son Henry Wolf Robe Hunt's description of a moment on one of the family's stage tours:

> One day in Memphis a little boy braver than the others, came close and I say, "This sure is a nice day, ain't it?" to get him friendly, but he get back behind the tree. Pretty soon he peeps out and says, "Are you a wild Injun?" and I says, "No, they made me go to school." "But how many scalps did you take when you was wild? Do you eat raw meat?" And then I could see he was serious, so I says, "My little friend, do you really want to know these things?" And he says, "Sure, Chief. Will you tell me?" And out he came from behind the tree. Then I says, "Well, you call your little friends and tell them I am not a wild Indian and we will sit down here under this big tree and we will talk."

Through exile, through stereotyping and misunderstanding, the Hunt family maintained this kind of gallantry. Edward and Marie Hunt's marriage lasted for fifty-nine years. Their children turned out well. Some Indian biographies decline into alcoholism; in the Hunts' story the word "alcohol" is barely mentioned. Nabokov does right to emphasize the origin myth that Hunt told, and to cause it to be republished, finally under Hunt's name. No doubt the myth added to the Hunts' self-possession, and assisted in their prevailing over the difficulties of life. The ancient story spinning like a gyroscope inside them kept them strong. □

The Cult of Saint Franz

Francine Prose

Is that Kafka?: 99 Finds
by Reiner Stach, translated from the German by Kurt Beals.
New Directions, 313 pp., $27.95


Franz Kafka

Almost a century after his death in 1924, Franz Kafka has become a sort of modern-day saint, one of those artist-martyrs revered, like Vincent van Gogh and Frida Kahlo, partly for their work and partly for the suffering they endured in order to create it. The process of Kafka's "canonization" is thought to have begun with his literary executor, Max Brod, who preserved the letters, diaries, and manuscripts from the flames to which Kafka had instructed him to consign them. In his 1937 biography of Kafka, Brod described the aura of beatitude that brightened around his friend:

> The category of sacredness (and not really that of literature), is the only right category under which Kafka's life and work can be viewed. By this I do not wish to suggest that he was a perfect saint.... But...one may pose the thesis that Franz Kafka was on the road to becoming one. The explanation of his charming shyness and reserve, which seemed nothing less than supernatural—and yet so natural—and of his dismayingly severe self-criticism, lies in the fact that he measured himself by no ordinary standard, but...against the ultimate goal of human existence.

Among the things one learns from Reiner Stach's *Is That Kafka?: 99 Finds* is that Brod was not the first person to portray Kafka as a species of holy man. Stach's book—an informative, charming, and frequently touching compilation of anecdotes, letters, documents, gossip, little-known facts, and texts culled from the research he did for his acclaimed three-volume biography of Kafka—includes an obituary that appeared in a Czech newspaper a few days after his death and that was written by Milena Jesenská, his Czech translator, lover, and, most famously, the recipient of his *Letters to Milena*. In her brief tribute, Milena describes him as having had a "sensitivity bordering on the miraculous," as someone who could "clairvoyantly comprehend an entire person on the basis of a single facial expression. His knowledge of the world was extraordinary and deep. He himself was an extraordinary and deep world."

It's telling that this testament to Kafka's superhuman qualities should be the last of Stach's *99 Finds*, since, as he explains in a preface, his principal intention was to provide evidence suggesting that Kafka was, at least in some ways, a regular guy, fond of beer, gambling, and slapstick humor, an imperfect creature who cheated on his school exams, who could be petty about money, and who was given to spitting from the balcony before and after his tuberculosis was diagnosed. Arguing against the clichés and images ("a cobblestone alley damp with rain in nighttime Prague, backlit by gas lanterns...piles of papers, dusty in the candlelight...the nightmare of an enormous vermin") that have contributed to the stereotypical view of Kafka as an "alien: unworldly, neurotic, introverted, sick—an uncanny man bringing forth uncanny things," Stach provides a series of "counter-images" and seems to have had a great deal of fun in chipping away at the myth of Kafka's pure asceticism, his moral and spiritual perfection:

These *99 Finds* from Kafka's life and work display him in unexpected contexts, in unexpected lights, and they allow us to hear rarely detected undertones and overtones.... Taken together—and this is the chief criterion for their selection—they quietly divorce us from the clichés, and allow us to see that it might be useful after all to try other approaches to Kafka, approaches that were always there, but—plastered over with "Kafkaesque" images and associations—largely forgotten.

Lucidly translated from the German by Kurt Beals, ingeniously designed, illustrated with photographs of Kafka and the people he knew, of places he visited and art he admired, and with facsimiles of newspaper articles, manuscripts, notes, and letters, *Is That Kafka?* is a handsome volume. Its cover—on which a fragment of Kafka's face is visible beneath a small circle cut from the black-and-white book jacket—captures and conveys the essence of the pages inside: a game of peek-a-boo in which the author beguiles the reader with fleeting glimpses of his elusive subject. Two sections entitled "Is that Kafka?" reproduce photographs of crowds—the audience at an air show near Brescia; 15,000 German-speaking residents of South Tyrol assembled in 1920 to protest the Italian occupation of the region. Stach playfully suggests that Kafka can be spotted among the Tyroleans:

> In the lower middle of the photograph...two distinctive men can be seen...observing the passing musicians up close. In contrast to the rural demonstrators, who are almost all dressed in dark colors, these two men are wearing light-colored summer suits, much like one that Kafka owned. The figure on the left has Kafka's strikingly slim, unusually tall build and—to the extent that this can be seen in the picture—his characteristically youthful features. While we can't be certain, there is a high probability: That's him.

Stach's "finds" are numbered, one through ninety-nine, and divided thematically into groups: idiosyncrasies, emotions, reading and writing, slapstick, illusions, and so forth. Each text and image is followed by a passage in which he explains or comments on what we have just seen or read. The first find begins with a quote from one of Kafka's letters to Milena, an account of the confusion he experienced as a small boy, uncertain about the best way to give money to a beggar. Stach suggests that the story was Kafka's way of defending his behavior after he'd appalled Milena by offering a beggar woman a two-crown coin—and then asking her to give him one crown back. The ninety-ninth find—Milena's obituary—precedes a section containing helpful biographical sketches of the people who appear in the book.

Some of Stach's finds will surprise even those familiar with the details of Kafka's life. I was particularly interested in the discarded first draft of the opening chapter of *The Castle*, and in the fact that Kafka at one point planned to write the novel in the first person. I'd had no idea that Kafka wrote a scheme for a social utopia, a "workforce without property" that was much admired by André Breton. Kafka's ideal society

was to provide housing for the sick and elderly, mandate a six-hour work day ("for physical labor four to five"), insist that individual possessions be turned over to the state, exclude independently wealthy, married men and women, and be governed by strict regulations and "duties":

> To earn one's livelihood only by working. Not to shy away from any work that one has the strength to perform without damaging one's health. Either select the work oneself or, if this is not possible, to follow the orders of the workers' council, which is subject to the government.

Another find informs us that Kafka composed two earlier versions of his long, impassioned letter to his father, the first draft of which was far more conciliatory and timid than the one with which we are familiar. "I am beginning this letter without self-confidence, and only in the hope that you, Father, will still love me in spite of it all, and that you will read the letter better than I write it." We learn that Kafka and Brod concocted a scheme ("to make us millionaires") for a series of guides advising travelers on how to visit Italy, Switzerland, Paris, Prague, and the Bohemian spas "on the cheap." Though their plan was never realized, it was (like so much that Kafka imagined) prescient; half a century later, guides of this sort would make a great deal of money.

It's satisfying to discover that the well-known story about Kafka's public reading, in Munich in 1916, of "In the Penal Colony"—allegedly, several distressed listeners fainted during the performance and Kafka went on reading—is, as one might have suspected, apocryphal. Other aspects of Kafka that Stach brings to light—that he distrusted conventional medicine and was a fan of faddish health regimes, that he frequented brothels, that he was not unknown and isolated in Prague but enjoyed a measure of literary success, that he liked reading his work aloud to friends—are more widely known.

A sequence of finds portrays Kafka, in contrast to the mournful, melancholic image we may have of him, as having had a robust sense of humor. In a letter to his fiancée, Felice Bauer, he describes, at considerable length, a fit of nearly uncontrollable laughter that seized him during a formal speech being given by the president of the Workmen's Accident Insurance Institute, where he worked. But the idea that Kafka was witty will surely not come as a shock to most of his readers, who will doubtless have noticed that, despite its frequently grotesque and horrifying subject matter, his fiction can be delightfully (if darkly) funny.

Some of Stach's discoveries are amusing but slight. Do we really need to know that another man named Franz Kafka lived in Berlin at the same time as the writer?

We finish Stach's book having learned more than a few odd facts about Kafka. But has our picture of him been fundamentally altered—or subverted? It soon becomes clear why Stach's admirable efforts to present Kafka in "unexpected contexts" and "unexpected lights" are not entirely convincing. Nearly every time he quotes from Kafka and allows us to hear his literary voice, we find ourselves seeing Kafka in the old light, the old context: self-lacerating, paralyzed by uncertainty and doubt, alienated, painfully sensitive and pathologically worried about his place in the world and his effect on others. On the page, Kafka sounds like Kafka.

Consider, for example, this 1920 diary entry, quoted by Stach, about a painting that Kafka admired—*Boulter's Lock, Sunday Afternoon* by Edward John Gregory—and that he reflected on, writing about himself in the third person:

> Now he imagined that he himself was standing on the grassy bank.... He observed the festivities, they weren't festivities exactly, but you could still call them that. Of course he would have loved to take part, he was practically yearning to, but he had to tell himself in all honesty that he was closed off from their festivities—it was impossible for him to insinuate himself there, it would have required so much preparation that not only this one Sunday, but many years, and he himself would have passed on, even if the time had been willing to stand still here, no other outcome would have been possible, his whole genealogy, his upbringing, his physical training would have had to go so differently.
>
> So that was how far he was from those holiday-makers, but at the same time he was very close, and that was even harder to grasp. After all, they were people like him, nothing human could be fully alien to them, and if you were to search their minds you would have to find that the same feeling that dominated him and excluded him from their boating trip was present in them as well, except that it did not come close to dominating them, but only lurked in some dark corners.

In Stach's thirty-fourth find, we watch Kafka trying and failing to write a book review with even a minimal relation to *The Powder-Puff: A Ladies' Breviary*, the collection of sketches by Franz Blei that he had been asked to write on:

> He who casts himself into the world with a great exhalation, like a swimmer plunging from the high platform into the river, disoriented at first and sometimes later as well by the currents, like a sweet child, but always drifting into the distant air with the beautiful waves at his side, may gaze across the water as one does in this book, aimlessly but with a secret aim, this water that bears him up and that he can drink and that has grown boundless for the head resting on its surface.

A short, lovely meditation by Kafka about his writing desk begins: "Now I've taken a closer look at my desk and realized that nothing good can be produced on it." This text, Stach tells us, breaks off, followed by a note:

> Wretched, wretched, and yet well intended. It's midnight.... The burning light bulb, the quiet apartment, the darkness outside, the last waking moments entitle me to

write, even if it's the most wretched stuff. And I hastily make use of this right. This is just who I am.

A fragmentary piece entitled "In the Management Offices" features an employer interviewing—and humiliating—a prospective employee in a manner that evokes the tone in which Josef K. is accused and berated throughout *The Trial*. In an early letter to Milena Jesenská, Kafka refers to her translation of his "abysmally bad story" "The Stoker." Eventually, one may come to feel that Kafka's spirit is actively resisting Stach's attempts to portray him as a beer-drinking, joke-loving fellow. Given the chance, Kafka continues to represent himself as a solitary insomniac, awake while the rest of the world sleeps, struggling to write his wretched and abysmally bad stories.

Reiner Stach is not the first writer to challenge the view of Kafka that inspired Brod's lengthy comparison of his sufferings to those of the biblical Job. Walter Benjamin and Milan Kundera disagreed with Brod, and Vladimir Nabokov's lecture on "The Metamorphosis" (which appears in his *Lectures on Literature*) includes his sharp, clever critique of Kafka's first biographer:

> I want to dismiss completely Max Brod's opinion that the category of sainthood, not that of literature, is the only one that can be applied to the understanding of Kafka's writings. Kafka was first of all an artist, and although it may be maintained that every artist is a manner of saint (I feel that very clearly myself), I do not think that any religious implications can be read into Kafka's genius.

But Brod's view continues to be influential, not least in the conversion of Kafka into a popular celebrity figure. Throughout Prague's historic center, souvenir shops sell Kafka coffee mugs, Kafka cell phone cases, Kafka T-shirts and memo pads. His haunted and haunting portrait is everywhere, and one can watch tourists deliberating over the Kafka refrigerator magnets with the rapt attention of pilgrims deciding which image of Saint Bernadette to carry home from Lourdes.

So perhaps the interesting question, and one which *Is That Kafka?* addresses only tangentially in its preface, is: Why, since Max Brod and Milena Jesenská before him, has Kafka proven to be such a natural candidate for literary beatification, and why it is so difficult to change people's minds about him? Why does his image seem to offer a kind of consolation, why does he so powerfully stir our imagination and excite our sympathy? Why do we continue to regard him as the exemplar of the suffering artist—even now, in an era when, it often seems, many people no longer want artists to suffer in isolation but prefer them to be successful, famous, visible: celebrities who somehow find the time to write, paint, or compose music?

Perhaps one reason that Kafka has assumed the role of the contemporary saint is that the instruments of his martyrdom were the quotidian psychic torments—isolation, self-doubt, boredom, and neurosis—familiar in modern life. A German Jew living among Czech-speaking Catholics, he was, from birth, an outsider. He worked, as many of his readers do, at an unrewarding, time-consuming office job. His relationship with his father was a source of deep unhappiness, as were his affairs with the women to whom he wrote letters of such raw, unfiltered panic and shame that Karl Ove Knausgaard's *My Struggle* seems, by comparison, reticent and self-protective. The aphorisms that have become well known ("A book must be the axe for the frozen sea within us," "There is infinite hope, but not for us") reinforce our notions of his pessimism and melancholia, and of the obsessive inner struggles so well documented in his diaries.

Even more to the point is the way in which Kafka's readers so frequently conflate him with his characters. It seems paradoxical—and somehow unfair—that such an imaginative and fantastical writer should so often be assumed to be a more narrowly autobiographical one. Asked to picture the face of Gregor Samsa (before his transformation into an insect) or of Josef K. or of Georg Bendemann in "The Judgment," many readers might admit that they imagine these unfortunate characters to look very much like their creator. But though these fictions contain autobiographical elements, they are far from being self-portraits.

Apparently this confusion between Kafka and his characters started during his lifetime. In Gustav Janouch's *Conversations with Kafka* (1968), Janouch, whose father was a business associate of Kafka's, describes his first meeting with the older writer, whose work he knew and esteemed. The two men consider the advantages of writing at night, without the distractions of daylight. "If it were not for these horrible sleepless nights," says Kafka, "I would never write at all. But they always recall me again to my own dark solitude." And Janouch thinks, "Is he not himself the unfortunate bug in *The Metamorphosis*?"

Of course, he was not. And not simply because, as Stach tells us, Kafka flirted with country girls and was kind to children, but because he was able to transmute his fears and his grief into magnificently inventive and compressed narratives, into simple, beautifully crafted sentences, into the judicious, perfect deployment of metaphor, dialogue, and description, into a profound understanding of human experience.

