensions of her politics, charging that agonism is masculinist, heroic, violent competitive...,” and more.⁹ Yet the agonism that Honig finds in Arendt is one that eschews certitudes of the generalized variety, such as nation, or of the more particular such as “male-female” opposition.¹⁰ Nor does it rest content with a condign “associationism” in which entities would relate consensually.¹¹ Rather, an “agonistic feminism” would recognise “the necessarily agonistic dimension of all action in concert, in which politically engaged individuals act *and* struggle with *and* against each other.”¹² What is entailed in this is “a performative politics” which “agonistically generates ‘who’ we are.”¹³

This performative politics brings with it a refined relation to the surpassing variety of political agonism that would supposedly encompass, subordinate, and even void it.¹⁴ This surpassing political is one which needs “retreating” in the produc-

4 *Ibid.*, at 36.

5 *Ibid.*, at 8 and 36.

6 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. by George Schwab (Chicago: The University of Chicago Press, 1985), at 2.

7 Michel Foucault, *The History of Sexuality: Volume One: An Introduction*, trans. by Robert Hurley (Harmondsworth: Penguin, 1978), at 139, and Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978*, trans. Graham Burchell (Houndmills: Palgrave Macmillan, 2007), at 89, 106.

8 Bonnie Honig, “Towards an Agonistic Feminism: Hannah Arendt and the Politics of Identity,” in Bonnie Honig (ed.) *Feminist Interpretations of Hannah Arendt* (University Park PA: The Pennsylvania State University Press, 1995), at 135-166.

9 *Ibid.*, at 156.

10 *Ibid.*, at 159.

11 *Ibid.*, at 156ff..

12 *Ibid.*, at 156 – Honig’s emphasis.

13 *Ibid.*, at 149.

14 As to voiding, see e.g. George Schwab, “Introduction,” to Schmitt, *Political Theology*, note 6 above, at xxx.

tively ambivalent usage of Lacoue-Labarthe and Nancy.¹⁵ What is involved here is not only a retreating from the ready assumption of the “political” in political theory and elsewhere, but also a revelatory retreating of the notion of the political itself. Most succinctly perhaps, and with Nancy, “[t]he political” retreated would be “the disposition of community as such”, a disposition in which the community is “inoperative,” imbued with an unworking needful for there to be an ever-changing “community consciously undergoing the experience of its sharing.”¹⁶ It is community as simultaneously a becoming and an existent being-together of its members. The imperative for there to be some working of and as community does not return us to the political as a quasi-transcendent ultimacy, to what Nancy would see as an “impossible communion” (Adorno’s “pantheon of the compatible”) rather than a community.¹⁷

The political retreated in and as community does not result in “an absence, a presence simply taken away.”¹⁸ Being equally succinct as to what presence there is, or may be, does pose a challenge. The “associationism” analysed by Honig veers towards an ultimate diversity. Her “performative politics” implicitly calls for something that is more focally cohering yet something that does not succumb to positivistic prescription.¹⁹ So, Nancy would aptly ask, “what might a politics be that does not stem from the will to realize an essence?”²⁰ As instantiated, and in terms explored by Menga, this could not be a politics of, say, multiculturalism but would be, rather, a politics of “interculturality.”²¹ A touch of semantics may delineate what this politics of the “inter-” could be. A plurality can be a simple plurality – a term denoting more than one, many, a multitude, numerousness, all courtesy of the Oxford English Dictionary: but, still drawing on the OED, the prime meaning given to “plurality” is “[t]he state of being plural; the fact or condition of denoting, comprising, or consisting of more than one.”²² This state of being, this consisting in and as a plurality, could be called an integral plurality. Relating plurally but integrally would, for Donald Davidson, “make sense...only if there is a common coordinate system on which to plot” the different entities relat-

15 Philippe Lacoue-Labarthe and Jean-Luc Nancy, *Retreating The Political*, edited by Simon Sparks (London: Routledge, 1997).

16 Jean-Luc Nancy, *The Inoperative Community*, trans. Peter Connor *et al.* (Minneapolis: University of Minnesota Press, 1991), at 40. The argument that follows lacks much of what goes to make Nancy’s “community”. As he puts it elsewhere: “*The plurality of beings is at the foundation of Being,*” in Jean-Luc Nancy, *Being Singular Plural*, trans. by Robert D. Richardson and Anne E. O’Byrne (Stanford: Stanford University Press, 2000), at 12 (his emphasis).

17 *Ibid.*, at 15. And see Lacoue-Labarthe and Nancy, *Retreating*, note 15 above, at 111. As to the Adorno, see note 2.

18 Philippe Lacoue-Labarthe and Jean-Luc Nancy, “The Unconscious Is Deconstructed like an Affect,” trans. by Brian Holmes, in *Stanford Literature Review*, 6 (1989), 191-209, at 201.

19 Honig, “Agonistic Feminism,” note 8 above, at 149.

20 Nancy, *Inoperative Community*, note 16 above, at xl.

21 Ferdinando Menga, “Interculturality and the Limits of a Globalized Order. Some Paradigmatic Insights on the Unavoidable Intervention of Contingency Within Human Institutions,” in *Rivista Internazionale di Filosofia e Psicologia*, 3 (2012), 254-262.

