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# How To Respond To Legal Positivism In The Trial By Franz Kafka

## Introduction

In *The Trial* by Franz Kafka uses visual and spatial imagery to place his readers in the shoes of Joseph K. (K.), who represents the people as a whole, who are constantly the subjects of the Court, which is a paradoxical mix of machinery and human – quite out of reach, but also very domestic. Kafka ultimately exposes the limits of the Legal Positivism and Rule of Law, which is manifested in the absurdity of judiciary and the legal system– authoritative, elusive, confusing, sometimes unjust. We therefore have the obligation to ourselves to resist laws that fail to serve justice. However, no matter how much we try to defy it, we, its subjects, cannot escape the Rule of Law. [1: Franz Kafka, *The Trial* (1925).]

This paper is in two parts: First is Kafka's description of the current legal system is, which is predominantly positivist, as represented by *The Trial*'s judiciary and legal system. Second, how Kafka thinks legal subjects should respond to the oppressive structure of the legal system.

## The Judiciary

Our protagonist is Joseph K., although he is mostly referred to as simply K. throughout the novel. His first name is only mentioned after several pages, after deliberately establishing in the mind of the reader this character's lack of concrete identity. Neither were his physical characteristics, save for being a male, nor habits described. The reader is therefore forced to imagine his own version of K, aside from the usual coat and hat – and in the process associating himself (the reader) to the protagonist. Kafka through his deliberate omission, made sure that the reader finds himself thrown in the story as K., who is intentionally a hallow character, because we soon realize that K. is us, the people.

The others, however, are even more static than K. In fact, all characters are so gloomily and negatively shaped, and this is shown since the beginning of the novel. Even Mrs. Grubach, the supposedly sweet and sensible old lady-lessor, introduced herself as the person who let strangers into the rooms of both K. while he was asleep, and Ms. Burstner while she was away. The policemen were immediately shown to us as clueless, greedy, and lame excuses of authority who knew nothing about their job aside from the fact that they were to arrest people. The bank employees, whom we expect to be respectful of others' property, help themselves disarranging the photos of Ms. Burstner. The examining judge is caught reading inappropriate materials instead of law books.

The men are presented as lust-driven and the women, who seem to only find stability by depending on the men, permit it.

It is evident that Kafka wanted to make sure that his characters immediately set the mood for the readers – negative, oppressive, and reluctant. In fact, he begins his entire novel with a person doing another person wrong: "Someone must have been telling lies about Joseph K."

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The characters probably play the most important role in the novel – more than the mysterious organization of the Court – as they represent both the human and non-human aspect of the same.

## **The Judiciary as the Gears of Law**

An ever-working machine. During a conversation with Elsa, the Court Clerk's wife, K. mentions that the court judges and employees are probably lazy – to which Elsa asserts the contrary. In fact, the judges spend daylight to midnight working on endless reports: "...see how exceptionally seriously (sic) these gentlemen take their professions and how they are thrown into great confusion by difficulties which it's just not in their natures to overcome...". She remarks that it seems impossible to ever finish the workload of members of the court.

Persons directly involved with the Court, such as judges, clerks, and law students are also described to be almost identical with their long beards which, they all seem to enjoy playing with, and their badges, which made K. realize that these people belong to the same organization. In fact, Kafka only bothered to describe the court members with respect to their court positions, daily routines, and their closely identical facial hair. The narrator itself does not bother to give them names, leaving that task to the characters themselves who occasionally mention the names to K. This lack of physical description in the part of the author, matched with anonymity of these persons only make them seem more like robots than human.

Officials indirectly involved with the court are also portrayed as clueless, mindless puppets of authority – which K. refers to as the "Organization; I give it a capital O to distinguish it from other groups of people, which I will explain later" – When K. asked the policemen and the supervisor about the details of his arrest, they could give no proper reply, only having to say that they were tasked to arrest K.

Like machines, a Court heats up when it is overworked – which is always. When K. went to see how the Court offices look like with the company of the Clerk, he is shocked to find himself significantly weakened by the oppressive atmosphere. Through Kafka's skillful use of sensual imagery, the reader is forced into vertigo as K. tries to traverse that labyrinth of building that is the Court office (in a very old apartment of the poorest of the poor, too). K. remarks how he thought he was used to office-air in his work at the bank, until his experience in the Court offices, which proves to be several times more taxing. What is more notable, however, is how the employees have adapted to such surroundings.

Domiciliary and elusive. Kafka's strategic use of imagery goes beyond mere aesthetics. Let us first discuss sensual imagery. As mentioned, the readers are effectively thrown into the story by Kafka, letting them experience K.'s surroundings "first-hand". Through this, the readers are able to feel the oppressive atmosphere of the story, especially the Court.