Regardless of how often we tell ourselves that Kafka was not Gregor Samsa, regardless of how convincingly Stach persuades us that Kakfa was more than just a tormented soul, we continue to see him that way. There seems a need to seek out and revere that sort of saint: the holy men who lived alone in the wilderness, who mortified their flesh, had visions, and fought off demons. The saint I found myself thinking of most often, as I read *Is That Kafka?*, was Saint Joseph of Cupertino, who insisted on levitating and swooping around the church, high above the congregants, despite the well-intentioned efforts of his brother monks to keep his feet safely on the ground. □

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Anyone Can "Think Like a Lawyer": How the Lawyers' Monopoly on Legal Understanding Undermines Democracy and the Rule of Law in the United States

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ANYONE CAN "THINK LIKE A LAWYER": HOW THE LAWYERS' MONOPOLY ON LEGAL UNDERSTANDING UNDERMINES DEMOCRACY AND THE RULE OF LAW IN THE UNITED STATES

*Bridgette Dunlap**

INTRODUCTION

Though a person needs a threshold understanding of the law to obey it or enjoy its protection, lawyers in the United States enjoy a near monopoly on knowledge of what the law is and how it works.[1] Widespread ignorance of the law robs it of deterrent effect, deprives those whose rights have been violated of recourse, and undermines deliberative democracy. This Article argues that the low level of legal knowledge in the United States is fundamentally at odds with the ideal of the rule of law and further contemplates a "legal empowerment alternative" for the United States, inspired by the approach that Stephen Golub has argued should supplant our lawyer-focused efforts to build democracies abroad.[2]

In the U.S. context, legal empowerment would not only require expanded access to legal services, but also a significant commitment to increasing the basic knowledge of nonlawyers. The American legal profession has an opportunity, if not an obligation, to work to counteract the detrimental effects of both the monopoly on legal services and the near monopoly on legal knowledge by promoting and providing basic legal education for the laypeople that the law binds and protects. Laypeople need to be empowered to think more like lawyers; but for this to happen, lawyers will need to "think less like lawyers and more like agents of social change."[3]

Part I of this Article argues that failures of the dominant "lawyer-centered" attempts of U.S. legal reformers to build democracies and the rule of law abroad—and the strategies developed to address those failures—

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1. *See* James Boyd White, *The Invisible Discourse of the Law: Reflections on Legal Literacy and General Education*, 54 U. COLO. L. REV. 143, 144–45 (1983) (characterizing the frustrating and unpredictable mix of the foreign and familiar in legal language for the layperson as a kind of disenfranchisement).

2. *See generally* Stephen Golub, *The Legal Empowerment Alternative*, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 161 (Thomas Carothers ed., 2006).

3. *Id.* at 162.

should inform efforts to comport with the rule of law ideal at home. Particularly in a legal system as complex as the United States, the rule of law would require basic legal knowledge and literacy among the public. Part II examines the public misperception of lawyers as general experts with exclusive access to legal knowledge and argues that laypeople need a better understanding of some of the limitations and peculiarities of the lawyer's work in order to understand the legal system, view the law as legitimate, and participate in its reform. Part III examines public ignorance of basic legal principles through an example of battery in tort and criminal law: the recent rash of incidents of young people taking and distributing photographs of sexual batteries they do not recognize as crimes indicates widespread ignorance of the law, which seriously undermines deterrence and deprives victims of recourse. Part IV first argues that the ABA's domestic access to justice programs focused on improving access to counsel and mandating civics education should include efforts to empower the public with basic legal knowledge and next considers some approaches to doing so.

I. LESSONS LEARNED FROM EFFORTS TO EXPORT THE U.S. MODEL OF THE LEGAL PROFESSION

My interest in lawyer monopolies began in Cambodia, where the influence of American legal reformers has contributed to the establishment of a very small, protectionist bar that enjoys a monopoly on the provision of legal services.[4] The resulting lack of legal counsel deprives most of the population of access to justice and perpetuates major human rights abuses. The well-intentioned work to build an American-style legal profession in Cambodia is part of the decades-long, billion-dollar effort of the United States and other nations to foster democracy by establishing "the rule of law" in developing and postconflict countries.[5] Definitions of the rule of law vary widely,[6] but in its thinnest conception the term refers to "universal rules uniformly applied."[7] A thicker conception requires that those rules be substantively just.

4. *See generally* Bridgette Dunlap, The Rule of Law Without Lawyers: American Legal Reformers and the Cambodia Lawyer Shortage (Apr. 12, 2014) (unpublished manuscript), *available at* http://ssrn.com/abstract=2424255.

5. Promoting lawyer monopolies and high standards for lawyer education is central to this agenda. *See generally* Samuel J. Levine & Russell G. Pearce, *Rethinking the Legal Reform Agenda: Will Raising the Standards for Bar Admission Promote or Undermine Democracy, Human Rights, and Rule of Law?*, 77 FORDHAM L. REV. 1635, 1638–42 (2009) (describing the reform agenda of promoting higher educational standards for bar admission).

6. *See* Rachel Kleinfield, *Competing Definitions of the Rule of Law*, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 2, at 31, 32 (identifying five different usages for the term "rule of law": (1) a government that obeys the law and respects judicial rule, (2) law and order, (3) lack of equality before the law, (4) enforced human rights, and (5) efficient and predictable justice).

7. Frank Upham, *Mythmaking in the Rule-of-Law Orthodoxy*, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 2, at 75. Joseph Raz points to the inadequacies of the rule of law, writing:

There is little empirical evidence for, and much scholarly criticism of, the claim that the rule of law project is effective in reforming legal systems, improving access to justice, building democracy, or alleviating poverty.[8] Despite this, the dominant paradigm, which Stephen Golub has termed the "rule of law orthodoxy," endures.[9] Donor projects seek to build legal systems in our own image by training judges and lawyers, upgrading courtrooms, buying furniture and computers, drafting laws, establishing court administration systems, and building up bar associations.[10] These efforts to "win the hearts and minds of the judicial and political elite" to bring about reform often fail, because the corruption and dysfunction in the existing system benefits those elites.[11]

Projects typical of the rule of law orthodoxy involve the "rule of lawyers," who Golub tells us may lack any development experience, be shortsighted about the failings of their own legal systems, and fail to recognize that attorneys are part of the problem in some societies where self-serving bar associations limit access to justice, work against social and economic equality, or subordinate the interests of the poor to those of attorneys or their clients.[12] Western "legal missionaries"[13] seek to pass laws and build strong judicial systems, but there is little reason to believe that the public will have access to those institutions, the laws will be fairly applied, or that social or economic equality will result.

Golub has proposed a "legal empowerment alternative" to the rule of law orthodoxy, consisting of the use of legal services to advance freedoms, particularly those of the marginalized.[14] However, his conception of "legal services" is broader than that typical in the United States. Beyond litigation and lawyer-provided legal advice, "legal services" include enhancing people's legal knowledge through training, media, and public education,

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> It is to be insisted that law is only one of the values that a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for person or the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty or racial segregation, sexual inequalities and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies.

JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW 210, 211 (2d ed. 1979).

8. *See, e.g.*, JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA (1980); STEPHEN HUMPHREYS, THEATRE OF THE RULE OF LAW: TRANSNATIONAL LEGAL INTERVENTION IN THEORY AND PRACTICE (2012); Golub, *supra* note 2, at 105–36.

9. Golub, *supra* note 2, at 108–09.

10. *Id.* at 109.

11. Fran Quigley, *Growing Political Will from the Grassroots: How Social Movement Principles Can Reverse the Dismal Legacy of Rule of Law Interventions*, 41 COLUM. HUM. RTS. L. REV. 13, 50 (2009).

12. Golub, *supra* note 2, at 127.

13. Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT'L L.J. 209, 237 (2011).

14. *See* Golub, *supra* note 2, at 163.

and developing services by laypeople who impart knowledge to others in their communities.[15]

Though the United States generally treats the rule of law as something we must build in foreign countries that already exists here, the reality is in fact far from the ideal.[16] Here, the solutions that the United States promotes in foreign countries are in place—voluminous legislation, a powerful judiciary, and a specially educated legal profession—but they create barriers to the layperson's understanding and enjoyment of the protections of the law and ability to play a meaningful role in shaping it. American law is extremely complex—thanks to American lawyers—making access to legal services imperative for one to enjoy equal application of the law. The United States doesn't suffer from a shortage of lawyers like Cambodia, but it does have a shortage of affordable legal services nonetheless. The "extreme reluctance" of the federal and state governments to make lawyer-provided services available to those of little means, as well as the bar's near complete refusal to permit nonlawyer services to address the resulting need, is a rejection of the fundamental norm of uniform application of the law.[17] As Frank Upham notes, the policy judgment that uniform application of the law is not worth significant resources indicates that Americans do not believe that the rule of law is imperative for economic growth and stability, as our rule of law promoters claim abroad.[18]

Even if affordable legal services somehow became widely available in the United States, however, the fact would remain that enjoying equal application of the law and participating fully in a society as legalistic and litigious as the United States requires a threshold level of legal understanding.[19] But our law's complexity and the lawyers' monopoly have led to a pervasive perception of law as the exclusive domain of lawyers, such that even highly educated laypeople may lack basic legal understanding.[20]

As Robert Gordon has recognized, "few other than the lawyers themselves have ever perceived the unique virtues of the courts and

15. *Id.* at 165.

16. *See* Upham, *supra* note 7, at 83–90 (surveying the ways that the reality in the United States does not match the rule-of-law model); *see also* HUMPHREYS, *supra* note 8, at 223 ("In many ways, indeed, the rule of law register might be thought of as standing in for the old language of 'civilisation'—the mark of accomplishment of the modern; something *we* have but *they* do not; that we must help them achieve; and whose presence or absence is itself the determinant and mobilising criterion for a body of other interventions."); *ABA Mission & Goals*, A.B.A., www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Apr. 26, 2014) (noting that "advanc[ing]" the rule of law in the United States consists of promoting "respect" of our existing system).

17. *See* Upham, *supra* note 7, at 18 (noting that for decades the United States has spent one-ninth the amount per capita as England on civil legal services for low-income people).

18. *Id.*

19. *See* White, *supra* note 1, at 144 (defining "legal literacy" as "that degree of competence in legal discourse required for meaningful and active life in our increasingly legalistic and litigious culture").

20. *See* Powell v. Alabama, 287 U.S. 45, 68–69 (1932) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law."), *quoted in* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

common law as instruments of governance."[21] It is possible that our efforts to export our legal system or our system itself may have fundamental flaws that the legal empowerment alternative does not address.[22] The model that the United States seeks to export has proven, at home and abroad, to concentrate power in the hands of those with the money and power to access judicial systems. But because this model is so much more entrenched and stable in the United States than in the countries to which we seek to export it, the empowerment of nonlawyers within our existing system is imperative. Marginally increasing access to legal services will not do this—the legal profession must empower laypeople for greater engagement with the law themselves.

II. DISPELLING THE LAWYER'S MYSTIQUE TO EMPOWER THE LAY PUBLIC

This Part discusses public misperceptions of lawyers that impede understanding of how the law works. Part II.A discusses the misperception of lawyers as special by virtue of being generalists with broad knowledge of all areas of law, rather than people with a particular way of thinking and working. Part II.B argues that if laypeople do not understand some peculiarities of "thinking like a lawyer," the law can seem arbitrary and corrupt, and attempts at reforming it can seem futile.

A. Lawyers Are Not General Experts

The education, exclusivity, and monopoly power of the U.S. legal profession has led to a common perception that lawyers are special. Lawyers may be special, but not for the reasons that the profession and the media commonly present to the public. In particular, given the complexities of the law, most lawyers are not generalists competent to answer any question at hand, but specialists in the law of particular disciplines and jurisdictions.[23] But the layperson that asks the lawyer at the cocktail party a tax question may think of lawyers as more generally knowledgeable than we are. The lawyer of the public imagination has the answer whatever the issue or jurisdiction. He doesn't answer, "That's not my area. You need a tax attorney."

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21. Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQUIRIES L. 441, 465 (2010).

22. *See* HUMPHREYS, *supra* note 8, at 211–13 (arguing that the United Nations' conception of "legal empowerment," which differs from Golub's, is not a meaningful divergence from the rule of law project); *see also* Upham, *supra* note 7, at 99 (concluding that neither the U.S. nor Japanese legal systems are likely useful models for other societies and arguing that the formal systems adherents to the rule of law orthodoxy seek to create may not be worthwhile in light of the benefits of informal systems such as Japan's).

23. A Florida criminal attorney provided an example of media's tendency to treat lawyers as generalists in a blog expressing frustration with the coverage of the trial of George Zimmerman, which regularly featured lawyers who did not practice in Florida and lacked criminal experience. *See* Brian Tannebaum, *The Embarrassment of the George Zimmerman Verdict*, CRIM. DEF. BLOG (July 14, 2013, 8:43 AM), http://criminaldefenseblog.blogspot.com/2013/07/the-embarrassment-of-george-zimmerman.html.

This does not mean that laypeople should stop asking intellectual property attorneys criminal procedure questions. Ideally, lawyers should have a broad, even if necessarily shallow, knowledge of the law. Any justification for the lawyers' monopoly and the costly education required to join the profession must rest in part on that presumption. But the lay public needs to understand that U.S. law is extremely complicated, even to lawyers, and varies among jurisdictions. Lawyers, in turn, who may be susceptible to "overconfidence bias,"[24] should not further misunderstanding of the legal system by presenting themselves as general experts, though the notion is encouraged by unauthorized practice of law rules.[25] Furthering the idea that lawyers have an exclusive ability to understand any law risks discouraging laypeople from learning about particular legal issues that are relevant to their lives or policy preferences.

Lawyers are special not because they have a database of laws in their heads making them experts on whatever legal topic might arise, nor by virtue of an exclusive ability for legal analysis,[26] but because they embrace certain counterintuitive processes and principles that can seem strange or

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24. Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2627 (2014).

25. The effect of unauthorized practice of law rules on access to justice, and the purported justification for such rules is discussed elsewhere in this Colloquium. One related set of examples that are perhaps minor in comparison but illustrative of the problem of the "specialness" of lawyers are certain pro bono efforts I have been involved in that entail minimal training but are open only to lawyers or law students, such as monitoring elections, which required only a few hours of training and did not entail giving legal advice. Additionally, I represented a woman seeking an order of protection in my first weeks of law school, but a social worker with years of experience in domestic violence generally may not. New York's Family Court Act permits unrepresented petitioners to have a "non-witness friend, relative, counselor or social worker present in the court room" but that individual is not authorized to take part in the proceedings. N.Y. FAM. CT. ACT § 838 (McKinney 2009). I was participating in Sanctuary for Families' Courtroom Advocates Program, which has special agreements with some courts allowing law students to represent petitioners seeking orders of protection.

In the aftermath of Hurricane Sandy, the New York Legal Assistance Group provided webinars and manuals to lawyers who manned makeshift legal clinics offering information about insurance claims, Federal Emergency Management Agency (FEMA) assistance, and other relief. *See* Nicole Wallace, *A Nonprofit Pushes To Make Legal Aid Key Part of Disaster Services*, CHRON. PHILANTHROPY (Oct. 29, 2013), https://philanthropy.com/article/A-Nonprofit-Pushes-to-Make/142681/; *see also* N.Y. LEGAL ASSISTANCE GRP., SUPERSTORM SANDY 1 YEAR REPORT, *available at* http://nylag.org/wp-content/uploads/2012/11/Superstorm-Sandy-1-Year-Report-Summary.pdf. This information might have been especially useful in the hands of the nonlawyer volunteers who went into homes to provide food and debris removal. One "Occupy Sandy" volunteer told me he needed information about how to handle problems encountered, sometimes in the homes of homebound individuals, like power and elevator service that had not been restored, or how to access emergency aid. Equipping those volunteers with New York Legal Assistance Group's training would likely be foreclosed by concerns about unauthorized practice and assumptions about the capabilities of nonlawyers. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5 (2013).

