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## Failed Lawyers and the Sources of Satire

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## FAILED LAWYERS AND THE SOURCES OF SATIRE

*Charles M. Yablon\**

### INTRODUCTION: THE BENEFITS OF A FAILED LEGAL EDUCATION

Most of those reading this Essay have ample reason to appreciate the benefits of a good legal education. There is pride in becoming a member of an ancient and learned profession, intellectual challenge in wrestling with complex questions of equity, power and social justice, and satisfaction in the sense of superiority you feel towards your loser friends who did not get into a decent law school.<sup>1</sup>

Yet in every law school class there are a few students who either never quite manage to start thinking like lawyers or are appalled with themselves when they do. I'm talking about the kind of student who shows up for the first day of Civil Procedure and is never seen again, or the one who keeps raising her hand in Contracts with irrelevant comments that elicit groans from other students and condescension from the professor, or the student who just sits in his dorm room all semester, perennially depressed and frequently inebriated.

Despite appearances to the contrary, legal education is not for everyone. Not everybody wants their mind sharpened so narrowly that they can make the finest of points. Not everybody wants to represent the guilty, the greedy, or worse yet, the self-consciously virtuous. But what happens to those failed lawyers who out of frustration, incomprehension, or disdain choose to leave the study of the law, or having completed their studies, choose never to practice? Truthfully, most do perfectly well. Failed lawyers are eminently employable. Many have gone on to successful careers in films, television, business, and, of course, the United States Congress.<sup>2</sup> They have become freedom fighters and dictators.<sup>3</sup> Indeed, some have ar-

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\* Professor of Law, Benjamin N. Cardozo School of Law. I want to thank my colleague, Peter Goodrich, for encouraging me to think less seriously about these issues.

<sup>1</sup> And, unlike those stuck-up medical students, you don't have to spend a lot of time around sick people.

<sup>2</sup> Raul Julia, John Cleese, and Portia De Rossi were all former law students, as well as Federico Fellini and Otto Preminger. Christine Alice Corcos, *What Else You Can Do With a Law Degree*, <http://faculty.lsu.edu/ccorcos/> (follow "What Else You Can Do With a Law Degree" hyperlink) (last visited Feb. 8, 2008); Univ. of Tex. Sch. of Law, *Famous Career Changers*, <http://www.utexas.edu/law/depts/alumni/npaac/changers.html> (last visited Feb. 8, 2008).

<sup>3</sup> Mohandas Gandhi, Nelson Mandela, Fidel Castro, and Saddam Hussein all had legal training. See MOHANDAS K. GANDHI, *AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH* 93-96 (Mahadev Desai trans., Beacon Press 1993) (1957); NELSON MANDELA, *LONG WALK TO FREEDOM*:

gued that a legal education can be just as valuable to those who do not want to become lawyers as to those who do. These people tend to be in the business of selling legal educations.<sup>4</sup> Yet, while students can undoubtedly take their minds out of law school, can they as easily get law school out of their minds? Once you start thinking like a lawyer, can you ever turn the damn thing off?

These questions are prompted by recent research in the burgeoning field of Law and Satire, the latest in a long line of interdisciplinary pursuits invented by legal scholars who would rather be talking about something more interesting than law. Law and Satire is based on the cogent observation that it is sometimes more effective to sneer, hoot and ridicule one's opponents than to engage them in reasoned legal debate, particularly if you can do so in a clever and humorous way. Accordingly, my colleague Peter Goodrich recently filled 120 pages of the Michigan Law Review with a detailed exegesis of the way in which satire has been deployed by Critical Legal Scholars in recent decades to make fun of certain types of mainstream legal scholarship.<sup>5</sup>

Analyzing the fads and foibles of legal academe in law reviews is a worthwhile, if slightly circular, endeavor, but this Essay is looking for bigger fish to marinate. It seeks to probe not just the feeble attempts at humor by bored law professors, but the great and enduring ridicule that is an essential part of the Western tradition. Interestingly enough, a substantial part of that great satirical tradition has involved making fun of judges, lawyers, and legal reasoning almost from the moment that lawyers were first invented.

Consider, for example, the trial of Socrates; not the real one, which wasn't very funny at all, but the one recounted by Aristophanes in *Clouds*. There, Socrates seeks to instruct a debt-ridden student in the art of false reasoning so that he can prevail in lawsuits against his creditors. Socrates orchestrates a debate between Good Reason and Bad Reason. Bad Reason wins, of course, by demonstrating, among other things, that justice does not

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THE AUTOBIOGRAPHY OF NELSON MANDELA 71-77 (1994); *Castro: Profile of the Great Survivor*, BBC NEWS, Dec. 18, 2007, available at <http://news.bbc.co.uk/2/hi/americas/244974.stm>; Rick Montgomery, *Saddam Rose from Squalor to Become a Defiant, Destructive Leader*, KNIGHT-RIDDER/TRIBUNE NEWS SERVICE, Oct. 17, 2005, at 1.

<sup>4</sup> See, e.g., sources cited *supra* note 2; Univ. of Calgary Sch. of Law, Career Profile—Law (2007), <http://www.ucalgary.ca/careerservices/files/careerservices/Career%20Profile%20for%20Web%20Law%202007%20-%20revised.pdf>.

<sup>5</sup> Peter Goodrich, *Satirical Legal Studies: From the Legist to the Lizard*, 103 MICH. L. REV. 397, 397-517 (2004). Professor Goodrich has had a highly personal relationship to Critical Legal Studies, one which somewhat resembles that of a stereotypical Jewish mother to her offspring. Having supported and nurtured the movement during its birth and formative years, Goodrich now expresses great disappointment at the movement's failure to live up to its full potential. See, e.g., Peter Goodrich, *Duncan Kennedy as I Imagine Him: The Man, the Work, His Scholarship, and the Polity*, 22 CARDOZO L. REV. 971, 975-76 (2001); Peter Goodrich, *Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America*, 68 N.Y.U. L. REV. 389, 389-92 (1993).

exist and all lawyers are—well, maybe you better read it in this footnote.<sup>6</sup> Consider also Rabelais' Judge Bridlegoose, who resolved complex questions of law, as he said all other judges did, using his "little small dice,"<sup>7</sup> or the Court of Chancery in Dickens's *Bleak House*, perennially swathed in fog, where litigants can expect no judgment until Judgment Day.<sup>8</sup>

Law, however, has been more than just a perennial subject of satire. Theorists of satire have long recognized that lawyers and satirists are basically in the same business; satire, like law, is essentially a juridical enterprise.<sup>9</sup> Both constitute methods of social control. Both impose judgments and condemnations on their subjects, and in doing so, confront vexing questions of fairness and justice. Both utilize sophisticated rhetorical techniques to accomplish their objectives. Indeed, one of the recurring questions posed by theorists of satire is whether satire is better thought of as a supplement to existing legal institutions or as a rival to them<sup>10</sup>

But if satire is a type of legal discipline, where do its practitioners get their training? This Essay offers a simple, but startling, answer: many go to law school and then do poorly. In fact, a surprising number of great satirists have been precisely the kind of failed lawyers we have been talking about; those who rapidly abandoned their legal careers or chose never to practice law at all. This Essay primarily considers the works of three of the most notable: (1) Lucian of Samosata, who, after expending great effort to achieve a Classical legal education<sup>11</sup> abandoned the practice of law for a life of writing satires and performing comedic dialogues; (2) Francois Marie Arouet (better known as Voltaire), who studied law for two years in Paris, but disdained the profession and never practiced; and (3) Franz Kafka, who received a doctorate in law, but spent his working life as a clerk in an insurance office. (He also did some writing, mostly unpublished, in his spare time).

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<sup>6</sup> ARISTOPHANES, *Clouds*, in THE COMPLETE PLAYS 129, 132, 172-82 (Paul Roche trans., 2005). It seems hard to find English words that capture all the nuances, but the basic insult is that all lawyers (as well as politicians) are the products of anal intercourse. *Id.* at 181 (stating that all lawyers stem "[f]rom buggerhood").

<sup>7</sup> FRANCOIS RABELAIS, GARGANTUA AND PANTAGRUEL, in THE COMPLETE WORKS OF FRANCOIS RABELAIS 247, 375-77 (Donald Frame trans., 1991) (1546). Frame's translation of Rabelais's work refers to Judge Bridlegoose as Judge Bridoye. *Id.* at 375-90.

<sup>8</sup> CHARLES DICKENS, BLEAK HOUSE 13-49 (Penguin Books 1996) (1853).

<sup>9</sup> See, e.g., CHARLES A. KNIGHT, THE LITERATURE OF SATIRE 26 (2004) ("[S]atire itself often parallels legal patterns of attack and defense . . ."); Peter Goodrich, *Lex Laetans: Three Theses on the Unbearable Lightness of Legal Critique*, 17 LAW & LITERATURE 293, 305 (2005) (defending the thesis that "[a]ll satire is juridical").

<sup>10</sup> See, e.g., authorities cited in Goodrich, *supra* note 9, at 305-09 nn.51-60 (seeing satire and law as "different faces of similar practices of appropriation and argument," but also seeing satire as "correction of [law's] abuse"); see also Edward P. Nathan, *The Bench and the Pulpit: Conflicting Elements in the Augustan Apology for Satire*, 52 ENG. LITERARY HIST. 375, 381 (1985) (discussing Dryden's defense of satire as both a "buttress to secular laws" and a way of creating a "purer social order").

<sup>11</sup> Since this was the Classical period, it was the only type of legal education available.



Kafka, Voltaire, and Lucian make for an interesting case study precisely because they have so little in common besides their satirical genius and failed legal educations. They did not write in the same language, live in the same century, nor were they raised in the same religion. Yet they all produced enduring works of art that not only challenged contemporary aspects of the social order, but also raised timeless questions about the possibility of justice. All employed humor and wild imagination to great rhetorical effect. And all found law and legal education to be boring, stultifying, and slightly contemptible.

This Essay will fill a critical gap in the literature<sup>12</sup> by examining the life and works of these failed lawyers in an effort to prove two audacious and patently improbable claims. First, that all satirists are failed lawyers, or have at least been subjected to some version of a failed legal education. Second, that many of the most familiar and enduring themes and literary devices of the satirical tradition can be understood as “bad lawyering” (that is, the kind of exaggerated, undisciplined, slightly subversive comments and arguments frequently made by students who have acquired some small familiarity with the law and legal reasoning, as well as some small amount of contempt for such reasoning).

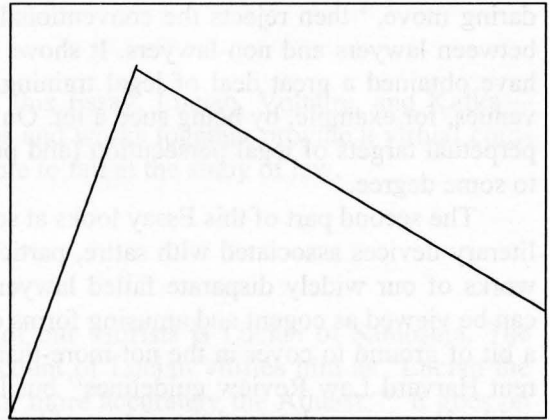
On this view, the great themes of satire reflect thoughts about injustice, human folly, and the arbitrariness of social institutions which have probably passed through the mind of every beginning law student, but in most cases were swiftly dismissed with the realization that they could not help you on the final exam. But for a few students, particularly the ones who don't wholeheartedly embrace the world of legal discourse, those thoughts can linger and become doubts, and those doubts can become obsessive, and these obsessive doubters can become—great satirists. Anyway, that's my thesis and I'm sticking to it—at least for this Essay.

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<sup>12</sup> Law reviews (or “the literature”) will only publish articles that fill “critical gaps.” “Gaps” are tiny, hair-splitting questions that are so arcane that no other professor has thought to write about them. A gap becomes “critical” when a professor really needs to publish something, and a law review really needs articles.