Kafka, however, goes beyond conventional narration by twisting the novel around, geographically. K throughout the novel often finds himself in labyrinths as he searches for the court and its offices in domestic spaces with which we are quite familiar, but not, but not spaces where we would expect the judiciary – poor communities, unmaintained apartments, private spaces such as homes and rooms of private individuals, etc. By placing the judiciary in the most absurd places, Kafka puts K. and the readers in constant uncertainty and disorientation. This

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shows us two things about the Law (and the Court): first, the Court is domestic but elusive; and second, everything belongs to the Court[footnoteRef:2]. [2: Roberto Buonamano, *Kafka and Legal Critique* (2016).]

Omnipresent, omniscient and omnipotent. In the novel, basically all attics hold court offices. It is so close to our homes, yet K. (and the readers) are left in a labyrinth in finding it. When it is found, we are left confused, thanks to Kafka's effective method of taking us to endless mental paths and spaces. As a result, it is difficult to determine which places belong to the courts, and which do not. By analogy, it is difficult to determine which aspects of life and living belong to the realm of law[footnoteRef:3]. This is best manifested through K.'s telling the arresting officers that he is not aware of his act that lead to his arrest, nor of any law that he violated. Only the elusive, omnipotent, all-powerful organization that is the (or behind the) Judiciary knows of such. [3: Buonamano, *supra*.]

This closely reflects our legal system where the Judiciary is the authority that determines what law is. The legislature serves to write the law, but in case of ambiguity and disagreement, the Judiciary has the last say. Its interpretation therefore becomes our command as the last main source of law[footnoteRef:4]. [4: John Austin, *The Province of Jurisprudence Determined* (1832).]

When K. becomes hauntingly aware of the Judiciary tailing him, his life becomes even more enwrapped by it – he attempts in vain to maintain some separation of his private and business life from official proceedings, whereas the court penetrates all aspects of his daily existence, and the law. As Agamben[footnoteRef:5] says, the K.'s body becomes the trial – I see this as K. realizing that he himself belongs to the Court, despite his struggle of defying and insulting it in its own face. [5: Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (Stanford University Press, 1998). ]

## **The Judiciary as the Heart of Law**

On one hand, the Court appears to be a homogenous organization of persons in uniformity and subjection; On the other hand, individual members are very much human, showing that the judiciary may not be as coldly independent.

Relational influences. To the court members, having friendly relations with other people is just as important, yet they are aware of the fact that they do indeed appear detached from society merely by working in the court offices.

I don't suppose any of us is hard-hearted, perhaps we'd all like to be helpful, but working for the court offices it's easy for us to give the impression we are hard-hearted and don't want to help anyone. It makes me quite sad. – Court employee to K.

This is perhaps the result of the Court's, as the administrator of justice having to keep distance from society in order to maintain objectivity. It is natural for the judiciary to give such impression considering that, in adverse proceedings, it is inevitable to make decisions disfavoring one of the parties. Those uninvolved with the case also may not agree with Court decisions. They are also quite literally confined to their officer, having to work both within and outside of office hours to finish endless paperwork. We therefore see how Court members try to make a good

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impression with others, and this is shown in their manner of dealing with litigants, their fellow officers and employees, and Titorelli's paintings that they commission to make them look bigger and fuller.

K. realizes that he needs to form such relations to increase his chances of winning in the trial. It seems, however, that he is one of the very few people who do not have such connections – even the mere painter, the poor tenants, and his old uncle know some people from the Court.

Corrupt. Kafka forces the readers into a 3-dimensional experience of the Court's many flaws. Titorelli's inaccurate paintings portray the judges in flamboyant ways – fancy clothing, exaggerated physical features, and enhanced authoritativeness. In reality, however, their law books are pornographic materials, wives are objects of desire, law enforcers are underdogs who have no understanding of the law, courtrooms are attics and private persons' homes, and other absurdities.

One might wonder why the Courts are in the most unexpected of places. Perhaps they wish to be as close to the community as possible; however, it is more plausible that Judiciary is in a state of poverty, or that the officials have simply gotten the funds for themselves.

The court officers are mentally and atmospherically oppressive, with people who are not familiar with the system, such as K., finding themselves weakened upon entering, until they get accustomed:

Sun burns down on the roof and the hot wood makes the air so thick and heavy. It makes this place rather unsuitable for offices, whatever other advantages it might offer. But the air is almost impossible to breathe on days when there's a lot of business, and that's almost every day. And when you think that there's a lot of washing put out to dry here as well - and we can't stop the tenants doing that. – Kafka, 1971<sup>[footnoteRef:6]</sup> [6: Kafka, *supra*.]