26. *See* Elizabeth L. MacDowell, *Law on the Street: Legal Narrative and the Street Law Classroom*, 9 RUTGERS RACE & L. REV. 285, 322 (2008) (challenging the view of lawyers as experts with special legal analysis abilities that devalue the problem-solving abilities of clients).

heartless to the uninitiated.[27] The idea of the lawyer as a member of a profession apart serves the monopoly, but it undermines the functioning of a participatory democracy in which nonlawyers are charged with obeying the law, shaping it through the political process, and applying it as jurors. For this reason, civic participants need to understand what lawyers do and be able to think like a lawyer to some extent themselves.

B. "Thinking Like a Lawyer"

That the goal of a legal education is to learn to think like a lawyer is a law school truism.[28] What it means or should mean to think like a lawyer, and whether teaching law students to do so is a good idea, is the subject of some debate.[29] The term may be a "cliché among law teachers" or "ritual cant,"[30] but it does capture the experience of law students who see themselves as having struggled to master a new way of thinking to succeed in law school that their nonlawyer friends find alien.

I use the term not to enter into the debate as to how a lawyer should think and what constitutes good legal reasoning, but to describe some common elements captured by the law school cliché. Thinking like a lawyer entails the ability to separate one's assumptions, and moral intuitions from the legal question at hand; attention to detail; an acceptance of counsel's role in the adversarial system; and a sense that even seemingly plain legal language is filled with terms of art.[31]

One professor illustrated the concept in a story recounted by a student. "Professor Lawson" would tell his students to imagine themselves in a bar a year prior to law school talking about a legal issue over drinks.[32] Students would admit they would have thought a particular behavior was illegal back then, based on their sense of right and wrong, to which he would exclaim:

> Well, boys and girls, that's not true. It is legal. They don't know over there at the bar what is and isn't legal. And neither did you, before you

27. *See* Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405, 1421 (1999) (stating that members of the public may see lawyers as "engaged in some sort of deceitful or unethical practice when, in reality, lawyers are merely fulfilling their role in the adversary system").

28. James R. Elkins, *Thinking Like a Lawyer: Second Thoughts*, 47 MERCER L. REV. 511, 512 (1996) (describing the phrase as "sufficiently common to have become a cliché among law teachers"); Sanford Levinson, *Taking Law Seriously: Reflections on "Thinking Like a Lawyer*," 30 STAN. L. REV. 1071, 1071 (reviewing RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977)) ("It is probable that everyone who has gone to law school has been told—often by the Dean in a welcoming address—that the purpose of the enterprise of a legal education is to learn to 'think like a lawyer.'").

29. *See* Elkins, *supra* note 28, at 515–17 (describing conflicting normative conceptions of what it means to "think like a lawyer"); *see also* MacDowell, *supra* note 26, at 317–25 (arguing that legal education thwarts development of the consciousness and skills a lawyer needs to work for social change); Levinson, *supra* note 28, at 1071 (questioning the two propositions that the term implies: "(1) that there is a particular way lawyers think; and (2) that this particular way is also a desirable way").

30. Elkins, *supra* note 28, at 512, 515; *see also* Levinson, *supra* note 28, at 1071 (arguing that "thinking like a lawyer" should not be dismissed as "ritual cant").

31. *See generally* White, *supra* note 1 (discussing the "invisible discourse of the law").

32. Elkins, *supra* note 28, at 517–18.

> came here. That's why you came to law school. Those people who think something is legal or illegal because it's right or wrong don't know what they're talking about. They're practicing "bar stool law." Law school is where you learn what the law is. This is where you find out what is and isn't legal—what you can and can't do. What the law really is.[33]

Professor Lawson railing against "bar stool law" may be a caricature of the arrogant and amoral lawyer, but he identifies two important truths.[34] The first is that the law can be counterintuitive or unjust, but lawyers must distinguish between what the law is and what they think it should be. The second is that significant barriers prevent "bar stool pundits," i.e., civic participants and subjects of the law, from understanding the laws that govern their lives.[35]

That a lawyer must be able to separate the law from her feelings about it does not mean her work ends with a determination of what the law says about a particular set of facts. The legalistic inquiry need only be a first step that precedes the broader work of considering the best options and arguments in light of what the law says, identifying inadequacies in the law, arguing for its reform, or identifying nonlegal approaches to a problem.

To the layperson, however, the insistence on clarity as to what the law does and does not say can look like an endorsement of the answer. For instance, at a panel concerning a report on the Obama Administration's drone program, an attorney who coauthored the report and openly and actively opposes the program explained that, as a lawyer, she could not say that the program was illegal.[36] Activists in attendance met this admission with derision, perhaps because they could not imagine how such a thing could be legal given their deep conviction that it was *wrong*, or because they took her refusal to call the program illegal as wavering in her moral condemnation of it.

Lawyers tend to respect the rule of law even in the case of bad laws that may seem illegitimate to the layperson.[37] They treat the law as a binding contract that can be renegotiated but remains in force no matter how flawed, while the layperson has less reason to suspend his disbelief as to his having consented to the terms. Many lawyers may be guilty of pretending that the law is itself objective rather than a construct reflecting our society's biases and power imbalances,[38] but it remains necessary to strive for objectivity and accuracy in determining what the law is in order to critique it.

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33. *Id.* at 517.

34. *See id.*

35. *Id.* at 518.

36. *Documenting Obama's Wars: A Roundtable Discussion*, CTR. CONST. RTS., http://www.ccrjustice.org/get-involved/calendar/documenting-obamas-wars-roundtable (last visited Apr. 26, 2014).

37. *See* MacDowell, *supra* note 26, at 332–33 ("[T]he paradox of lawyering for social change requires positioning oneself both inside and outside the law.").

38. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 162 (1989) ("Objectivity is liberal legalism's conception of itself. It legitimates itself by reflecting its view of society, a society it helps make by so seeing it, and calling that view, and that relation, rationality. Since rationality is measured by point-of-viewlessness, what counts as reason is that which corresponds to the way things are.").

The attention to detail and concern with procedure involved in thinking like a lawyer can look to the layperson like an elevation of form over substance or an attempt to sanitize or rationalize injustice. Many lawyers have a principled commitment to their role in a flawed system or actively work for reform. The uninitiated, however, may see the lawyer explaining the intricacies of the law as uninterested in systemic injustice.[39]

Understanding how the common law adversarial system works is necessary to believe we have something approaching the rule of law in the United States, rather than a system in which judges decide whatever they want by virtue of their power. The common law system has inherent obstacles to the layperson's view of the law as predictable, because, counterintuitively for some laypeople, one cannot just read what a statute or the Constitution says but must know the precedent that controls its interpretation. The professional conservatism of Anglo-American lawyers has been attributed to their attachment to the past through precedent,[40] but this same precedent can make the law seem arbitrary and unpredictable to the layperson.[41]

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39. This became evident to me as a result of readers' reactions to pieces I have published online in which I aimed to explain to a lay audience the law relevant to a number of viral media stories. *See, e.g.*, Commentista, Comment to Bridgette Dunlap, *No, Texas Law Does Not Say You Can Shoot an Escort Who Refuses To Have Sex*, RH REALITY CHECK (June 8, 2013, 12:27 PM), rhrealitycheck.org/article/2013/06/08/no-texas-law-does-not-say-you-can-shoot-an-escort-who-refuses-to-have-sex/ [hereinafter Dunlap, *Texas Law*] ("This entire hand-wring article is unbelievably boring and pedantic. Imagine, a 'legal analyst' (aka lawyer)—a profession that prides itself on character assassination and lying for money—scolding journalists because they didn't wallow in the same obscure legal minutae that law-liars grow fat on. The judge, the jury, and the legal defense team, deserve all the denigration that can be heaped upon them."); QuickStriker, Comment to Bridgette Dunlap, *What the Blogosphere Got Dangerously Wrong About the Renisha McBride Case*, RH REALITY CHECK (Nov. 19 2013, 10:47 AM), http://rhrealitycheck.org/article/2013/11/19/what-the-blogosphere-got-dangerously-wrong-about-the-renisha-mcbride-case/ [hereinafter Dunlap, *What the Blogosphere Got Dangerously Wrong*] ("You're making statements about the letter of the law, but the letter doesn't matter. What matters is how the public views it . . . ."); Rebecca Binns, Comment to Bridgette Dunlap, *How Anonymous Does More Harm Than Good for Sexual Assault Victims*, RH REALITY CHECK (Feb. 10, 2014, 5:54 PM), http://rhrealitycheck.org/article/2014/02/10/anonymous-harm-good-sexual-assault-victims/ [hereinafter Dunlap, *Anonymous*] ("Yes, innocent until proven guilty is important. Yes, information accuracy is important. But pointing that out shouldn't also come at the expense of furthering rape culture yourselves, and rape really isn't that hard to prove. We need to listen to survivors instead of blame and disbelieve them by default. What this article is is pussyfooting. Pure and simple."); *see also* colleen2, Comment to Dunlap, *Anonymous*, *supra* ("If you don't have a problem with the way the current system treats rape and rape victims I can fully understand why you appear to believe that the real damage was caused by speaking the truth.").

40. Gordon, *supra* note 21, at 450. ("Anglo-American lawyers in particular are professionally conservative because [they are] attached to the past through common law method, with its respect for precedent. Lawyers promote institutions and procedures that will use their skills, services and reasoning modes: judicial review of legislative and administrative action, trial-type procedures for determining facts, and the like.").

41. Andrew Beckerman-Rodau, *A Jurisprudential Approach to Common Law Legal Analysis*, 52 RUTGERS L. REV. 269, 271–72 (1999) (describing some laypeople's view of the law as uncertain and legal outcomes as thus determined by the personal views and biases of judges).

Another strange aspect of thinking like a lawyer is the commitment to the adversarial process over the search for objective truth.[42] Few Americans, including lawyers, are familiar with civil law systems, but the inquisitional approach in which even the accused is obliged to share what she knows is, perhaps, more intuitive, given that in many contexts one is expected to account for one's actions and explain inconsistencies in one's story.[43] Ignorance of the reasons for the right against self-incrimination and its centrality, for better or worse,[44] creates an obstacle to laypeople's willingness to buy in to the system that has built up around it. The fiction that the truth will emerge from two adversaries telling opposite stories and doing their best to keep information that is true but damaging out of court is central to our legal system,[45] but the lawyer's work to build a competing narrative regardless of her client's factual guilt can look like lying to the layperson. Distaste for the legal profession certainly results from some actual bad acts of lawyers, but it would also seem to result from incomplete understanding of the lawyer's role in the only judicial system we have.[46]

The concept of zealous representation is not as intuitive as a lawyer might think. Laypeople must be educated about the fact that American lawyers have ethical obligations to prioritize the interests of their clients over the truth, the public interest, and justice.[47] This is not to say lawyers must be "hired guns" barred from considering the public interest at all, or that they should not give more consideration to the greater good.[48] It is only to say that the public needs to have a general understanding of the lawyer's obligations when representing an individual client and the justifications for them, even if those justifications are contested.

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42. *See generally* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (proposing reforms that might alter the balance between lawyers' ethical obligations to the client and the search for truth).

43. *See* Bron McKillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527, 576 (1997) (noting the expectation that an accused in the French system has an obligation "to contribute information within his knowledge to the common endeavor of establishing the truth"); *see also* Frankel, *supra* note 42, at 1053 ("Our commitment to the adversary or "accusatorial" mode is buttressed by a corollary certainty that other, alien systems are inferior. We contrast our form of criminal procedure with the "inquisitorial" system, conjuring up visions of torture, secrecy, and dictatorial government. Confident of our superiority, we do not bother to find out how others work.").

44. Frankel, *supra* note 42, at 1053 ("It is permissible to keep asking, because nobody has satisfactorily answered, why our present system of confessions in the police station versus no confessions at all is better than an open and orderly procedure of having a judicial official question suspects.").

45. *See* Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1066 (1975) (responding to Frankel, *supra* note 42, and arguing our commitment to fundamental values protected by the Fourth, Fifth, and Sixth Amendments "precludes a single-minded search for truth").

46. *See* Gross, *supra* note 27, at 1406 (suggesting misunderstanding of their role in the adversarial system has more to do with lawyers' bad image than unethical practices).

47. *See* Frankel, *supra* note 42, at 1057–59.

48. Russell G. Pearce & Eli Wald, *The Obligation of Lawyers To Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 4 (2011).

The person equipped to think like a lawyer forces herself to look at the law in the light most favorable to her opponent. She must accept that factually guilty people go free as a result of rules put in place to check government power and minimize the risk of innocent people being found guilty. She must think of how a law might affect someone unlike herself.

When the commentator or legislator thinks like a lawyer, she considers the merits of a law based on how it will actually affect people, the way a lawyer considers the application of the law to her client. This, however, is not what the public typically encounters. Too often, commentators and politicians, even those trained as lawyers, argue for or against laws on the basis of generalizations or make claims about the effect of court decisions they know to be inaccurate.[49] This makes it especially important for laypeople to have basic legal reasoning skills and knowledge so they can critically assess the arguments of their representatives.

The bar stool pundit unfamiliar with thinking like a lawyer may be inclined to write off an unsatisfactory legal outcome as the product of a racist jury or corrupt legal system.[50] Unlawyerly judgments about the reasons for a verdict or a law have the potential to obscure the specific problems underlying injustice or make working to address those problems seem futile.[51] The legal profession needs to empower the bar stool pundits to spot legal questions and learn more, so they can demand their rights, seek counsel, or advocate and vote for reforms rather than seeing the law as hopelessly corrupt.

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49. *See* Jeffrey W. Stempel, *Lawyers, Democracy and Dispute Resolution: The Declining Influence of Lawyer-Statesmen Politicians and Lawyerly Values*, 5 NEV. L.J. 479, 488–98 (2005) (describing "the tendency of lawyer-politicians to leave behind lawyerly values in favor of the poorer quality values of politics"); *see, e.g.*, Rick Ungar, *Ted Cruz and the Doctrine of Pretend Paranoia*, FORBES (July 24, 2013, 10:18 AM), http://www.forbes.com/sites/rickungar/2013/07/24/ted-cruz-and-the-doctrine-of-pretend-paranoia/ (reporting that Senator Ted Cruz warned that the legalization of gay marriage could lead to pastors who refuse to perform marriage ceremonies or preach against homosexuality facing prosecution for hate speech despite the fact that Cruz is a former U.S. Supreme Court litigator familiar with the First Amendment who knows this is not the case). *See generally* Nancy B. Rapoport, *Presidential Ethics: Should a Law Degree Make a Difference?*, 14 GEO. J. LEGAL ETHICS 725, 730 (2001) (arguing that lawyer-politicians should follow the ethics rules even when they are not representing clients).

50. *See, e.g.*, Dunlap, *Texas Law*, *supra* note 39 (disputing a viral media narrative attributing the acquittal of a man who shot a fleeing woman to either Texas's defense of property law or a biased jury).

51. *See, e.g.*, Dunlap, *What the Blogosphere Got Dangerously Wrong*, *supra* note 39 (arguing misrepresentation of "Stand Your Ground" laws has the dangerous effect of making people believe they have a greater right to use force than those laws actually provide and that the rush to vilify individual prosecutors obscures systemic problems); *see also* Dunlap, *Anonymous*, *supra* note 39 (arguing that the cyber-activist collective Anonymous's misrepresentation of and interference with rape prosecutions undermines legal protections and reform efforts).

III. THE LIMITS OF ACCESS TO COUNSEL: LEGAL ILLITERACY AND LAWLESSNESS

This Part argues that public ignorance of basic legal principles risks a functional lawlessness that greater access to counsel will not address. Part III.A discusses the American Bar Association's (ABA) conflicting interests in serving lawyers and improving access to justice. Part III.B examines the ABA's public education work and argues that efforts aimed at mandating civics education do too little to address the fundamental problem of the typical layperson's ignorance of her protections and obligations under the law. Part III.C illustrates this by examining examples of public ignorance of the tort and crime of battery, and Part III.D focuses on the recent rash of young people taking and distributing photographs of sexual batteries they do not recognize as crimes or torts.