TABLE I

CAPACITY FOR  
SATIRICAL OUTRAGE  
(CSO)



Begin LT      Finish LT      Pass Bar      Make Partner

LEGAL TRAINING (LT)

Applying the quantitative techniques so popular in academia these days, Table 1 provides a graphic depiction of the theoretical<sup>13</sup> relationship between Legal Training (LT) and Capacity for Satirical Outrage (CSO). Note that there is a positive correlation between CSO and small to moderate amounts of LT, as initial acquaintance with the basic topics of legal study—tragedy, violence, false dealing, arbitrary formalism and injustice<sup>14</sup>—tend to sharpen one’s satirical capacities. As LT increases further, however, and one becomes completely and indisputably a “lawyer,” CSO drops sharply, until most older lawyers don’t even recognize when they become satires of themselves. This theory conclusively explains (or at least conclusively re-states) the thesis of this Essay—that failed lawyers play such a prominent role in the great satirical tradition because they have had just enough legal education to turn them into cynical loudmouths, but not quite enough to turn them into pompous asses.

This Essay is divided into two parts. The first, which is primarily biographical, demonstrates that all satirists are, to some extent, failed lawyers.<sup>15</sup> It examines the careers of many of the most illustrious writers in the

<sup>13</sup> By “theoretical” in this context I mean “completely made up.”

<sup>14</sup> Commonly referred to in the first year curriculum respectively as Torts, Criminal Law, Contracts, Civil Procedure, and Constitutional Law.

<sup>15</sup> A conscientious reader, particularly one of a lawyerly temperament, might expect me now to define exactly what I mean by the term “satire” and explain how the works of these various failed lawyers fall within that definition. No such luck. Generations of debate among literary theorists have demonstrated that the effort to define “satire” is a fruitless and endlessly contestable matter. (Although it can be pretty helpful getting you tenure in an English department.) Very broadly speaking, there are two schools of literary thought on the matter. One school limits the term “satire” to a specific and somewhat

satirical tradition, cogently dividing them into two categories: those that actually are failed lawyers and those that are not quite. But this Essay, in a daring move,<sup>16</sup> then rejects the conventional, formal bright-line distinction between lawyers and non-lawyers. It shows that throughout history people have obtained a great deal of legal training outside of formal educational venues, for example, by being sued a lot. On this view, great satirists, being perpetual targets of legal persecution (and prosecution) are always lawyers to some degree.

The second part of this Essay looks at some of the standard themes and literary devices associated with satire, particularly as they are found in the works of our widely disparate failed lawyers, and demonstrates how they can be viewed as cogent and amusing forms of bad lawyering. That is quite a bit of ground to cover in the not-more-than-fifty-pages mandated by current Harvard Law Review guidelines<sup>17</sup> but I think I can manage. Satirists, unlike lawyers, understand the virtues of brevity.

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formal literary genre, one which emphasizes formal unity and moral critique of contemporary society, preferably in verse. These theorists recognized and were able to analyze a relatively clear and coherent line of influence from Horace to Pope. They tended to focus on the so-called "Horatian" mode of satire which was, in their view, poetic, rhetorical, and moral. They excluded from their relatively narrow concept of satire such wild, crazy, and funny works as the Classical comedies, Shakespeare, and all the great satirical novelists. Major exponents of this view begin with John Dryden, *Discourse Concerning the Original and Progress of Satyr*, in *THE SATYRS OF DECIMUS JUNIUS JUVENALIS AND OF AULUS PERSIUS FLACCUS* iii, xvi-xvii (John Dryden et al. trans., AMS Press 1979) (1735); see also LEON GUILHAMET, *SATIRE AND THE TRANSFORMATION OF GENRE* 4 (1987); ALVIN KERNAN, *THE CANKERED MUSE: A SATIRE OF THE ENGLISH RENAISSANCE* 34 (unabr. ed., Archon Books 1976) (1959); RONALD PAULSON, *THE FICTIONS OF SATIRE* (1967).

The more expansive scholarly perspective, in contrast, includes not just the Horatian poets but the more disparate and unruly tradition of so-called "Menippean satire" whose works were often in prose, were stylistically diverse, and whose attitudes toward contemporary society ranged from the moral to the bemused to the downright subversive. See, e.g., DUSTIN GRIFFIN, *SATIRE: A CRITICAL REINTRODUCTION* (1994); FRANK PALMERI, *SATIRE IN NARRATIVE: PETRONIUS, SWIFT, GIBBON, MELVILLE & PYNCHON* (1990); MICHAEL SEIDEL, *A SATIRIC INHERITANCE: RABELAIS TO STEARNE* (1979). This view of satire sweeps much more broadly and would certainly include all the failed lawyers considered in this Essay, with the possible exception of Kafka, who deserves a footnote of his own. See *infra* note 40.

<sup>16</sup> By "daring move" in this context I mean "the only argument I could think of, even if it is probably wrong."

<sup>17</sup> Harvard Law Review, Guidelines for Submitting Manuscripts, <http://www.harvardlawreview.org/manuscript.shtml> (last visited Feb. 8, 2008). The Law Review editors imposed these limits after surveying 800 law professors, 90% of whom complained about the excessive length of law review articles. *Id.* This is somewhat like convicted felons complaining about the rising crime rate.

## I. THE GREAT SATIRISTS: PRODUCTS OF THEIR (LEGAL) TRAINING

### A. *Meet the Failed Lawyers*

So let's meet the stars of this Essay, Lucian, Voltaire, and Kafka—three failed lawyers whose lives and works together provide a virtual compendium of the ways it is possible to fail at the study of law.

#### 1. Lucian

Oldest and most obscure of our satirists is Lucian of Samosata. The earliest known biographical account of Lucian vilifies him as “Lucian the Blasphemer, or the Slanderer, or more accurately the Atheist.”<sup>18</sup> It goes on to state that Lucian “practiced for a while as a barrister at Antioch in Syria, but did so badly at it that he turned over to literature, and wrote no end of stuff.”<sup>19</sup> Lucian's own account of his life, which is equally dubious, states that at an early age his father sought to apprentice him as a stonemason, but Culture (in the form of a beautiful woman) came to him in a dream.<sup>20</sup> She said that if Lucian embraced her rather than a career in stonework, she would make him rich, successful, famous, respected, beautiful (at least on the inside), and able to predict the future.<sup>21</sup> Even Yale Law School doesn't promise that much, at least not in writing.

With unrealistic expectations like that, it is not surprising that Lucian was disappointed in the practice of law and abandoned it in fairly short order. As he says: “As soon as I realized what a career at the bar involved, lying, cheating, shouting, thrusting oneself forward, and various unpleasant things like that, I naturally turned my back on it . . . .”<sup>22</sup>

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<sup>18</sup> Paul Turner, *Introduction to LUCIAN, SATIRICAL SKETCHES* 7, 7 (Paul Turner trans., Indiana Univ. Press 1990). The quotation is from the Suda Lexicon, a 10th Century Byzantine Encyclopedia that has never been fully translated into any modern language. Welcome to the Suda On Line (SOL), <http://www.stoa.org/sol/> (last visited Feb. 8, 2008). Yet even as you read this, a dedicated cadre of classical scholars are collectively seeking to produce a massive translation of the *Suda* (as they affectionately call it) into English and are making it available free on line (no kidding). See *id.* Accordingly, those of you who are tired of getting erroneous and biased information from Wikipedia will soon be able to get erroneous and biased information from a far more ancient and impressive source.

<sup>19</sup> Turner, *supra* note 18.

<sup>20</sup> LUCIAN, *The Dream*, in *SATIRICAL SKETCHES*, *supra* note 18, at 23, 24-26. Lucian apparently did not know that all teenage boys have dreams like that.

<sup>21</sup> *Id.* at 26-27. The last translation into English of Lucian's complete works was published in 1913. See LUCIAN, *THE WORKS OF LUCIAN* (A.M. Harmon trans., William Heinemann 1913). It is very scholarly, but stiff and formal, and not really very funny. I have chosen, whenever possible, to use Turner's looser, slangier, raunchier translation, because, let's face it, this is that kind of Essay.

<sup>22</sup> LUCIAN, *Fishing for Phonies or The Philosophers' Day Out*, in *SATIRICAL SKETCHES* *supra* note 18, at 166, 181-82.

Yet during the time that Lucian lived (roughly 117 to 180 A.D.), the distinctions between lawyer, orator, politician, and stand-up comedian were not as clear as they are today.<sup>23</sup> Although Lucian gave up representing clients, he continued to use his rhetorical skills as an itinerant lecturer and public speaker and may have achieved a moderate amount of wealth and fame.<sup>24</sup> He did this primarily by writing and reciting satirical speeches and dialogues making fun of contemporary fads and beliefs. If he were alive today, he would probably have a show on Comedy Central.<sup>25</sup>

## 2. Voltaire

Voltaire was a man of dualities. He had two names, two fathers, and multiple personalities. He was an egalitarian who spent much of his life alternately ridiculing and sucking up to the wellborn and powerful. He was a powerful advocate for tolerance and justice who was also a nasty anti-Semite.<sup>26</sup> A trained lawyer who disdained the law, he wrote powerful briefs on behalf of those he considered falsely accused.<sup>27</sup> He attacked the abuses of the rich and powerful, but became rich himself through financial chicanery, exploitation of inside information, and loaning money to friends and acquaintances at usurious rates of interest.<sup>28</sup> Yet it would be a mistake to consider Voltaire a hypocrite. He simply hated so many things that it was hard for him to keep track of them all.

Voltaire was a bastard in a number of senses. His official father was François Arouet, an ambitious and quite talented lawyer, who after developing a successful practice as a notary, sold that practice and bought himself an even more lucrative and prestigious position as “receveur des epices” where he supervised the King’s collection of taxes on the spice trade and received a hefty commission.<sup>29</sup> His actual father, at least according to Voltaire, was Guérin de Rochebrune, a musketeer from an aristocratic family who was a client of Voltaire’s ostensible father and wrote song lyrics on the side.<sup>30</sup> Voltaire clearly preferred being descended from an impecunious

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<sup>23</sup> See CHRISTOPHER ROBINSON, LUCIAN AND HIS INFLUENCE ON EUROPE 3-4 (1979). Basically, anyone who got paid for talking in public was considered a practitioner of “rhetoric.” See *id.* at 5-6.

<sup>24</sup> Lucian seems to have had an inflated view of his own significance. Although our records of that period are sparse, it is noteworthy that “no contemporary or near contemporary,” *id.* at 3, even mentions Lucian, and that his works were also apparently “unknown to the immediately succeeding generations,” *id.* at 65.

<sup>25</sup> See *id.* at 61 (stating that Lucian’s “works were designed for live performance”).

<sup>26</sup> See Ben Ray Redman, *Editor’s Introduction* to VOLTAIRE, THE PORTABLE VOLTAIRE 1, 42-43 (Ben Ray Redman ed., Viking Press 1968).

<sup>27</sup> *Id.* at 2.

<sup>28</sup> See *id.* at 18-19.

<sup>29</sup> ROGER PEARSON, VOLTAIRE ALMIGHTY: A LIFE IN PURSUIT OF FREEDOM 13-14 (2005).

<sup>30</sup> *Id.* at 9-10.



soldier-poet than a successful lawyer, although it is unclear whether his mother would have agreed.

