

TOWARD A MORE RESPONSIBLE PROFESSION: SOME REMARKS ON KAFKA'S *THE TRIAL* AND THE SELF

Oliver Wendell Holmes once observed: "Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house."¹ For Holmes, the law was a synthesis of theoretical underpinnings and practical application. As one prepares to enter the legal profession of the 1980's, however, one sees little evidence of a harmonious relationship between theory and practice. Today, many law students seem to sense that theory has become academic: it is essential to legal scholars, but of little use to the rest of the profession. An approach to legal problems which focuses solely on a pragmatic result is thought preferable to analyzing such problems in terms of underlying theory.² In fact, a theoretical approach is widely regarded as a luxury affordable only by those who lack the competence to succeed in practice.³ According to prevailing student wisdom, the practice of law is a bottom-line, result-oriented business to which theory may once have mattered, but is now clearly inapposite.

This perspective must be altered for two basic reasons. First, it may be a faulty perception of the realities of the legal profession. As legal analysis involves the practical application of carefully conceived principles, one who cannot grasp the theory behind the law he practices cannot properly apply such theory. Therefore, theory is essential to law as it is practiced by lawyers dedicated to professional excellence.

¹ O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 200 (1921).

² Law reviews reflect these contrasting approaches to legal analysis. Compare Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) with Warren & Auerbach, *Tax Policy and Equipment Leasing After TEFRA*, 96 HARV. L. REV. 1579 (1983); Arnold, *Accident, Mistake, and Rules of Liability in the Fourteenth Century Law of Torts*, 128 U. PA. L. REV. 361 (1979) with Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article VI*, 128 U. PA. L. REV. 379 (1979) and Davis, *Critical Jurisprudence: An Essay on the Legal Theory of Robert Burt's Taking Care of Strangers*, 1981 WIS. L. REV. 419 with Schneider, *Evolving Proof Standards Under Section 7 and Mergers in Transitional Markets: The Securities Industry Example*, 1981 WIS. L. REV. 1.

³ Student rejection of the theoretical approach embraced by many academicians is captured in the familiar aphorism: "Those who can, do; those who can't, teach." For a cogent analysis of the friction between law students and their mentors, see generally Margolick, *The Trouble With American Law Schools*, N.Y. Times, May 22, 1983, § 6 (Magazine), at 20.

This perspective must change for a second, far more significant reason. If the legal profession has become primarily a practical, money-making venture rather than a highly principled social craft, this situation must change. It is not going to change if law students simply tailor their behavior to suit a clouded perception of what is expected of them. If membership in the legal profession bespeaks integrity and public service, attorneys must serve the public with integrity.

With this challenge in mind, the author presents a law student's impressions as to how one might become a responsible attorney. Specifically, the concern here is with the importance of individual development to both the lawyer and the profession. As classical literature has long been an instrument of self-awareness,⁴ an analysis of Franz Kafka's *The Trial*⁵ highlights this article's thesis. Like much of Kafka's work, *The Trial* speaks to and of the self in a manner which urges an almost too revealing introspection, disquieting yet necessary for all individuals, particularly lawyers.

Self-development is essential to becoming a responsible attorney. In this context, self-development refers to the formation of individual values—beliefs which one holds as the preeminent guide to one's life, work, and behavior toward others. Such value development does not occur as a natural incident of birth; it must be actively pursued to be achieved. The active pursuit of personal values involves serious self-confrontation—periodic and rigorous questioning of one's own values, of whether such values are still viable, and if so, of whether one is really honoring them. This is, of course, a matter of personal choice. One can choose to develop one's own values, one can subscribe to group or "collective" values, or one can choose to embrace no values at all.

