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Ordeal by Trial: Judicial References to the Nightmare World of Franz Kafka

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Abstract

[Excerpt] "Franz Kafka's novel *The Trial* is firmly entrenched in the modern consciousness as an exemplar of judicial indifference to the most basic rights of citizens to understand the nature of criminal proceedings directed against them. Yet, Kafka was not mentioned in an American judicial opinion until forty years after his death in 1924. Since the mid 1970s, however, Kafka's name has appeared in more than 400 opinions written by American state and federal judges. Judges have used Kafka to criticize bureaucratic absurdity, unfair tribunals of all sorts, and even their own colleagues on the other side of an appellate decision, and to empathize with litigants. Some judges referring to Kafka have taken great pains to explain their understanding of Kafka and the application of his fiction to the case being decided, while others have exercised considerable creativity, linking Kafka to other literary figures such as George Orwell, using Kafka as a character in their opinions, or seeing the facts of a particular case as belonging in Kafka's fictional world. Kafka's name has such power that at least four lines of cases have coalesced around particularly well-phrased references to Kafka."

Keywords

literary, judicial, references, metaphor, Kafkaesque

Ordeal by Trial: Judicial References to the Nightmare World of Franz Kafka

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Franz Kafka's novel The Trial is firmly entrenched in the modern consciousness as an exemplar of judicial indifference to the most basic rights of citizens to understand the nature of criminal proceedings directed against them. Yet, Kafka was not mentioned in an American judicial opinion until forty years after his death in 1924. Since the mid 1970s, however, Kafka's name has appeared in more than 400 opinions written by American state and federal judges. Judges have used Kafka to criticize bureaucratic absurdity, unfair tribunals of all sorts, and even their own colleagues on the other side of an appellate decision, and to empathize with litigants. Some judges referring to Kafka have taken great pains to explain their understanding of Kafka and the application of his fiction to the case being decided, while others have exercised considerable creativity, linking Kafka to other literary figures such as George Orwell, using Kafka as a character in their opinions, or seeing the facts of a particular case as belonging in Kafka's fictional world. Kafka's name has such power that at least four lines of cases have coalesced around particularly well-phrased references to Kafka.

I. INTRODUCTION

Over the last twenty-five years, Franz Kafka's place in the American judicial canon has undergone a dramatic metamorphosis: once a seldom-cited popgun whose name rarely appeared in judicial opinions, Kafka has become a rhetorical howitzer.¹ To date, more than 400 judicial opinions contain references to the celebrated Czech author.² The first of those opin-

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1. Douglas E. Litowitz, *Franz Kafka's Outsider Jurisprudence*, 27 L. & Soc. Inquiry 103, 104 (2002) (citing Christine Bell, *Teaching Law as Kafkaesque*, in *In Tall Stories? Reading Law and Literature* 11 (John Morison & Christine Bell eds., Dartmouth Press 1996)) ("Kafka is already safely enconced in the 'canon' of law and literature.").

2. On March 12, 2004, a Westlaw search of the ALLCASES database using the search term "Kafka!" yielded an astonishing 961 hits. Even after filtering out cases in which the Kafka that triggered the hit was an attorney or a party, there remained well over 400 cases in which a writing judge referred to Franz Kafka the Czech author. (As for the Kafka hits not involving the author, in nearly 100

ions was written in 1963,³ nearly forty years after Kafka's death, and the tenth did not appear until 1972,⁴ but after that tentative beginning, judicial interest in Kafka picked up quickly and has continued unabated; since January 1, 2000, more than eighty judicial opinions containing references to Kafka have been issued by federal and state courts in the United States. This article surveys judicial references to Franz Kafka from 1963 to the present. Its basic purpose is to showcase those opinions in which judges have been particularly thoughtful or creative in their invocations of Kafka and his writing. In other words, my focus is more on striking legal writing than on profound legal or literary analysis.⁵ Thus, this article is like a scoop of tuna salad; I have written the mayonnaise that holds together a generous helping of judicial albacore. In addition to spotlighting sparkling writing, I cannot help but tell a few terrific tales; some of the real-world stories that have inspired judges to turn to Kafka demonstrate the adage that truth can sometimes be stranger than fiction.

Part II is a brief introduction to Kafka's life and literary work, from a legal perspective. Part III reviews the first ten judicial references to Kafka. Part IV examines some of the ways in which judges have referred to Kafka in their opinions. Part V explores four lines of cases, each of which features the same felicitously phrased reference to Kafka.

cases from 1952 through 1982, a party was represented by attorney Anne G. Kafka, first of New York City, later of Mineola, and finally, of Patchogue. The next most prolific Kafka attorney, Gerald A., has been the attorney in a mere twenty-six reported cases.)