As the bright and promising son of a wealthy civil servant, Voltaire attended some of the best schools in France. At his father's insistence, he enrolled at the Ecole de Droit, the Paris law school.<sup>31</sup> He pretty much hated it, complaining to a friend about "the vast amount of useless rubbish they wanted to load into my brain."<sup>32</sup> Accordingly, Voltaire spent most of his time studying Paris rather than the law. He indulged in the eighteenth century Parisian equivalent of sex, drugs, and rock and roll—which was sex, wine, and salacious, potentially treasonous poetry.<sup>33</sup>

Voltaire refused his father's attempts to purchase a position for him as a lawyer.<sup>34</sup> Voltaire sought instead to make it big in show business by writing plays for the Comedie Francaise. While he had some initial success, he could not resist also composing political poems that viciously attacked the current French government.<sup>35</sup> These poems were circulated surreptitiously and when discovered, gained Voltaire legal experience of a different kind. He was sent to the Bastille for almost a year.<sup>36</sup>

Indeed, much of Voltaire's career consisted of hounding authorities and being hounded by them in turn. He was imprisoned again and exiled from France for much of his life.<sup>37</sup> Voltaire's legal training did not go entirely to waste. Later in his life, he used it in seven major public campaigns to clear the names of people he considered to have been wrongly accused or condemned.<sup>38</sup> Voltaire's famous motto was "Ecrasez l'infame," or "crush the infamous."<sup>39</sup> While that sounds like something you might hear at an Ivy League football game, it neatly summarizes Voltaire's powerful intolerance of the intolerant.

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<sup>31</sup> *Id.* at 34.

<sup>32</sup> *Id.*

<sup>33</sup> Voltaire fell in with a group of freethinking epicureans at a place called, inappropriately enough, "Le Temple," where the police, for obscure legal reasons, were prohibited from entering and where Voltaire got a lot of applause for his witty satirical verses as well as a lot of aristocratic babes. *See id.* at 34-35 ("For the habitués of Le Temple, as for European high society in general, poetic composition was a form of elegant and witty social intercourse . . .").

<sup>34</sup> *Id.* at 36.

<sup>35</sup> PEARSON, *supra* note 29, at 42. The government at that point was the Regent, Philippe, duc d'Orleans, who Voltaire, repeating a common slander of the time, unwisely accused of sleeping with his own daughter. *Id.*

<sup>36</sup> *Id.* at 44, 49.

<sup>37</sup> IAN DAVIDSON, VOLTAIRE IN EXILE: THE LAST YEARS, 1753-78, at 1-2 (2004).

<sup>38</sup> *See id.* at xvii, 86-144.

<sup>39</sup> PEARSON, *supra* note 29, at 269.

### 3. Franz Kafka

With Kafka, satire enters the twentieth century, the age of totalitarianism, genocide, and global war.<sup>40</sup> Although Kafka died in 1924, his work creates a unique atmosphere of paranoia, dread, and absurdity that seems to foreshadow the crisis of European civilization and the destruction of European Jewry, both of which are too easily associated with Kafka's own personal history.<sup>41</sup> With Kafka, in short, satire ceases to be a laughing matter.

Yet Kafka thought his writing was pretty funny. According to Max Brod, his friend and posthumous publisher, when reading to his friends from the first chapter of *The Trial*, Kafka, "laughed so much there were moments when he couldn't read any further."<sup>42</sup> That same work, now seen as a masterpiece of bureaucratic horror and psychological dread, was considered a laugh riot by Kafka's friends.<sup>43</sup>

Kafka was both funny ha-ha and funny strange.<sup>44</sup> His letters and diaries (preserved for posterity in violation of Kafka's express instructions)

<sup>40</sup> For those willing to accept a fairly expansive literary concept of satire, see *supra* note 15, there is little doubt that Lucian and Voltaire (as well as all the rejected writers discussed in Part I.A.3, *infra*) easily qualify as satirists. Kafka, however, poses a bit more of a question. It is true that Kafka's works are rarely classified as satire, but this is because Kafka's works are pretty much unclassifiable. As this Essay demonstrates, Kafka utilizes many of the traditional satirical techniques, including humor, exaggeration, and rhetorical excess. Moreover, there is a growing body of research which suggests that, far from being pure fantasies, the bureaucratic abuses portrayed in Kafka's work are very closely tied to the actual practices and process of the Austro-Hungarian government and legal system, and can be seen as a satirical commentary on them. See, e.g., THEODORE ZIOLKOWSKI, *THE MIRROR OF JUSTICE: LITERARY REFLECTION OF LEGAL CRISES* (1997); George Dargo, *Reclaiming Franz Kafka, Doctor of Jurisprudence*, 45 BRANDEIS L.J. 495, 505 ("The pervasive indeterminacy of Kafka's fiction mirrors the unresolved tensions in the Austrian legal system . . ."); Martha S. Robinson, *The Law of the State in Kafka's The Trial*, 6 ALSA F. 127 (1982).

<sup>41</sup> On the "almost irresistible temptation" to view Kafka as a prophet of the Nazi state, see Anthony Northey, *Myths and Realities in Kafka Biography*, in *THE CAMBRIDGE COMPANION TO KAFKA* 189, 193 (Julian Preece ed., 2002) [hereinafter *CAMBRIDGE COMPANION*]. See also HAROLD BLOOM, *GENIUS: A MOSAIC OF ONE HUNDRED EXEMPLARY CREATIVE MINDS* 206 (2002) (stating that it is not possible to think of Kafka "without reflecting upon the dilemmas of Jewish identity").

<sup>42</sup> MAX BROD, *FRANZ KAFKA: A BIOGRAPHY* 178 (G. Humphreys Roberts & Richard Winston trans., 2d ed. 1960).

<sup>43</sup> Brod also notes that he and Kafka's other friends "laughed quite immoderately," although he adds that it was "not entirely good, comfortable laughter." *Id.* Uncomfortable laughter, I submit, is pretty good evidence of great satire. For an argument that Brod under-emphasized the "elements of comedy and parody" in *The Trial*, see REINER STACH, *KAFKA: THE DECISIVE YEARS 477-78* (Shelley Frisch trans., 2005); see also BLOOM, *supra* note 41, at 206 (commenting that Kafka's short piece, *The Great Wall of China*, "can be regarded as an extended Jewish joke"); DAVID FOSTER WALLACE, *Some Remarks on Kafka's Funniness from which Probably Not Enough Has Been Removed*, in *CONSIDER THE LOBSTER AND OTHER ESSAYS* 60 (2006).

<sup>44</sup> He says that to his family he is "more strange than a stranger." FRANZ KAFKA, *Selections from Diaries, 1911-1923*, in *THE BASIC KAFKA* 255, 280-81 (1979).

frequently sound like a Mittel-European version of Woody Allen.<sup>45</sup> He described himself to the father of the woman he loved and (sometimes) hoped to marry as “taciturn, unsociable, morose, selfish, a hypochondriac, and actually in poor health . . . .”<sup>46</sup> However, he also said “I am a mendacious creature.”<sup>47</sup> He might have been lying about that.

Kafka was born to a middle class Jewish family in Prague. His family owned and ran a store that sold fancy ladies dresses and accessories.<sup>48</sup> His cousin Bruno, a near contemporary, became a professor of law, rector, and member of the parliament of the Czechoslovak Republic.<sup>49</sup> Kafka also obtained his degree in law in 1906 from the Imperial and Royal Karl-Ferdinand German University in Prague, but never practiced as a lawyer.<sup>50</sup> To say that Kafka’s life was dedicated to writing would be an understatement. Writing was his obsession, his definition, his sole purpose in life and the thing that ultimately drove him crazy (or more accurately, crazier.)<sup>51</sup>

In his “Letter to his Father,” Kafka, unlike the other failed lawyers we have seen, does not express disappointment or contempt for the legal profession but rather utter indifference. He admits that his father gave him “complete freedom” in his choice of career; however, because his sole desire and ambition was to write:

[E]verything would be as much a matter of indifference to me as all the subjects taught at school, and so it was a matter of finding a profession that would let me indulge this indifference without injuring my vanity too much. Law was the obvious choice.”<sup>52</sup>

Not exactly a ringing endorsement of the legal profession, but once again Kafka may not be entirely leveling with us. In another letter, Kafka

<sup>45</sup> Both Woody the neurotic funny guy and Woody the creepy old guy. Speaking of Woody, there have been numerous attempts to make films based on Kafka’s work. Kafka tended to attract the more eccentric and egomaniacal directors, including the great Orson Welles himself. See Martin Brady & Helen Hughes, *Kafka Adapted to Film*, in CAMBRIDGE COMPANION, *supra* note 41, at 226. There is also a pretty good Kafka comic book. See ROBERT CRUMB & DAVID ZANE MAIROWITZ, R. CRUMB’S KAFKA (1993).

<sup>46</sup> Letter from Franz Kafka to Carl Bauer (Aug. 28, 1913), in THE BASIC KAFKA, *supra* note 44, at 280, 280.

<sup>47</sup> Letter from Franz Kafka to Felice Bauer (Sept. [presumably Oct.] 19, 1916), in THE BASIC KAFKA, *supra* note 44, at 283, 286.

<sup>48</sup> STACH, *supra* note 43, at 24.

<sup>49</sup> ANTHONY NORTHEY, KAFKA’S RELATIVES: THEIR LIVES AND HIS WRITING 89-90 (1991). Northey contrasts Bruno’s success with Franz’s “lacklustre” legal career, but tells us that Franz “greatly admired this energetic and successful relative.” *Id.* at 90. Wanna bet?

<sup>50</sup> BROD, *supra* note 42, at 78. The Imperial and Royal Karl-Ferdinand University of Prague is now Charles University in Prague. Charles University—History of CU, <http://www.cuni.cz/UKENG-181.html> (last visited Feb. 8, 2008).

<sup>51</sup> He spoke of both the necessity and impossibility of writing. Letter from Franz Kafka to Max Brod (June 1921), in THE BASIC KAFKA, *supra* note 44, at 290, 292.

<sup>52</sup> Letter from Franz Kafka to His Father, in THE BASIC KAFKA, *supra* note 44, at 186, 223.

describes (or as we lawyers say, “impeaches”) this “Father-letter,” which he never actually gave to his father. Kafka advises that in reading it one should “try to understand all the lawyer’s tricks, it’s a lawyer’s letter.”<sup>53</sup> So maybe he thought better of the legal profession. Or worse.

Kafka’s non-literary career was spent in the insurance business, primarily at the Workers’ Accident Insurance Institute for the Kingdom of Bohemia.<sup>54</sup> Kafka stated that the main advantages of this job were the minimal effort and relatively few hours it required, which left him with more time and energy to write.<sup>55</sup> Although he describes himself as a mere “clerk” in the office,<sup>56</sup> his job was actually a rather important and responsible one.<sup>57</sup> Utilizing his legal and literary expertise, he wrote reports and ultimately became an expert on industrial accidents, risk assessment, and accident prevention.<sup>58</sup> Still, he hated his job.<sup>59</sup>

The law also had a starring role in Kafka’s more important life as a writer. In his literary works, the law is inextricably linked with concepts of authority and judgment, legitimate and illegitimate; temporal and divine; and real, rational, and stark raving nuts. Kafka’s great work of legal paranoia, guilt, and absurdist terror is *The Trial*.<sup>60</sup> It famously tells the story of “Joseph K.,”<sup>61</sup> who “someone must have traduced,”<sup>62</sup> and who is forced to defend himself in a very strange legal proceeding which does not go well.<sup>63</sup>

<sup>53</sup> Letter from Franz Kafka to Milena, in *THE BASIC KAFKA*, *supra* note 44, at 270, 270-71.

<sup>54</sup> Northey, *supra* note 41, at 198. Although a semi-autonomous entity, the Accident Insurance Institute had actually been established by the Austro-Hungarian government, so Kafka was technically a civil servant. *Id.* Like other such bureaucracies, it was designed to frustrate and provide unsatisfactory answers to the workers and employers who sought its services and was popularly known as the “best hated” organization in the Empire. *Id.*

<sup>55</sup> Letter from Franz Kafka to Felice Bauer (Nov. 1, 1912), in *THE BASIC KAFKA*, *supra* note 44, at 275, 277. His work day usually lasted from 8:00 A.M. to 2:00 or 2:30 P.M., which left him free to come home, have lunch and take a quick nap before starting to write. *Id.* Being Kafka, however, he was more likely to have nightmares about Montenegrins, “in extremely disagreeable clarity” than restful sleep. *Id.*

<sup>56</sup> *Id.* at 278.