⁴ In 1908, recognizing the importance of literature to the law, evidence authority John H. Wigmore compiled a list of novels of particular significance to lawyers. See Wigmore, *A List of One Hundred Legal Novels*, 17 ILL. L. REV. 26 (1922), reprinted with corrections from Wigmore, *A List of Legal Novels*, 2 ILL. L. REV. 574 (1908). Wigmore's list was for the most part comprised of novels directly involving law and lawyers, such as JOSEPH CONRAD'S LORD JIM and CHARLES DICKENS' BLEAK HOUSE. This list has been twice revised in the past several years. See Weisberg & Kretschman, *Wigmore's "Legal Novels" Expanded: A Collaborative Effort*, 7 U. MD. L.F. 94 (1977), revised from Weisberg, *Wigmore's "Legal Novels" Revisited: New Resources for the Expansive Lawyer*, 71 NEV. U.L. REV. 17 (1976). It now includes over 300 titles, among them works with more subtle connections to the law, such as ANTHONY BURGESS' A CLOCKWORK ORANGE and RICHARD WRIGHT'S NATIVE SON.

⁵ F. KAFKA, *THE TRIAL* (Willa and Edwin Muir trans., rev. E.M. Butler, Vintage Books ed. 1969).

An attorney, however, has surrendered this freedom of choice: An attorney *must* develop individual values. The legal profession is an integral component of American society. It is the corrective sword and the protective shield, the means of access to a complex system, the representative voice which resolves conflict. Ideally, it seeks and attains the just result. As servants of the law, attorneys are entrusted with a vital task. In return for this trust, they are expected to develop and honor positive professional values. It is by no means certain that the values each individual attorney views as positive will be consistent with the ends of justice. Nevertheless, it is clear that justice will be better served by those who have taken the time and effort to develop as selves than by those who consciously honor no values whatsoever, and hence come to embrace values which are thrust upon them.⁶

Unfortunately, it may be that American law schools foster value neutrality.⁷ The volume of work required of a first year law student is so great that there may simply be no time to ruminate on individual values. More significant than the time restraints are the constant demands made upon the new law student to "think like a lawyer." This may well be the crux of the problem. To the extent that thinking like a lawyer involves rational decisionmaking, it is certainly desirable. To the extent, however, that it requires the blanket renunciation of individual values, it is insidious.⁸

No one would deny that legal problems demand the use of reason rather than emotion. Nevertheless, there are many different ways of looking at *Reason*. Viewed in the best light, the use of reason involves a logical journey to a just result. In this sense, reason is perfectly compatible with, and in fact demands, carefully developed values. From the perspective of a student being exposed to the legal system for

⁶ The basic premise is that confronting one's self and developing personal values is a worthwhile end in itself. It must be stated, however, that in addition to conveying an existential message about the self, this writing proceeds from the hopeful yet realistic belief that self-confrontation will lead to the development of values consistent with societal well-being.

⁷ See generally Halpern, *On the Politics and Pathology of Legal Education (Or, Whatever Happened to that Blindfolded Lady with the Scales?)*, 32 J. LEGAL EDUC. 383 (1982); Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982). The idea that an educational system could actually foster value neutrality is indeed strange. Equally curious is the fact that legal education, run for the most part by individuals who have eschewed practice, somehow conveys an extremely pragmatic view of the law. See Margolick, *supra* note 3.

⁸ Duncan Kennedy of Harvard Law School maintains that the art of thinking like a lawyer taught in law schools is part of a decidedly political process. Specifically, Professor Kennedy espouses the extreme view that legal education entails "ideological training for willing service in the hierarchies of the corporate welfare state." Kennedy, *supra* note 7, at 591.

the first time, however, the art of reasoning may seem inconsistent with "pre-legal" values.

New law students are constantly reminded that they must discard old ways of analyzing problems. This is because even educated individuals who are accustomed to confronting complex questions tend to answer such questions intuitively, out of a basic sense of fairness, rather than logically. In their zeal to internalize the law school experience and exercise pure rationality, however, law students may reject personal values which are perfectly consistent with reason.⁹ This is partially the result of student misunderstanding, and partially the fault of a system which seems to deemphasize individual value development.¹⁰ In an effort to churn out rational attorneys, legal education may have the ultimate effect of banishing the human factor. What begins as a quest for reason may well result in value neutrality.