A. The American Bar Association's Approach to Access to Justice

Though legal professions extol the equal application of the law and its availability to all, they generally do too little "to secure practical access to justice."[52] The ABA prides itself on its commitment to access to justice and advocates for legal aid funding and pro bono legal assistance but has not made widespread access to legal services a reality.[53] There is reason to doubt that the ABA's latest effort, discussed below, will have a meaningful impact on access to counsel. Regardless, more low-cost legal services would be insufficient to enfranchise members of a lay public whose knowledge of their rights and responsibilities is so lacking that they may not know to seek counsel. The focus on lawyer-provided services as the solution risks perpetuating this knowledge problem.

In an October 2013 article, ABA President James R. Silkenat wrote, "Our nation is facing a paradox involving access to justice."[54] He went on to explain that too many people cannot afford lawyers no matter how urgent the issue, while "too many law graduates in recent years have found it difficult to gain the practical experience they need to enter practice effectively."[55] Silkenat explains that the American Bar Association is "uniquely positioned to connect the unmet legal needs of our society and the unmet employment needs of our young lawyers."[56] Unfortunately,

52. *See* Gordon, *supra* note 21, at 451.

53. James R. Silkenat, *Connecting Supply and Demand: Legal Access Job Corps Will Place Law Grads in Areas with Unmet Legal Needs*, A.B.A. J., Oct. 2013, at 8.

54. *Id.*

55. *Id.* It is debatable whether the problem is properly framed as one of graduates lacking practical experience given the traditional use of an apprenticeship model. Arguably, the problem is actually a shortage of employers willing to train young attorneys given the availability of more experienced attorneys due to the contraction in the legal market, technologies and other service models replacing some lawyer services, an increased number of law graduates, and the chronic underfunding of legal services that makes even low-paying jobs providing services to the poor competitive. But what is indeed a "paradox" is that a country with as many lawyers as we have has such a severe access to justice problem. *See generally* Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1786 (2001).

56. Silkenat, *supra* note 53, at 8.

these interests may conflict. The loss of legal jobs may exacerbate the already protectionist impulses of the American legal profession, which has a monopoly that extends to services that lawyers are not providing. Training paralegals to provide services has been a particularly effective legal empowerment strategy abroad, but it is generally foreclosed by unauthorized practice rules in the United States.[57] Lawyers might train laypeople in other fields, such as social work, to, for example, provide representation in eviction proceedings or to obtain orders of protection.[58] We might prefer that these services be provided by lawyers. But short of *Lassiter v. Department of Social Services*[59] being overturned or a massive new commitment to public funding of civil legal services—a kind of public works project for lawyers that would solve the access to justice problem and the employment problem all at once—the bar's best efforts to address unmet legal needs with more lawyer-provided services are almost certain to fall short.[60]

The ABA has convened a Legal Access Jobs Corps Task Force to identify ways to address the access to justice "paradox" by increasing opportunities for new lawyers to serve the poor.[61] Examples of such initiatives seem promising and worthwhile, but ultimately all appear to come down to new funding models for lawyer services. However, funding on the scale that would be necessary to comport with the rule of law ideal that we promote around the globe appears impossible in the near term given the widespread hostility to government in the United States and the lack of consensus about our obligations to create conditions for equality.[62]

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57. *See* Golub, *supra* note 2, at 171–73. Permitting knowledgeable laypeople to appear in administrative proceedings has been successful in the United States. Erin B. Corcoran, *Bypassing Civil* Gideon*: A Legislative Proposal To Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643, 667 (2012) (highlighting the examples of Social Security Administration disability appeals, the U.S. Patent and Trademark Office, and the U.S. Department of Justice's Legal Orientation Program).

58. *See* Suzanne J. Schmitz, *What's the Harm?: Rethinking the Role of Domestic Violence Advocates and the Unauthorized Practice of Law*, 10 WM. & MARY J. WOMEN & L. 295, 317 (2004) (arguing that the bench and bar have not met the needs of domestic violence victims and should support lay advocates' ability to do so). Landlords are much more likely than tenants to have representation in housing court, and tenants have a dramatically increased likelihood of success if represented. Matthew Desmond, *Tipping the Scales in Housing Court*, N.Y. TIMES, Nov., 13, 2012, at A35 (describing unpublished research). The New York Senate has a bill, pending in the Judiciary Committee, that would allow tenants to be represented by nonlawyers in eviction proceedings, but those nonlawyers must not be paid. *See* S. 427, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013).

59. 452 U.S. 18 (1981) (holding that there is a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty" in a case concerning an unrepresented, indigent woman who lost her parental rights).

60. *See id.* at 26–27.

61. Silkenat, *supra* note 53, at 8.

62. *See, e.g.*, Binyamin Appelbaum & Robert Gebeloff, *Even Critics of Safety Net Increasingly Depend on It*, N.Y. TIMES, Feb. 12, 2012, at A1 ("Many people say they are angry because the government is wasting money and giving money to people who do not deserve it. But more than that, they say they want to reduce the role of government in their own lives. They are frustrated that they need help, feel guilty for taking it and resent the government for providing it. They say they want less help for themselves; less help in caring

The access to justice initiatives cited by Mr. Silkenat, such as a postgraduate Legal Access Jobs Corps and law school–based clinics that would serve indigent populations, are consistent with a continued dependence on lawyers. Putting more of the bar's indebted and unemployed new members to work fulfilling unmet legal needs is an excellent idea, but the emphasis on new attorneys getting experience to make them more competitive raises the concern that the interests of lawyers will take priority over those without access to justice.[63] Indeed, of the four goals the ABA outlines for the achievement of its mission, the first is to serve the members of the ABA, and the last is to advance the rule of law and ensure "meaningful access to justice for all persons."[64]

If the Job Corps is a low-paying stepping stone to more lucrative work, it will risk making serving the poor seem like a temporary, charitable endeavor for novices who need more training for "real" legal work, rather than an obligation society must meet in order to establish the rule of law. The Job Corps could marginally increase access to services while fortifying the idea that only lawyers can serve our vast unmet legal needs or understand the law, which is at the heart of the access to justice problem.

A true commitment to legal empowerment on the part of lawyers would necessarily entail some efforts to make ourselves less needed, less special, and less wealthy. But it might also create new opportunities if we expanded the conception of the role of a lawyer. If we accept that the bar will never be able to provide enough pro bono and low-cost, individual representation to give everyone equal access to justice—given the ubiquity and complexity of the law in the United States—we can think honestly and strategically about what the American bar's role should be in promoting the rule of law domestically.[65] This might involve educating laypeople and empowering them to address their own legal needs and those of people in their

for relatives; less assistance when they reach old age."); Richard A. Epstein, *In Praise of Income Inequality*, DEFINING IDEAS (Feb. 19, 2013), http://www.hoover.org/publications/defining-ideas/article/140746; Reva B. Siegel, *Dead or Alive: Originalism As Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 228 (2008) (describing hostility towards the government as a theme in the 1994 election and pronounced in the National Rifle Association).

63. *Cf.* Elizabeth Chambliss, *It's Not About Us: Beyond the Job Market Critique of U.S. Law Schools*, 26 GEO. J. LEGAL ETHICS 423 (2013) (arguing that the conversation about legal education should focus on the interests of consumers and clients, rather than law students and lawyers).

64. *ABA Mission and Goals*, *supra* note 16.

65. Benjamin Barton predicts in this Colloquium that the letter of lawyer regulation will not change anytime soon, but technologies and workarounds will lead to a practical change in who can practice law. The weakening of the lawyer monopoly out of court will benefit consumers, who will enjoy lower cost services. The monopoly will endure, however, in the courtroom. *See* Benjamin H. Barton, *The Lawyer's Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3079–80 (2014). If Barton is correct, legal services will become more accessible for everyone but those who need them most: people who cannot afford representation in eviction proceedings, creditor lawsuits, parental rights determinations, and the like.

communities in ways currently forbidden by unauthorized practice of law rules.[66]

B. The Limits of Civics

The ABA has a number of initiatives aimed at public education on the law, primarily focused on information for consumers of lawyer-provided services and advocacy for civics education. Civics education is undeniably vital to a functioning democracy and is lacking in the United States.[67] The ABA's advocacy is an important effort to keep it in the public school curriculum given No Child Left Behind's emphasis on tested subjects like math and reading.[68] Yet the vision of civics and law education, most prominently promoted by the ABA through both advocacy for mandatory civics standards and youth summits, seems incomplete in its lack of focus on practical legal knowledge and legal reasoning skills.

The ABA's conception of what the citizenry most needs to know aligns well with the continued primacy of lawyers. Its civics education efforts focus heavily on "respect" for the rule of law, which ostensibly already exists in the United States. Specifically, this entails respect for the separation of powers and the independence of the judiciary. The former

66. New York is piloting a program in which nonlawyer "navigators" supervised by three nonprofit organizations assist unrepresented litigants. However, the navigators are prohibited from giving legal advice and may address the court only if questioned by a judge. Administrative Order of the Chief Administrative Judge of the Courts, No. AO/42/14 (Feb. 10, 2014), *available at* http://www.nycourts.gov/COURTS/nyc/SSI/pdfs/AO-42-14.pdf (relating to the Court Navigator Program). Predictably, the state bar association expressed concern, and proponents had to assure lawyers that the navigators would not hurt their economic interests because they will assist people too poor to pay an attorney. *See* Joel Stashenko, *State Bar Seeks Assurances on 'Navigator' Plan*, N.Y. L.J., Mar. 5, 2014, at 1, 1 ("[State bar president David] Schraver said lawyers are concerned about the breadth of the navigator's role. 'The concern is that the navigator not cross the line into practicing law,' he said."). The *New York Times* editorial board praised the plan and told lawyers not to feel threatened. Editorial, *Better Lawyering for the Poor*, N.Y. TIMES, Feb. 27, 2014, at A26. It failed to note that the navigators are, in fact, prohibited from doing any "lawyering for the poor."

67. *See* AM. BAR ASS'N COMM'N ON CIVIC EDUC. IN THE NATION'S SCH., RESOLUTION 1–2 (2011), *available at* http://www.americanbar.org/content/dam/aba/images/public_education/2011augustabapolicyresolutionandreportmandateciviced0080911.pdf.

68. While the ABA is right to criticize the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at scattered sections of 20 U.S.C.), it is unclear to what, if any, extent it is to blame for the public's lack of civic knowledge, especially given that earlier generations of Americans also had little civics knowledge, as was recognized in an article about the ABA's efforts in the *ABA Journal*. *See* Marc Hansen, *Flunking Civics: Why America's Kids Know So Little*, A.B.A. J., May 2011, at 32, 35 ("While it's true that most young Americans don't know all that much about politics and government, they know as much as their parents did and more than their peers in other countries, says Peter Levine, director of the Center for Information and Research on Civic Learning and Engagement, and one of the leading researchers in the field . . . . Levine says that schools are still teaching civics as much as or more than ever before. The amount of time devoted to social studies in elementary and middle school has remained pretty constant over the years, he says, and the amount of time devoted to social studies in high school is up substantially, although the mix of courses has changed appreciably since the 1950s. Civics and problem- or discussion-oriented classes are less common today than they were in the 1950s, he says, but political science, economics and social studies classes are more common.").

name of the ABA's civic education commission, the Commission on Civic Education and the Separation of Powers,[69] highlights this emphasis on protecting the role of the courts, as does that of a recent event entitled "Law Day: No Courts, No Justice, No Freedom."[70] This emphasis, motivated by attacks on the judiciary,[71] is in keeping with a history of bar associations' proclivity to join in resistance to authoritarianism only once their autonomy is threatened.[72] It is also in keeping with the emphasis of ABA rule of law promoters abroad on promoting the prestige of judiciaries.[73]

An alternative approach would place greater emphasis on knowing one's rights and obligations, but lawyers can be unfriendly to the spread of general rights consciousness that would permit legal remedies against the powerful clienteles on which they depend.[74] Less ominously, lawyers may see themselves as having an exclusive role in mediating those rights based on their special knowledge or skill. This leaves the subjects of the law without an adequate knowledge of it, which undermines the rule of law in even its most formalist sense of a set of predictable rules, uniformly applied. A basic civics education is imperative for a citizen to be able to shape the law through participation in the democratic process.[75] But an

69. Michael S. Greco, *Lawyers Have a Lot To Teach: Take on the Education of Your Fellow Citizens To Protect the Rights We Have Through Courts*, A.B.A. J., Oct. 2005, at 6.

70. AM. BAR ASS'N, LAW DAY 2012 (2011), *available at* http://www.americanbar.org/content/dam/aba/images/public_education/law_day_2012_planning_guide2.pdf.

71. *See American Bar Association Commission on Civic Education and the Separation of Powers*, A.B.A., http://apps.americanbar.org/op/greco/civic_ed.pdf (last visited Apr. 26, 2014) ("Current tensions among the executive, legislative, and judicial branches have brought to the fore the basic principles of separation of powers that have supported and sustained our republic for more than 200 years. Recent attempts to intimidate judges, cut court budgets, and dramatically alter the jurisdiction and other fundamental characteristics of courts have raised serious concerns about unhealthy and unwarranted infringements on the separation of powers, and their effect on public perception of the judiciary and public understanding of the importance of separation of powers.").

72. Gordon, *supra* note 21, at 457 ("Bar associations—not generally the most courageous or liberal-minded of institutions—have been most likely to join in resistance to authoritarian rule where they had some traditions of autonomy they were motivated to defend.").

73. HUMPHREYS, *supra* note 8, at 198 ("[I]f law is to rule, its priests and guardians must be tended. An important background theme in rule of law projects has been to increase the prestige of the judiciary. . . . Funding judicial associations and supporting regular conferences on themes such as the role of judges in society, or the importance of the rule of law, are all intended to address these shortcomings, to nurture professional pride, and to sensitize the courts to their public role . . . . [T]his will lead to greater 'societal respect' (the term used in one USAID document for 'legitimacy'), which will in turn boost their capacity to apply the law independently." (citations omitted)).

74. Gordon, *supra* note 21, at 451 (noting the efforts of U.S. bar associations to undermine personal injury bars with ethics rules prohibiting solicitation and contingency fees, tort reform efforts, and unauthorized practice prosecutions even in markets that lawyers do not serve).

75. Ilya Somin argues that intractably low levels of voter knowledge are not due to poor access to political information or low levels of education but are the result of "rational ignorance," because voters have little incentive to acquire political information given the insignificance of any one vote to electoral outcomes. Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1293–94 (2004).

understanding of governmental institutions and the separation of powers is not enough to provide a threshold awareness of the content of the law that governs daily life.

In a 2011 paper on legal knowledge in the United States, the ABA Commission on Civic Education lamented the fact that more Americans could name a judge on *American Idol* than name the Chief Justice of the U.S. Supreme Court.[76] While this may be demoralizing to denizens of the judicial branch, it seems unlikely to either indicate or cause an impediment to a person's participation in American democracy or awareness of her rights. It is perhaps even a sign that our courts are less personality driven than the political branches. Regardless, not being able to name Chief Justice John Roberts is, in my view, not nearly as big a problem as not knowing, for example, what a tort is.

C. Ignorance of Legal Basics: The Example of Battery

Americans need to know that they are bound by the criminal and civil law in order to understand that they can be held responsible for harming someone, even by accident. They need to know what their rights are in order to seek recourse when they are violated. They need to know what a tort is in order to pursue civil remedies when the criminal justice system fails them or isn't the appropriate forum.