22 “Plurality,” in *Oxford English Dictionary*, CD ROM Version 4.0, Second Edition.

ing plurally, “yet the existence of a common system belies the claim to dramatic incomparability”.²³

This seeming paradox of plurality may at least intimate a socio-logic of commonality. If, say, individuals or groups are to relate in and as a plurality in the sense of a being-together plurally, then the element in commonality cannot be only within them because this would leave them as a simple plurality, leave them in dissipation. So the commonality has to be, and be set, in some way determinately apart from them. Yet the determinate commonality cannot be so much apart from them in their singularity that it ceases to relate responsively to them – ceases constitutively to absorb their changing commonality. This commonality, then, nestles in an aporia. It has to be capable of vacating itself and changing in this responsiveness whilst assuming still a determinacy apart. The aporia is generative of what the commonality, the integral plurality, is. This ineluctable aporia cannot be subsumed in the quasi-transcendence of sovereignty, society, ideology *e tutti quanti*. Which is not to deny such entities a place in the make-up of some particular integral plurality, but it is to say that they would be enabled by it. And it is to say they are intrinsically inadequate when it comes to the dependence of these entities on an immanent, an integral plurality – on a plurality incompatible with their essential claim to a transcendent ultimacy of origin and effect, to say nothing of the distinct incompatibility between transcendence and the constituent claim of sovereignty, society and such to a secular and existentially accessible modernity. The gaps left by these retreats are filled by law,²⁴ a law that would match this immanent plurality.

This is a law seemingly torn between its own constituent dimensions yet possessed of an autonomous singularity. In one jurisprudential orientation, law’s determinate existence is abjectly dependent on “society” or on sovereign or governmental powers – to mention only leading contenders. Or, in seeming contrast and in another such orientation, law takes on an enduringly posited meaning of its own, but this relies on an abstracted positivist elevation.²⁵ Yet law, if it is to be the law of “[t]he political” that is the ever-changing “disposition of community as such” -- a community that must be an unworking as well as a work,²⁶ then it must be a law ever and entirely responsive to such change. And if, in the same vein, it is to be a law matching an integral plurality, it must be capable of vacating itself in its responsive relation to the plurality. What ensues is an illimitability of law. Such a law is one enabled to effect quasi-transcendent affirmations of these powers and

23 Donald Davidson, “On the Very Idea of A Conceptual Scheme”, in John Rajchman and Cornel West (eds.), *Post-Analytic Philosophy* (New York: Columbia University Press, 1985), 129-143, at 130.

24 Cf. Nancy, *Singular Plural*, note 16 above, at 47.

25 See for example the best-selling text in Jurisprudence, H. L. A. Hart, *The Concept of Law*, Third Edition (Oxford: Clarendon Press, 2012). Despite, or perhaps because, of this elevation of law, Hart is impelled eventually to see law as entirely an emanation of officialdom – broadly, a type of abjection that his book was initially set against: see *ibid.*, at 117.

26 See note 16.

forces that endow it with determinable content, and a law enabled to do so by a vacuous illimitability which avoids its being attached to or compromised by any transcendent positivity.²⁷ So, whilst law remains dependently contained by these powers and forces, they are also dependent on it, and dependent in a way that confirms law's illimitability since the pretensions of those powers and forces to illimitability depend performatively on law having the like quality. That ostensible paradox could confirm an ultimate dependence of law in that the pervasion of its illimitable responsiveness makes its own content entirely derivative.²⁸

Aptly in a way, then, it would seem to be impossible for law to have any positive, any self-existent content. Rather than search for content in terms of the positive, perhaps a resort to the negative could prove to be more promising, and this is where Kafka comes in. Perhaps further, from the negative import of his legal dystopias we may deduce what a content of law could otherwise be. The search would not and, given the tenor of the argument so far, could not be for substantively positive content. The formulation of what may thence be found will be deferred until it is.

III

The search could begin, and even continue, in what may seem an unpromising vein of Benjamin's relating poetry to Kafka's notorious branding of his own works "as failures," specifically instancing Kafka's failed and "grandiose attempt to convert poetry into doctrine."²⁹ In a later piece, Benjamin emphasised Kafka's general realization of the inevitability of failure: "One is tempted to say: once he was certain of eventual failure, everything worked out for him....," and that "[t]o do justice to the figure of Kafka...one must never lose sight of one thing: it is the purity and beauty of a failure."³⁰ This is, in short, a productive failure, one which in a variety of ways can tell us something of what, for example, poetry "is."

Benjamin is less obliging when it comes to law. Gasché observes that Benjamin takes the "laws" in Kafka to have "mainly a semblance-like character," and that he sees Kafka as not having "said anything determinate about the law or the laws."³¹

27 For Blanchot law "affirms itself as law and without reference to anything higher: to it alone, pure transcendence." See Maurice Blanchot, *The Step Not Beyond*, trans. by Lycette Nelson (New York: State University of New York Press, 1992), at 25.

28 Hence, perhaps, the unceasing irresolution in jurisprudential debate as to what is or may be law.

29 Walter Benjamin, "Franz Kafka: On the Tenth Anniversary of His Death," in Walter Benjamin, *Illuminations* (London: Fontana/Collins, 1973), 111-140, at 129. And see Franz Kafka, *The Blue Octavo Notebooks*, trans. by Ernst Kaiser and Eithne Wilkins (Cambridge: Exact Change, 1991), at 63: "Whatever I touch crumbles to pieces."

30 Walter Benjamin, "Max Brod's Book on Kafka," in Benjamin, *Illuminations*, note 29, 141-148, at 148. See also Nicholas Murray, *Kafka*, (London: Little, Brown, 2004), at 347.

31 Rodolphe Gasché, "Kafka's Law: In the Field of Forces Between Judaism and Hellenism," in *MLN*, 117 (2002), 971-1002, at 972.