While a detailed geographical analysis of judicial references to Kafka lies beyond the scope of this article, several trends deserve brief mention. Of the dozens of federal and state courts that have issued opinions containing references to Kafka, none has been more prolific than the California Court of Appeals which has published more than twenty-five Kafka opinions, authored by nearly twenty different justices. The Connecticut Court of Appeals runs a distant second, with an even dozen Kafka opinions, all in a single line of cases (*see infra* pt. V(C)). The New York Supreme Court checks in next, with eleven Kafka opinions. (However, when considered in sum, the lower courts of New York (the Supreme Court, the Supreme Court Appellate Division, the Family Court, the New York City Civil Court, and the Surrogate's Court) account for a total of twenty Kafka references). Among state supreme courts, California is the clear Kafka leader, with ten opinions. On the federal side, the Southern District of New York leads the way, with twenty Kafka opinions, written by nineteen different judges. The District of Columbia is second, with fifteen Kafka opinions by eight judges, followed by the Northern District of Illinois, with ten Kafka opinions by six judges. (And the Bankruptcy Court for the Northern District of Illinois has contributed another seven Kafka opinions, by only three judges. *See infra* pt. V(B)). In the Circuits, the D.C. Circuit heads the list with seventeen Kafka opinions by twelve judges, followed by the Second Circuit, with sixteen opinions by thirteen judges, and the Ninth Circuit, with fourteen opinions by twelve judges. While it seems understandable that Kafka is big in Washington, New York, and Chicago, it is somewhat surprising, if not alarming, that he has found so much favor in the Golden State.

3. *U.S. v. Hughes*, 223 F. Supp. 447 (S.D.N.Y. 1963). It is not surprising that the first reported opinion with a reference to Kafka was written by a judge from the Southern District of New York, given that court's history of prolific Kafka citation.

4. *State v. Blake*, 495 P.2d 905, 909 (Kan. 1972).

5. For a more analytical view of judicial uses of Kafka, *see* Scott Finet, *Franz Kafka's Trial as Symbol in Judicial Opinions*, 12 Leg. Stud. Forum 23 (1988).

II. FROM KAFKA TO KAFKAESQUE

Franz Kafka was born in 1883⁶ and was a lifelong resident of Prague,⁷ where he died of tuberculosis in 1924, one month shy of his forty-first birthday.⁸ After a brief attempt at studying chemistry at the Royal and Imperial German Karl-Ferdinand University in Prague,⁹ Kafka switched from chemistry to law, “completed the eight-semester program in due course and received his doctorate in law on June 18, 1906, at the age of twenty-two.”¹⁰ After receiving his degree, Kafka accepted a non-legal position with an insurance company,¹¹ and within months, he embarked on a fourteen-year career as “an attorney for the state agency responsible for administering the workers’ compensation scheme in Prague,”¹² known as the Workers Accident Insurance Institute for the Kingdom of Bohemia.¹³ Kafka retired from the Institute in 1922 on disability, and died two years later.¹⁴

While Kafka toiled by day at the Institute, he wrote in the afternoons and evenings, often long into the night.¹⁵ He “holds a special fascination for legal scholars because he was a practicing lawyer who often wrote about law and legal systems.”¹⁶ Among Kafka’s most important works on legal subjects are his novel, *The Trial*, and his short story, “In the Penal Colony.”¹⁷ *The Trial* “is the story of the arrest, trial, and execution of Josef K., the chief clerk of a large bank, who never learns the nature of the charges leveled against him nor the identity of the accusatory body.”¹⁸ “In the Penal Colony” recounts an explorer’s visit to a tropical penal colony to witness an execution carried out with an apparatus called “the harrow,” which used needles to physically engrave a convicted person’s sentence onto his or her body over the course of twelve hours.¹⁹

6. *Bartlett’s Familiar Quotations* 700 (Justin Kaplan, ed., 17th ed., Little, Brown & Co. 2002).

7. Litowitz, *supra* n. 1, at 106.

8. *Id.* at 109.

9. *Id.* at 108; Samuel Wolff & Kenneth Rivkin, *The Legal Education of Franz Kafka*, 22 *Colum.-VLA J.L. & Arts* 407, 407 (1998).

10. Wolff & Rivkin, *supra* n. 9, at 408.

11. Litowitz, *supra* n. 1, at 106. In *City of Burlington v. Indemnity Insurance Co.*, 332 F.3d 38, 48 n. 8 (2d Cir. 2003), Judge Calabresi noted that it should not be assumed that “insurance policy writers [do not] spend their evenings contemplating quantum mechanics or, for that matter, Shakespeare . . . given such distinguished toilers in the insurance industry as Franz Kafka, Charles Ives, Wallace Stevens and Benjamin Whorf.”

12. Litowitz, *supra* n. 1, at 104 (citations omitted).

13. *Id.* at 109.

14. *Id.*

15. Wolff & Rivkin, *supra* n. 9, at 411 (citing Ernst Pawel, *The Nightmare of Reason* 270 (1984)).

16. Litowitz, *supra* n. 1, at 104.

17. *See generally id.* at 115-27.

18. *Id.* at 117.

19. *Id.* at 122.