The average citizen does not need to know all the elements of the prima facie case for common law battery, for example, but she does need to get the gist: that intentionally touching someone without permission is generally a tort and often a crime.[77] It might seem obvious to a lawyer, but the normalization of violence, as well as the treatment of women's bodies as public in our society, can obscure the fact that it is not just mean or rude to touch without consent but illegal. If we taught citizens from a young age that starting a fistfight or groping a person is a tort (and in many jurisdictions a crime even without an injury),[78] it would give notice to would-be perpetrators of the significance of the action, bring greater opprobrium to everyday violence, and empower victims with the knowledge that their treatment is not acceptable. A person who is

76. AM. BAR ASS'N COMM'N ON CIVIC EDUC. IN THE NATION'S SCH., *supra* note 67, at 2.

77. *See* RESTATEMENT (SECOND) OF TORTS § 18 (1965) ("(1) An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) an offensive contact with the person of the other directly or indirectly results."); *see also* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 16.2(a) (2d ed. 2003) ("But in addition to these more obvious bodily injuries, offensive touchings (as where a man puts his hands upon a girl's body or kisses a woman against her will, or where one person spits into another's face) will also suffice for battery under the traditional view. The modern approach, as reflected in the Model Penal Code, is to limit battery to instances of physical injury and cover unwanted sexual advances by other statutes. This is the prevailing view in those jurisdictions with new criminal codes . . . . [A] minority of these codes follow a much broader view, sometimes extending the crime to any touching or physical contact, but more often requiring that the contact be 'offensive,' 'insulting or provoking,' or done 'in a rude, insolent, or angry manner.'" (citations omitted)).

78. *Id.*

experiencing physical harm may respond differently if she understands the perpetrator's actions are a violation of her rights that society has not just stigmatized but outlawed. This awareness is conducive to seeking counsel, reporting crimes, or setting boundaries in interpersonal relationships. There is a long history in this country of violence against women, in particular, not being treated as a "real crime," which scholars have traced to coverture laws and a public/private distinction that functionally deprives women of the protection of the law.[79] But it also reflects an inadequate understanding or acceptance of the most basic obligations of citizens to each other.

A perennial example of the public's lack of understanding of battery is the pie in the face of the public figure.[80] Protesters attempt to hit some controversial figure, often a political conservative, in the face with a pie and media commentators treat it as harmless silliness.[81] When the pie thrower is charged, reports may mention he was charged with assault or battery but fail to define the crime.[82] Never is there any explanation of the fact that "unlawfully touching" a person, including by a substance put in motion, or making a person *fear* an unlawful touching, is a crime in the jurisdiction.[83]

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79. *See, e.g.*, Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in* Brzonkala v. Morrison, 75 N.Y.U. L. REV. 150, 155–56 (2000) (arguing that the Court should uphold the right of rape victims to bring federal claims against their rapists under the Violence Against Women Act, 42 U.S.C. § 13981 (1994), as within Congress's remedial powers because, historically, under legal doctrines such as coverture, a woman's legal identity was subsumed upon marriage into that of her husband, who had the right to chastise her. Such doctrines "legitimated, amplified, and gave legal force to malign impulses, and left women more vulnerable to violence and discrimination than they otherwise would have been" (citing RICHARD J. GELLES & MURRAY A. STRAUS, INTIMATE VIOLENCE 19 (1988))); *see also* G. Kristian Miccio, *Male Violence—State Silence: These and Other Tragedies of the 20th Century*, 5 J. GENDER RACE & JUST. 339, 344 (2002) ("The liberty to beat wives, a liberty the common law granted husbands through the doctrine of coverture, is still part of our common culture. Such violence is pervasive, and it is manifestly gendered."). Feminist theorists have critiqued the conception of a line between the private and the public that places deprivations of liberty by private actors, such as private violence against women, outside the realm of constitutional concern. Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847, 857 (2000).

80. *See* Peter Grier, *Carl Levin to Ann Coulter: The Political History of a Pie in the Face*, CHRISTIAN SCI. MONITOR (Aug. 17, 2010), http://www.csmonitor.com/USA/Politics/The-Vote/2010/0817/Carl-Levin-to-Ann-Coulter-the-political-history-of-a-pie-in-the-face.

81. *See* Timothy Stenovec, *Pie in the Face: Rupert Murdoch, Ann Coulter, Bill Gates and Tom Friedman Have All Gotten It*, HUFFINGTON POST (July 19, 2011, 6:46 PM), http://www.huffingtonpost.com/2011/07/19/rupert-murdoch-pie-in-the-face_n_903757.html#s311920 ("While it remains to be seen whether Jonnie Marbles will be punished for his attempted pieing of Rupert Murdoch, clowns from generations before are sure looking down, knowing that their legacy lives on.").

82. *See, e.g.*, *2 Arrested for Tossing Pies at Coulter*, CHI. TRIB., Oct. 24, 2004, at 13; *Anti-war Protester Hits Senate Armed Services Chairman Carl Levin in Face with Pie in Michigan*, FOX NEWS (Aug. 16, 2010), http://www.foxnews.com/us/2010/08/16/anti-war-protester-hits-senate-armed-services-chairman-carl-levin-face-pie/.

83. *See* RESTATEMENT (SECOND) OF TORTS § 18 (1965); *supra* note 77 and accompanying text.

Ms. Magazine, an organization one would expect to be particularly sensitive to the nonconsensual touching of women,[84] celebrated the thirty-fifth anniversary in 2011 of antigay activist Anita Bryant being hit in the face with a pie by posting an artist's rendering, in a pop-art style, of Bryant's cream covered face on its Facebook page.[85] A student who threw a pie at Ann Coulter during a speaking event indicated his lack of understanding of his actions by telling a reporter, "When throwing a pie can be called assault and bombing civilians called collateral damage, you gotta laugh to stay sane."[86] Another pie thrower indicated he did not grasp that he had committed a crime (and tort) when he distributed a manifesto under his real name in the days after his stunt that "provided a complete and detailed confession to committing the crime of battery against William Kristol according to the prosecutor."[87] We might want to dismiss these incidents as the work of people with poor judgment, but their surprise at facing legal consequences for throwing things at people, and the consistent media reaction, indicates a lack of the most basic knowledge of the law among even college-educated citizens.

I am not suggesting that more young people should be prosecuted for pie-throwings and school-yard fights (especially in light of racial and class disparities in who benefits from prosecutorial discretion).[88] I am, however, saying that everyone should be aware that "no hitting" (more precisely: "no touching without permission") is not just good etiquette, but the law, even if the law is enforced in only a minority of instances of unwanted touching. Nor am I suggesting that normalized violence results primarily from ignorance of the law, and therefore educating students about the law is the

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84. *Ms. Magazine*, a feminist magazine that played an important role in the women's movement, was "the first magazine to feature domestic violence on its cover." *Issues We Hope Steinem Keeps Fighting For . . .*, DAILY NEWS, Mar. 25, 2009, at 37. *Ms.* is currently published by the Feminist Majority Foundation, whose mission is to "advance women's equality, non-violence, economic development, and, most importantly, empowerment of women and girls in all sectors of society." *Mission and Principles*, FEMINIST MAJORITY FOUND., http://www.feminist.org/welcome/mandp.asp (last visited Apr. 26, 2014).

85. The Facebook posting is no longer available, but for the image by Derek Erdman, see Christoper Frizzelle, *Anita Bryant with Pie on Her Face—One of the Great Moments in the History of Humiliation*, STRANGER (Aug. 2, 2011, 10:22 AM), http://slog.thestranger.com/slog/archives/2011/08/02/anita-bryant-with-pie-on-her-faceone-of-the-great-moments-in-the-history-of-humiliation.

86. J.D. Wallace, *Al Pieda Member Says the Arrest Was Worth the Stunt*, TUCSON NEWS (Oct. 26, 2004), http://www.tucsonnewsnow.com/story/2485057/al-pieda-member-says-the-arrest-was-worth-the-stunt.

87. Mary Sell, *Pie-Toss Letter Prompts Investigation: Medlin Faces Judiciary Action by School, Possible Battery Charges*, STUDENTS ACAD. FREEDOM (Apr. 8, 2005), http://www.studentsforacademicfreedom.org/news/694/Earlhampiethrowinginvestigation040805.htm.

88. *See generally* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012) (arguing that implicit racial attitudes and stereotypes skew prosecutorial decisions in a range of racially biased ways); *see also* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 67 n.12 (1998) (noting that, in addition to race, "class and socio-economic status are both relevant to the treatment of criminal defendants and victims of crime").

best path to changing the culture. Research on teaching empathy to students is perhaps more promising in this regard.[89] But where there is a failure of empathy, awareness of the law should deter perpetrators and empower victims.

I use the pie-throwing example because it is not unreasonable for a layperson not to know that throwing something without causing an injury or even making contact could be a crime.[90] It is much harder to understand the rash of recent examples of young people witnessing, recording, and distributing video of the touching or penetration of incapacitated women and their apparent failure to comprehend that they were witnessing or committing a crime and a tort.[91]

D. Ignorance of the Law and the Steubenville Rape Pattern

In the most famous case of a minor raped in front of her peers, which occured in Steubenville, Ohio, witnesses did not recognize that a perpetrator penetrating the incapacitated victim's vagina with his fingers constituted rape. One witness explained that he did not try to stop the rape

89. *See* Jennifer Kahn, *Can Emotional Intelligence Be Taught?*, N.Y. TIMES, Sept. 14, 2013, § 6 (Magazine), at 44 (reporting on a number of programs designed to teach students emotional intelligence); Pam Belluck, *For Better Social Skills, Scientists Recommend a Little Chekhov*, N.Y. TIMES (Oct. 3, 2013), http://well.blogs.nytimes.com/2013/10/03/i-know-how-youre-feeling-i-read-chekhov/?_php=true&_type=blogs&_r=0 (reporting findings that after reading literary fiction, people performed better on tests measuring empathy, social perception, and emotional intelligence). *But see* Katherine Beals, *How To Teach Empathy*, OUT LEFT FIELD (Oct. 20, 2013, 10:00 AM), http://oilf.blogspot.com/2013/10/how-to-teach-empathy.html (arguing that such programs are expensive and detract from core subjects like social studies and world history, which teach empathy for people outside the student's peer group).

90. For another illustration of widespread ignorance of battery, see Bridgette Dunlap, *Learn Your Rights: Touching a Pregnant Person's Stomach Is Illegal and Has Been for Some Time*, RH REALITY CHECK (Nov. 5, 2013, 4:17 PM), http://rhrealitycheck.org/article/2013/11/05/learn-your-rights-touching-a-pregnant-persons-stomach-is-illegal-and-has-been-for-some-time/ (discussing a story that went viral misreporting that Pennsylvania had passed a law making it *newly* illegal to touch a pregnant woman's stomach without consent). Contrary to the media narrative, authorities issued a citation to a man who repeatedly touched a pregnant woman against her will under Pennsylvania's existing harassment law, 18 PA. CONS. STAT. ANN. § 2709 (West 2000), under which physical contact "with intent to harass, annoy or alarm another" is a summary offense.

91. *See* Connor Simpson, *The Kids at the Steubenville Rape Party Told Cops They Should Have Stopped It*, WIRE (March 24, 2013, 12:02 PM), http://www.theatlanticwire.com/national/2013/03/steubenville-police-tapes/63463/; *see also* Nina Burleigh, *Sexting Shame and Suicide*, ROLLING STONE, Sept. 26, 2013, at 46 (reporting that three boys allegedly removed the clothing of an incapacitated 15-year-old girl (who later killed herself), drew all over her body with marker, digitally penetrated her, and took photos that were passed around her school); Abigail Pesta, *'Thanks for Ruining My Life,'* NEWSWEEK (Dec. 10, 2010, 12:00 AM), http://www.newsweek.com/thanks-ruining-my-life-63423 (reporting that two sixteen-year-old boys stripped a girl and took pictures while digitally penetrating her); *Stephen Harper 'Sickened' by Alleged 'Sexual Criminal Activity' Linked to Rehtaeh Parsons Tragedy*, NAT'L POST (Apr. 11, 2013, 7:01 PM), http://news.nationalpost.com/2013/04/11/harper-decries-criminal-activity-in-n-s-teens-death/ (reporting that a girl killed herself after four boys allegedly assaulted her and distributed pictures).

because "at the time, no one really saw it as being forceful."[92] Another tweeted, "If they're getting 'raped' and don't resist then to me it's not rape."[93] The prosecutor explained that testifying witnesses "'don't think that what they've seen is a rape in the classic sense.'"[94] These statements and the actions of the many witnesses indicate ignorance of the fact that it does not take a certain kind of penetration, amount of force, or injury to commit rape in Ohio and many other states.[95]

Media coverage of the case treated the story as a cautionary tale about the dangers of social media rather than rape.[96] This and similar cases demonstrate the prevalent misperception that the crime of rape is defined by popular understanding of the term rather than statute.[97] If "classic" rape is something akin to rape at common law, there is widespread ignorance that the law has changed.[98] Argument over what kind of penetration *should* constitute rape misses the point that the definition is not arrived at via opinion poll, and also suggests a lack of awareness that one can commit tortious and criminal batteries other than rape without any penetration or injury.

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92. Juliet Macur & Nate Schweber, *Rape Case Unfolds on Web and Splits City*, N.Y. TIMES, Dec. 17, 2012, at D1.

93. Ariel Levy, *Trial by Twitter*, NEW YORKER, Aug 5., 2013, at 38.

94. *Id.*

95. OHIO REV. CODE ANN. § 2907.01(A) (LexisNexis 2010) ("'Sexual conduct' means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.").

96. *See, e.g.*, Matt Lombardi, Lisa Soloway & Sean Dooley, *The Steubenville Rape Case: The Story You Haven't Heard*, ABC NEWS (Mar. 13, 2013), http://abcnews.go.com/2020/steubenville-rape-case-story-heard/story?id=18705357.

97. *See, e.g.*, Richard Cohen, *Miley Cyrus, Steubenville and Teen Culture Run Amok*, WASH. POST (Sept. 2, 2013), http://www.washingtonpost.com/opinions/richard-cohen-miley-cyrus-steubenville-and-culture-run-amok/2013/09/02/1cecafa6-11af-11e3-bdf6-e4fc677d94a1_story.html (implying that the case did not concern a genuine rape and thus obscuring the fact that digital penetration is rape: "The first thing you should know about the so-called Steubenville Rape is that this was not a rape involving intercourse. . . . Obviously, she was sexually mistreated").

98. *See* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1105, 1133–61 (1986) (explaining that "force" or "threat of force" was traditionally an element of the crime of rape and assessing two reform models). The Model Penal Code has provided for a third-degree felony of "gross sexual imposition" involving forms of nonconsenual sex that do not involve force or threat of force. MODEL PENAL CODE § 213.1 (2009). Michigan's statute, MICH. COMP. LAWS ANN. § 750.520a(o) (West 2004), was amended in 1983 to expand the crime to include penetration with objects and offensive sexual touching, male victims, and female perpetrators. Estrich, *supra*, at 1148. It dispensed with the term "rape" like many states that labeled the expanded crime criminal sexual conduct or assault. *Id.* Estrich warned that the well-intentioned renaming aimed at shedding the "common law baggage" associated with rape "risks obscuring the unique meaning and understanding of the indignity and harm of 'rape.'" *Id. See generally* Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207 (2003) (detailing out-of-date sexual offense provisions of the Model Penal Code that misrepresent the progressive thinking of the Code's reporters and are out of step with modern attitudes and rape statutes).