<sup>57</sup> STACH, *supra* note 43, at 24-26, 284-289, 295. He didn’t get paid very much, however, and complained that he earned no more than civil servants with a high school diploma. *Id.* at 284.

<sup>58</sup> *Id.* at 285. He was also a skilled negotiator and public speaker. *Id.* at 286-87. During the First World War he supervised the care of disabled veterans. *Id.* at 470.

<sup>59</sup> See Ruth V. Gross, *Kafka’s Short Fiction*, in *CAMBRIDGE COMPANION*, *supra* note 41, at 80, 80 (stating that Kafka “hated” his “office job”). He was “seized with revulsion” by the thought of going to work, even though he got to leave at 2:00 P.M. and could take a day off whenever he wanted. STACH, *supra* note 43, at 28-29, 292-93. These days, only professors keep those kinds of hours.

<sup>60</sup> FRANZ KAFKA, *THE TRIAL* (E.M. Butler ed., Willa & Edwin Muir trans., Everyman’s Library 1992) (1935).

<sup>61</sup> Guess what the “K” stands for—wrong! Well, sort of wrong. It turns out there was an actual Joseph Kafka, an unemployed day laborer from Bohemia and possibly a distant relative of Franz. STACH, *supra* note 43, at 464. He came to the Prague Workers’ Accident Insurance Institute in 1899 (long before Franz Kafka started working there) demanding compensation. *Id.* When his request was denied, he went a little nuts, screaming at the top of his lungs, breaking chairs and pulling a knife on the



### B. *The Legal Training of Great Satirists Not Discussed in this Essay*

This section briefly considers the lives of many other great satirists who might have been, but are not, the subjects of this Essay. They failed to make the grade not because of the quality of their satire, but because of the quality of their legal education, which was either too little or too much to meet my stringent criteria for an actual “failed lawyer.”<sup>64</sup> Nonetheless, the point of this section is to show that even many great satirists who cannot quite qualify as failed lawyers shared much of the same rudimentary familiarity with law and contempt for lawyers and legal reasoning as those who have had true failed legal training. Also, it gives me a chance to use a lot of leftover citations that wouldn’t fit in any other section. Consider then, the following selection of great satirists and not-quite-failed lawyers:

*Aristophanes*: Generally considered the father of Greek comedy,<sup>65</sup> many of his extant works deal in whole or in part with legal themes. In addition to the aforementioned *Clouds*, whose subject is, in effect, the training of dishonest lawyers,<sup>66</sup> Aristophanes also wrote *Wasps*,<sup>67</sup> which takes a jaundiced view of the Athenian passion for litigation.

Little is known of Aristophanes’ early life, but there is no indication that he trained as a lawyer. There is substantial evidence, however, that he had a long and fruitful career as a litigant. His early work was a thinly disguised diatribe against Cleon, a notoriously litigious Athenian politician.<sup>68</sup>

officious bureaucrats. *Id.* The police were summoned and took him away. Stach speculates that Franz Kafka would have found this story amusing, and might explain why K.’s first name is Joseph. *Id.* at 465.

<sup>62</sup> KAFKA, *supra* note 60, at 1. “Traduce” is an obscure English word that is a close translation of a common German word that means to slander or calumniate.

<sup>63</sup> Like all of Kafka’s major works it is unfinished. It has a poignant ending, but it lacks a substantial part of its middle. One might have said the same about Kafka.

<sup>64</sup> Instead, they are members of the category of lawyer I have termed “not quite,” thus preserving my thesis that all satirists are failed lawyers. If inventing a new category of “quasi-failed lawyer” strikes you as specious and a little silly, you are no longer thinking like a lawyer.

<sup>65</sup> See THE COLUMBIA ENCYCLOPEDIA 151 (6th ed. 2000) (citing Aristophanes as “greatest of the ancient writers of comedy”). It should be noted, however, that none of the works of any of Aristophanes’ contemporaries in the so-called “Old Comedy” style have survived. This may be a reflection of the superior quality of Aristophanes’ work, or simple carelessness.

<sup>66</sup> Although *Clouds* is not a particularly flattering portrait of Socrates, it is worth noting that Plato, Socrates most illustrious student, had pretty nice things to say about Aristophanes. An epigram attributed to Plato states that “The Graces, looking for an enduring shrine, found it in the soul of Aristophanes.” OSKAR SEYFFERT, DICTIONARY OF CLASSICAL ANTIQUITIES 67 (Henry Nettleship & J.E.Sandys eds., 1894), available at <http://www.ancientlibrary.com/seyffert/0070.html>. Leo Strauss was also worried about Aristophanes’ attack on Socrates, who he considered the founder of the “Great Tradition” of political philosophy. LEO STRAUSS, SOCRATES AND ARISTOPHANES 3-8 (1966). This Essay suggests that Aristophanes was the founder of an equally great tradition of insult comedy.

<sup>67</sup> ARISTOPHANES, *Wasps*, in THE COMPLETE PLAYS, *supra* note 6, at 201.

<sup>68</sup> See Helene P. Foley, *Tragedy and Politics in Aristophanes’ Acharnians*, in OXFORD READINGS IN ARISTOPHANES 117, 117-19 (Erich Segal ed., 1996). With that strange mixture of caution and fool-



Cleon, not surprisingly, responded with a lawsuit, accusing Aristophanes of being a foreigner, a devastating charge since only freeborn Athenians were permitted to ridicule their rulers.<sup>69</sup> Aristophanes won by quoting a line from Homer, which in those days was better than a DNA test.<sup>70</sup> He proceeded to brag about his litigation victory over Cleon in later plays.<sup>71</sup> Cleon, having unwisely sued both Aristophanes and Thucydides, the two best and most enduring writers of his time, went down in History as a really bad guy.<sup>72</sup>

*Horace*: Roman poet and inventor, not surprisingly, of the Horatian mode of satire. The son of a freed slave, Horace had a spectacular early political career. Despite his lowly birth, he became a military tribune at an early age.<sup>73</sup> Unfortunately, his main political connections were with Brutus and Cassius, (yes, *that* Brutus and Cassius), whose political clout was substantially diminished after they lost the battle of Philippi and committed suicide.<sup>74</sup> Horace, pardoned by Octavius but with fewer political prospects than a Democrat in Idaho, was forced to become a civil servant, the other quasi-legal profession that has been a training ground for much great satire. Horace became a clerk in the questor's office, a minor magistrate who handled treasury matters.<sup>75</sup> Not only was this a tedious job that involved copying a lot of government documents, but Horace had to bribe somebody to get it.<sup>76</sup>

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hardiness that is surprisingly common among satirists, Aristophanes wrote his first plays under pseudonyms. According to legend, however, when he wrote *Knights*, finding no other actor willing to play the role of Cleon, he pretty much outed himself by taking the part. Mark Damen, Classical Drama and Theater, Ancient Greek Comedy: Aristophanes, <http://www.usu.edu/markdamen/ClasDram/chapters/091aristoph.htm> (last visited Feb. 8, 2008).

<sup>69</sup> Foley, *supra* note 68, at 117.

<sup>70</sup> The point of the line was that nobody knows for sure who their father is. See HOMER, *THE ODYSSEY* 84 (Robert Fagles trans., Penguin Books 1996).

<sup>71</sup> See J.E. Atkinson, *Curbing the Comedians: Cleon Versus Aristophanes and Syracosius' Decree*, 42 CLASSICAL Q. 56, 60 (1992).

<sup>72</sup> See T.A. Dorey, *Aristophanes and Cleon*, 3 GREECE & ROME 132, 132 (2d. ser 1956).

<sup>73</sup> HORACE, *SATIRES AND EPISTLES* 27 (Niall Rudd trans., Penguin Classics 1973).

<sup>74</sup> See HENRY DWIGHT SEDGWICK, *HORACE: A BIOGRAPHY* 19-24 (1947).

<sup>75</sup> See EDUARD FRAENKEL, *HORACE* 14-15 (1957). Horace's duties in the questor's office required "a certain amount of legal knowledge." *Id.* at 14.

<sup>76</sup> *Id.* at 15. Latin scholars, themselves no strangers to tedium, continue to debate how bad the job actually was. You could, for example, earn extra fees by "making authentic copies of government documents and decrees." DAVID ARMSTRONG, *HORACE* 18 (1989). Sure, and if you're a paralegal you get overtime for doing document discovery on the weekends. It still doesn't make it fun. Nevertheless, the crummy job did leave Horace with substantial time to write poetry, which ultimately made him famous. There is speculation, however, that Horace got his subordinates to do most of his actual work. See FRAENKEL, *supra* note 75, at 15. Horace's satires are fairly mild as satire goes. Dryden famously insulted him as a "well mannered court slave . . . who is ever decent because he is naturally servile." JOHN DRYDEN, *Discourse Concerning the Origin and Progress of Satire*, in 2 *THE ESSAYS OF JOHN DRYDEN* 15, 87 (W.P. Ker ed., 1926) (1692), available at <http://www.gutenberg.org/dirs/etext01/dscep10.txt>. It should be remembered however, that at the time Horace was writing, the preferred punishment for those deemed overly critical of the incumbent regime was crucifixion.

*Rabelais*: Even if Francois Rabelais had not been born in the fifteenth century, he would have been considered a Renaissance Man. His family, not knowing Rabelais was going to become famous, did not keep very good records, and his early life is therefore quite uncertain. He was probably the son of a lawyer (but maybe an apothecary or possibly a tavern-keeper).<sup>77</sup> He may well have started out as a student of law, but gave it up to become a monk in the Franciscan order.<sup>78</sup> As a monk, he probably also studied some canon and civil law.<sup>79</sup> He subsequently got permission from Pope Clement VII to switch to the Benedictine order, apparently because they had a better medical school.<sup>80</sup> He then trained as a physician, receiving a Bachelor's Degree in Medicine at the University of Montpellier.<sup>81</sup>

Rabelais' great four volume work,<sup>82</sup> *Gargantua and Pantagruel*, is a satirical masterpiece that reflects the author's eclectic perspective on the manifold absurdities of the world in which he lived. While the misadventures of Judge Bridlegoose and his "little small dice" have captivated the attention of legal scholars,<sup>83</sup> Rabelais had a few other choice comments about lawyers<sup>84</sup> and also had nasty things to say about priests, doctors, apothecaries, tavern-keepers, and pretty much everybody else in sixteenth century France. Yet the prime focus of his ridicule is on the scholarly enterprise itself. Gargantua, after all, first displays his intellectual prowess by discovering the perfect ass-wipe (which probably explains why the book has never been made into a movie).<sup>85</sup>

*Jonathan Swift*: The greatest satirist in the English language and, I am sorry to say, there is no evidence that he had any legal training at all. Swift's father was a lawyer and civil servant, but he died shortly before

<sup>77</sup> ANTHONY LEVI, GUIDE TO FRENCH LITERATURE: BEGINNINGS TO 1789, at 654 (1994).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*; see also GUY DEMERSON, FRANÇOIS RABELAIS 10-11 (1991). Unfortunately, Rabelais' early legal studies are mostly scholarly speculation, based on the standard curricula at the time and the erudition with which Rabelais would later lampoon the legal profession. With a little better documentation, Rabelais might well have qualified as a failed lawyer and received a much bigger role in this Essay.

<sup>80</sup> LEVI, *supra* note 77, at 655.