This is juxtaposed by Gasché to Gershom Scholem's remonstrating with Benjamin about one of his talks on Kafka: "How, as a critic, you could manage to say anything about the world of this man without putting the doctrine, what Kafka calls the law, into the center is an enigma for me."³² And many would affirm a comparable significance for law in Kafka's work.³³ Yet there is no abrupt resolution here. Gasché's own essay on "Kafka's Law" affirms, aptly enough, that "Kafka's world is a legal world," yet affirms also that "Kafka's legal world is characterized by complete lawlessness. ...[I]n this world *Recht* and *Unrecht* blend without any distinguishing between them."³⁴

As between law and a dystopian lawlessness, Kafka's work is almost invariably typified by the latter. Such tokens of law as can be found are fragmentary, incoherent, unhinged. "In Kafka," adds Cixous, "the law is not figured by anyone."³⁵ And for Banakar "...the legal images in Kafka's fiction" come with "their bewildering, enigmatic, bizarre, profane and alienating effects."³⁶ And that description could readily match Minkkinen's equating law and "the Kafkaesque" with that term's denoting horror and despair in the face of existential uncertainty and self-abnegation when confronted with an all-pervading, tentacular, inscrutable and inescapable power.³⁷ It appears then that Kafka would not be contributing to that jurisprudential quest for what a more condign law may be. Yet the search here will be for such a law by way of its dystopian negation, a proceeding buoyed by Kafka's seeing himself by having "vigorously absorbed the negative element of the age in which I live."³⁸ And the work of his most readily associated with negation and dystopia is *The Trial*.³⁹

With *The Trial* the work of negative formation begins with the title. There is no trial. Or the title could be translated as "the process." There is no process. And in a sense the novel itself is not "there" in being reputedly unfinished. Yet incompleteness is apt since the novel insistently pursues irresolution. And the focal figure of this irresolution and of the law – where "[a]ll reality has become the Law" – is "the court."⁴⁰

32 *Ibid.*

33 E.g. Panu Minkkinen "The Radiance of Justice: On the Minor Jurisprudence of Franz Kafka," in *Social & Legal Studies*, 3 (1994), 349-363, at 350.

34 Gasché, "Kafka's Law," note 31 above, at 973, 984.

35 Hélène Cixous, *Readings: The Poetics of Blanchot, Joyce, Kafka, Kleist, Lispector, and Tsvetayeva*, trans. by B. Andermatt Conley (Minneapolis: University of Minnesota Press, 1991), at 3.

36 Reza Banakar, "In Search of Heimat: A Note on Franz Kafka's Concept of Law," in *Law & Literature* 22, (2010), 463-490, at 463.

37 Minkkinen, "Radiance of Justice," note 33 above, at 353.

38 As quoted in Murray, *Kafka*, note 30 above, at 272.

39 Franz Kafka, *The Trial*, trans. by Breon Mitchell (New York: Schocken Books, 1998). The numerous further references to *The Trial* will be accompanied by bracketed page numbers in the text.

40 Petro Citati, *Kafka*, trans. by Raymond Rosenthal (London: Secker & Warburg, 1990), at 132.

The court is everywhere and is nowhere. Or with Citati: "The Court is secret and manifest: concealed and apparent, invisible and most visible..."⁴¹ "Everything belongs to the court" – this said by way of explaining why certain licentious "girls belong to the court" (150). Character after character, location after location (attics, stairs, windows and doors, doors opening onto more or closing off more being frequently singled out) are said to be of the court. Vivid and palpable as such people and places can be, it is not long before they fall out of contention or are implicitly set against their contrary. The windowless room acquires a window, or *vice versa*; or a "reddish" beard becomes "blonde" a few pages later (13, 18). Even the usual indicia of a court – a courtroom, a hearing, officials – soon dissipate into something else. The official merges into an unofficial and quotidian inconsequence. Officialdom can only be approached unofficially – through "influence" or "connections" (e.g. 58, 90). Petitions to the court are unconsidered or they are incapable of being finished because one's "entire life, down to the smallest actions and events, would have to be called to mind, described, and examined from all sides" (127 and see 122). The courtroom dissolves into a scene of sexual improprieties or of mysterious and diverse groups. Any resort to certain levels of the court is eventually revealed as futile, only some highest court having any efficacy at all, but it never appears and the only relevant courts are "inaccessible" (121).

Yet the court has a "strange attraction" (29). The focal character, Josef K., assiduously seeks the court feeling that the law is something he has to effect – effect even to the point of knowing "it was his duty" to carry out his own execution (230). He believes he lives "in a state governed by law" where "all statutes were in force" (6). He seeks to obtain a hearing and is assured by his lawyer that his case "had excited a great deal of attention at the court from the very start" (124). But lawyers had already been shown to be irrelevant with "everything" being "laid upon the defendant himself," even to the extent of the dying K. observing how his executioners "drew near to his face, leaning cheek-to-cheek to observe the verdict" somehow embedded in him (115, 121, 231). K. finds himself trying to deal with "an unknown system of jurisprudence" (61). Not only is K. denied knowledge of his supposed offence, an offence for which he is usually assumed to be guilty, but as an "accused" he can know nothing of the processes of the court or secure any significant hearing to present his defence, or to present anything at all (e.g. 113-4, 121). His securing a hearing is something either effectively deferred or simply speculated about. "Where was the judge he'd never seen? Where was the High Court he'd never reached?" (132). And even if all that were as nought there is, in Benjamin's gloss, the ultimate impasse: "The court does not dare to admit that it cannot make up its mind".⁴²

Benjamin also finds in *The Trial* an impasse that is potentially more productive. This entails a positioning in-between – now a condition in and between determi-

41 *Ibid.*

42 Walter Benjamin, *Selected Writings, Volume 2: Part 1, 1927-1930* (Cambridge MA: Harvard University Press, 2005), at 68.

nacy and evanescence, the graspable for now and the ever-elusive. For Benjamin, Kafka peoples this in-between with messengers and assistants, “beings in an unfinished state,” beings for whom “there is hope,” and beings in whose “activities” law “may be discerned, subtly and informally,” what Gasché calls an “intermediate” or “intermediary” status.⁴³ This positioning will be returned to later together with the famed parable beginning “Before the Law” found towards the end of *The Trial* (215-17). Whilst *The Trial* has long provided the focal impetus for the content of the “Kafkaesque” and for generalized accounts of Kafka’s work, along with the pervasive part of an abject law within it, and whilst there is much in his other work sustaining that picture, there is also much countering it. First, instances of the sustenance.