This is a dangerous situation. One's ability to reason is only complete when it is informed by a firmly rooted value structure. Certainly, law students have much to learn about analytical thinking, and about the ways of the legal profession. Nevertheless, aspiring attorneys also have a contribution to make to the profession. As John Stuart Mill noted:

Nobody denies that people should be so taught and trained in youth as to know and benefit by the ascertained results of human experience. But it is the privilege and proper condition of a human being,

⁹ See Kennedy, *supra* note 7, at 594. Kennedy contends that the cases read by first year law students are either "cold" cases, which are apolitical, amoral, and unemotional, or "hot" cases, in which a "sympathetic" plaintiff loses to an "unsympathetic" defendant. Students' first reaction to the hot cases is one of righteous anger. But, Kennedy continues, class discussion of these cases will lead students to conclude that this "initial reaction of outrage is naive, nonlegal, irrelevant . . . and may be substantively wrong in the bargain. There are good reasons for the awful result, when you take a legal and logical large view, as opposed to a knee-jerk passionate view, and if you can't muster those reasons, maybe you aren't cut out to be a lawyer." *Id.*

¹⁰ See Halpern, *supra* note 7, at 385. Professor Halpern observes:

The first-year student studies contracts, property, torts, and constitutional law and finds virtually no attention given to the role of social class, political power, distribution of wealth, and their respective influences on the substantive law in all those fields. The omission of such factors speaks volumes to the student. He learns that professional norms are such for attorneys that to conceive of law in these terms is unlawyerly and unprofessional. He soon understands that law professors, judges, lawyers, and presumably good law students do not think in this way. The student must then unlearn what any thinking layman readily recognizes—that law is a form of authority which, among other things—preserves the gross inequality in our society.

Id.

The fear of value erosion in law schools which is expressed in this paper does not demand the exact perspective of either Halpern or Kennedy. Whatever the current state of the law, its future is in the hands of the legal profession. It is with this in mind that the author urges the development of individualistic values and the exercise of a rationality informed by such values.

arrived at the maturity of his faculties, to use and interpret experience in his own way. . . . The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice. He who does anything because it is the custom makes no choice. He gains no practice either in discerning or desiring what is best. The mental and moral, like the muscular powers, are improved only by being used. . . .¹¹

Mill speaks directly to the lawyers and law students of the 1980's. Although it is essential to think rationally—in this sense to think like a lawyer—it is equally important to bring one's values to bear upon the legal profession. When this is done the profession will benefit from the input of its membership. This point cannot be overemphasized in law schools. Clearly, a lawyer must be both reasonable and value-oriented.

In 1859, Mill warned that society had gotten the better of individuality, and admonished that “the danger which threatens human nature is not the excess, but the deficiency, of personal impulses and preferences.”¹² The same danger currently threatens the legal profession. If this deficiency is to be corrected, individual lawyers and law students must confront themselves and develop personal values which will enable them to approach legal problems as both rational and human beings.

Franz Kafka's *The Trial* explores the horrible consequences of one man's failure to develop as a self. The protagonist, Joseph K., is an ordinary man content with slow but steady advancement in his position at a local bank. The invasion of K's uneventful life gives rise to the novel, which begins: “Someone must have traduced Joseph K., for without having done anything wrong he was arrested one fine morning.”¹³ Suddenly, on his thirtieth birthday, K.'s perception of perfect order in the world is disturbed: he has done nothing wrong, yet is being accused. “Who could these men be? What were they talking about? What authority could they represent? K. lived in a country with a legal constitution, there was universal peace, all the laws were in force; who dared seize him in his own dwelling?”¹⁴

Speaking in K.'s voice, Kafka reveals the perspective of his central character: K. has faith in the world around him, and in his own

¹¹ J.S. MILL, *ON LIBERTY* (Norton ed. 1975), at 55.

¹² *Id.* at 57-58.

¹³ F. KAFKA, *supra* note 5, at 3.

¹⁴ *Id.* at 7.

freedom within that world. He is surprised and indignant at the arbitrary invasion of his right to live in peace. When he questions this invasion, K. is told that the "officials, . . . as the Law decrees, are drawn toward the guilty."¹⁵ Disturbed by this confrontation with an unidentified guilt, K. nevertheless rejects any attempt at "a quick solution in favor of . . . that certainty which the natural course of things would be bound to bring."¹⁶

From this point forward, K. moves toward his demise. Significantly, his arrest at no time results in physical imprisonment. He is merely told that he "has a trial." He is never informed of the charge against him, nor given any opportunity to address his accusers. Thus confronted, K. becomes obsessed with clearing his name. His attempts to do so comprise the body of the novel. On his thirty-first birthday, exactly one year after his arrest, K. is led out into the street and executed. The novel ends.