What is additionally frightening is the Steubenville prosecutor's speculation that only one in a thousand teens would realize that taking or distributing a video of a naked minor is illegal.[99] If our society provided young people with a basic understanding of the law that governs their lives, they would assume this was illegal, regardless of whether the criminal laws of their state have caught up with cyberbullying, because sending around naked pictures of someone is almost certainly the tort of intentional infliction of emotional distress, among others.[100] Victims who knew the law was on their side might seek help rather than engaging in self-harm, as has occurred in multiple instances.[101]

That there have been so many cases of young people committing and distributing pictures of sexual batteries is obviously a much deeper problem than ignorance of the law. However, ignorance deprives the law of its deterrent effect and deprives victims of recourse and support. We can say everyone knows these things are wrong, but prosecutors are dealing with boys "who seem to think they are committing pranks with phones and passed out girls."[102] This kind of confusion would not be possible if high school students were taught that any kind of offensive touching is illegal and that there is such a thing as a privacy tort. Where morality and empathy have failed, we can at least be clear about the law. The ignorance of perpetrators, victims, and the public is contributing to lawlessness.[103]

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99. Levy, *supra* note 93.

100. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 (2012) ("An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm."); *see also* Elizabeth M. Jaffe, *Cyberbullies Beware: Reconsidering* Vosburg v. Putney *in the Internet Age*, 5 CHARLESTON L. REV. 379, 390–91 (2011) ("Cyberbullying is actually just a new term that encompasses several very old wrongs: intentional torts."); 4 IAN C. BALLON, E-COMMERCE AND INTERNET LAW § 51.04[2] (2d ed. 2005) ("[R]evenge porn[, the distribution of intimate pictures online by a former mate,] may justify other tort claims as well, such as intentional infliction of emotional distress.").

101. *See* Burleigh, *supra* note 91, at 46 (reporting on the suicides of Audrie Potts, Jill Naber, and Rehtaeh Parsons). It is, of course, impossible to know to what extent the photos are the cause of these women's suicides.

102. *Id.* ("'[T]he young men committing them are not seeing them as crimes, they see them as pranks. And there's no point in pulling a prank unless you share it.' Anderson said parents and educators need to talk to younger boys about informed consent. 'When I speak to students, I tell boys that if a young woman isn't of age, she isn't capable of giving informed consent. . . . And those cases, if you have sex, you can go to jail. And the jaws drop, because right away the think of the sex they had at a party last weekend, where everybody was wasted.'").

103. Battery provides just one example of legal rules every American should know. Others include basic principles of contract law. Too many laypeople think signing a contract is the end of their rights because they are not aware that contract provisions can be void as against public policy or what a contract of adhesion is. The idea that signatures are magic also leads laypeople to believe that they cannot enter into a contract without a writing or have rights outside a contract, such as those provided by statutes and ordinances. This perpetuates power imbalances between individuals and the corporations, landlords, and employers with whom they contract, because a person who assumes she has no rights has no reason to obtain counsel, attempt to negotiate on her own, or even look up available legal information.

IV. TEACHING LEGAL BASICS

I cannot claim to know the optimal way to impart legal knowledge in a country struggling to teach its students basic math and reading, as I am not an education scholar. There are, however, some models worth mentioning briefly. A number of bar associations have programs aimed at engaging lawyers pro bono and training public school teachers to provide legal education, known as Law-Related Education (LRE). The ABA holds an LRE conference every two years that focuses on civic education, but this might be an opportunity to integrate legal education into the existing work with teachers, as some state bars have done.[104]

One of the most established LRE programs, "Street Law," emphasizes practical legal knowledge.[105] Founded at Georgetown Law Center in 1972, there are street law programs in every U.S. state that teach public school students and community groups about housing, employment, child custody, abuse and neglect, consumer law, criminal law, the juvenile justice system, police procedures, domestic violence, sexual assault, and other legal topics.[106] Street Law programs also aim to teach young people "where rules and laws come from, how they can be changed, and why they are essential to society."[107] There are multiple models,[108] but they often consist of law students teaching semester- or year-long courses in public high schools.[109] By most, if not all, accounts, these programs provide invaluable experiences to both the law student instructors and the high school students[110] and provide additional benefits such as pipeline programs that foster diversity in the legal profession.[111]

Though they serve critical public service objectives, Renee Newman Knake notes that four decades of Street Law and other LRE programs have not democratized legal education.[112] She proposes that law schools band

104. Janet Stidman Eveleth, *Teaching Children About the Law*, MD. B.J., May/June 2006, at 10, 14 ("We educate young people on how the law impacts their daily lives as citizens. Having people understand how a bill becomes a law is only one aspect . . . . Understanding how that bill affects them, in terms of zoning, a contract or even in the context of a crime, is something our schools have never covered, but it is critical for our kids to understand. These future adults will be consumers of the civil and criminal justice system, yet they have little or no understanding of it.").

105. Richard Grimes, David McQuoid-Mason, Ed O'Brien & Judy Zimmer, *Street Law and Social Justice Education*, *in* THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE 2011, at 225, 225 (Frank S. Block ed., 2010).

106. Matthew M. Kavanagh & Bebs Chorak, *Teaching Law As a Life Skill: How Street Law Helps Youth Make the Transition to Adult Citizenship*, 18 J. JUV. JUST. & DETENTION SERVICES 71, 72 (2003).

107. *Id.*

108. *See* Grimes et al., *supra* note 105, at 230 (describing the credit-bearing model, the nonclinical pro bono model, and the law student organizations model).

109. Kamina A. Pinder, *Street Law: Twenty-Five Years and Counting*, 27 J.L. & EDUC. 211, 231–32 (1998).

110. *See generally* Grimes et al., *supra* note 105; MacDowell, *supra* note 26; Pinder, *supra* note 109.

111. Kavanagh & Chorak, *supra* note 106, at 73.

112. Renee Newman Knake, *Democratizing Legal Education*, 45 CONN. L. REV. 1281, 1305 (2013).

together for a systematic public information campaign aimed at increasing public awareness of one's rights and how lawyers can help.[113] This is a creative solution to the problem of people not hiring lawyers as a result of not realizing that they have a legal problem or knowing how to access affordable services. That is a different (though related) problem than the lack of general knowledge of the law necessary for daily life and participation in a democracy apart from specific legal problems that lawyers can address. But practical knowledge, like the type imparted in Street Law programs, might stimulate demand for legal services by increasing the public's awareness of their rights and how the legal system works.

The impact that law school–based Street Law programs can have is limited for a number of reasons. First, according to proponents, the "primary rationale" for such programs is the professional development of law students rather than the education of the general public.[114] Additionally, widely replicating the model would prove difficult, as it is extremely time intensive and requires unusually dedicated students and teachers. At Georgetown, law students take a two-hour seminar, teach three hours per week,[115] and spend six "often grueling" weeks preparing for a mock trial competition.[116]

There is also significant prep time required for class since the law student teachers must create their own lesson plans.[117] The program relies on first-time teachers reinventing the wheel rather than educators improving their skills over time and refining their curriculum.[118] One Street Law alumna notes, "Some would argue that a program like Street Law belongs in a graduate school of education and not in a school of law," but discounts this as the concern of those afraid to stray outside the traditional law school curriculum.[119] However, one can acknowledge the value to law students but still believe that training teachers who intend to teach would be a better use of resources. The Georgetown model could be subject to some of the same criticisms leveled at Teach For America—that young people who are not starting careers as teachers are thrown into urban classrooms with little training, contributing to the de-professionalization of teaching.[120]

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113. *Id.* at 1312–16.
114. Grimes et al., *supra* note 105, at 229.
115. Pinder, *supra* note 109, at 212–13.
116. *Id*.
117. *See id.* at 215.
118. *But see* Grimes et al., *supra* note 105, at 225 ("While the sessions can be led by experienced experts—law teachers and practicing lawyers—they are often most effective when done by law students whose task is to learn the material themselves before helping others to understand it. Law students often strike an immediate rapport with school pupils, in part because they may not be many years senior to their target audience.").
119. Pinder, *supra* note 109, at 226.
120. Catherine Michna, *Why I Stopped Writing Recommendation Letters for Teach for America: And Why My Colleagues Should Do the Same*, SLATE (Oct. 9, 2013, 2:38 PM), http://www.slate.com/articles/life/education/2013/10/teach_for_america_recommendations_i_stopped_writing_them_and_my_colleague.html.

Proponents argue that Street Law programs are most effective when sponsored by law school clinics.[121] However, the efforts of law clinics are necessarily piecemeal, though they can be laboratories to develop approaches aimed at systemic change and have historically played an important role in public interest law.[122] As in the case of the ABA's emphasis on law school clinics and postgraduate fellows to provide legal services discussed above, relying too heavily on clinics risks fostering the idea that imparting basic legal knowledge is an act of charity by generous lawyers rather than an obligation of a society committed to the rule of law.

Professional educators could, however, teach Street Law, other practical LRE curricula, and the form of dialogic argument taught through law.[123] Street Law has published a number of textbooks and provides information explaining how the curriculum aligns with "Common Core" requirements on its website.[124] The ABA could add advocacy for basic practical legal education to its work for state-mandated civics programs.

Law school–based Street Law programs have the benefit of programs tailored to the legal needs of particular inner-city communities, but these topics also have a place in a core curriculum for all populations. The ability to recognize when one's rights have been violated by police officers may be particularly important in a community targeted by "stop and frisk," but this knowledge is also "practical" for students who seldom interact with police, in that it is useful for evaluating public policy and understanding how the law affects others. Community-specific workshops on specific legal issues, like those taught by pro bono attorneys for Street Law, might also be expanded, but would need to supplement universal basic legal education for the law to be predictable and uniformly applied.

CONCLUSION

The rule of law is a nebulous concept, but central to the ideal promoted by the United States abroad and at home is the notion that universal laws must be uniformly applied. The formalist reliance on procedures and institutions is inadequate to achieve uniform application of the law where those institutions are inaccessible due to lack of knowledge and counsel. In the United States, the lawyers' monopoly has led to a view of the law as the

121. Grimes et al., *supra* note 105. Golub also sees law school clinics as an important tool for legal empowerment. Golub, *supra* note 2, at 173–74.

122. *See* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 20–57 (2008).

123. A recent study found that students who took a class in dialogic argument improved their writing significantly more than students who took a class that involved much more instruction and practice in expository writing. Deanna Kuhn & Amanda Crowell, *Dialogic Argumentation As a Vehicle for Developing Young Adolescents' Thinking*, 22 PSYCHOL. SCI. 545–52 (2011).

124. *How Street Law Aligns with the Common Core State Standards*, STREET L. INC. (Sept. 17, 2013), http://www.streetlaw.org/en/newsroom/Article/417/How_Street_Law_Aligns_with_the_Common_Core_State_Standards. The Common Core is a set of standards adopted by forty-four states and the District of Columbia to replace inconsistent learning measures that policymakers considered too easy. Al Baker, *Education Official Says State Is 'Not Retreating' on New Standards*, N.Y. TIMES, Apr. 11, 2014, at A21.

exclusive domain of lawyers, leaving laypeople with inadequate knowledge of their rights and responsibilities. This ignorance deprives citizens of the protection of the law and the norms it represents, because wrongdoers are undeterred by laws they are not aware of, victims do not claim rights they do not realize they have, and government actors have limited incentive to address problems that go unrecognized by the public.

Furthermore, the lack of understanding of how the law works and what lawyers do discourages laypeople from learning what the law is and how it could be improved, impairing the discourse and political process that should lead to just laws. The current approach of the U.S. legal profession is consistent with its rule of law orthodoxy abroad, but promoting respect for the judiciary and access to lawyer-provided services exclusively leaves laypeople too dependent on the legal profession to mediate the laws that govern their lives.

The Corner Office PROFESSIONALISM

The last tenet of the MBA Commitment to Professionalism states, "**We will work to ensure access to justice for all segments of society.**" Of course, this has nothing to do with how many people define professionalism, which is often - and erroneously - reduced to merely, "Don't be such a jerk." But this tenet, lurking quietly at the bottom of the MBA list, is the touchstone of our profession.

"The practice of law is a *profession* - not a business or skilled trade. While the elements of gain and service are present in both, the difference between a business and a profession is essentially that while the chief end of a trade or business is personal gain, ***the chief end of a profession is public service***." *Bradshaw v. U.S. Dist. Court for S. Dist. of California*, 742 F.2d 515, 518 (9th Cir. 1984) (bold italics added).

This tenet is not purely aspirational. After all, ORS 9.460, which identifies the duties of lawyers, mandates that, "[a]n Attorney shall never reject, for any personal consideration, the cause of the defenseless or the oppressed." This makes sense because lawyers, unlike other professionals such as teachers, doctors and writers, are the gateway to an entire branch of government which has the power to give and take away many of life's most precious elements. After all, one's property, freedom, family, livelihood and, in some circumstances, one's life can be at risk when navigating through the judicial system. Without competent counsel, huge swaths of the population - many of them historically disenfranchised - are simply chewed up on one side of the system and spit out the other. And, as the middle class shrinks and the cost of providing legal services grows, there is no end in sight to this cycle.

Applying this statute and tenet in a profession that has tended to stray far from the duty set forth in ORS 9.460(4) requires a significant shift in thinking. Even though public service and working to ensure access to justice on one hand, and economic profitability on the other hand, are not mutually exclusive concepts, following this tenet and statute does require law firms to find different ways to evaluate their own performance. This, in turn, requires less emphasis on short term profitability and billable hours requirements and more focus on the long-term profitability of the firm with a larger eye toward raising the bar in the profession as a whole. At the very least, it requires all of us to engage in pro bono services every year and, better yet, to explore those segments of society that have been historically and systemically disenfranchised and marginalized to better understand how barriers to justice work.

More importantly, our duty to work toward access to justice requires us to evaluate whether doing any of the above will even come close to meeting the unmet need and whether a more holistic approach is necessary. Our duty to work toward access to justice requires us to no longer stick our heads in the sand in the face of this crisis, and to start thinking creatively to solve the root cause of the problem. After all, we are not going to make the middle class un-shrink any more than we are going to meet this unmet need by doing piecemeal pro bono work. These are short-term solutions, not real solutions. The crux, but not the cause of the problem, is that for almost everyone other than corporations and governments - the primary recipients of legal advice in our country - hiring a lawyer is too expensive.

As to the cause of the problem, perhaps we should more aggressively explore to what extent the access to justice problem is caused by our over-regulation of the practice of law. We should re-evaluate whether our monopoly on this branch of government is simply too tight and whether a completely new model of legal services is necessary that provides competent legal services by non-lawyers on a limited basis at a much lower cost. Perhaps that is what our work to ensure access to justice should encompass, more than anything. Larger states, like New York and Washington, are already rolling out limited non-lawyer legal practitioner or court navigator models to provide services to those who lack legal representation in certain areas. California is actively working toward doing the same. Whatever the solution, we owe it to those without a fair shot for justice in our current system to explore holistic solutions to the access to justice problem by re-evaluating how we have defined ourselves as professionals.

The Corner Office is a recurring feature of the Multnomah Lawyer and is intended to promote the discussion of professionalism taking place among lawyers in our community and elsewhere. While The Corner Office cannot promise to answer every question submitted, its intent is to respond to questions that raise interesting professionalism concerns and issues. Please send your questions to mba@mbabar.org and indicate that you would like The Corner Office to answer your question. Questions may be submitted anonymously.

AN EXAMINATION INTO THE INFLUENCE OF FRANZ KAFKA ON AMERICAN JURISPRUDENCE

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This paper seeks to explore and explain some of the key ways in which judicial opinions in the United States cite the works of the 20th century author Franz Kafka. A Westlaw search shows that the name "Franz Kafka" appears in 54 federal and state court opinions. "Kafkaesque" is used in 363 federal and state court opinions. "The Trial" appears in 207 cases in the same paragraph as "Kafka."

There are two principal contexts in which Kafka is used in judicial opinions. It should be noted that these contexts often blend together and are not necessarily distinguishable. The first context involves any deprivation of due process. In such cases, Kafka's novel *The Trial* is cited, too, and a circumstance of the main character, Joseph K., is usually compared analogously to the situation of the individual who is deprived of due process. These cases may involve police or government abuse of an individual's civil rights, or a violation of the rules of court.