## **The Legal System**

Much of the theoretical criticism is about the legal system. For Kafka, the legal system and is absurd – authoritative, elusive, confusing, sometimes unjust, and no matter how much we try to defy it, we, its subjects, somehow remain subservient to it. The Trial is an elaborate sketch of what the legal system really is according to Kafka – the rule of law, and why we should be wary of it.

### **Critique on the Legal System**

Due process. Kafka gives the readers a full view of legal oppression and lawlessness. The accused in his fictional world are forced to surrender themselves, and instead of being protected by a just government, the government itself throws the people into an unjust situation. No social contract is formed, and if one is indeed formed, it is simply breached by authorities.

None of the characters knew much about his case and arrest, except maybe for the highest Court and justices. K. himself remarks about the Court's indifference to his case when it fails to provide K. with proper dates and venues for hearings. The trial would not be public; if the court deems it necessary it can be made public but there is no law that says it has to be. Ultimately,

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there is virtually no actual trial or proceedings, no Miranda rights, not even a proper arrest because there is no real defense, which is unfortunate because the defense often determines the whole course of the proceedings – sometimes it is not even read by the courts. Court records and case statuses are also generally kept hidden both from the public and the accused. Hence the lawyers and counsels are given no choice but to employ wrongful means to make a proper defense through bribery to extract information from the staff who are also incompetent as to forget their duty of fidelity to the Court.

Self-accusation. What is more striking, however, is the in the first place, The Trial begins with an accusation whose accuser is never revealed. Agamben<sup>[footnoteRef:7]</sup> (cited by Buonamano) makes an interesting observation of the themes accusation and self-slander in the novel. Ben notes the Roman criminal procedure of branding the letter “K” (for Kalumniator) on the forehead of a person who makes a false accusation. That person is to be tried before the same tribunal which also tried the person he has accused. It is evident that K. represents the Kalumniator, best shown when K. found the arresting officers being whipped as a result of K.’s complaint against them for trying to take his property. He becomes both a subject and accuser. [7: Giorgio Agamben, *Nudities* (Stanford University Press, 2011).]

K. also seems to have unwittingly branded himself as guilty when, despite being certain that he has done nothing wrong to upset the law, K, allows the trial to consume him, therefor legitimizing his own accusation. For instance, he found himself unable to separate his professional and personal life from the trial; when he was not given details about his first hearing, he came as early as possible, and even came to the courts even though he was not informed of his second hearing. In fact, it appears that it was K. himself who ran the trial: During his hearings, the judges and jury (audience) barely spoke – it was him who gave a speech without even being prompted to do so; K., although he had a lawyer, represented himself; He summoned and presented himself before the Courts, etc. K.’s entire trial is a presumption of guilt imposed upon him, which he allowed, nonetheless, and is the only thing that keeps him away from the blade.

The accusation is, all at the same time, the causa, the legal process, and the indictment of the K.’s trial<sup>[footnoteRef:8]</sup>. [8: Agamben 2011, *supra*.]

How then does Kafka resolves the absurdity of K.’s trial and, ultimately, the point of The Trial itself? He resolves this through legal positivism and rule of law.

## Legal Positivism

Modern scholars argue about whether the law and morality are distinct from one another, and whether one or the other is the true source of law. For some, jurisprudence may also be understood in the cultural context of what the majority considers moral. Nevertheless, for Kafka, that single Authority (for which I use a capital A) determines what law is, regardless of where said Authority pulled it out of. It should be clarified that Kafka, in The Trial, is not concerned about the influence of the law makers’ sense of morality upon our laws. He is mainly concerned about how we, the subjects of law, should respond to the laws laid down by Authority.

Authority. Authority is an overwhelming element across Kafka’s novels, and K.’s character only establishes this further. He refuses to be subjected to the Court’s authority and challenges its

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legitimacy yet theorizes on the existence of an Organization – the greatest authority in the legal world. He also finds himself cornered by the halls of justice, allowing it to take over his life. He maintains this superficial defiance but obeys every imposition of such authoritative presence as he tries to deflect its effect upon him. This Authority, although it is never exposed, is simply inescapable.

K., in his diatribe before the examining judge when he first appeared in Court, remarks that there is an Organization behind the Judiciary, which controls the legal system. This Organization is never really revealed by Kafka, and remains to be unknown, yet both K. and the readers feel that it exists, watching in victory as K. is executed with the blade. In this respect, there is parallelism between Kafka and Austin<sup>[footnoteRef:9]</sup>, the author of the Command Theory, which states that there is a supreme authority whose dictates become law, but whose identity is not known. According to Austin (1832), “All judge-made law is the creation of the sovereign or state,” and when they draw from social practices – customs – and codify them “into legal rules...the legal rules which emerge from the customs are tacit commands of the sovereign legislature. [9: Austin, *supra*.]