At the novel's inception, Joseph K. is arguably a modern day Everyman. He has enough to eat, a place to sleep, and regular, if passionless, sexual relations. Beyond a mild desire for personal social advancement, he is content. Insofar as it jars him out of this perfectly mundane existence (so familiar to the 1980's), K.'s arrest is as much a blessing as a curse. Normally, one who does not choose to undertake self-examination is left in whatever peace resides in an unexamined life. K., however, is forced to question his own existence. His trial reveals the emptiness of that existence. By demanding that K. reflect upon the meaning of his being, his accusers paradoxically grace him with the opportunity to choose life over death.¹⁷

The paradox is completely lost on K. He is asked to examine himself and discover a reason for guilt in his life,¹⁸ and fails miserably. Having never taken responsibility for his own development, K. is almost entirely a product of the world around him. He attempts to

¹⁵ *Id.* at 10.

¹⁶ *Id.* at 11. K's reaction makes clear that, as critic James Rolleston observes, he has been "caught in the middle of an unreflecting life." ROLLESTON, *KAFKA'S NARRATIVE THEATER* 75 (1974). Rolleston also suggests that, at the time of K's arrest, he "is somewhat detached from his own life, that he goes along with the values of society because he has nothing to put in their place. . . ." *Id.* at 73.

¹⁷ Professor Walter Sokel takes the view that as "the self that is to be examined is living and continuous and constantly adds new acts and aspects to itself during the very process of self-evaluation . . . [o]nly death can put an end to the process that is the trial." Sokel, *Oedipal and Existential Meanings of The Trial*, in *ON KAFKA: SEMI-CENTENARY PERSPECTIVES* 2,5 (1976). In this sense, however, every examined life is a trial. It is K's failure to appreciate the positive connotations of self-confrontation that makes him shrink from the responsibilities inherent therein.

¹⁸ See generally Sokel, *supra* note 17. Professor Sokel deals extensively with the question of guilt in *THE TRIAL*.

force a confrontation with his accusers because his existence depends upon an external view of himself. When K.'s world turns against him, his life becomes a fruitless search for affirmation.

K.'s reaction to his trial reflects Kafka's dark view of humanity. K. cannot heed an explicit life or death command to confront himself and develop an individual identity. As he descends into death, his groping nonexistence is set against the experience of those he encounters. Most notably, K. meets a man who tells him, "I am here to whip people; and whip them I shall."¹⁹ Unquestioning and value neutral, the whipper embodies the horror of abdicating self-identification in favor of external definition. Through this character, one critic notes, "Kafka . . . shows a man's profession as his exclusive mode of existence, and man as completely swallowed up by it."²⁰ The whipper derives his meaning from an external perception of himself. He can no longer exist apart from his role as whipper.

Ironically, K. is disturbed by the whipper's blind devotion to his profession. He fails to see in the whipper a mirror image of himself, devoid of a self-realized identity. One of the keys to *The Trial* is K.'s failure to appreciate his own absolute dependence upon an external perception of himself. Tragically, he has successfully repressed any desire to reach beyond the confines of his immediate existence. He has acquiesced to a life predicated upon his perception of what society expects of him. He has never confronted himself and examined his being and its significance—or insignificance.

Max Brod, Kafka's close friend and confidant, described the author's "fundamental principle: pity for mankind that finds it so hard a task to do what is right."²¹ K. is a fitting object of such pity. Arbitrarily put on trial, he accepts the role ascribed to him and becomes determined to prove his innocence. Unable to see that "[i]nnocence is an inner certainty which is not in need of external confron-

¹⁹ F. KAFKA, *supra* note 5, at 107.