Relatively few of Kafka's works were published before his death,²⁰ thus both publication and fame came to him posthumously.²¹ Kafka, however, has grown into "an important cultural icon,"²² and now, eighty years after his death, he "is widely recognized throughout Western culture as a 'representative man' who captured the anxieties of the modern age and heralded the emergence of postmodernism."²³ Substantively, Kafka is known for "his harrowing portraits of legal outsiders,"²⁴ "victims who seek the law as if it were a symbol of protection, order, and acceptance"²⁵ but who are sent "shuffling between doorkeepers and administrators"²⁶ in "an exhausting process of endless delay"²⁷ only to find "that the law is a disappointing mess of elusive rules endlessly administered by petty bureaucrats."²⁸ Kafka's vivid portrayals of faceless, absurd bureaucratic institutions have resonated so deeply that his name has become an adjective, "Kafkaesque," which has been defined as "marked by surreal distortion and often a sense of impending danger"²⁹ and as "refer[ring] to the terrible and absurd power of nameless, inscrutable bureaucracies."³⁰ With respect to proper usage of the term,

the noted poet and critic W.H. Auden [once] said, "Sometimes in real life one meets a character and thinks, 'This man comes straight out of Shakespeare or Dickens,' but nobody ever met a Kafka character. On the other hand, one can have experiences which one recognizes as Kafkaesque, while one would never call an experience of one's own Dickensian or Shakespearian."³¹

20. *Id.* at 115.

21. Wolff & Rivkin, *supra* n. 9, at 412.

22. Litowitz, *supra* n. 1, at 103.

23. *Id.* at 104.

24. *Id.*

25. *Id.* at 106.

26. *Id.*

27. *Id.*

28. *Id.*

29. *The American Heritage Dictionary of the English Language* 952 (4th ed., Houghton Mifflin Co. 2000).

30. Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 *Stan. L. Rev.* 39, 56 n. 65 (1994) (citing Franz Kafka, *The Trial* (Willa & Edwin Muir trans., 1992) ("A detached observer might sometimes fancy that the whole case had been forgotten No one really acquainted with the Court would think such a thing. No document is ever lost, the Court never forgets anything.")).

31. Litowitz, *supra* n. 1, at 128 (quoting W.H. Auden, *The Dyer's Hand and Other Essays* 160 (Random House 1956)).

Not only has Kafka entered the popular consciousness, his works have been cited by hundreds of judges.³² Kafka did not have an immediate impact on the American judiciary; the first judicial citation of Kafka came nearly four decades after his death. Only three more references to Kafka appeared in the 1960s. The 1970s saw forty-two more. That number more than tripled in the 1980s, when 142 judicial opinions referred to Franz Kafka.³³ The trend continued in the 1990s with 161 more judicial references to Kafka. And, as noted above, the first decade of the twenty-first century is off to a fast start; no fewer than eighty-five judicial opinions have mentioned Franz Kafka since January 1, 2000. Perhaps more interestingly, of the approximately 430 Kafka references I have identified, more than 300 use the adjective Kafkaesque while another dozen or so use the adjective “Kafka-like.”³⁴

32. Kafka is so well-ingrained in the contemporary consciousness that fewer than ten percent of the judicial opinions that refer to Kafka actually provide a formal citation to one of his novels or short stories.

33. By the late 1980s, judicial invocations of Kafka had become widespread enough to inspire academic comment. See e.g. Finet, *supra* n. 5.

34. Extensive use of the word “Kafkaesque” is in keeping with another trend: of Kafka’s works, the most heavily cited, by far, is his novel *The Trial*, which is, in all likelihood, the work that inspired some wordsmith to coin the adjective form of Kafka’s name.

According to my survey, Kafka’s short story “The Metamorphosis” has been referred to four times. *U.S. v. Arboleda*, 633 F.2d 985, 990 (2d Cir. 1980) (“If, as the dissent suggests, there is anything ‘Kafkaesque’ about this case it is the complete ‘metamorphosis’ in appellant’s legal argument between trial and appeal a change so great as to make it questionable whether Arboleda should even be heard on the contention with respect to the illegality of Bisbee’s presence on the ledge that is now mainly pressed.”); *Wassell v. Adams*, 865 F.2d 849, 852 (7th Cir. 1989) (“Susan Wassell’s counsel argues that the jury’s verdict ‘reflected a chastened, hardened, urban mentality – that lurking behind every door is evil and danger, even if the guest is from a small town unfamiliar with the area.’ He takes umbrage at the defendants’ argument that Susan’s ‘antennae’ should have been alerted when she didn’t see anyone through the peephole. He rejects the metaphor, remarking unexceptionably that human beings do not have antennae and that this case is not a Kafka story about a person who turned into an insect (i.e., is not *The Metamorphosis*).”); *Glenn v. Sec. of HHS*, 814 F.2d 387, 391 (7th Cir. 1987) (“The regulations provide some guidance in performing this unavoidably arbitrary task of classification. They make clear that to be deemed literate you need only be able to read and write well enough to be able to hold simple, unskilled jobs. This is not everyone’s idea of literacy; it would not satisfy the distinguished literary critic who said that ‘He who has read Kafka’s *Metamorphosis* [the story about a man who wakes up one morning to find that he’s a giant bug] and can look into his mirror unflinching may technically be able to read print, but is illiterate in the only sense that matters.’”) (quoting George Steiner, *Literacy*, in *Language and Silence: Essays on Language, Literature, and the Inhuman* 3, 11 (1974)); *Wertz v. U.S.*, 51 Fed. Cl. 443, 449 (Fed. Cl. 2002) (“But, there is no indication, either in the statute or its legislative history, that Congress intended the late filing of a tax return to have such a Kafkaesque metamorphic impact.”).