IV

The Castle offers something of a mirror image of *The Trial* even if the reflection is less sharply focussed: here, along with the main character also called K., and borrowing a summary from Brod, we are involved with “the inexplicable, unpredictable and unappeasable nature of the reigning powers.”⁴⁴ Despite K.’s insistent efforts, the decisions he needs from the castle are never forthcoming, and the holder of its ultimate authority is never seen. The quiescent populace do not even bother to seek “official decisions” considering them to be “as shy as young girls.”⁴⁵ The role of the in-between, drawing again on Benjamin’s category, is filled by a messenger, Barnabas, who provides precarious connection between K. and the castle’s officialdom.⁴⁶

In the short stories and parables, unappeasable authority and its quiescent objects are evident, if not as extensively as standard descriptions of Kafka’s work would allow.⁴⁷ The instance most signalled has to be the terrifying exercise of paternal authority in a short story, “The Judgement” (77-88). And as Benjamin puts it: “There is much to indicate that the world of the officials and the world of the fa-

43 Benjamin, “Franz Kafka,” note 29 above, at 117, and Gasché, “Kafka’s Law,” note 31 above, at 973, 974.

44 Franz Kafka, *The Castle*, trans. by Willa and Edwin Muir, in *The Collected Novels of Franz Kafka*, (London: Penguin, 1983), 177-432, and Max Brod, *Franz Kafka: a biography*, trans. by G. Humphreys Roberts and Richard Winston (Boston: da Capo Press, 1995), at 254.

45 Kafka, *The Castle*, note 44 above, at 317.

46 Benjamin, “Franz Kafka,” note 29 above, at 117.

47 The short stories and parables referred to in what follows are all taken from Franz Kafka, *The Collected Short Stories of Franz Kafka* (London: Penguin, 1988). Page numbers in the text when each of these works is being considered will refer to this collection. The particular works and their relevant page numbers are as follows: (“An Imperial Message” (4-5), “The Judgement” (77-88), “In the Penal Colony” (140-67), “The Great Wall of China” (235-48), all trans. by Willa and Edwin Muir, “The Refusal” (263-67), trans. by Tania and James Stern, “The New Advocate” (414-15) and “The Problem of Our Laws” (437-38), both trans. by Willa and Edwin Muir, and finally “Advocates” (449-51), trans. by Tania and James Stern.

thers are the same to Kafka.”⁴⁸ With this short story, a son is becoming comfortably involved in life and in the family business in particular, taking over from his ailing father. Yet he kills himself in self-abnegation when the father, reasserting himself as a figure of complete authority, issues an insane judgment that the son must do so (87-8). To take just one more example, also a short story, there is “The Refusal” (263-267) in which the custodian of the village’s law compliantly succumbs whenever his petitions are refused by the representative of a remote authority.

Yet, always ‘yet’ with Kafka, matters become more mixitive when we add another helpful trio – this time all parables. “The Problem of Our Laws” announces at the outset that “[o]ur laws are not generally known; they are kept secret by the small group of nobles who rule us” – nobles who “stand above the laws,” laws “entrusted exclusively into their hands” (437-438, 437). There is an imperative quality to the existence of this nobility: “...nobody would dare to repudiate the nobility... . The sole visible and indubitable law that is imposed upon us is the nobility, and must we ourselves deprive ourselves of that one law?” (438). Yet there is an ancient tradition, and an accessibility, to the law. It has been studied by the people so there is *a* knowledge of the law, a knowledge which discerns “certain main tendencies which permit of this or that historical formulation; but when in accordance with the scrupulously tested and logically ordered conclusions we seek to adjust ourselves somewhat for the present or the future, everything becomes uncertain, and our work seems only an intellectual game, for perhaps these laws we are trying to unravel do not exist at all” (437-8). That supposition is held by “a small party” who anticipate a brand of legal realism in also holding that “[t]he Law is whatever the nobles do” (438). Nonetheless, “the overwhelming majority of our people” would hold “that the tradition is far from complete and must be more fully inquired into” (438). And although it would be a conclusion to be long awaited, “when everything will have become clear, the law will belong to the people and the nobility will vanish” (438). But in the interim “nobody would dare to repudiate the nobility”: “the sole visible and indubitable law that is imposed upon us is the nobility, and must we ourselves deprive ourselves of that one law?” (438).

Before looking at the remaining two of our contrary trio of parables, it could be emphasised that with Kafka the hold of remote power is usually neither clear nor complete. A stark illustration of the point is offered in story of “The Great Wall of China” where its official purpose is forgotten and “[l]ong-dead emperors are set on the throne in our villages, and one that only lives on in song recently had a proclamation of his read out by the priest before the altar” (235-248, 245). The very remoteness of authority makes the purchase of actual edicts doubtful and dependent, something vividly affirmed in the parable “An Imperial Message” where a message issued by the emperor, and one on which he sets great store, survives his death yet fails to negotiate the compounded complexity of its passage leaving its intended recipient to “dream it” to himself (5).

48 Benjamin, “Franz Kafka,” note 29 above, at 113.

Returning to the trio, in the second parable we are immersed in the contemplative calm of “The New Advocate,” Dr. Bucephalus (414-415). Once the mighty horse of Alexander the Great, this Bucephalus, remaining very much alive, no longer follows Alexander’s precipitate path of violent assertion and acquisition – a path that inevitably reached its limit: “Even in his [Alexander’s] day the gates of India were beyond reach, yet the King’s sword pointed the way to them. Today the gates have receded to remoter and loftier places; no one points the way...”:

So perhaps it is really best to do as Bucephalus has done and absorb oneself in law books. In the quiet lamplight, his flanks unhampered by the thighs of a rider, free and far from the clamour of battle, he reads and turns the pages of our ancient tomes (415).