<sup>81</sup> *Id.* These days, of course, you need a doctorate to practice medicine (or virtually anything else), but there was less to learn back then, and most of it was wrong. Rabelais got his degree "only weeks after matriculating" but eventually started calling himself "doctor." *Id.*

<sup>82</sup> Or possibly five volume. The last volume came out eleven years after Rabelais died, an impressive feat of either authorship or copyright infringement. Edwin M. Duval, *Rabelais and Textual Architecture*, in A NEW HISTORY OF FRENCH LITERATURE 154, 156 (Denis Hollier ed., 1989).

<sup>83</sup> Judge Bridlegoose gets a pretty good write-up in a 1929 article by Joseph C. Hutcheson Jr., a judge and a first generation legal realist. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929). Hutcheson described his own method of decision making, the "intuitive," as closely related to Bridlegoose's "aleatory" approach and distinguished them both from a third method, the "asinine." *Id.* at 275-76.

<sup>84</sup> RABELAIS, *supra* note 7, at 13, 167-70.

<sup>85</sup> *Id.* at 34-37.

Swift was born.<sup>86</sup> Swift did have a successful career as an Anglican clergyman, becoming Dean of St. Patrick's Cathedral in Dublin.<sup>87</sup> Some might consider the clergy a related field to law, since both professions require its practitioners to express opinions on matters of justice, morality, prevarication and strange behavior, all of which figure prominently in Swift's satirical work.<sup>88</sup> His famous essay, *A Modest Proposal*, in which Swift suggests breeding Irish infants as food for the wealthy, could be considered a precursor of modern law and economics scholarship, but is not quite as funny.<sup>89</sup>

*Henry Fielding*: The first great English satirical novelist was a lawyer by training. He studied at the University of Leiden, apparently because tuition was lower in Holland.<sup>90</sup> When he came to London, however, he did not pursue legal studies. Instead, he became a popular playwright whose sharply satirical works lampooned the current government. The government responded in 1737 with a law, the Licensing Act, which limited the number of theaters in London to two and gave the Lord Chamberlain complete control over what could be shown in them.<sup>91</sup> Like many disappointed artists before and after him, Fielding decided to get his law degree so that he would have something to fall back on.<sup>92</sup> Fielding became a barrister in 1740.<sup>93</sup> He also switched from writing plays to writing novels.

Fielding assiduously pursued his legal career. In 1748, he was appointed a magistrate for London and Middlesex.<sup>94</sup> He became an active advocate of criminal justice reform, both as a writer and judge. In 1748, the same year he published his masterpiece, *Tom Jones*, Fielding also organized the "Bow Street Runners," the first reasonably professional detective force.<sup>95</sup> He also opposed public hangings, but mostly because he thought the audience enjoyed them too much.<sup>96</sup>

So why isn't Fielding a subject of this Essay? Simple. He wasn't a failed lawyer. Indeed, Fielding holds a unique place in literary history as the one writer who managed simultaneously to maintain the ironic detachment

<sup>86</sup> IRVIN EHRENPREIS, *SWIFT: THE MAN, HIS WORKS, AND THE AGE 27* (1962).

<sup>87</sup> KEITH CROOK, *A PREFACE TO SWIFT* 44-45, 50-71 (1998).

<sup>88</sup> It was also a position that involved a fair amount of political sophistication and maneuvering.

<sup>89</sup> JONATHAN SWIFT, *A Modest Proposal*, in *SELECTIONS FROM THE PROSE WRITINGS OF JONATHAN SWIFT* 136, 139 (F. C. Prescott ed., 1908) (1729).

<sup>90</sup> MARTIN C. BATTESTIN & RUTHE R. BATTESTIN, *HENRY FIELDING: A LIFE* 63-64 (1989). Not really, but it was a center of Protestant learning, untainted by "Jacobitism," and students were entitled to "a tun of wine a year" and "half a barrel of beer per month." Campus life obviously hasn't changed all that much. *Id.* at 64.

<sup>91</sup> *Id.* at 217-34.

<sup>92</sup> *Id.* at 237-45.

<sup>93</sup> *Id.* at 271-72.

<sup>94</sup> *Id.* at 446-49. It was a non-prestigious judgeship, involving only the lowest class of criminals, and the fees legally available to the judge were a "pittance." BATTESTIN & BATTESTIN, *supra* note 90, at 459.

<sup>95</sup> HAROLD PAGLIARO, *HENRY FIELDING: A LITERARY LIFE* 40-41 (1998).

<sup>96</sup> BATTESTIN & BATTESTIN, *supra* note 90, at 66.

and scathing social critique of a great satirist while also pursuing a successful legal career. He undoubtedly drank a lot.<sup>97</sup>

*Charles Dickens*: The last of our non-subjects was also a great satirical novelist with extensive knowledge of law, criminals, and the legal system. Dickens knew the legal system inside and out, having spent part (the most traumatic part) of his childhood in debtor's prison, where his father was sent in 1824.<sup>98</sup> At the age of fifteen, Dickens became a junior clerk in the law offices of Ellis and Blackmore, a "poor old set of chambers" at Gray's Inn.<sup>99</sup> This might well have led to a legal career, but Dickens found the law "a very little world, and a very dull one."<sup>100</sup> He would sometimes break the monotony by dropping cherry pits on people who passed by on the street below his office window.<sup>101</sup>

Having decided that the law was too boring, Dickens decided instead to opt for the far more exciting career of a shorthand stenographer. He apparently became quite expert at this skill and soon found work as—what else—a court reporter.<sup>102</sup> This then led to a job reporting on Parliament, then to satirical essays, and finally to the socially conscious and scathingly satirical novels through which Dickens became world famous and quite rich.

## II. LAWYERS BEHAVING BADLY: INAPPROPRIATE ADVOCACY AND THE NATURE OF SATIRE

This Section demonstrates the close relationship between the behavior of failed lawyers and important elements of the satirical tradition. It shows that the same inappropriate questions that can get you dirty looks in law school classes constitute some of the great and enduring themes of satire. Specious legal reasoning that will cause you to bomb the final exam can also be a powerful satirical literary device, and the disrespectful, mocking, wise-ass attitude that will probably get you kicked out of class is, not surprisingly, a fundamental element of all great satire. We can find all of these

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<sup>97</sup> We know he suffered from severe and chronic gout, which is often brought on by heavy drinking. *Id.* at 529.

<sup>98</sup> The profound effects on Dickens of his father's incarceration are discussed in a famous essay by EDMUND WILSON, *Dickens and the Marshalsea Prison*, in *THE PORTABLE EDMUND WILSON* 354, 354-57 (Lewis M. Dabney ed., 1983).

<sup>99</sup> PETER ACKROYD, *DICKENS* 115 (1990).

<sup>100</sup> *OXFORD READER'S COMPANION TO DICKENS* 317 (Paul Schlicke ed., 1999). Even after his writing career had started, Dickens hedged his bets by registering as a student barrister at Middle Temple. *Id.* But he "never ate sufficient dinners to be called to the Bar and he resigned his membership of Middle Temple in 1855." *Id.* One might say that Dickens did not have a sufficiently strong stomach for the practice of law.

<sup>101</sup> ACKROYD, *supra* note 99.

<sup>102</sup> *Id.* at 124.

inappropriate behaviors in the works of Lucian, Voltaire, Kafka and many other great satirists.

### A. *Bad Questions to Ask*

#### 1. Does the Law Make Any Sense?

Every beginning law student encounters numerous legal rules that seem completely arbitrary and artificial. Some injured parties get paid and others do not. Some kinds of wrongdoers are punished, while others get away with it. Much of legal education is spent training and convincing students that there is an underlying sense and order to these rules, that certain injuries are more appropriately compensated than others and that some wrongs more appropriately sanctioned. Yet it must be admitted that the distinctions drawn are often very fine ones, and young lawyers must be trained to chop their logic into very thin slices. Failed lawyers, of course, are those who never get it. They are those to whom the legal system continues to appear arbitrary, artificial, and downright nonsensical. Their inappropriate questions appear frequently in the works of our satirists.

Lucian, for example, has his favorite character, Menippus the Cynic,<sup>103</sup> travel to the underworld to try to make sense of a puzzling legal conundrum. As Menippus explains:

When I was a child and read in Homer and Hesiod about wars and revolutions among the gods—real gods mind you, not demi-gods—when I read of them committing rape, theft and adultery, taking revenge on one another, kicking their fathers out of doors, and marrying their sisters, I thought it all quite in order—in fact it rather tickled my fancy. But when I began to grow up, I found that the law took exactly the opposite line, and said it was wrong to steal, or commit adultery, or start a revolution. This puzzled me very much, and I couldn't think what to make of it. For presumably the gods wouldn't have behaved like that, if they hadn't regarded it as perfectly proper, nor would our government have issued instructions to the contrary, if they hadn't thought there was something to be gained by it.<sup>104</sup>

Although he has many interesting adventures in the underworld, Menippus never really gets an answer to his question whether it is better to follow the example of the gods or the strictures of the law. He finally gets some whispered advice from the blind sage Tiresias, who first tells him “I

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<sup>103</sup> Menippus was a Cynic and satirist who lived around 250 B.C. He is considered the inventor of “Menippean satire,” a literary genre so obscure it probably doesn't exist at all. See generally Edward J. Milowicki & Robert Rawdon Wilson, *A Measure for Menippean Discourse: The Example of Shakespeare*, 23 POETICS TODAY 291 (2002); Joel C. Relihan, *On the Origin of “Menippean Satire” as the Name of a Literary Genre*, 79 CLASSICAL PHILOLOGY 226 (1984).

<sup>104</sup> LUCIAN, *Menippus Goes to Hell*, in SATIRICAL SKETCHES, *supra* note 18, at 97, 99.



can't tell you the answer. It's strictly against the rules."<sup>105</sup> But then advises him to "forget all those clever arguments—they don't mean a thing. Just live in the moment and get along as best you can, trying to see the funny side of things and taking nothing very seriously."<sup>106</sup> Many a failed lawyer has come to same conclusion.

Voltaire's work is filled with arbitrary and absurd legal disputes and judgments. In *Zadig*,<sup>107</sup> a good and just man is made minister to the king.<sup>108</sup> He is presented with a violent legal dispute among warring sects as to whether to enter the temple of Mithra first with the left or right foot.<sup>109</sup> He jumps in with both feet, demonstrating that "the God of heaven and earth, who has no respect of persons, does not esteem the left leg more than the right."<sup>110</sup> For this, and similar good advice, he is soon forced to leave the kingdom.<sup>111</sup>

Voltaire's accounts of criminal cases invariably involve arbitrary and senseless inflictions of punishment. In *Micromegas*, the hero is banished from court for writing a book that was "condemned by some jurists who had not read it."<sup>112</sup> In *Candide*, Voltaire manages to make a Portuguese *auto-da-fe* appear even more cruel and senseless than it actually was.<sup>113</sup>

Voltaire's most famous account of criminal punishment under a ridiculous law occurs when Candide lands on the English coast and sees an English admiral put to death "because he did not kill enough people."<sup>114</sup> Voltaire explained the jurisprudential principle as follows: "in this country it is a good thing to kill an admiral from time to time to encourage the others."<sup>115</sup> It is a notable attack on bad legal justification by a failed law student.

<sup>105</sup> *Id.* at 109. Note the similarity between Tiresias' response and that of a Socratically inclined law professor.

<sup>106</sup> *Id.* at 109-10.

<sup>107</sup> *Zadig* can be pronounced to mean "righteous" in Hebrew or "truthful" in Arabic. Julius Lichtenstein, *The Title of Voltaire's "Zadig,"* 33 *FRENCH REV.* 65, 67-67 (1959).

<sup>108</sup> VOLTAIRE, *ZADIG*, in *THE PORTABLE VOLTAIRE*, *supra* note 26, at 329, 351 (1747).

<sup>109</sup> *Id.* at 350.

<sup>110</sup> *Id.* The war between the Lilliputians and Blefuscians over which end of an egg to break is the obvious predecessor to this dispute. See JONATHAN SWIFT, *GULLIVER'S TRAVELS* 36 (Paul Turner ed., N.Y. Oxford Univ. Press 1998) (1726).