²⁰ G. ANDERS, *FRANZ KAFKA* 48 (1960). Professor Anders continues: [W]hat a man "really" is—the question despairingly asked by existentialism—Kafka neither asks or answers, simply because there is no room for this "real" person in the "professional" world he describes. *Imperator somnians imperator*: the emperor is emperor even while he sleeps. Kafka makes this identification of man and profession in the modern world absurdly obvious, by inventing absurd professions; but the point is no less true—it only does not strike us as abnormal—in the case of everyday professions. . . .

Id.

²¹ M. BROD, *FRANZ KAFKA* 180 (1960). Brod does not suggest that Kafka had or believed that he had an absolute sense of that which was *right*. Rather, he describes Kafka's pity for mankind as a "half-smiling, half-weeping pity. Not the fulminating excommunication of the 'theology of the crises' which knows so exactly when mankind has gone wrong." *Id.* In fact, Brod attests to the fact that "Kafka's demands on himself were the most severe." *Id.*

tation,"²² K. fails to appreciate his power to reject the trial and live as he chooses to live. Therefore, he willingly takes up his cross and carries it to his unhappy death.

Toward the novel's end, K. encounters a priest who offers a parable which reveals the meaning of the trial.

[B]efore the Law stands a doorkeeper. To this doorkeeper there comes a man from the country who begs for admittance to the Law. But the doorkeeper says that he cannot admit the man at the moment. The man, on reflection, asks if he will be allowed, then, to enter later. "It is possible," answers the doorkeeper, "but not at this moment. . . ."²³

Although the man from the country did not anticipate such difficulty in gaining admittance to the Law, which, "he thinks, should be accessible to every man . . . at all times, . . . he decides that he had better wait until he gets permission to enter."²⁴ His wait stretches on "for days and years."²⁵

He makes many attempts to be allowed in and wearies the doorkeeper with his importunity. . . . In the first years he curses his evil fate aloud; later, as he grows old, he only mutters to himself. . . . Before he dies all that he has experienced during the whole time of his sojourn condenses in his mind into one question. . . . He beckons the doorkeeper, "What do you want to know now?" asks the doorkeeper, "you are insatiable." "Everyone strives to attain the Law," answers the man, "how does it come about, then, that in all these years no one has come seeking admittance but me?" The doorkeeper perceives that the man is nearing his end, so he bellows in his ear: "No one but you could gain admittance through this door, since this door was intended for you. I am now going to shut it. . . ."²⁶

K. immediately concludes that the doorkeeper deceived the man in that he "gave the message of salvation to the man only when it could no longer help him."²⁷

"He was not asked the question any earlier," said the priest, "and you must consider, too, that he was only a doorkeeper, and as such fulfilled his duty." "What makes you think he fulfilled his duty?"

²² Sokel, *supra* note 17, at 11.

²³ F. KAFKA, *supra* note 4, at 267.

²⁴ *Id.* at 268.

²⁵ *Id.*

²⁶ *Id.* at 268-69.

²⁷ *Id.* at 269-70.

asked K. . . . His duty might have been to keep all strangers away, but this man, for whom the door was intended, should have been let in. . . ."²⁸

The priest's lesson is in many ways the message of *The Trial*. The Law is a metaphor for that which human beings seek to attain:²⁹ enlightenment, happiness, peace, and ultimately, salvation. In an indifferent world, each individual bears the responsibility for his own self-development. Abdication of this responsibility invites damnation. One who cannot look inward cannot realize the full potential of his own being. The man from the country never gains admission to the Law precisely because he waits for the Law to admit him.³⁰

K.'s misinterpretation of the parable underscores his fundamental flaw: a persistent faith in "that certainty which the natural course of things was bound to bring."³¹ His belief in the man's undeniable right to enter the Law mirrors his belief in his own undeniable right to freedom. He fails to perceive the individual's responsibility to decide what is to become of himself, and to make choices in accord with that decision. Just as the man from the country seeks an external mandate of admission to the Law, K. seeks an external mandate of innocence. Like the man, K. never grasps the need to look inward for direction. Nevertheless, K. fails to recognize the man as a horrible caricature of himself, frozen on the brink of true being.