Benjamin again, after noting that Bucephalus actually “does not seem to be practicing law,” continues: “The law which is studied and not practiced any longer is the gate to justice.”⁴⁹

The protagonist in the third parable, “Advocates,” is also unconstrained, ultimately able to range beyond limits, but initially he is deeply uncertain (449-451). In his search for advocates he is unsure whether a surreal court and its corridors, reminiscent of *The Trial*, house the law, whether an incessant and pervasive droning said to be characteristic of “a law court” originated in “the place where one happened to be standing”, or whether that was an illusion “for it came from a distance” (449).⁵⁰ Yet he remains set on his search to find advocates for they are needed “everywhere” because the “verdict” is based on “inquiries” that extend “everywhere” (450). Indeed, advocates are, “if anything needed less in court than elsewhere” for a court, “one assumes, passes judgment according to the law” (450).

Within the ambience of the seeming court with its unlikely and vaporous denizens, he fails to find advocates, realises that “I cannot rid myself of the feeling that I’m not in the right place, I ought to be in a place where all kinds of people meet, from various parts of the country, from every class, every profession of all ages...” (450). Impulsively, he runs into a house and offers us a string of nostrums to the effect that in any existential search one cannot go back. These culminate in a beautifully buoyant passage which ends the parable:

So if you find nothing in the corridors open the doors, if you find nothing behind these doors there are more floors, and if you find nothing up there, don’t worry, just leap up another flight of stairs. As long as you don’t stop climbing, the stairs won’t end, under your climbing feet they will go on growing upwards (451).

To claim that Kafka’s short story, “In the Penal Colony,” extends that illimitable search could seem utterly perverse, but a proposition to that effect will come later (140-167). The usual response to this famed and lurid account of a penal colony and its mechanized mode of execution is that it renders the Kafkaesque

49 *Ibid.*, at 139.

50 My use of the masculine pronoun is an assumption. The feminine could be more appropriate – something implicitly confirmed later.

gruesomely “real” and “portrays the horror of the world as it truly is,” but it is the specific inability of this regime to endure that signals what is needed for there to be an enduring authority, and law.⁵¹

The setting is a penal colony in which there is a machine that executes those who break the law. It does this by inscribing the letter of the law on their bound bodies and doing so over a long period – twelve hours in all, the words eventually piercing all the way through the body. The story is about a particular execution or attempted execution. The law to be inscribed is “HONOR THY SUPERIORS” (144). It is to be inscribed on the body of a condemned man whose duty it was throughout the night to salute the door of a captain at regular intervals. He sleeps through one saluting slot, is caught out by the captain, vigorously resists being arrested by him and, is to be executed. The main character, however, is an officer who superintends the execution and who describes the machine to another character, a visiting explorer, in terms of its autonomy and functional perfection – “it works all by itself” (141): “No discordant noise spoiled the working of the machine” (154). “It is effective in itself” (154). “[M]ovements [of a key section] are precisely calculated” (143). The machine was the invention of a former authoritarian Commandant of the colony. The officer proudly shows the Commandant’s plan of the machine to the explorer who finds it entirely inexplicable.

The range of set determinations of which the machine is the symbol and instrument extends to the status of the condemned man. His “guilt is never to be doubted” (145). He is entirely submissive, even taking a compliant interest in the whole proceedings. And with executions generally, and as the officer claims, at “just about the sixth hour” of the machine’s “Harrow” inscribing the law, a luminous “enlightenment” (more accurately translated as “understanding”) shines out of the face of the condemned when they “begin...to understand the inscription” (150) – “the radiance of that justice, achieved at last and fading so quickly” (154). This is for the officer “[a] moment that might tempt one to get under the Harrow oneself” (150).

But with this particular planned execution, it soon becomes evident that all is not well with either the machine or the penal regime that it comprehensively characterises. For a start, the whole scene has a stark solitariness to it. There is only the officer, the explorer, the condemned man and a soldier who guards him, all set along with the machine in a desolate landscape. This contrasts to the glory days when “[a] whole day before the ceremony [of execution] the valley was packed with people” (153) wanting to come to it. “It was impossible to grant all the requests to be allowed to watch it from nearby” (154).

The lack of popular concern and commitment is not the only problem however. There is a new regime, a new Commandant, the colony is changing, and neither the officer nor the machine fits into the new scheme of things. So, whereas the machine inevitably required occasional replacement parts, now those parts are not so forthcoming and the machine creaks with mounting dysfunctions. Furthermore,

51 See Minkkinen, “Radiance of Justice,” note 33 above, at 352, and cf. 355, 361.

both the condemned man and the soldier supposedly guarding him act in undisciplined, almost casual ways. Generally, the machine with its concordant regime are no longer the focal force of the colony but are increasingly marginalised and set apart with the officer now being its sole supporter. The new regime would seem to be humane, to accommodate some popular participation, and to have popular support (158, 167). And it becomes evident, repeatedly so and much to the chagrin of the officer, that the new Commandant is much influenced by “the women” or “the ladies” seemingly always around him (e.g. 153, 158).

The *dénouement* is as gruesome as it is abrupt. The condemned man is strapped into the machine by the officer. Previously “the condemned man was laid under the Harrow by the Commandant himself” (153). But, with the explorer having refused the officer’s request to seek the new Commandant’s support for the machine, the officer decides that “the time has come” (160) and, perhaps seeking that enlightenment he found so tempting, frees the condemned man in a farcical scene and substitutes himself in the machine. With that sacrifice the machine may for one terminal time complete its intrinsic function of dealing death, of effecting finality. Which it proceeds to attempt, but in the process its functioning becomes a horrifying malfunctioning. As the machine fragments, it still kills but in an inordinate way that fails to complete the old process. This also dissipates the ability of the machine itself to inscribe the law. So the legal text the officer wants to have inscribed in and through his body, “BE JUST” (161), itself dissipates as “the machine was obviously going to pieces” (165). It “was not writing, it was only jabbing”, and “this was no exquisite torture” suffused with a radiant “enlightenment” or understanding – “this was plain murder”: “no sign was visible of the promised redemption” (165, 166).