Hence the law does not have to be derived from morality to be considered legitimate or existing – this is a form of legal positivism. What the law says, the law is. K., in his legal rollercoaster acknowledges this, despite constantly trying to defy the Courts.

Rationality. It therefore remains a big question both to K. how such authoritative presence is so strongly felt, when K. himself questions the existence of this Authority (or Organization) that he conceptualized.

According to H. L. A. Hart<sup>[footnoteRef:10]</sup>, one of the most prominent positivism writers, morality has no role in Law, for unlike statements of facts, moral judgments cannot be established or defended through rational argument, evidence, or proof. If the Sovereign makes unjust, irrational laws, however, where no legal basis, rationale, nor procedure is made known to legal subjects, laws will still be accepted, because the Sovereign is the source of law and authority. Austin<sup>[footnoteRef:11]</sup>, too, makes the same argument when he says “The existence of law is one thing, its merit or demerit is another”. [10: H. L. A. Hart, *Positivism and the Separation of Law and Morals* (Harvard Law Review, 1958).] [11: Austin, *supra*.]

How does one, however, reconcile the established existence of a law or command when one has not even seen the commander?

K., dying from the blade in his execution, questions the existence of this judge that he has never seen – he once asked the Clerk where the presiding judge is, who is much higher than the examining judge – and the high Court which he never finds in this labyrinth of a legal system, which Kafka domesticizes and secludes at the same time. “The illusory nature of the court as an institution is raised as a possibility precisely at the moment when the farcical spectacle of the execution traverses the point beyond which logic can function, where K.’s assurance in the reliability of reason is lost”<sup>[footnoteRef:12]</sup>. [12: Buonamano, *supra*.]

Kafka now questions legal positivism – law has authority as its basis for positing law, but authority itself has no basis, resting upon no authority other than itself.

K.’s trial procedure itself is utterly irrational. The lower officers know nothing about the arrest

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aside from the fact that it was to be made; neither K. nor his lawyers were informed of the nature of the crime from which to derive a defense; the locations of the courts themselves seem misplaced. The people are, despite having relationships with members of the Court, are individually separated from the law, and are in constant state of illusion.

The doorkeeper, who is an agent of the law, holds an empty position, a place-holder. K. was not allowed to enter through the door which is precisely meant for him as the accused. In this regard, both legal subject and legal agent appear to be helpless before the law – they quite literally have no choice but to stand before the law. They have no choice but to surrender themselves to this invisible Authority despite its irrationality.

This is where Kafka departs from the Command Theory of Austin and Hart and shifts to Legal Realism. I find K's trial best explained by Holmes<sup>[footnoteRef:13]</sup> in his *The Path of Law*. According to Holmes, we must look at external actions, not internal intent, through the eyes of a bad person, to understand the law. K. does this as he attempts to find justification and escape from his conviction. He knows to himself that he has done nothing wrong yet acts as if he has already been convicted of guilt (recall Slander and Guilt). He is therefore driven by his prediction of what would happen if he were convicted as a bad man – ultimately, punishment is what pushes him to acknowledge the existence of the authority of law. [13: Oliver Wendell Holmes, *The Path of the Law* (1897)]

Holmes, like Kafka, also assert that law is not logical, not always rational, and not a set of historical and moral rights. Derrida<sup>[footnoteRef:14]</sup> supports this by stating that, “to be invested with its categorical authority, the law must be without history, genesis, or any possible derivation”. In other words, for us to fully acknowledge the authority of law, which definitely exists according to Command Theory, we must cease to question its roots. We must acknowledge law for law as it is, otherwise, we will remain in constant uncertainty on the reliability of law and reason, like what happened to K. With legal positivism, law's legitimacy is ultimately established by the fact of law being in force. We, the legal subjects as represented by K. only further affirm this through our subservience to law. The law is therefore immune from human scrutiny as to its foundation, which is shown when the priest tells K. that no one has the right to pass judgment upon the doorkeeper, the agent of law. This is how Kafka, through legal positivism, justifies legal authority. [14: Jacques Derrida, *Before the Law* in *Acts of Literature* (1992)]

Thus, while it can be said that history comes into the service of positive law, it does so as an aid to interpretation (and corresponding reification) rather than as a function of its derivation, since the law's claim to legitimacy is fundamentally ahistorical. – Buonamano, 2016

## **The Legal Subjects:**

### **How to Respond to the Legal System**

The legal system and the Rule of Law is an inescapable reality. It's totality – power, authority, irrationality, and absurdity – enwraps us, the legal subjects, constantly. To Kafka, however, we must remain alert and defy the injustices that the Rule of Law might bring notwithstanding its benefits to society.