<sup>111</sup> VOLTAIRE, *supra* note 108, at 356-57.

<sup>112</sup> VOLTAIRE, *MICROMEGAS*, in *THE PORTABLE VOLTAIRE*, *supra* note 26, at 413, 414 (1752).

<sup>113</sup> VOLTAIRE, *CANDIDE*, in *THE PORTABLE VOLTAIRE*, *supra* note 26, at 229, 242 (1758). He has the tribunal condemn a Biscayner for marrying his godmother (possible incest), two Portuguese condemned for throwing away a piece of bacon (possible Judaism), and Dr. Pangloss and Candide, "one because he had spoken and the other because he had listened" (possible blasphemy). *Id.* at 243.

<sup>114</sup> *Id.* at 301. This refers to the actual English Admiral John Byng, who was condemned to death by a court martial for failing to close with the enemy at the beginning of the Seven Years War, a verdict affirmed by both houses of Parliament. PEARSON, *supra* note 29, at 257-58. Voltaire had met Byng years earlier when he had visited England, and wrote letters to English authorities opposing the sentence. *Id.*

<sup>115</sup> VOLTAIRE, *supra* note 113, at 302-03.

The senselessness and arbitrariness of legal proceedings is also a major theme of Kafka's *Der Process*, the German title of Kafka's work, which could be translated into English as "The Trial," "The Process," "The Procedure," or "The Progress" (as of a disease).<sup>116</sup> K. arrives at his first interrogation and gives an impassioned speech proclaiming not only his own innocence, but seeking a "public ventilation of a public grievance."<sup>117</sup> K. perceives a vast conspiracy in which "innocent persons are accused of guilt, and senseless proceedings are put in motion against them."<sup>118</sup> K., impressed by his own eloquence, thinks he is making powerful points with his audience, but the audience is not only inattentive and easily distracted, they all turn out to be government officials who he has just accused of being part of a vast conspiracy.<sup>119</sup> Returning to the courtroom the following week, K. is surprised to find it not in session.<sup>120</sup> K. sees some books lying on the Magistrate's table.<sup>121</sup> He is told they belong to the Examining Magistrate, and he is not allowed to look at them.<sup>122</sup> K. naturally assumes they are law books that can provide important and hidden insight into his case, and makes substantial efforts to gain access to them.<sup>123</sup> When he finally does so, the books turn out to be pornographic novels with "indecent pictures," poorly drafted ones at that.<sup>124</sup>

Yet in *The Trial*, the court's procedures are not only arbitrary and absurd, they are also oddly insubstantial. They seem supported mostly by the participants' belief that the whole process makes some kind of sense. Even K. seems to have an inkling of this when he says: "It is only a trial if I recognize it as such."<sup>125</sup> He goes on to attack the "procedure" as "contemptible."<sup>126</sup>

K's attitude reflects the incredulity of the skeptical law student who finds it hard to take the whole rule-rationalizing process seriously. He criticizes the formal and mechanical nature of judicial processes in words that might be applicable even outside the boundaries of his novel:

Their remoteness kept the officials from being in touch with the populace; for the average case they were excellently equipped, such a case proceeded almost mechanically and only needed a push now and then; yet confronted with quite simple cases, or particularly difficult cases, they were often utterly at a loss, they did not have any right understanding of human

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<sup>116</sup> Osman Durrani, *Editions, Translations, Adaptations*, in THE CAMBRIDGE COMPANION, *supra* note 41, at 206, 215.

<sup>117</sup> KAFKA, *supra* note 60, at 46.

<sup>118</sup> *Id.* at 50.

<sup>119</sup> *Id.* at 52.

<sup>120</sup> *Id.* at 53.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> KAFKA, *supra* note 60, at 54-55.

<sup>124</sup> *Id.* at 55.

<sup>125</sup> *Id.* at 44.

<sup>126</sup> *Id.*

relations, since they were confined day and night to the workings of their judicial system, whereas in such cases a knowledge of human nature itself was indispensable.<sup>127</sup>

Sounds a lot like the complaint of a disenchanting law student, doesn't it?

## 2. Is the Legal System Corrupt?

Nobody in law school teaches you how to bribe a judge, notwithstanding the fact that in most legal systems it has been a useful, if not essential, legal skill. But the abstract law that is taught to lawyers presupposes that the system is run by disinterested, reasonably diligent, and competent judges and other civil servants. It may be alright to recognize, in passing, that not all actual judges conform to this ideal, but if you devote too much attention to figuring out just how corrupt the system is, and therefore question how much the actual legal rules have to do with how cases are actually decided, you leave the realm of legal study and enter the world of the satirist. Unlike lawyers, satirists place corruption at the center of their account of the legal system. This is because pointing out the contrast between the lofty ideals supposedly embodied in the legal system and the venal practices of those who actually run it not only makes for a powerful social critique, it can also be pretty funny.

Consider Lucian's account of perhaps the oldest known tale of judicial corruption, the Judgment of Paris.<sup>128</sup> Sometimes the story is told as a tragedy, in which Zeus and the other gods foresee the horrors of the Trojan War but are powerless to prevent the fated award of the dreaded golden Apple of Discord in this famous beauty contest. In Lucian's version, however, the story is played for laughs, and the only predictable aspect is self-interest. Everybody cheats. Even before they know who Paris is, the goddesses try to figure out if he will be susceptible to their particular forms of bribery.<sup>129</sup> Paris, despite describing himself as a simple cowherd, seems well aware of the advantages presented by the situation.<sup>130</sup> He not only arranges to see each contestant naked, but also has a private conversation during which each contestant offers him the appropriate bribe.<sup>131</sup> Paris has no qualms about selling his judgment, but like a clever Contracts student, recognizes that there will be some problems enforcing the deal.<sup>132</sup> He makes Aphrodite

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<sup>127</sup> *Id.* at 129.

<sup>128</sup> LUCIAN, *A Beauty Competition*, in SATIRICAL SKETCHES, *supra* note 18, at 55.

<sup>129</sup> Both Aphrodite and Athena have private whispered conversations with Hermes, who is taking them to meet Paris. *Id.* at 56-57. Aphrodite wants to know if he is a bachelor, and Athena asks if he has military ambitions. *Id.*

<sup>130</sup> *See id.* at 59-60.

<sup>131</sup> *Id.* at 60-63.

<sup>132</sup> *See id.* at 64.

repeat her promise of Helen's love and specifies all the material conditions before handing over the golden apple.<sup>133</sup>

In Voltaire's works, judicial corruption takes a more regular and institutional form. Voltaire was an experienced litigant and seems to have had a deep resentment of court fees. *Candide*, having been tricked by a Dutch sea captain, applies for redress to a Dutch magistrate.<sup>134</sup> Unfortunately, he makes the mistake of talking in court "a little louder than he ought" which gets him fined ten thousand piastres.<sup>135</sup> The judge then promises to look into the matter, but that will cost ten thousand piastres more.<sup>136</sup> When *Zadig* clears himself of some unfounded allegations, the court orders a fine of 400 ounces of gold to be returned to him.<sup>137</sup> Voltaire informs us that the court "retained only three hundred and ninety-eight for judicial costs . . ." <sup>138</sup> Voltaire also condemned the law of bankruptcy, "which seizes the goods of bankrupts only to deprive the creditors . . ." <sup>139</sup> This is perhaps a rather strange complaint from a great civil libertarian, but perfectly understandable from someone with a sideline as a moneylender.

In *The Trial*, Joseph K. accepts the corruption of the court and the necessity of bribery as a matter of course.<sup>140</sup> His problem is that he can't get any clear instructions concerning whom to bribe. A good lawyer, of course, is an indispensable source of such information. The rather decrepit counsel K. hires claims to have all the right connections,<sup>141</sup> and as K. recognizes: "Nothing was of any real value but personal connections with the higher officials, that was to say higher officials of the subordinate rank, naturally."<sup>142</sup> In Kafka, corruption, like every other aspect of authority, is pervasive, obscure, and not fully under anybody's control.

Near the end of *The Trial* there is a philosophical discussion of bribery. A priest tells Joseph K. the strange parable of the door-keeper.<sup>143</sup> In it, a man from the country seeks the Law, but it is "forbidden him only by one

<sup>133</sup> LUCIAN, *supra* note 128, at 64.

<sup>134</sup> VOLTAIRE, *supra* note 113, at 283-84.

<sup>135</sup> *Id.* at 284.

<sup>136</sup> *Id.*

<sup>137</sup> VOLTAIRE, *supra* note 108, at 337-38.

<sup>138</sup> *Id.* at 338.

<sup>139</sup> VOLTAIRE, *supra* note 113, at 239.

<sup>140</sup> See KAFKA, *supra* note 60, at 50. Before the Examining Magistrate and his advisers, K. utters:

[I]nnocent persons are accused of guilt, and senseless proceedings are put in motion against them, mostly without effect, it is true, as in my own case. But considering the senselessness of the whole how is it possible for the higher ranks to prevent gross corruption in their agents? It is impossible. Even the highest Judge in this organization cannot resist it.

*Id.*

<sup>141</sup> See *id.* at 113 ("[Y]ou must consider that this intercourse enables me to benefit my clients in all sorts of ways, some of which cannot even be divulged.").

<sup>142</sup> *Id.* at 128.

<sup>143</sup> *Id.* at 234-36.

individual, the door-keeper."<sup>144</sup> The man "parts with all he has, however valuable, in the hope of bribing the door-keeper."<sup>145</sup> Unlike Aphrodite in Lucian's story (who at least knows how to cut a deal), Kafka's door-keeper is annoyingly noncommittal: "The doorkeeper accepts it all, saying however, as he takes each gift: 'I take this only to keep you from feeling that you have left something undone.'"<sup>146</sup> This disclaimer is enough to signify to the priest that the doorkeeper "is not to be bribed."<sup>147</sup> Joseph K. is not so sure.<sup>148</sup> Corruption is so deep and ambiguous in the judicial system that it appears possible to give and take bribes purely for therapeutic purposes.

### 3. Can Justice Be Achieved?

It is a cliché to point out that Justice is rarely discussed in law school classes.<sup>149</sup> Like most clichés, however, it's also pretty much true. It may be that law professors are just too busy expounding on the intricacies of in personam jurisdiction to have much time for the subject, or maybe they are embarrassed by the vast chasm that exists between the concept of Justice and the world in which we actually live. If one thinks about this issue too long, as a failed lawyer might, one could conclude that it is both too easy and somewhat unfair to condemn the law for the wretched injustice of the world in which we live. While the law may not do much to alleviate the problem, it is hardly the root cause of it. To take on the really big injustices, one has to call to account the Higher Authorities.

In *Some Awkward Questions for Zeus*, Lucian gives us a pagan version of the Book of Job.<sup>150</sup> Lucian, however, skips all the plagues and smiting and plays it for laughs. He just asks the Big Guy the hard questions. "Why on earth do you let so many people get away with sacrilege and burglary, perjury and crimes of violence, and usually aim your thunderbolt at something quite inoffensive like a tree, a stone, or a ship's mast, or even at a perfectly innocent traveler?"<sup>151</sup> Zeus has trouble thinking up a suitable reply, but he finally comes up with a half-hearted assertion that the wicked will be punished in the next world.<sup>152</sup> Lucian isn't sure about that whole

<sup>144</sup> *Id.* at 240.

<sup>145</sup> See KAFKA, *supra* note 60, at 235.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 237.

<sup>148</sup> See *id.* at 237-42.

<sup>149</sup> By Justice, of course, I mean capital "J" Justice, the fundamental norm and underlying criteria of the legal system, not "interests of justice," the last and least factor in deciding whether to grant a preliminary injunction, or the name of that department in Washington that gives out the really good internships.