The term "Kafkaesque," in the second context, is used to illustrate a scenario in which a government rule, or rules at issue, is needlessly complex to the point of being illogical. These situations can involve an individual overwhelmed by a web of government regulations, such as an immigrant trying to avoid deportation.[2] "Kafkaesque" is most frequently used to describe arbitrary use of government power, and can be used to characterize an argument as illogical.

These two contexts can blend together, because when a person is deprived of due process, as in the case of Joseph K. in *The Trial*, it may also be "Kafkaesque" in the sense that the individual is incapable of defending himself against an arbitrary and overwhelming government. The term "Kafkaesque" is also defined as "of Kafka," "or relating to his work."[3] Therefore, the circumstance of Joseph K. is by definition, "Kafkaesque."

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[2] *Singh v. Reno*, (1999) 182 F. 3d 504, 510 (7th Cir.)

[3] "Kafkaesque." Merriam-Webster Online Dictionary. 2008. Merriam-Webster Online. 9 November 2008. <http://www.merriam-webster.com/dictionary/Kafkaesque>

The Use of *The Trial*

In *The Trial*, [4] the protagonist, Joseph K., is arrested one morning without warning and without being informed of his crime. Throughout the story, K., although allowed to go about his normal routine, attempts in vain to defend himself. His trial and all related proceedings take place in secret without his participation, and the more he seeks to learn about his case, the more confounded he becomes. He is faced with a senselessly complex, farcical legal system in which he is forced to confront an endless number of low-ranking bureaucrats, none of whom are able to inform him of his crime. Throughout, he assumes that his arrest is a mistake because he has not committed a crime. However, his trial moves forward with an unstoppable momentum. In one of the more famous episodes, K. is wandering throughout a large tenement house hopelessly searching for the courtroom in which his "initial inquiry" is to take place. When he finds the courtroom, the Examining Magistrate is so uninformed that he believes K. to be a house painter. The story culminates with K. being taken away by two executioners, led to a quarry, and put to death. At no point in the story is he informed of his crime.

The Trial is one of the most analyzed works of 20th century literature. The story and its author are unique in many aspects. Notably, Kafka did not complete *The Trial*; its chapters were arranged posthumously by Kafka's friend, Max Brod.[5] Kafka was a German-educated, secular Jew who lived in the Czech Province of the Austro-Hungarian Empire.[6] Kafka was educated in the law and worked for a state-run insurance institute in the area of risk-assessment.[7] His writing style, described by literary critics as concise and unpretentious, invites a wide array of interpretations.[8]

The Trial and other works of Kafka are seen by some critics as anticipating the Nazi regime and the horror of Gestapo arrests.[9] The circumstance of Joseph K. is also easily compared to the sham trials carried out by any number of totalitarian regimes. Other critics see the trial of Joseph K. as being reflective of the guilt that Kafka felt in his own life for cutting off his engagement with his fiancée, as well his struggles as a writer.[10] For some judges in modern

[4] Franz Kafka, *The Trial* (first published 1925, 1998 ed).
[5] Angel Flores and Homer Swander, *Franz Kafka Today* (1977). p. 127.
[6] Meno Spann, *Franz Kafka*, (1976). p. 17.
[7] George Dargo, 'Reclaiming Franz Kafka, Doctor of Jurisprudence' (2007) 45 *Brandeis L.J.* 495, 496.
[8] Angel Flores and Homer Swander, *Franz Kafka Today* (1977). p. 145.
[9] Meno Spann, Franz Kafka, (1976). p. 98.
[10] Stanely Corngold, *Franz Kafka The Necessity of Form* (1988). p. 239-241.

American jurisprudence, *The Trial* serves as a compelling example of how a corrupt judicial system can confound and overwhelm a helpless defendant.

The Trial is often used by Judges to give effect to opinions of cases in which individuals are victimized by government. In *B.B. v. Department of Children and Family Services,*[11] two children were removed from the custody of their mother after the death of a sibling. The mother filed a demand for a trial on the dependency proceeding, but the trial was denied indefinitely pending the investigation into the death by the Sheriff's Office, which had admitted that its investigation was at a stalemate.[12] The situation of the mother was worsened by the denial of her discovery request for information pertaining to the death of her child, on the grounds that it pertained to an ongoing criminal investigation.[13]

The Court described the case as a "tragic Kafkaesque scenario," where a mother's children were taken away without her being afforded a trial or given an opportunity to examine the evidence held against her.[14] It quoted the following passage from *The Trial*, which describes the nature of the proceeding against Joseph K.:

"In no other Court was legal assistance so necessary. For the proceedings were not only kept secret from the general public, but from the accused as well. Of course only so far as this was possible, but it had proved possible to a very great extent. For even the accused had no access to the Court records, and to guess from the course of an interrogation what documents the Court had up its sleeve was very difficult, particularly for an accused person, who was himself implicated and had all sorts of worries to distract him."[15]

The Court is able to draw upon the horror that K. faces as a result of being kept in the dark from the charges and evidence held against him. K.'s 'trial' is the hellish ordeal of being an accused living with the threat of conviction, imprisonment or worse for no stated reason.[16]

In *In re J.M.*, a woman was involuntarily committed to a psychiatric care hospital on the basis of a defective warrant.[17] A court then ordered her held for

[11] (1999) 731 So. 2d 30, 32-33 (Fla. 4th DCA)
[12] Id.
[13] *Id.* at 32.
[14] *Id.* at 33.
[15] Id.
[16] Robert B. Kershaw, 'Kafka's The Trial: An Enigma Encountered' (2008) 41 DEC Md. B.J. 66, 70.
[17] (1996) 454 Pa. Super. 276, (PA. Super. Ct.).

an additional 90 days without conducting a hearing on the evidence that supported the extended commitment.[18] The Appellate Court held that her due process rights were violated when the commitment was extended without an independent review of the evidence being conducted by the trial Court.[19]

The Court stated that "to her, the experience of the literary figure, Joseph K. became very real."

"You can't go out, you are arrested." "So it seems," said K. "But what for?" he added. "We are not authorized to tell you that. Go to your room and wait there. Proceedings have been instituted against you, and you will be informed of everything in due course."[20]

The Court was able to use the arrest of Joseph K. analogously to the situation of the women whose involuntary commitment was being extended without an independent review of the evidence supporting the commitment. Both K. and the woman were deprived of their freedom by an external, impersonal force in a seemingly unorthodox manner.

In *The Trial*, K. is visited in his room on the morning of his thirtieth birthday by two warders, and—still in bed—is told he is under arrest.[21] He is puzzled by the event because the warders refuse to identify themselves as public officials, and initially believes the matter to be a joke.[22] However, the arrest marks the end of his personal freedom.

In *Rafeedie v. INS*, the U.S. Immigration and Naturalisation Service (INS) used a "special summary proceeding" to exclude a permanent resident from re-entry into the United States.[23] The Attorney General relied upon confidential information and issued an order of exclusion and deportation without allowing Rafeedie an opportunity to cross-examine witnesses, to consider the government's evidence, or to appeal the decision.[24] The INS invoked the summary procedure because of allegations that the Rafeedie was a high-ranking member of a terrorist organization. Because the process did not allow him to confront the INS or the evidence against him directly, the District Court

[18] *Id.* at 289.
[19] *Id.* at 289 - 290.
[20] *Id.* at 290.
[21] Franz Kafka, The Trial (first published 1925, 1998 ed). P. 4.
[22] *Id.*
[23] (1988) 688 F.Supp. 729 (D.D.C.)
[24] *Id.* at 736.

granted Rafeedie a preliminary injunction that barred the government from employing the summary proceeding.[25]

The Appellate Court affirmed the decision of the lower Court and remarked that Rafeedie, like Joseph K. in *The Trial*, was "in the untenable position of being forced to prove that he was not a terrorist in face of the Government's confidential information: It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden."[26]

The Court in the following case cites to *The Trial*, in the context of a situation in which a discovery rule has been violated, to invoke the unjustness of a situation in which a person is unable to adequately present their case because they have not been allowed to see the evidence held against them. In *Bulen v. Navajo Refining Co., Inc.*, the defendants knowingly violated the rules of discovery by withholding requested documents and falsifying discovery responses.[27] The Court drew upon *The Trial* in order to explain the importance of the rules of discovery:

"In Franz Kafka's short story *The Trial,* the main character K. was arrested for a crime. *See* Franz Kafka, *The Trial* (Willa & Edwin Muirtran., Schocken Books 1984) (1914). K. did not know of what crime he was accused. K.'s struggle, at least in part, was a result of the fact that he could not discover the necessary information to defend his case. During K.'s first interrogation, the following exchange occurred:

Emboldened by the mere sound of his own cool words in that strange assembly, K. simply snatched the notebook from the Examining Magistrate and held it up with the tips of his fingers, as if it might soil his hands, by one of the middle pages so that the closely written, blotted, yellow-edged leaves hung down on either side. "These are the Examining Magistrate's records," he said, letting it fall on the table again. "You can continue reading it at your ease, Herr Examining Magistrate, I really don't fear this ledger of yours *though it is a closed book to me* ...." (emphasis added).[28]

"K.'s attempt to defend himself is, as the Appellants describe it, a "nightmare" because K. is prohibited from accessing information about his case. This is precisely the nightmare discovery rules were developed to alleviate. The purpose of the Montana Rules of Civil Procedure is to "secure the just, speedy, and inexpensive determination of every action." If anyone in this case is guilty

[25] Id.
[26] 880 F. 2d 506, 516.
[27] (2000) 301 Mont. 195, 196 (Mont.)
[28] Id.

of creating a *Kafkaesque* nightmare, it was the Defendants, who refused to comply with the Rules of Civil Procedure and refused to disclose information necessary for the proper preparation of the Plaintiffs' case."[29]

In the scene in which the Court quotes, K. becomes enraged by the Magistrate's inability to provide him with any information regarding his charge. By examining *The Trial* under the theory of reification, under which a concept is treated as an object, the entire legal process that K. is subjected to is mechanical and therefore incapable of taking into account his protestations.[30] When K. presses the Magistrate to answer some of his questions, the Magistrate responds "you are laboring under a great delusion. These gentleman here and myself have no standing whatever in this affair of yours, indeed we know hardly anything about it, I can't even confirm that you are charged with an offense, or rather I don't know whether you are. You are under arrest, certainly, more than that I do not know."[31] The Magistrate's statement demonstrates a blind obedience to authority.[32]

Courts have also found the lack of presence or inadequacy of an interpreter at a criminal trial worthy of comparison to Joseph K. In *Mendiola v. State*, the defendant claimed that he should be granted a new trial because he did not have a competent interpreter during his initial trial.[33] The Court determined that his interpreter was adequate, and the dissenting judge saw fit to explain the importance of a translator for a criminal defendant:

"A defendant who is subjected to ineffective translation must "guess" at what is going on around him. An atmosphere is created where the defendant is hindered in effectively assisting his own defense, a milieu worthy of Kafka but unworthy of this Court's imprimatur:

Naturally, therefore, the records of the case, were inaccessible to the accused and his counsel, consequently one did not know with any precision, what charges to meet; accordingly it could be only by *pure chance* that it contained really relevant matter. Evidence could be *guessed* at from the interrogations. In such circumstances the Defense was naturally in a very ticklish and difficult position." Id. at 166.

[29] Id.
[30] Patrick J. Glen, 'The Destruction and Reification of the Law in Kafka's "Before the Law" and The Trial,' (2007) 17 S. Cal. Interdisc. L.J. 23, 59-60.
[31] Id.
[32] Id.
[33] (1995) 924 S.W. 2d 157 (Tex.App.-Corpus Christi).

Likewise in *U.S. v. Carrion*, the Court stated that "the right to an interpreter rests most fundamentally, however, on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment."[34]

Many courts draw upon the lack of accessibility K. had to his trial. Some critics believe that K.'s role as an outsider is a manifestation of Kafka's status in his own life.[35]
Kafka was a German-educated secular Jew who lived in the Czech Province of the Austro-Hungarian Empire.[36] He did not fully identify with any of the groups—Germans, Czechs, or Jews.[37] Similar to Kafka, K. is an outsider to his trial. He is ignorant of the charges leveled against him, and he is informed that nobody understands the court structure.[38]
The Trial has been cited to where there is the appearance of arbitrariness on the part of the court. In *Mediterranean Const. Co. v. State Farm Fire & Cas. Co.*, the Judge's clerk telephoned both parties on the morning of their hearing to inform them that the movant's motion for summary judgment had been granted and there would be no hearing.[39] Despite this, counsel for both sides appeared, but were denied permission to argue the merits, object to the evidence, or respond to the other side's papers.[40] On appeal, the Appellate Court determined that denying oral argument creates the appearance of impropriety:

"It is in the nightmare world of Franz Kafka's *The Trial* where Josef K. was left wondering, "Where was the Judge whom he had never seen?"[41]

Similarly in *Rose v. Superior Court*, the lower Court denied the defendant an evidentiary hearing on his motion for ineffective assistance of counsel.[42] The Appellate Court determined that the lower Court had merely skimmed over the defendant's petition so quickly that could not have given it proper consideration.[43] It stated that: [the defendant] Rose, like Kafka's condemned prisoner, Josef K., has been left to wonder, "Where was the Judge whom he had never seen?"[44]

[34] (1973) 488 F. 2d 12, 14 (1st Cir.).
[35] Douglas Litowitz, 'Franz Kafka's Outsider Jurisprudence,' (2002) 27 Law and Soc. Inquiry 103.
[36] *Id.* at 104.
[37] *Id.*
[38] *Id.* at 129.
[39] (1998) 66 Cal.App.4th 257, 261 (Cal. 4th DCA).
[40] Id.
[41] *Id.* at 785.
[42] (2000) 92 Cal. Rptr. 2d 313 (Cal. App. 2 Dist.).
[43] *Id.* at 321.
[44] Id.