Kafka’s novel *The Castle* has been referred to three times. *Grant Ctr. Hosp. v. Health Group of Jackson, Inc.*, 528 So. 2d 804, 809 (Miss. 1988) (“Grant Center argues that this phrase [‘the most current state health plan’] must necessarily mean the most current state health plan in effect at the time the proposal is submitted or else delays in the administrative process would mire applicants in a kafkaesque struggle to reach an ever receding castle – this particularly where there is opposition and judicial review and where state plans are revised more frequently than applications may be processed.”); *Nitti v. Credit Bureau of Rochester, Inc.*, 375 N.Y.S.2d 817, 822 (N.Y. Sup. Ct. Monroe County 1975) (“Time and again plaintiff came to the defendant’s office and went over the same credit

III. THE FIRST TEN KAFKA REFERENCES

In 2005, a judicial reference to Franz Kafka hardly causes a blip on the “law and literature” radar screen. But in the 1960s and 70s, such references were on the cutting edge. This section focuses on ten pioneering opinions that established the Kafka beachhead in American judicial writing.

On December 12, 1960, Paul Hughes pled not guilty, in the Southern District of New York, to thirty-two counts of a criminal indictment filed on November 18, 1960.³⁵ Subsequently, he retained counsel.³⁶ With the advice of counsel, he pled guilty to conspiracy, one of the thirty-two counts against him.³⁷ Approximately two years later, Hughes moved for leave to withdraw his guilty plea and to plead not guilty to the conspiracy count.³⁸ Hughes’ change of heart resulted from disputes over: (1) the nature and scope of the cooperation he was obligated to provide the government;³⁹ and (2) the leeway he would be given to avoid being sentenced by “one or two judges whose alleged reputation for severity made them undesirable from [his] point of view.”⁴⁰ At the hearing on Hughes’ motion to withdraw his plea, his counsel argued:

[E]ven “if there had never been made any representations to the defendant,” the defendant should be allowed to withdraw his plea “solely because at the time at which he made his plea (of guilty) he could not conceivably anticipate that in some way an unmentioned something would be demanded of him as a token of cooperation; * * * that at that time (when he pleaded guilty) nobody could antici-

information with the defendant’s employees, pointing out the errors, all to no purpose. Time and again he tried to have the defendant update and correct its report of him; he pleaded, he lost his temper, all to no avail. Like a character in Kafka, he was totally powerless to move or penetrate the implacable presence brooding, like some stone moloch, within the castle. It was this very kind of contumacious conduct that Congress sought to correct.”); *State v. Hurd*, 734 N.E.2d 365, 366-67 (Ohio 2000) (“It may seem that we are mired in a Borgesian Labyrinth or Kafkaesque Castle, where there is a wrongdoing and yet no way to punish the perpetrator.”).

Kafka’s short story “In the Penal Colony” has also been referred to, but only once. *Larijani v. Georgetown U.*, 791 A.2d 41, 45 (D.C. 2002) (Farrell, J., dissenting) (“The majority seems to agree, though I am not sure, that if the foot-length ‘noise makers’ in this case were the conventional sort of ‘husher’ or ‘white noise’ maker employed in most courtrooms of the Superior Court, this suit would be meritless. But apparently because the devices might have been of a different, diabolical sort capable of inflicting ‘acoustical torture’ over time – maybe a relic from Kafka’s penal colony – the suit is allowed to go forward.”).

35. *Hughes*, 223 F. Supp. at 478.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

pate that some such vague thing might come up. * * * if the defendant at the time that he made his plea could merely have guessed that some such thing would develop in later years, he would not have pleaded guilty * * * *it is just terribly unfair to a defendant after securing his cooperation in a long and difficult case to trot out this Kafkaesque suggestion.* * * * it is an undefined suspicion of cooperation about an undefined something. * * * the unfair conduct of the Government, even assuming that no repudiation was made, or no representations were made. * * * Unfairness in the sense of first securing from the defendant the cooperation in a long trial, arousing in the defendant the expectation that this cooperation would redound to his benefit, thereby assuring that the defendant would not move for immediate sentence, and then using something that no one could have anticipated at the time the plea was changed to guilty in some way to reflect on the defendant and to make his position worse in a manner which he couldn't reasonably anticipate. * * * Meaning to use that incident to attempt to secure a harsher sentence than which he might ordinarily have received. * * * they (the Government) refuse to define the matter. * * * it is impossible for him to comply with such a request of the Government. * * * (a request that is) unanticipated and impossible. * * * In an impossible predicament."⁴¹

Hughes' counsel evidently failed to persuade Judge Herlands that his client had been subjected to anything all that Kafkaesque; the motion to withdraw his guilty plea was denied.⁴² However, *Hughes* represents an important genre of opinions that refer to Kafka, those in which Kafka is invoked not by the court itself, but in an argument or brief quoted by the court.⁴³

The second reported reference to Kafka is not rhetorical. In *Zeitlin v. Arnebergh*, the California Supreme Court, like many other courts at that time, was called upon to determine whether Henry Miller's novel *Tropic of Cancer* was obscene.⁴⁴ Writing for a court that unanimously held that the book was not obscene, Justice Tobriner characterized the book as "express[ing] the writer's thoughts in their most primitive aspect, often violent

41. *Id.* at 480-81 (quoting the hearing record) (emphasis added).