<sup>150</sup> LUCIAN, *Some Awkward Questions for Zeus*, in SATIRICAL SKETCHES, *supra* note 18, at 137.

<sup>151</sup> *Id.* at 144.

<sup>152</sup> *Id.*



“next world” concept, and his legal training comes in pretty handy as he cross-examines Zeus, laying a trap by getting him to admit that “involuntary” crimes would not be subject to divine punishment.<sup>153</sup> He closes the trap by pointing out, as Zeus previously asserted, “human beings don’t do anything of our own free will” and that “Fate’s responsible for everything.”<sup>154</sup> Having been thus presented with some of the most profound questions about free will, responsibility, and the justice of punishment, Zeus replies like a petulant law student: “You’re just an irresponsible intellectual. I refuse to listen to you. I’m going away.”<sup>155</sup>

Voltaire had a similar but even more longstanding quarrel with the Deity, which was exacerbated by the way his nemesis (that toady Leibniz) was always sucking up to Her.<sup>156</sup> Exhibit A in Voltaire’s Divine indictment was the Lisbon earthquake of 1755, which is thought to have killed between 30,000 and 40,000 people.<sup>157</sup> In his poem, *The Lisbon Earthquake*, Voltaire lays the blame directly where it belonged: “Say, will you then eternal laws maintain/Which God to cruelties like these constrain?”<sup>158</sup> Voltaire emphatically rejected any possible claim that the earthquake was some form of Divine retribution. He noted, probably from personal experience, that London and Paris were at least as bad as Lisbon on any cosmic accounting of sinfulness, yet they got off scot-free.<sup>159</sup>

<sup>153</sup> *Id.* at 145.

<sup>154</sup> *Id.* at 145-46.

<sup>155</sup> *Id.* at 146.

<sup>156</sup> Voltaire’s greatest work, *Candide*, takes aim at one of the fattest satirical targets ever presented, the astounding conclusion by the great German philosopher Gottfried Leibniz that ours is the best of all possible worlds. This conclusion was logically derived from careful contemplation of the nature of existence, which led him to an understanding of the nature of God’s attributes and perfection. See GOTTFRIED WILHELM VON LEIBNIZ, *Monadology*, in *MONADOLGY AND OTHER PHILOSOPHICAL ESSAYS* 148, 162-63 (Paul & Anne Martin Schrecker trans., Macmillan 1988) (1692). Leibniz, who also invented calculus, was undoubtedly the most brilliant stupid person who ever lived. Voltaire does not so much refute the argument as present it in stupefied amazement, as he piles misfortune after misfortune on *Candide* and the other innocent but rather dim protagonists of his story. He also manages to include numerous contemporary illustrations of intolerance, greed, and injustice among a wide variety of nations and cultures. God does not come off too well either.

<sup>157</sup> VOLTAIRE, *The Lisbon Earthquake*, in *THE PORTABLE VOLTAIRE*, *supra* note 26, at 560 & n.1 (1755).

<sup>158</sup> *Id.* at 560.

<sup>159</sup> *Id.* at 560-61 (“Was then more vice in fallen Lisbon found/Than Paris where voluptuous joys abound?/Less debauchery to London known, where opulence luxurious holds her throne?/Earth Lisbon swallows; the light sons of France/Protract the feast, or lead a sprightly dance.”). In *Candide*, Voltaire makes the same points in a more sardonic mode. *Candide* and Pangloss are shipwrecked off the coast of Lisbon as a result of the earthquake. VOLTAIRE, *supra* note 113, at 239-40. A kindly Anabaptist on board tries to help the others but is knocked down by a brutish sailor and is ultimately drowned. *Id.* at 240. The sailor meanwhile manages to get to shore and has a fine old time in Lisbon, where he “dared death to find money, found it, seized it, got drunk, and having slept off his wine, purchased the favors of the first woman of good-will he met on the ruins of the houses and among the dead and dying.” *Id.* at 240-41.

In Kafka, the question of Divine Justice and retribution is always present, but given the pervasive ambiguity of Kafka's world, it is unclear whether the problem is too little Divine Justice or too much. Unlike Lucian and Voltaire, who are at least secure in their knowledge that they can distinguish the suffering of the innocent from that of the guilty and justice from injustice, Kafka's work takes away even the certainty of outrage. We can never be sure that the suffering of the apparently innocent may reflect some deep cosmic guilt on their part, or perhaps just a profound ignorance of the rules.

There are many things in *The Trial* that frighten Joseph K., but the possibility that there may be no justice at all frightens him the most. He insists to the painter that he is innocent, yet complains that "[m]y innocence doesn't make the matter any simpler . . . . I have to fight against countless subtleties in which the Court indulges. And in the end, out of nothing at all, an enormous fabric of guilt will be conjured up."<sup>160</sup> Yet the painter, while agreeing that once convinced of his guilt, "[t]he Court can never be dislodged from that conviction," offers up at least the possibility of an ostensible acquittal.<sup>161</sup> Unfortunately, "[e]ven while they are pronouncing the first acquittal the Judges foresee the possibility of a new arrest."<sup>162</sup> In Kafka's universe, the victims are deprived not only of status, property, and ultimately life, but even the knowledge of their own guilt or innocence.

## B. *Bad Ways to Reason*

### 1. *Dikanikos Logos* and the Non-Legal Trial.

Experienced lawyers know that the trial is a powerful but limited tool for the adjudication of disputes. Before a case can be submitted to trial, issues must be clearly defined and evidence carefully prepared. Good lawyers don't subject any old claim to adjudication in a haphazard fashion. Satirists do.

It is a tradition that begins with Aristophanes, who created the "non-legal trial," a literary invention in which contentious issues totally unsuitable to formal adjudication are litigated and resolved in an ad hoc and absurd mockery of trial procedures.<sup>163</sup> The poetry contest in *Frogs*, in which

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<sup>160</sup> KAFKA, *supra* note 60, at 163.

<sup>161</sup> *Id.* at 164.

<sup>162</sup> *Id.* at 175.

<sup>163</sup> The ancient Greeks, like modern Americans, viewed trials as a form of entertainment, and would pay to hear a good hyperbolic legal argument, so long as it wasn't directed against them. Aristotle classified forensic oratory, *dikanikos logos*, as one of the three main categories of rhetoric, and many plays featured examples of it. ARISTOTLE, RHETORIC 31-32 (W. Rhys Roberts trans., Random House 1954).

Aeschylus seeks a judgment restoring him to the Chair of Tragedy (improperly usurped by Euripides, who got it by pandering to a disreputable jury<sup>164</sup>) is one of the most famous examples. These absurd legal proceedings also give the satirists an opportunity to employ *dikanikos logoi*, forensic rhetoric, in bizarre and amusing ways.

Lucian also employed this satirical device to great effect, often by putting himself on trial, thereby simultaneously confronting and ridiculing his critics. In one such dialogue, Lucian is attacked by a bloodthirsty band of philosophers led by Socrates.<sup>165</sup> They seek to stone him for Lucian's alleged slanders against their profession.<sup>166</sup> Lucian temporarily puts them off with some well-selected quotations from Homer and Euripides.<sup>167</sup> They agree to settle their dispute with another bizarre trial, presided over by Philosophy herself, with Diogenes as the prosecutor.<sup>168</sup> Diogenes begins with an *ad hominem* attack on Lucian, claiming that he "abandoned an honest career in the courts" and instead "devoted all his rhetorical skill to the one object of attacking us."<sup>169</sup> Lucian, using those rhetorical and legal skills,<sup>170</sup> as well as a bit of pandering to the Judge,<sup>171</sup> wins a unanimous verdict in his favor and proves that the contemporary philosophers he attacks are a bunch of hypocrites.<sup>172</sup> After the trial is over, he further proves his point by snaring philosophers with a fishing rod baited with a fig and a gold coin.<sup>173</sup>

Voltaire does not quite put his own life on trial in literary form, perhaps because he had too many such experiences in real life. In *Zadig*, however, he describes a contest to select the citizen who has "performed the most generous action."<sup>174</sup> It is won by Zadig, Voltaire's stand-in, who

<sup>164</sup> ARISTOPHANES, *Frogs*, in *THE COMPLETE PLAYS*, *supra* note 6, at 535, 575-84. The jury in Hades that voted for Euripides is referred to as "those hooligans." *Id.* at 576.

<sup>165</sup> LUCIAN, *supra* note 22, at 166.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 167-68.

<sup>168</sup> *Id.* at 178. Plato was the angry philosophers' first choice, but he demurred, saying they needed someone "more violent." *Id.* Plato warned that "[t]his is no time to worry about subtleties of style—what we want is someone who knows how to secure a conviction in a court of law. This Frank person [a pun on Lucian's name] is an experienced barrister, you know." *Id.*

<sup>169</sup> LUCIAN, *supra* note 22, at 180.

<sup>170</sup> At Lucian's suggestion, Philosophy brings Truth along to the trial. *Id.* at 175. When they think that Truth might be on Lucian's side, the philosophers begin to get nervous. *Id.* at 176.

<sup>171</sup> *See id.* at 182. He tells Philosophy he loves her (and her doctrines) and hates the way she has recently been treated. *Id.*

<sup>172</sup> *Id.* at 186.

<sup>173</sup> LUCIAN, *supra* note 22, at 187. Perhaps the most bizarre example of this literary genre is another work attributed (probably erroneously) to Lucian. Entitled *The Consonants at Law*, it portrays a suit by Sigma (not the fraternity, but the actual Greek letter) against Tau (same comment) before a jury of vowels for improperly appearing in too many mispronounced words. LUCIAN, *The Consonants at Law*, in *THE WORKS OF LUCIAN*, *supra* note 21, at 395, 395-97. It is pretty much incomprehensible to a non-Greek speaker.

<sup>174</sup> VOLTAIRE, *supra* note 108, at 343.

“spoke well of a disgraced courtier who had incurred his king’s wrath.”<sup>175</sup> Kafka’s *Trial* represents the apotheosis of this tradition, where Joseph K’s entire life seems to be on trial, or where it all may just be a big mistake.

## 2. Absurd Categories and Non-Legal Legal Reasoning

Much time in law school is spent arguing about which legal categories apply to various people, cases and things. Is an SUV a car or a truck?<sup>176</sup> Is the statute of limitations a rule of substance or procedure?<sup>177</sup> Is a frozen chicken a chicken?<sup>178</sup> There may be right answers to these questions in law school, but anyone with a more sober and realistic perspective on the world quickly notices that they are actually pretty stupid. Arguing about what things belong in what categories may be *de rigueur* for law school, but to those seeking a deeper understanding of the world such questions are either raw materials for Zen koan or the source of cosmic jokes. Satirists tended to opt for the jokes.

Categories that satirists find particularly amusing (perhaps because their contemporaries took them so seriously) are those that define rank or social status. One of Lucian’s favorite themes is that all differences in social status are merely different costumes in “a vast sort of pageant organized by Chance.”<sup>179</sup> When his hero, Menippus, journeys to the Underworld, he has trouble telling the inhabitants apart because “being but bare bones, they all look practically alike.”<sup>180</sup> (Except that is, for Egyptians who, being mummified, manage to stay “fresh and firm.”)<sup>181</sup> An almost identical perspective is provided by Voltaire in *Micromegas*, his story of an eight league tall giant from Sirius who makes a brief sojourn to earth accompanied by a shrimpy Saturnian only one thousand fathoms tall. Seeing nothing their size on Earth, they initially assume it is uninhabited, but eventually notice infinitesimal beings, who they refer to as insects or maggots, but soon recognize as sentient beings who “slaughter each other” in order to decide if some “mud-heap” will “belong to a certain man called ‘Sultan’ or to another called, ‘I know not why, ‘Caesar[.]’”<sup>182</sup>

Voltaire’s hero Zadig gets in trouble for applying common sense to a rule against eating a certain category of meat, namely griffon, an animal

<sup>175</sup> *Id.* at 345.