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The Trial involves persons who are subservient to the oppressive legal system and judiciary, with little to no resistance at all. K. himself was ignorant of the realities of the law until he was arrested and forced to act. Indeed, laws enjoy presumption of validity, but for the ones that prove to be so unjust, it is our obligation to ourselves to resist such laws, even if subjection is certainly our ultimate end. He uses K. to portray the constant questioning expected from legal subjects despite their subservience.

In this regard, we may compare Kafka's philosophy with some naturalists and moralists, divine moralists, etc. since his work can be interpreted in so many ways – he uses very secular and indifferent characters, and then inserts a chaplain. For the purpose of this discussion, however, we focus on discussion on the Rule of Law and how Kafka believes in the obligation to defy legal oppression.

For one thing, Kafka's fiction features a sort of law that is not in accordance with justice and morality. According to Raz<sup>[footnoteRef:15]</sup> in *The Obligation to Obey*, it is improper that we obey the laws simply because it says to – because not all laws have a moral obligation attached to it. This moral obligation came before the existence of legal government. Therefore, using Kafka's dynamic characterization of K. who constantly questions the law despite subservience and imminent loss, Kafka wants the readers to not allow the continuance of an oppressive legal world similar to what he has painted for us in *The Trial* – “this is how it is, and this is how we should respond to it”. [15: Joseph Raz, *The Obligation to Obey* (1984).]

Kafka, in creating a High Court of supreme authority and power, and then giving a message of not letting this power consume the legal subject, did not contradict himself. By analogy with Raz, Raz's positivism does not in any way counter the Rule of Law, for according to him, the Rule of Law is not undermined if some individual fails to comply. The law would still prevail despite a person's defiance, since there will be consequences to such defiance. Regardless, it is still the obligation of the legal subject to fight against laws that do not make any attempt at justice<sup>[footnoteRef:16]</sup>. [16: *Id.* ]

My interpretation of Kafka should not be confused with the ideology of Aquinas<sup>[footnoteRef:17]</sup>, Plato<sup>[footnoteRef:18]</sup>, and Martin Luther King, Jr.<sup>[footnoteRef:19]</sup>. According to the first two, there are laws that may seem unjust, but must be obeyed for the sake of common good; for the latter, unjust laws should not be obeyed at all. In *The Trial*, however, it was evident that K., no despite initial defiance, could not escape the law. We, the legal subjects, may attempt to violate certain laws (including unjust ones), but this certainly does not mean that we can escape it. Violating laws only impose consequences that law itself created – penalty, branding as fugitive, etc. The law will work against us either way; nevertheless, we have the moral obligation to ourselves to resist laws that fail to serve justice. [17: Aquinas, *Summa Theologica*: “Laws can be unjust . . . by being contrary to the divine good, as are tyrannical laws that induce men to idolatry or to do anything else that is contrary to divine law. It is not permissible to obey such laws in any way at all” (I-II. Q96. A4); If in any point [human law] deflects from the law of nature, it is no longer a law but a perversion of law” (I-II. Q95. A2); unjust law is not a binding law (I-II. Q96. A4)] [18: Plato, *Crito* (translated by Cathal Woods and Ryan Pack, 360 BCE)] [19: Martin Luther King, Jr., *Letter from Birmingham Jail* (1963)]

## References



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1. Franz Kafka, *The Trial* (1925)
  2. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (Stanford University Press, 1998)
  3. Giorgio Agamben, *Nudities* (Stanford University Press, 2011).
  4. H. L. A. Hart, *Positivism and the Separation of Law and Morals* (Harvard Law Review, 1958)
  5. Jacques Derrida, *Before the Law in Acts of Literature* (1992)
  6. John Austin, *The Province of Jurisprudence Determined* (1832).
  7. Joseph Raz, *The Obligation to Obey* (1984)
  8. Martin Luther King, Jr., *Letter from Birmingham Jail* (1963)
  9. Oliver Wendell Holmes, *The Path of the Law* (1897)
  10. Plato, *Crito* (trans. Cathal Woods and Ryan Pack, 360 BCE)
  11. Roberto Buonamano, *Kafka and Legal Critique* (2016).
  12. Thomas Aquinas, *Summa Theologica*, (1920, 2nd, rev. ed., trans. Fathers of the English Dominican Province, New Advent, 2008)