42. *Id.* at 488.

43. *See infra* pt. IV(F)(2).

44. 383 P.2d 152, 154 (Cal. 1963). Prior to *Zeitlin*, at least four courts had held *Tropic of Cancer* not to be obscene, *see Haiman v. Morris*, No. 61 S 19718 (Ill. Cook County Super. Ct. 1962); *Atty. Gen. v. Book Named "Tropic of Cancer"*, 184 N.E.2d 328 (Mass. 1962); *People v. Fritch*, 236 N.Y.S.2d 706 (N.Y. Sup. Ct. Onondaga County 1963); *McCauley v. Tropic of Cancer*, 121 N.W.2d 545 (Wis. 1963), while at least three other courts had gone the other way, holding that the book was obscene, *see Besig v. U.S.*, 208 F.2d 142 (9th Cir. 1953); *State v. Huntington*, No. 24657 (Conn. Hartford County Super. Ct. 1962); *Cmmw. v. Robin*, No. 3177 (Pa. Phila. County Ct. of C.P. 1962).

and repulsive, and constantly in four-letter words.”⁴⁵ He went on to call the book “a kind of grotesque, unorthodox art-form,”⁴⁶ and then validated that form of art by quoting an art historian who had described modern art as “fundamentally ‘ugly’ foregoing the euphony, the fascinating forms, tones and colours of impressionism,”⁴⁷ and who had written about “the fight against all voluptuous and hedonistic feelings, hence the gloom, depression and torment in the works of Picasso, Kafka, and Joyce.”⁴⁸ While such references to Kafka are rare, several other judges have discussed or mentioned Kafka in an artistic context, rather than in a purely rhetorical way.⁴⁹

Judicial use of Kafka started to come into its own three years later in *United States v. Desist*.⁵⁰ In *Desist*, Nebbia, a criminal defendant who did not speak English, asked for a translator to assist him at trial, at government expense.⁵¹ Based upon Nebbia’s ability to post bail in the amount of \$100,000 shortly after his arrest, the trial court determined that Nebbia was not indigent and denied his request.⁵² On appeal to the Second Circuit, Nebbia argued “that he was denied due process and a fair trial, as well as the rights of confrontation, presence at his trial, and effective assistance of counsel, by the trial judge’s refusal to provide him at government expense with a court-appointed interpreter to render simultaneous translation of the proceedings.”⁵³ As framed by the court of appeals, the question before it was “whether a [criminal] defendant has an absolute right to a free simultaneous translator.”⁵⁴ In announcing the court’s decision that the Constitution guarantees no such right, Judge Feinberg noted that the court was “aware that trying a defendant in a language he does not understand has a Kafka-like quality, but Nebbia’s ability to remedy that situation dissipates substantially—perhaps completely—any feeling of unease.”⁵⁵ The issue raised in *Desist*, trying a criminal defendant in a language he or she does not understand, is a mainstay of subsequent Kafka jurisprudence.⁵⁶

45. *Zeitlin*, 383 P.2d at 165.

46. *Id.*

47. *Id.* at 166 n. 27 (quoting Hauser, *The Social History of Art* 230-31 (1958)).

48. *Id.*

49. See e.g. *Turpin v. Mailet*, 579 F.2d 152, 169 n. 3 (2d Cir. 1978) (“Rostow, *The Democratic Character of Judicial Review*, 66 Harv. L. Rev. 193 (1952), is about as far removed from R. Berger, *Government by Judiciary* (1977), as Ralph Waldo Emerson is from Franz Kafka.”).

50. 384 F.2d 889 (2d Cir. 1967).

51. *Id.* at 901.

52. *Id.*

53. *Id.* (footnote omitted).

54. *Id.* (citing *Ex parte Roelker*, 20 F. Cas. 1092 (D. Mass. 1854)).

55. *Id.* at 902.

56. See *infra* pt. V(D).

In *People v. Colletti*, two criminal defendants appealed their convictions for robbery and burglary, arguing, *inter alia*, that they were denied due process by the State's failure to record the grand jury testimony that led to their indictment.⁵⁷ Explaining that the State had no "duty to insure that the testimony of witnesses before the Grand Jury will be recorded for the later use of the defendant,"⁵⁸ Justice Moran of the Illinois Court of Appeals observed that the defendant's position, positing such a duty, "must inevitably lead to a Kafka-like dream in which police departments and prosecutors' offices become mere clerical centers for the recording and transcription of witnesses' statements to be turned over to the defense."⁵⁹ This is an especially curious reference to Kafka. Several opinions have characterized some particular situation as a "Kafkaesque nightmare" as a prelude to using, or trying to use, the power of the court to make the nightmare go away.⁶⁰ But here, by contrast, Justice Moran characterized

57. 242 N.E.2d 63, 63, 65-66 (Ill. App. 2d Dist. 1968).