<sup>176</sup> *E.g.*, *Marubeni Am. Corp. v. United States*, 821 F. Supp. 1521, 1522 (Ct. Int’l Trade 1993), *aff’d*, 35 F.3d 530 (Fed. Cir. 1994); *BMW of N. Am., L.L.C. v. Motor Vehicle Bd. of Tex.*, 115 S.W.3d 722, 723 (Tex. App. 2003).

<sup>177</sup> See your Civil Procedure teacher.

<sup>178</sup> Didn’t you read something about that in some first year class? Was it Torts?

<sup>179</sup> LUCIAN, *supra* note 104, at 106.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> VOLTAIRE, *supra* note 112, at 431.

which does not appear to exist. He sensibly advises “[I]f there are griffons, do not let us eat them: if there are no griffons, we shall eat still less.”<sup>183</sup> This advice is considered sacrilegious, and gets Zadig threatened with impalement. Feeling sorry for himself, he cries “I am persecuted by everything in the world, and even by things which are not[.]”<sup>184</sup>

Speaking of the legal category of “things which are not” brings us to Kafka’s great discourse, in *The Trial*, on the three categories of acquittal. Joseph K. gets this advice from a painter, one of a number of people who seem more knowledgeable about the workings of the Court than K. or his rather distracted lawyer. The painter, sounding very much like a law professor, explains: “There are three possibilities, that is, definite acquittal, ostensible acquittal and indefinite postponement.”<sup>185</sup> Further discussion reveals, however, that definite acquittal, like Zadig’s griffon, belongs to the category of things that are not. The painter notes that in all the cases known to him “I have not met one case of definite acquittal.”<sup>186</sup> Yet he acknowledges that the category exists, as it is recorded in the ancient legends of the court. “These legends certainly provide instances of acquittal; actually the majority of them are about acquittals, they can be believed, but they cannot be proved.”<sup>187</sup> Essentially, the rules about definite acquittals are like the rules about griffons; rules which might apply to actual events, but probably don’t, yet are nonetheless available to be argued about endlessly.

### C. *Bad Attitudes: Humor and Tone in Satire*

Law is not a fundamentally humorous enterprise. Sure, you can find lawyers and even the occasional judge who believe themselves to be great wits and will start an argument, a lecture, or a judicial opinion with some joke or clever remark. But having gotten their laugh, they quickly change to a more solemn tone as they get down to the serious legal business of compensating, punishing, and pontificating. The difference between satirists and lawyers is not that satirists make jokes, or even that their jokes are funnier, but rather in their fundamental attitude toward the juridical enterprise. They think that the law itself is a joke.

Unlike lawyers, who tend to find humor only in the more ephemeral aspects of the legal process, we have seen Lucian, Voltaire, and Kafka mine comedic gold from such weighty and fundamental juridical topics as abuse of power, injustice, and death. It would be wrong, of course, to say that satirists don’t treat these subjects seriously. They just don’t treat them sol-

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<sup>183</sup> VOLTAIRE, *supra* note 108, at 339.

<sup>184</sup> *Id.*

<sup>185</sup> KAFKA, *supra* note 60, at 167.

<sup>186</sup> *Id.* at 168.

<sup>187</sup> *Id.* at 169.



emly. They recognize that there is a fundamental absurdity in the juridical enterprise, the attempt to impose order on a chaotic world through arcane language and abstract rules. Their perspective is that of the bemused and insolent law student who focuses not on the rules, but on the hypocrisy and pretentiousness of those who claim to understand and apply them.

Humor is pretty much a necessary accompaniment to such an attitude. Like all good rhetorical techniques, it has persuasive force, and can win you supporters. A reader who laughs at a satirist's joke is, however involuntarily, acknowledging the power of the satirical point of view. In much the way a judge or jury may be swayed, momentarily or permanently, by a well crafted legal argument. Humor also reflects the relative powerlessness of satirical judgments. Unlike judges, satirists cannot directly injure bodies or wallets, only feelings.

Humor also protects the satirist both from the repression of the state and from the danger of boring the reader. In the attempt to be humorous, satirists can tell lies openly and with impunity, as Lucian does with *The True History*,<sup>188</sup> which is an exciting and blatantly ridiculous account of Lucian's supposed trip to the moon (frankly acknowledged by him to be false). The tall tale is a forerunner of Moore's *Utopia*, Swift's *Lilliput*; and all the wild and absurd stories that satirists have told of fictional worlds that have nothing to do with our own (except when they do).<sup>189</sup> In the attempt to be humorous, satirists can oversimplify or distort the views and teachings of others, as Voltaire mercilessly does to Leibniz, or exaggerate to the point of absurdity, as Kafka does to the Austro-Hungarian state bureaucracy. Yet the humor in all this lying and exaggeration must nonetheless come from its relationship to an underlying truth, preferably one that escapes the notice of the authorities.<sup>190</sup>

Satirical humor, however, is more than just a useful literary technique and a way of avoiding prosecution. Humor is the very point of the satirical enterprise, the fundamental expression of the satirical point of view. And that point, quite simply, is to show disrespect. If by respect we mean immunity or protection from insult,<sup>191</sup> the satirical attitude of disrespect is antithetical to that concept. It views everything as potentially subject to insult

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188 LUCIAN, *The True History*, in SATIRICAL SKETCHES *supra* note 18, at 249.

189 See Simon Critchley, *Satura Resartus: Living in the Woods with Bears*, 17 LAW & LITERATURE 433, 438-39 (2005). Critchley states that satire works by asking us to "look at ourselves as if we were visitors from an alien environment, to examine terrestrial existence from a Martian point of view." *Id.* at 438.

190 A contemporary German satirist was "bowled over by Kafka's aesthetic cosmos, which struck him as neither dream nor reality, neither allegory nor symbol, and for this reason it demanded a meaning." STACH, *supra* note 43, at 472.

191 Most dictionaries define respect in terms of esteem or high regard, but this strikes me as failing to capture the social quality of the term. Respect as a social quality can be shown to a person or institution for which one has no esteem or regard at all, simply by acting a certain way towards them, notably by acting in a way that insures that they will feel no insult or injury.

and ridicule. When a student makes a joke in class, after all, it is the disrespect, not the joke, which causes the problem.

So am I saying that the attitude and tone of Lucian, Voltaire, and Kafka is similar to the attitude and tone of an insolent law student making wisecracks in the back of the class? Pretty much. They all take a similar delight in ridiculing not just the high and mighty of their respective societies, but the very idea of social order itself. It is their humor and their insolent attitude that extends their critique from simply comments about particular people and things to a more general indictment of society, because it signals that every aspect of their society, including themselves, is potentially open to similar mockery.

One might object that not all satire is so scathing and all-encompassing. But satire, in this sense, is very much like law because while it does not condemn universally, it assumes the right to judge universally. Humor, like legal punishment, can vary in severity, from mild to scathing. Yet the parking scofflaw is just as much a potential subject of the law as the vicious killer. In much the same way, the pompous, pretentious, and silly, even the innocent, are just as much potential subjects of satire as the cruel and the wicked.<sup>192</sup> The point is that the perspective of satire is all encompassing, in that everything can be the subject of an attitude that seeks out the ridiculous and the absurd.

## CONCLUSION

The great satirists were well aware of the broad scope that the satirical attitude makes available for social critique. Remember that in Part I of this Essay we saw many satirists complain about the smallness and uselessness of legal education, the way in which it seemed to focus only on a narrow set of arguments and issues.<sup>193</sup> Of course, we all recognize that this is how legal training works, that it “sharpens the mind by narrowing it.”<sup>194</sup>

But suppose you are a restless young person, dissatisfied with the injustice and hypocrisy you see all around you and bored by legal pedagogy. You might well prefer an attitude of universal disrespect to one of tinkering with arcane doctrines and obscure statutes. Rather than obsequiously pleading to the court for a judgment in your favor, you might prefer to issue your own condemnations, viewing nothing as sacred and everything as a poten-

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<sup>192</sup> For this reason, much satire can shift easily from silly lampoons of contemporary figures to profound questions of social injustice. See, e.g., DICKENS, *supra* note 8.

<sup>193</sup> See *supra* Part I.A (discussing the comments of Lucian, Voltaire, Kafka and Dickens).

<sup>194</sup> This quote is generally attributed to Edmund Burke, who might also qualify as a failed lawyer, but it is not at all clear that he actually said it. It is clear that Oliver Wendell Holmes, Jr., believed that Burke had said it. See OLIVER WENDELL HOLMES, *Brown University—Commencement 1897, in COLLECTED LEGAL PAPERS* 164, 164 (1920).

tial subject of jokes and ridicule. Such attitude would not be good for your legal career, but if you were clever and talented enough, it might make you famous and widely read, or get you sued and thrown in jail. You might well consider either result preferable to a life committed to the practice of law.

## INTRODUCTION

When the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") handed down its decision in *Shays v. FEC*<sup>1</sup> on July 15, 2005, United States Representatives Christopher Shays and Martin Meehan, the appellants in the action, praised the court's ruling.<sup>2</sup> Both Shays and Meehan released press statements that day asserting, respectively, that "today's decision affirm[s] that the FEC has not done its job,"<sup>3</sup> and "[t]oday, the appellate court confirmed that the FEC has been acting as a rogue agency and not an executor of the law."<sup>4</sup> In *Shays*, the Federal Election Commission ("FEC"), the independent federal agency charged with promulgating regulations to implement the Bipartisan Campaign Reform Act of 2002 ("BCRA"),<sup>5</sup> appealed a district court decision striking down and remanding many of the regulations that the agency had passed to execute this statute.<sup>6</sup> Congressman Shays and Meehan were the primary House sponsors of BCRA,<sup>7</sup> which Congress passed to address its "concerns about the increasing use of soft money and issue advertising to influence federal elections."<sup>8</sup> The D.C. Circuit affirmed the district court decision in *Shays*, holding that all five of the FEC regulations on which the agency appealed were invalid.<sup>9</sup>

<sup>1</sup> *Shays v. FEC*, 357 F.3d 1017 (D.C. Cir. 2005).  
<sup>2</sup> *Shays*, 357 F.3d at 1017.  
<sup>3</sup> *Shays*, 357 F.3d at 1017.  
<sup>4</sup> *Meehan*, 357 F.3d at 1017.  
<sup>5</sup> 116 Stat. 1808 (2002).  
<sup>6</sup> *Shays*, 357 F.3d at 1017.  
<sup>7</sup> *Shays*, 357 F.3d at 1017.  
<sup>8</sup> H.R. REP. NO. 106-582, at 1 (2000).

<sup>9</sup> *Shays*, 357 F.3d at 1017.

<sup>1</sup> Press Release, Congressman Martin T. Meehan, Appeals Court Upholds Ruling Striking FEC Provision (July 15, 2005), <http://www.house.gov/meehan/news/050715FEC.html>; Press Release, Congressman Christopher Shays, Appeals Court Upholds Ruling Striking FEC Provision (July 15, 2005), <http://www.house.gov/shays/news/2005July15FEC.html>.

<sup>2</sup> Press Release, Congressman Christopher Shays, *supra* note 1.

<sup>3</sup> Press Release, Congressman Martin T. Meehan, *supra* note 1.

<sup>4</sup> Pub. L. No. 107-155, 116 Stat. 1808. It consisted primarily in sections 301 and 302 (15). The FEC's rule-making authority was tried for 270 days and is codified at 115 Stat. 1431 (now Chap. 2004).

<sup>5</sup> *Shays v. FEC*, 357 F. Supp. 2d 28 (D.C. 2004), *aff'd*, 357 F.3d 1017 (D.C. Cir. 2005).

<sup>6</sup> *Shays*, 357 F.3d at 1017.

<sup>7</sup> *Shays*, 357 F.3d at 1017.

<sup>8</sup> *Shays*, 357 F.3d at 1017.