In the final scene, the explorer visits the hidden grave of the old Commandant which contains this inscription: “There is a prophecy that after a certain number of years the Commandant will rise again and lead his adherents from this house to recover the colony. Have faith and wait!” (167). This is something which “the bystanders” seem to find “ridiculous” (167), perhaps a little uneasily. Then at the end of the story, when the explorer is leaving the colony, the once-condemned man and the soldier seem desperately to want to go with him. But he rejects them. He does not want to engage with them. Perhaps he is repulsed by the whole experience. But in any case he is only an observer, something he had been concerned to emphasize throughout.

Returning to *The Trial*, Kafka’s most famed engagement with the law has yet to be accommodated, his parable “Before the Law” (215-217). For present purposes, this piece will serve to draw out the law incipient in the series of works sketched so far. In *The Trial* the parable is told near the end when K. comes to place, or misplace, some trust in an ostensibly obliging priest who “belong[s] to the court” (215), and with whom K. engages in the hope of finding some way of influencing the court or avoiding its jurisdiction. The priest is quick to disabuse K., and having chastised him for seeking “too much outside help, ... particularly from women,” the priest tells K. he is “deceiving [himself] about the court” and continues with that now resonant opening: “in the introductory texts to the Law it says of this

deception: before the Law stands a doorkeeper..." (213, 215). The parable tells, or appears to tell, of someone persistently denied any access to the law, to a law that seems ever beyond him. The parable is tightly packed, but a summary could go like this: "A man from the country comes to this doorkeeper and requests admittance to the Law" (215). The doorkeeper, a figure of official authority, and the first in a hierarchy of keepers stretching beyond the door, asserts control over entry to the law. Despite the man's repeated, "insatiable" efforts to obtain entry, this doorkeeper only allows him a glimpse beyond the door and refuses immediate entrance through what is an ever-open doorway to the law (217). Yet he does not rule out the possibility of later entry. After a lifetime of waiting by the door and of seeking to persuade the official to let him enter, the man from the country is near death:

Before he dies, everything he has experienced over the years coalesces in his mind into a single question he has never asked the doorkeeper. ... "Everyone strives to reach the Law," says the man, "how does it happen, then, that in all these years no one but me has requested admittance." The doorkeeper sees that the man is nearing his end and in order to reach his failing hearing, he roars at him: "No one else could gain admittance here, because this entrance was meant solely for you. I'm going to go and shut it now" (216-217).

With that the parable ends and the multitude of engagements with it begins, starting with a debate between K. and the priest which will eventually be drawn on after looking at some other contentions, those of Cixous and of Derrida. "Before the law" provides both the opening phrase of the parable and its title when Kafka published it separately. And in *The Trial* the priest tells K. that the parable is to be found "in the introductory texts to the Law" (215), in what introduces the law – in what would, by way of the etymology of "introduce", bring it in and within.⁵² So, from the many meanings attached to "before," we can begin with what comes before the law in the sense of what there has to be before there can be law.⁵³ Cixous then:

The definition of the law can unfold only in relation to the question of the origin of the law. In order to get out of Kafka's text, we must ask: Where does the law come from? and not think that it has always been there.⁵⁴

Which may not be immediately promising since Cixous would add that the originary dimension of law is what impels a feminine law – a law which "has no material inside," "does not exist," "does not take place," "cannot be defined."⁵⁵ Furthermore, and in another setting, Cixous would affirm: "Not the origin: she

52 Walter Skeat, *Concise Etymological Dictionary of the English Language* (New York: Capricorn Books, 1963), at 266.

53 The range in German for *vor* would include the meanings covered here and much more. Thanks to Hannah Franzki for guidance on this.

54 Cixous, Readings, note 35 above, at 19.

55 *Ibid.*, at 18.

doesn't go back there."⁵⁶ Not the origin, the origin as the delimited, appropriated, place of secure return to which "he will go: she will go further, always beyond," "to the unknown."⁵⁷ Hence, his eternally straitened law as against her "wild," her "savage" heart.⁵⁸ Yet for law there is still a "closing" as well as an "opening" to what is beyond.⁵⁹

This generative irresolution "before the law" links the man from the country with the feminine of Cixous – links them through their resolute seeking of the law: "There are always men from the country with a little bit of femininity who feel like going in to see nevertheless... ." ⁶⁰ Like those "women" in *The Trial* whose "help" K. was chastised for seeking, the man is also "outside," at least insofar as he comes from the country and the country is "beyond the reach of the court somewhat" (94, 213). Likewise, it would seem, the new Commandant who brings a more open regime to the penal colony is faulted by the officer for being influenced by "the women" and "the ladies" (153, 158) – the officer who is now the sole representative of the draconic old regime.

We could begin to meld "Before the Law" with the novels, stories and parables just surveyed by returning to Benjamin's finding in Kafka's writings "beings" in-between, beings who are "in an unfinished state," beings in whose "activities" law "may be discerned" and for whom "there is hope."⁶¹ These are beings of embedded possibility, neither settled in a determinate world nor outside and dissipated indeterminately. Seen in such an "intermediary" way, this in-between is attuned and related to the determinate and the indeterminate and it is in and as this relation that we may find the formative force of law – a relation that, in sum, pervades Kafka's works on law and a relation which will now be explored further.⁶²

The determinate, or the seeming determinate, abounds in Kafka. As for law, it can somehow be found or accessed through a multitude of palpable sites – doors, stairs, attics, bedrooms, even courtrooms – and more. The guilt of both K. in *The Trial* and of the condemned "In the Penal Colony" is not to be doubted. And in the colony the erstwhile machine effects the law in a complete calculability and cutting assertion. Here the law becomes a further variety of legal positivism, one where it is the creature of an entirely surpassing authority, much like the paternal "sentence" in "The Judgment". From that surpassing position, appeals to law can be arbitrarily and constantly rejected, as in "The Refusal".

56 Hélène Cixous and Catherine Clement, *The Newly Born Woman*, trans. by Betsy Wing (Manchester: Manchester University Press, 1986), at 93.

57 ⁵⁷ *Ibid.* For a luminous engagement with the thought of Cixous on this point see Sara Ramshaw, "Nearing the 'wild heart': The Cixousian 'feminine' and the quest for law's origin," in *The Australian Feminist Law Journal*, 19 (2003), 11-27.