58. *Id.* at 66.

59. *Id.* at 66-67.

60. See e.g. *Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992) ("A police department has an undeniable interest in discouraging unofficial internal investigations. If personal investigations were the usual way for an officer to check out suspicious activities of a fellow officer, the effect on efficiency and morale could be very disrupting, and the effectiveness of the police force might deteriorate. Instead of concentrating on their traditional duties in the community, officers with personal hostilities could become preoccupied with personal investigations of one another. Esprit de corps could collapse into a kafkaesque nightmare of improper investigations into the impropriety of improper investigations."); *Holloway v. Frey*, 202 S.E.2d 845, 847 (Ga. App. 1973) ("If this [allowing actual notice of a suit to substitute for proper service of process] were the law, of course, there would be no such thing as service of process, but all that would be necessary to obtain judgment and levy on a man's property and possessions would be to inform him by whatever means that there was in fact a suit pending against him, and throw the burden on him of checking out the rumor, a situation that would indeed lead to the nightmare situations envisioned by Kafka in *The Trial*."); *Rural Water Sys. # 1 v. City of Sioux Center*, 38 F. Supp. 2d 1057, 1069 n. 6 (N.D. Iowa 1999) ("To permit such belated 'clarification' would have the unacceptable effect of turning this fee litigation into precisely the sort of 'Kafkaesque nightmare' or 'second major litigation' over fees – involving endless submissions, revised submissions, and counter submissions – that courts abhor") (citations omitted); *Evans v. State*, 441 So. 2d 520, 526 (Miss. 1983) (Robertson, J., dissenting) ("The majority would have Evans die, not because the proceedings at trial and on direct appeal were fundamentally fair or constitutionally adequate, but because his lawyer goofed . . . Connie Ray Evans, the center and subject of this kafkaesque nightmare, no doubt has not the slightest comprehension of his lawyer's inaction at trial or our action here. Decisions that life be taken should be made of more solid stuff."); *Ferber v. City of Phila.*, 661 A.2d 470, 472 (Pa. Commw. 1995) (quoting the "well-reasoned and thorough opinion" of the trial court. "Factually, this case presents a Kafkaesque nightmare of the sort which we normally would characterize as being representative of the so-called justice system of a totalitarian state. Unfortunately, and shamefully, as the trial evidence showed, it happened here in Philadelphia."); see also *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 921-22 (D.C. Cir. 1977) (Wilkey, J., dissenting) (quoting appellee's claim that "[s]uch a result would create bureaucratic competition having the characteristics of a Kafka nightmare in which no response to an agency is ever sufficient because the of needs of a competing agency to show the insufficiency of a prior response to the former agency"); *People v. Privitera*, 141 Cal. Rptr. 764, 766, 784 (Cal. App. 4th Dist. 1977) (holding that enforcement of California statute to deny laetrile to cancer patients "take[s] on a Kafkaesque, a nightmare, quality."); *Beegle v. Ted Bolle Millwork, Inc.*, 1994 WL 1631040 at *1 (S.D. Ohio Aug. 4, 1994) ("To state that the captioned cause represents a procedural nightmare of

the court as avoiding a Kafka-like dream,⁶¹ rather than a Kafkaesque nightmare, and thus, he stands alone in taking credit for avoiding a Kafkaesque situation in a ruling that went *against* a criminal defendant.

United States ex rel. Negron v. New York addressed the issue raised in *Desist*, namely the unfairness of submitting a criminal defendant to a trial in a language he or she does not understand without the benefit of an inter-

Kafka-esque proportions is egregiously to understate the reality of the situation of an arbitration gone awry.”).

Sometimes, however, a court is powerless to chase away the nightmare. In *Coldiron v. United States Department of Justice*, Judge Kennedy of the District of D.C. explained:

The words “Kafka-esque nightmare” may well describe Coldiron’s ongoing employment relationship with the INS. It is undisputed that the INS suspended her security clearance, demanded that she explain herself, and invoked (through the FBI) FOIA [Freedom of Information Act] Exemption 1 to bar access to the very information upon which INS based its decision to suspend Coldiron. But because it appears that the FBI’s invocation of Exemption 1 is proper, Coldiron may not access portions of the documents which would allow her to defend herself against the INS’s claims.

310 F. Supp. 2d 44, 54-55 (D.D.C. 2004).

Finally, not only do the cases mention Kafkaesque nightmares, they also mention Kafkaesque judicial nightmares, *see e.g. Cinciarelli v. Reagan*, 729 F.2d 801, 810 (D.C. Cir. 1984), which are discussed *infra* pt. V(A).