Also like the man from the country, K. never realizes that he must build his own road to freedom. He refuses to forego his illusory sense of balance in the universe, although his trial demands that he do

²⁸ *Id.* at 270.

²⁹ See Sokel, *supra* note 17, at 15. See also *infra* note 30.

³⁰ According to Professor Sokel:

Entrance into the law is possible only at a definite, unique moment, which the man allows to pass by unused. The unique moment is linked to the unique individual for whom alone this entrance is destined. Uniqueness of moment and uniqueness of person are united in the free decision that is necessary to enter the law. No one else can make the man's entrance possible since it is his alone, and the one single moment for it must be seized by him who is to enter. If the doorkeeper were to grant the entrance, it would not be the man's entrance. It would be a gift bestowed on him by another or it would be a general right belonging to anyone and everyone. Furthermore, the entrance can truly belong to the man alone only if it results from his own free decision. Given the absolutely individual nature of the entrance, the man must lose it from the moment he fails to choose it. We are reminded of Kierkegaard's FEAR AND TREMBLING in which the individual's relation to the Absolute—in terms of Kafka's parable "the law," i.e., that which everyone strives for—can only be individual, i.e., completely and utterly unique.

Id.

³¹ See F. KAFKA, *supra* note 5, at 11; see also *supra* note 16.

so. Unlike most individuals, who are free to choose the path of least resistance, K. is forced to examine his individual being. His trial denies him his comfortable niche in society. K. is asked to determine where he truly fits in—that place at which he will be in harmony with the world. He is asked to confront himself and ascertain his real identity.

In the last analysis, K. has so fully internalized the messages of the external forces in his life that he cannot be jarred into self-realization. At the novel's end, he is dragged out and killed "[l]ike a dog!,"³² still certain there were "arguments in his favor that had been overlooked."³³ K. simply missed the point.

One critic recently observed, "Kafka's work is so specific on the surface, and so cryptic underneath, that it can serve any interpreter."³⁴ Moreover, *The Trial* is a work of multidimensional richness. The foregoing interpretation does not purport to be the definitive reading of this literary masterpiece. It merely highlights three characters—Joseph K., and through him the whipper and the man from the country. The experiences of these three characters convey a symbolic message for lawyers and law students.

K. was being pulled along by the current of life when he was waylaid by the trial. His vain search for a rational explanation then became the focal point of his existence. The whipper knew only blind devotion to his mechanical task. The man from the country spent his life waiting to be saved. In attempting to discern the meaning of these characters, it must be noted that Kafka's legacy lies not in solutions offered, but in questions presented.³⁵ The reader does not leave knowing more; he leaves with a better sense of all that remains to be known. In *The Trial*, Kafka gives no prescription for avoiding the unhappy fate of either K., the whipper, or the man from the country. While the reader is tempted to dismiss this as a function of the author's own unhappiness, it may be that Kafka's inability to fashion a formula for the world's sorrow was more the cause than the result of his pain.

Whatever the reason, insofar as *The Trial* depicts the failure of individuals to take responsibility for their own destinies, it is fitting that it offers no explicit answers. Individuals must identify their own values, and take responsibility for the implementation of these values.

³² F. KAFKA, *supra* note 5, at 286.

³³ *Id.*

³⁴ Kantor, *The Malady Was Life Itself* (Book Review), *Time*, July 18, 1983, at 64.

³⁵ Henel, *The Legend of the Doorkeeper*, in *TWENTIETH CENTURY INTERPRETATIONS OF THE TRIAL* 48 (1976).

For the law student, living up to this responsibility involves incorporating a knowledge of the law into a carefully developed value structure. For the attorney, it involves practicing or teaching law not as a trade, but as a principled profession rooted in sound theory and committed to public service.

If attorneys are to occupy a highly respected social position, they must conduct the profession with respect, both for one another and for the society they serve. Perhaps most important, each attorney must faithfully adhere to his own conception of right and wrong. If, as Holmes believed, one "may live greatly in the law as well as elsewhere,"³⁶ professional responsibility must begin with the self.

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³⁶ O.W. HOLMES, *The Profession of the Law*, in SPEECHES BY OLIVER WENDELL HOLMES 22 (1913).