58 Cixous, Readings, note 35 above, at 1, 3.

59 *Ibid.*, at 18.

60 *Ibid.*, at 27.

61 Benjamin, "Franz Kafka," note 29 above, at 116.

62 Gasché, "Kafka's Law," note 31 above, at 974, and Cixous, Readings, note 35 above, at 118.

"The Problem of our Laws" began to complicate matters however. At the outset we would seem to be in the positivist's paradise where the laws "are kept secret by the small group of nobles who rule us" (437). Not only do the nobles "stand above the laws," such laws are "entrusted exclusively into their hands" (437). And this nobility is indispensable: "The sole visible and indubitable law that is imposed upon us is the nobility" (438). Yet this pellucid scene not only poses a problem, it is also a "problem of *our* laws". Such laws are demotically generated – generated to the extent of discernible "main tendencies which permit of this or that historical formulation", but also formulations that are taken as far as "scrupulously tested and logically ordered conclusions" (437). The focal "problem of our laws" ensues when "we seek to adjust ourselves somewhat for the present or the future" because then "everything becomes uncertain, and our work seems only an intellectual game, for perhaps these laws we are trying to unravel do not exist at all" (437-8). The emphasis here would have to be on "perhaps" because this is the view of "a small party" who hold that "the Law is whatever nobles do" (438). "[T]he overwhelming majority" insistently think otherwise, however (438). Even 'though "nobody would dare to repudiate the nobility," still that majority would cling to their legal tradition because it "is far from complete and must be more fully inquired into" to the extent that eventually "everything will have become clear [and] the law will belong to the people and the nobility will vanish" (438). And another of Kafka's frequent themes is the evanescence of imperative authority. In "an imperial message" the message disappears in its transmission (4-5). The Emperors in the instances taken from "The Great Wall of China" are fictive (245). The father in "The Judgment" collapses on his issuing it (87). And the all-presiding court in *The Trial* dissipates in the very effort to locate it; or, Benjamin again, "[t]he court does not dare to admit that it cannot make up its mind."⁶³

The road to resolution is opened up by Kafka's most spectacular, and most thorough, dissipation of determinate law – the demise of its mechanical exaltation "In the Penal Colony". Dissolution ensues when the focal instruction given the machine is "BE JUST" (161). This instruction proves to be entirely destructive of the machine's complete calculability. A more specific outcome is provided by "The New Advocate," Dr Bucephalus. Having reached a limit of Alexander's acquisitive violence, and in the recognition that there was more "beyond reach," Bucephalus throws off restraint and serenely seeks the law – and returning to Benjamin yet again, and this time in relation to Dr Bucephalus: "The law which is studied and not practiced any longer is the gate to justice."⁶⁴

The justice here could, peremptorily for now, be found in one of Derrida's engagements with "Before the Law".⁶⁵ Here the law identified with justice is a law "always to come, always promised," the antithesis yet necessary companion

63 Benjamin, *Selected Writings*, note 42 above, at 68.

64 Benjamin, "Franz Kafka," note 29 above, at 139.

65 Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'," trans. by Mary Quaintance, in Jacques Derrida, *Acts of Religion* (New York: Routledge, 2002), 230-298, at 270.

of a determinate law: “[o]nly the ‘to-come’...will produce the intelligibility or the interpretability of this law...” – that is the law determinate.⁶⁶ So, for the demotic majority in “The Problem of Our Laws,” these laws have ever to “be more fully inquired into” even as the attempt to bring them to bear intimates that they “do not exist at all” (438). A more optimistic scenario is adopted by the seeker of the law in “Advocates”. Although initially uncertain whether a manifestation of the law was in “the place where one happened to be standing” or whether it came from afar, he proceeds irrepressibly to seek it “everywhere” (450). He could be disappointed. The “force” of this law beyond, the law that is to come, is one of negative formation: it is “not law”.⁶⁷ So when seeking through various doors he anticipates finding “nothing”, much like the man from the country who would find that the door meant for him would “open on nothing”, “has no material inside”.⁶⁸ It would follow, as Derrida notes of “Before the Law,” that this law is “essentially inaccessible”.⁶⁹ But some relief may be found in Derrida’s revealing that the distinction between this law ever beyond and the law determinate “is not a true distinction,” and that the two combine in an “aporetic structure”.⁷⁰ And to activate the combining of the two would depend upon a “performative act by which” the man from the country “institutes” the law, a law that always “depends only on who is before it”.⁷¹

We are coming closer to the exact terms of “Before the Law” but before reaching them there remains a further obstacle besides that presented by the doorkeeper. *The Trial* has already given us something like a combining of these two dimensions of law. “Everything belongs to the court” (150). Everywhere there are palpable locations where law is, supposedly, to be determinately found. Yet, for all Josef K.’s performative searching, the law proves to be entirely malleable or ever elusive. A more dramatic outcome climaxes “In the Penal Colony” where a mechanistic mode of determination is to perform the illimitable injunction “BE JUST,” only for the machine to self-destruct in the process (161). Apparently then, these two dimensions of law must not only be joined but also and decidedly kept apart. Here we can return to Derrida and his seeing these dimensions of law as combined in an “aporetic structure”.⁷² “Aporetic”, so they are not joinable. “Structure”, so they must be joined. A condition of there being such an aporetic structure would require the opposition itself to be connective. The effective “order” of this connection “only belongs to either realm by exceeding each one in the direction of the

66 *Ibid.*

67 *Ibid.*, at 254.

68 Jacques Derrida, “Before the Law,” trans. by Avital Ronell and Christine Roulston, in Jacques Derrida, *Acts of Literature* (New York: Routledge, 1992), 183-220, at 206, and Cixous, Readings, note 35 above, at 18.