61. Judge Moran is not, however, the only jurist link to Kafka to a dream rather than a nightmare.

In 1983, at the Annual Judicial Conference of the Second Judicial Circuit, Professor Arthur Miller, in his capacity as reporter for the Advisory Committee for the Federal Rules, offered the following commentary on Rule 26:

But I would like to admit that I have a recurrent Kafkaesque dream; it goes something like this:

A lawyer seeks discovery under one of the rules. It is followed by a motion to sanction under Rule 26(g) on the ground that the discovery request was beyond the standard set up in Rule 26 for legitimate discovery.

So there is a sanction hearing, at the end of which the judge says, “It was a tough discovery request, it was a demanding request, but I don’t think it violated the certification obligation of Rule 26(g). Sanction motion denied.”

At which point the other lawyer pops up and says, “I hereby move to sanction the sanction motion.”

As Kurt Vonnegut would say, “And so it goes.” Thank you. (Applause.)

101 F.R.D. 161, 200 (1984).

Professor Miller’s reference to Kafka was picked up in a short line of cases. *McMahon v. Shearson/Am. Ex., Inc.*, 896 F.2d 17, 24 (2d Cir. 1990); *Roberts v. Peat, Marwick, Mitchell & Co.*, 857 F.2d 646, 654 (9th Cir. 1988) (“The Rule 11 drafters’ nightmare has become a reality.”); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir. 1986); *Ophir v. Goldstein*, 1990 WL 284519 at *5 (S.D.N.Y. Oct. 10, 1990); *True Oil Co. v. Sinclair Oil Corp.*, 771 P.2d 781, 797 n. 14 (Wyo. 1989). Professor Miller even inspired the title of an academic commentary, Kim M. Rubin, *Has a “Kafkaesque Dream” Come True? Federal Rule of Civil Procedure 11: Time for Another Amendment?*, 67 B.U. L. Rev. 1019 (1987).

preter.⁶² In *Negron*, however, the criminal defendant was successful; Judge Bartels of the Eastern District of New York granted Negron's application for a writ of habeas corpus, on grounds that he "was denied his Sixth Amendment right to confrontation,"⁶³ which, in turn, denied him "the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment."⁶⁴ The key difference between Negron's situation and that of Nebbia in *Desist* is that, Negron, unlike Nebbia, was indigent.⁶⁵ On appeal, Judge Kaufman affirmed Judge Bartels—from the bench, no less⁶⁶—and while Judge Kaufman did not mention Kafka in his opinion, he did observe that "[t]o Negron, most of the trial must have been a babble of voices."⁶⁷

White v. State marks the first appearance of Kafka in a dissenting opinion,⁶⁸ a fairly common place for Kafka to lurk,⁶⁹ and it is the first opinion in which the term "Kafkaesque" appeared in a judge's own words rather than in a quotation from an attorney's argument or brief. In *White*, the plaintiff sued the State of California, alleging that certain of its employees in the Bureau of Criminal Identification and Investigation "negligently posted to plaintiff's record, and negligently disseminated and published erroneous information relating to plaintiff."⁷⁰ The erroneous information was posted to plaintiff's record in 1941,⁷¹ but the plaintiff did not discover its inclusion until 1967.⁷² The trial court granted the defendants a nonsuit on grounds of both absolute and conditional privilege.⁷³ The California Court of Appeals held "that the trial court erred in granting nonsuit on the theory that defendants' publications were absolutely privileged,"⁷⁴ but went on to hold that "publication of such material was conditionally privileged."⁷⁵ Justice Friedman concurred in the affirmance of the nonsuit granted to an individual defendant, one Mr. Coffey, but dissented from affirmance of the nonsuit granted to the State of California,⁷⁶ observing that "[o]ur nation's current social developments harbor insidious evolu-

62. 310 F. Supp. 1304, 1305 (E.D.N.Y. 1970).

63. *Id.* at 1309.

64. *Id.*

65. *Id.* at 1307 (quoting *Desist*, 384 F.2d at 902).

66. *U.S. ex rel. Negron v. N.Y.*, 434 F.2d 386, 387 (2d Cir. 1970).

67. *Id.* at 388.

68. 95 Cal. Rptr. 175, 184 (Cal. App. 3d Dist. 1971).

69. *See infra* pt. IV(A)(1)(b).

70. *White*, 95 Cal. Rptr. at 176.

71. *Id.*

72. *Id.* at 177.

73. *Id.* at 179.

74. *Id.*

75. *Id.* at 181.

76. *Id.* at 185.

tionary forces which propel us toward a collective, Orwellian society,"⁷⁷ one feature of which is "the utter destruction of privacy, the individual's complete exposure to the all-seeing, all-powerful police state."⁷⁸ In a discussion of malice, which had to be proven to defeat the defendants' claim of privilege, Justice Friedman wrote:

While mere negligence does not amount to malice, the latter appears when the statement was made with willful disregard for accuracy. Were libel plaintiff's sole theory of recovery, it would be necessary that he satisfy the jury that the Bureau acted with willful disregard of the harm emanating from an untrue report of crime. Its unrealistic advice that plaintiff solicit the benevolence of the local police department which, a quarter-century earlier, had originated the error, was a bland cloak for official indifference, shunting the citizen in Kafkaesque fashion from agency to agency. Willful disregard lay not so much in the Bureau's communications of the record as in its willful immobility when the victim sought correction.⁷⁹

The situation sketched by Justice Friedman would certainly have been familiar to Kafka's Josef K.