The excerpt which the Court uses, "where was the Judge whom he had never seen?," is taken from the final scene of the story, in which K. is executed. Some critics believe that K.'s trial was symbolic of Kafka's engagement to Felice Bauer.[45] Kafka felt that Bauer stood in the way of the life he wanted, to spend as much time writing as he pleased.[46] Kafka's trial, it follows, was his engagement to Bauer, and the only relief from the sense of being on trial would come when the death sentence was passed.[47]

Kafka has also been cited when explaining the limits of government intrusion against the individual's right to privacy. In *Creamer v. Raffety*, at issue was a City's blanket policy of conducting both a strip search and a cavity search on any person arrested and held overnight in the City's jail.[48] In holding that the scope of such a policy was overly broad, the Court explained that:

"[Such a policy] creates a Kafkaesque scheme whereby Mr. Creamer or any other misdemeanant could suffer a massive intrusion upon the right to privacy in the future at the hands of law enforcement personnel stretching the limits of their discretion to release and acting on little or no justification."[49] "In *The Trial*, Franz Kafka described the archetypal encounter of the ordinary mortal with the capriciousness and irrationality of modern bureaucracies."[50]

Some critics suggest that Kafka's depiction of a world controlled by a cruel and arbitrary force is traced to his relationship with his domineering father.[51] On one occasion, Kafka describes in a journal entry, the traumatic childhood experience of being carried out on to the balcony by his father and being locked there for hours.[52] Kafka explained the experience as emblematic of his relationship with his father.[53] The act relates to Kafka's work as an arbitrary punishment at the hands of an unchallengeable authority.[54]

In *State v. Palamia*, the defendant was detained illegally and held for 18 hours without being told of the reason for his arrest, and without being allowed to contact anybody.[55] The police later discovered that the defendant had an

[45] Ronald Hayman, *Kafka: A Biography* (1981). P. 183-184.
[46] *Id.* at 184.
[47] *Id.*
[48] (1984) 145 Ariz. 34, (Ariz. 2nd Div. App.).
[49] *Id.* at 920-921.
[50] *Id.* at 921.
[51] *Id.* at 184.
[52] Ernst Pawell, The Nightmare of Reason: A Life of Franz Kafka (1997). P. 18.
[53] *Id.*
[54] Ronald Hayman, *Kafka: A Biography* (1981). P. 184
[55] (1983) 124 N.H. 333 (N.H.).

outstanding warrant.[56] The Court stated that the probable cause established by the outstanding warrant was the product of the illegal arrest, and "it is antithetical to the principles of a democratic society to seize someone and hold him for 18 hours, while shopping around to see if a reason exists for the detention. *See* Franz Kafka, *The Trial* (1937)."[57]

The Use of the Term: "*Kafkaesque*"

Kafka's vision of a threatening and pointless bureaucracy was first encapsulated in the English word "Kafkaesque," in 1946.[58] *Merriam Webster* defines "Kafkaesque" as meaning "of, relating to, or suggestive of Franz Kafka or his writings; *especially*: having a nightmarishly complex, bizarre, or illogical quality."[59] *Encarta* defines it as "overly complex in seemingly pointless, impersonal, and often disturbing way."[60] Kafka biographer Jeremy Adler states that the adjective "Kafkaesque" "denotes nightmarish situations, an all-pervasive bureaucracy, looming totalitarianism, infinite hierarchies, and a deep existential angst."[61]

Some scholars suggest that the complex and illogical world Kafka creates was influenced by his employment in a semi-governmental insurance company, the Workers' Accident Insurance Institute, in the heavily-bureaucratic Austro-Hungarian Empire.[62] The company was created by broad and ambitious social legislation aimed at regulating relations between capital and labor, as well as the relationship between the State and the worker.[63] The legislation resulted in part, in corruption and inefficiency.[64]

Kafka's principal task at the institute was the processing of employee appeals against the assignment of their firms to certain risk categories, legal information for enterprises, and measures for the prevention of accidents.[65] His work gave

[56] *Id.* at 336.
[57] *Id.* at 338.
[58] Klaus Wagenbach and Ritchie Robertson and Ewald Osers, *Kafka, Life and Times* (2003). P. x
[59] "Kafkaesque." Merriam-Webster Online Dictionary. 2008. Merriam-Webster Online. 9 November 2008. <http://www.merriam-webster.com/dictionary/Kafkaesque>
[60] "Kafkaesque." Encarta World English Dictionary. 2007. Microsoft Corporation. 9 November 2008. <http://encarta.msn.com/dictionary_/kafkaesque.html>
[61] Jeremy Adler, *Franz Kafka* (2001). P. 4.
[62] Klaus Wagenbach and Ritchie Robertson and Ewald Osers, *Kafka, Life and Times* (2003). P. ix
[63] Ernst Pawell, The Nightmare of Reason: A Life of Franz Kafka (1997). P. 183.
[64] *Id.*
[65] Klaus Wagenbach and Ritchie Robertson and Ewald Osers, *Kafka, Life and Times* (2003). P. 66.

him exposure to questions concerning government, administration, bureaucracy, and the law—themes that are present in *The Trial*.[66]

Some critics suggest that Kafka's prose was developed by writing reports for The Worker's Accident Institute.[67] The precise and distinctive style present in his fictional works is also present in his official reports regarding industrial accidents, injuries and compensation claims.[68] His descriptive precision and awareness of consequences are attributes of both his professional work and his writing.[69] The period in which Kafka worked at the institute was also his most prolific period as a writer.[70]

Kafka was not immune to run-ins with the institute's management despite being highly regarded among fellow employees.[71] Kafka, on one occasion, filed a thorough and well drawn out complaint with the company board of directors (of which there were more than 20), seeking to obtain higher wages for the institute's draftsmen.[72] Such an experience may have helped Kafka depict bureaucracies in his works.

Judges often use the term "Kafkaesque" to paint a bureaucracy, often within a government agency, as arbitrary and oppressive. In *Hunt v. Indiana Family and Social Services*, the owner of a day care center's license was revoked on the basis of an unsubstantiated charge of child abuse.[73] The Agency refused to remove the charge from Hunt's record despite an Administrative Law Judge's order against the Agency.[74] An official with the Agency explained that he did not believe the administrative law judge's decision to control whether the record would be expunged, and instead relied upon the decision of the social worker who determined the charge of abuse to be valid.[75] The Court stated that, "given these circumstances, the Court can understand Mrs. Hunt's feelings of being caught in a *Kafkaesque* nightmare of unchecked bureaucratic power-if the facts are as the Hunts allege."[76]

[66] Jeremy Adler, Franz Kafka (2001). . P. 48-49.
[67] George Dargo, 'Reclaiming Franz Kafka, Doctor of Jurisprudence' (2007) 45 Brandeis L.J. 495, 496.
[68] *Id.* at 510.
[69] *Id.* at 514.
[70] *Id.* at 509.
[71] Ernst Pawell, The Nightmare of Reason: A Life of Franz Kafka (1997). P. 188-189.
[72] Reiner Stach, *Kafka, The Decisive Years* (2005). P. 284.
[73] (2007) 2007 WL 2349626 (S.D. Ind.)
[74] *Id.* at 1.
[75] *Id.* at 4.
[76] *Id.* at 5.

In *Abdel-Muhti v. Ashcroft*, the U.S. Immigration and Customs Enforcement Agency (ICE) held the petitioner, an alien, in detention for two years pending a final order of deportation.[77] The Agency claimed that it was holding the petitioner because he failed to cooperate with the INS' efforts to remove him.[78] However, the record established that the petitioner had provided the Agency with all the necessary documentation needed to deport him.[79] The Court stated that:

"The record establishes that Petitioner provided ICE with his birth certificate, including his parents' names, and his region of origin, and made substantial efforts to obtain travel documents. Yet in a *Kafkaesque* exchange that began with Petitioner's November 25, 2002 custody review and culminated with a post-hearing request that he complete a form that was completed and submitted to Israel on November 20, 1975, ICE persists in its demand that he produce something more. While ICE is empowered to prosecute and detain those who withhold information, absent some reasonable basis for its apparent suspicion that Petitioner is lying or withholding information, the law does not authorize ICE to continue Petitioner's detention until he supplies answers it likes."[80]

In *Ngwanyia v. Ashcroft*, the petitioners, immigrants who had attained the status of "asylees," brought action asserting, in part, that the government had failed to provide the them with the documentation necessary to allow them to work while in the United States.[81] Federal law provided that the government must authorize the asylees to engage in employment, and to provide the asylees with the documentation to reflect that authorization.[82] An employer could not hire the asyless without the documentation, which was in the form of a simple government document.[83] The Court was not persuaded by the government's responses to the petitioner's claims, and stated:

"In the face of these simple statutory commands, Defendants have established procedures that verge on the *Kafkaesque*. Defendants provide "no one particular form of an endorsement of employment authorization." Rather, the type of document an asylee receives-and the length of time for which it is valid-

[77] (2004) 314 F.Supp.2d 418 (M.D.PA.)
[78] *Id.* at 427.
[79] *Id.* at 430.
[80] *Id.*
[81] (2004) 302 F.Supp. 2d 1076, (D.Minn.).
[82] *Id.* at 1084.
[83] *Id.* at 1097.

depends upon the manner in which the asylee was granted asylum and the district office handling the asylee's request."[84]

In *Family and Social Services Administration v. Boise*, Boise petitioned for a reclassification of his position with the Division of Family and Children that would provide an increase in compensation.[85] The petition was denied by a Hearing Officer, who ruled that the classification of the petitioner's job status was *not* based solely on caseload size, in spite of facts that clearly showed the contrary.[86] The Appellate Court stated that the Respondents are "…exercising uncontrolled discretion in the application of indeterminable standards to facts the relevance of which would be unknown to them. Such actions are so classically arbitrary and capricious as to be *Kafkaesque*."[87]

In *Kurnik v. Department of Health & Rehabilitative Services*, the a disabled person was denied reimbursement of medication by the Department of Health & Rehabilitative Services after a hearing officer determined that she had not timely applied for assistance.[88] Mismanagement on the part of the agency prevented the petitioner's properly filed application from being processed.[89] The Appellate Court stated that "appellant's *Kafkaesque* experience with that agency was characterized by no information, misinformation, unanswered letters, unreturned phone calls, unfulfilled promises, and classic bureaucratic runaround the sum total of which amounted almost to studied indifference if not purposeful neglect on the part of the agency."[90]

In *H & V Engineering Inc., v. Idaho State Board of Professional Engineers and Land Surveyors*, the State Board indefinitely revoked the licenses of the petitioners, Engineers, for "misconduct in the practice of engineering" which constituted "gross negligence."[91] The petitioners claimed that the action of the board violated their right to due process because the board did not adequately warn them as to what conduct would subject them to discipline.[92] The Court determined that the grounds upon which the petitioners were disciplined were unconstitutionally vague because nothing in the statutory definition, board rules

[84] *Id.* at 1085
[85] (1996) 667 N.E. 2d 753 (Ind. App.).
[86] *Id.* at 755.
[87] *Id.* at 756.
[88] (1995) 661 So. 2d 914 (Fla. 1st DCA).
[89] *Id.* at 916.
[90] *Id.* at 917.
[91] (1987) 113 Idaho 646, 647 (Idaho).
[92] *Id.* at 649.

or regulations warned the engineers that their acts would subject them to discipline.[93]

The Court explained that "disciplinary standards cannot be kept secret from the professionals or the courts. In this case, the phantom of unknown standards robbed the engineers of notice as to what conduct was proscribed. As stated in another tribunal: "This *Kafkaesque* chain of secrecy is not what the Due Process Clause contemplates."[94]

In *Meadows v. Lewis*, three workers who suffered injuries during employment filed a petition for a writ of mandamus seeking to force the State Worker's Compensation Commissioner to rule on the compensability of a claim within the time frame mandated by law, pay disability awards, and pay attorney's fees.[95] The Court ruled for the petitioners on all counts, stating:

"Attorneys for the petitioners in this case were forced by bureaucratic indifference to lead their clients on a *Kafkaesque* journey through a labyrinth of administrative bungling. Petitions were processed and hearings scheduled for matters upon which determinations had already been made, consequently resulting in proceedings at which only the hearing examiner appeared. Claims were periodically opened, closed, reopened, reclosed, etc., for no cognizable reason other than the commissioner's repeated justification of "clerical error."[96]

Courts often use "Kafkaesque" to characterize an argument as illogical, or one that would lead to an absurd result. In *Petties v. District of Columbia*, a case arising under the Individuals with Disabilities in Education Act, the school district argued that it was not required to give the parents prior notice of the decision to send their children to a different school, because such a move "did not constitute a change in child placement or program" under the Act.[97] The school board then contended that the parents could not challenge the school board's placement of the children because under the Act, a parent must have notice of the placement in order to make a challenge.[98]

The Court concluded that the Act provides the parent the right to challenge any proposed changes in placement in advance of the change taking place and a right to argue that the changes proposed do in fact effect fundamental changes

[93] *Id.* at 650.
[94] *Id.* at 651.
[95] (1983) 172 W.VA. 457, 468-469 (W.VA.).
[96] *Id.* at 476.
[97] (2002) 238 F.Supp. 2d. 114, 124 (D.D.C.).
[98] Id.

in the student's educational program.[99] The Court stated that accepting the School Board's premise would lead to an absurd result.[100] "It is disingenuous-indeed, *Kafkaesque* for the defendants to argue that the burden is on the parents first to identify a fundamental change in a student's educational program in order to raise the claim that there has been a change in placement even though DCPS has not provided notice to the parents of the nature of such proposed change."[101]

In *Williams v. Sullivan*, the petitioner brought suit after his petition for social security benefits was denied.[102] The Secretary of Health and Human Services claimed that the decision was simply the dismissal of the petitioner's request for a hearing, and therefore not subject to judicial review under the Social Security Act.[103] The petitioner claimed that his case was subject to judicial review because the action by the Secretary amounted to the reopening of a previous case.[104] However, the Secretary did not believe the action to be a final decision and refused to turn over the transcript which would help determine the nature of the action.[105]

The Court objected to the reasoning of the Secretary: "This Court finds such *Kafkaesque* reasoning remarkable. If one of the purposes of the act administered by the Secretary is to fairly award benefits actually due beneficiaries, it would seem that he would endeavor to review and make available such information as would be reasonably necessary to make such determinations possible. Additionally, government lawyers have a duty to seek justice and to develop a full and fair record."[106]

Incorrect Uses of Kafka

Attorneys and Judges often cite to Kafka incorrectly, in an effort to dramatise an argument. In *U.S. v. Jackson*, a criminal defendant argued that the prison sentence for the offense he was charged with should be based on the amount of cocaine found on his person at the time of his arrest, as opposed to the amount of cocaine he was convicted of distributing.[107] Jackson argued that using the aggregate amount of cocaine he was charged with possessing is

99 *Id.*
100 *Id.*
101 *Id.*
102 (2001) 779 F.Supp. 471 (W.D. Mo.).
103 *Id.* at 472.
104 *Id.*
105 Id.
106 Id.
107 (1997) 121 F. 3d. 316, 321 (7th Cir.).

speculative and that basing a prison term on speculation is *Kafkaesque*.[108] The Court stated that "Jackson is hardly in the position of Joseph K. It is clear what offense Jackson was charged with and Jackson was given an opportunity to defend himself against those charges."[109]

One author has written that the liberal use of Kafka in judicial opinions has distorted the meaning of Kafka's works,[110] and may have the consequence of rendering the term meaningless.[111] In a law review essay, Brian Pinaire comments that Kafka has been used to describe the rush of court proceedings to execute prisoners.[112] This use stands in contrast to the conventional understanding of Kafkaesque to describe the slowness and delay of bureaucracy.[113]

Pinaire also notes that Monica Lewinsky's attorney described the lengthy interrogation of his client by FBI agents as Kafkaesque.[114] This description is inappropriate because the interrogations that take place in *The Trial*, in contrast to the standard interrogation conducted by the FBI, are distinct in that they were not conducted in a standard fashion, but were marked by a secretive and obtuse quality.[115]

Conclusion

The Trial is more than just a work of literature, but has served as a powerful warning of the dangers of arbitrary government. Kafka was able to create a compelling and terrifying world in which the government could, seemingly at random, single its citizens out for punishment in the name of the law. This is even more remarkable because Kafka, unlike Orwell, for example, was not political and did not intend for his stories to be parables.[116]

What makes *The Trial* all the more influential is that it is not set in any single nation, during any particular period of time. Its main character is honest, hardworking, and mostly nondescript. He is easily related to by the reader. The

[108] Id.
[109] *Id.*
[110] Brian Pinaire, 'The Essential Kafka: Definition, Distention, and Dilution in Legal Rhetoric,' (2007) 46 U. Louisville L. Rev. 113, 151.
[111] *Id.* at 152.
[112] *Id.* at 148.
[113] *Id.*
[114] *Id.* at 147.
[115] *Id.*
[116] Julian Preece, *The Cambridge Companion to Kafka* (2002). P. 131-132.

story's theme transcends cultures and time. The trial of K. is as relevant today as it was when Kafka was alive.

Judges seem to have latched on to Kafka in order to demonstrate what our law is supposed to prevent. Due process and fairness are designed to prevent government over-reaching and abuse. The world of Joseph K. is an unimaginable nightmare. Judges are able to use that nightmare in order to make the point that government transparency and fairness are fundamental in our society. Without these fundamental protections, what is to prevent the average citizen from being victimized by the state?