69 Derrida, “Before the Law,” note 68 above, at 199.

70 Derrida, “Force of Law,” note 65 above, at 270.

71 *Ibid.*

72 *Ibid.*

other... .”⁷³ And from this connection, from the joiner, can be derived not only an instantiated condition of there being law but also attributes of that law. So, if law's vacuity, its irreducible opening, is to endure in its strange integrity with-in this “order, there has for any connective decision to be a responsive hearing; the decision must be reached impartially; and it cannot be tied to any pre-existing differentiation of those affected by it – equality before the law, to evoke a phrase. To gauge this impartiality and equality, the law or laws being brought to bear must be made evident. All of which attendant qualities of law are conspicuous in *The Trial* by their absence.

In all, with *The Trial* this aporetic structure is evoked in its absence and in the impelling search for an ever elusive law. Yet the trial, the process, remains interminable. The law remains indistinguishably everywhere. And that everywhere is variable and fleeting. Then, towards the end of the novel, the parable “Before the Law” provides the corrective by instating the enduring opposition between the determinate, limited law and the illimitable. But the effect of this opposition is suspended. The man from the country seeks a determinate law but is left before the law in its illimitability, before its taking determinate place. Although entry to such a law is “open as always” the illimitable cannot be entered and any resolution is at best deferred from one doorkeeper to another; yet the immediate doorkeeper holds out future entry as “possible” (215). This is something which the priest affirms is not a deception (218).

To appreciate how entry to and as law can take place by connecting the dimensions in opposition, that connectibility could be considered a little more closely. What, in brief, it consists of is the necessity of one dimension for the sustained existence of the other. Should “everything” belong to the law, as it does in *The Trial* by way of the court as law's proxy (150), the law would be incapable of any differentiated existence. Should it be differentiated and seek to be purely and enduringly so, it would decline and disappear with its inability to respond responsively to change – as with the isolated and increasingly dysfunctional machine “In the Penal Colony.” Turning to the obverse, the illimitable, the law beyond the door cannot have any operative effect unless made determinate. And for this conjunction and disjunction of law's dimensions to work each has to remain distinct and untrammelled by the other. The determinate cannot persist inviolate in part any more than it can in its putative whole. And the illimitable cannot be delimited. It resists reduction.

Whilst these dimensions of law have to remain distinct from, and opposed to, each other, that opposition has, as we saw, to be connective. Much of Kafka's work delved into here can be read “in the quiet lamplight” with Dr Bucephalus as a search for that connection (415). Acutely appreciative of limits as he is, Dr Bucephalus is surely not so intent on seeking that which can simply and never be found. Likewise, the joyous search in “Advocates”, starting with the uncertainty of whether the law was near or came from afar, is not one dedicated to futility. And

in “The Problem of our Laws” the demos, or its majority party, seeks the law not as a vacuity but as ultimately realizable. Both K.s, in *The Castle* and especially in *The Trial*, are dedicated to the search for a palpable, a realizable connection. And the man from the country seeks its possibility, a possibility held out to him by the doorkeeper, and that same possibility pervades *The Trial*. There K. does not find connection in the factuality of law’s officials and locations, in the force of the state’s statutes, or in any positive conceptual constraint, and he realises at times that he is dealing with “an unknown system of jurisprudence,” but he remains committed to the possibility of resolution (61). Derrida finds the law “whose presence always escapes” the man from the country to be quite beyond, to be “transcendent.”⁷⁴ The “performative” connection is to a law that is “always to come, always promised.”⁷⁵

The existential challenge this poses is intimated by the priest in his response to K.’s claiming that the doorkeeper deceived the man from the country: “One passage says: ‘that he can’t grant him admittance now’; and the other: ‘this entrance was meant only for you’” (217). But here “there is no contradiction. On the contrary, the first statement even implies the second” (218). Whilst the priest is surely being disingenuous in disregarding the deception involved in the doorkeeper’s explanatory restraint, there is no delineable, ultimately measurable moment in which we can enter, assuredly know or attain the law – a law ever receding from gate to gate and a law which, in its infinite deferral, cannot be finally “entered.” Yet this is a law which holds out the possibility of determinate resolution for the time being, even if for a transient time being. The law as promised and as possibility is for the man from the country “nearest to him...depends only on him, on the performative act by which he institutes it.”⁷⁶ The gate-way, “the entrance is meant solely for” him (217). The law cannot be simply there, whether as fact, command or concept. It is “a matter” of belief and commitment, and of their operative extent. And of hope – the hope of Kafka’s “beings in an unfinished state,” those beings in-between observed by Benjamin, beings in whose “activities” law “may be discerned,” if “subtly and informally.”⁷⁷

Even if the man from the country were performatively to transcend his concentrated dystopia, there would remain the absence of a community emanant of law. Such community is an imperative evoked, yet again, by dystopian absence. The man from the country is isolated. The country dwellers in *The Castle* and the populace in “The Refusal” are entirely quiescent. In *The Trial* K. is a solitary whose attempts to link with others are continually truncated or frustrated. There is also a stark solitariness to the officer “In the Penal Colony.” The erstwhile regime he represents cannot withstand that contrary sociality which undermines it. More affirmatively, the seeker after law and its advocates in “Advocates” comes to realise that, rather than simply searching in the courts, “I ought to be in a place where

74 *Ibid.*, at 270.

75 *Ibid.*

76 *Ibid.*

77 Benjamin, “Franz Kafka,” note 29 above, at 117.

all kinds of people meet, from various parts of the country, from every class, every profession, of all ages" (450).

Then there is the culminating instance of "The Problem of Our Laws" where the laws become ours, and decidedly so. Whilst our efforts to know and adapt ourselves to the laws produce uncertainty, and whilst it remains obvious that we still depend on the nobles to know the laws determinately – true to the etymology of "noble" which would draw upon both the "well known" and "to know" –⁷⁸ there is still the expectation that the demotic "tradition" seeking to know the law "is far from complete and must be more fully enquired into..." (438).

78 Skeat, *Etymology*, note 52 above, at 349.