In *United States v. Dockery*, Judge Wright of the D.C. Circuit dissented from an opinion holding that the district court did not violate a criminal defendant's right to due process when it denied her request for disclosure of a probation officer's pre-sentence report.⁸⁰ In his dissent, Judge Wright noted that "[a]n individual's interest in knowing and meeting official evidence to be used at an adjudicative hearing is . . . generally accorded great weight in our legal system"⁸¹ as a way of both "honor[ing] our due process commitment to truth seeking in the administration of the law"⁸² and "respect[ing] . . . individual dignity in the criminal process."⁸³ In Judge Wright's view, those two principles "insure that the defendant is treated as a citizen entitled to know what is happening to him and why and

77. *Id.* at 181. Justice Friedman was the first judge, but hardly the last, to pair up Franz Kafka and George Orwell. See *infra* pt. IV(C)(1).

78. *White*, 95 Cal. Rptr. at 181.

79. *Id.* at 184 (citing *A.B.C. Needlecraft Co. v. Dun & Bradstreet, Inc.*, 245 F.2d 775, 777 (2d Cir. 1957)).

80. 447 F.2d 1178, 1200 (D.C. Cir. 1971).

81. *Id.* at 1191.

82. *Id.*

83. *Id.*

how it is happening – not as a Kafkaesque victim of Star Chamber secret proceedings.”⁸⁴

In *Sullivan v. Houston Independent School District* the issue litigated was a school’s attempt to regulate the content and distribution of “SPACE CITY!, a newspaper in general circulation in Harris County.”⁸⁵ The School District’s regulations required, among other things, prior review by the school principal before the publication could be distributed.⁸⁶ The School District defended that particular regulation on grounds of its duty to prevent the publication of obscene language,⁸⁷ and cited, as an example, a letter to the editor printed in SPACE CITY! bearing the caption “High Skool is Fucked.”⁸⁸ By way of explaining the unusual spelling of the word “school,” Judge Seals observed that “[t]he substitution of ‘k’ for ‘c’ and ‘ch’ (e.g. ‘Amerika’) is widely current among publications of the New Left, and is believed to derive from the writings of Franz Kafka.”⁸⁹ Not surprisingly, given the aforementioned familiarity with Kafka and the New Left, Judge Seals ruled that “High Skool is Fucked” was not obscene because its use of the word “fuck” did not appeal to a prurient interest in sex,⁹⁰ and he criticized the School District for misapplying the legal test for obscenity by failing to consider the offending letter to the editor in the context of the newspaper as a whole,⁹¹ and for “fail[ing] to apply correctly another part of the obscenity test, the definition of ‘common community standard’ by which a work must be judged to determine its obscenity.”⁹²

Bangor Punta Corp. v. Chris-Craft Industries, Inc., involved “the bitter struggle between [Bangor Punta and Chris-Craft] for control of Piper Aircraft Corporation.”⁹³ Bangor-Punta won the battle, Chris-Craft sued, and Bangor-Punta “countered by charging, in essence, that because of the wrongful acts of Chris-Craft it paid more than it would otherwise have paid to acquire control of Piper.”⁹⁴ *Bangor-Punta* is another case in which the writing judge fingered one of the parties for citing Kafka: “Chris-Craft’s response to Bangor Punta’s charges is to label Bangor Punta’s case as

84. *Id.* Several other judges have included references to both Kafka and the Star Chamber in a single opinion. See *infra* pt. IV(C)(3).

85. 333 F. Supp. 1149, 1155 (S.D. Tex. 1971).

86. *Id.* at 1154 n. 3.

87. *Id.* at 1162-63.

88. *Id.* at 1163.

89. *Id.* at 1163 n. 15.

90. *Id.* at 1165.

91. *Id.* at 1164.

92. *Id.*

93. 337 F. Supp. 1147, 1149 (S.D.N.Y. 1971).

94. *Id.*

'sheer fantasy' and its inferences as 'Kafkaesque logic.'⁹⁵ While Bangor Punta's position may have been illogical, or even absurd, Judge Pollock clearly recognized the incongruity of a reference to Kafka in a battle between two well-heeled corporations:

Chris-Craft's attacks on the evidentiary underpinning and legal support of Bangor Punta's case would require a minute consideration of the record and of precedents cited were this Court to accord to Bangor Punta the status of damaged innocent which it claims for itself.

But Bangor Punta cannot wear that mantle. It was the willing and winning contestant in a hard fought and (for both sides) enormously expensive struggle for control.⁹⁶

Judge Pollock went on to remind the parties that "this Court made it clear that it would not, at the behest of a disappointed contender in a battle for corporate control, necessarily take the same view of the requirements of the securities laws and rules as it does in cases of claimed injury to the average public investor."⁹⁷ A defrauded individual investor unable to gain satisfaction from the courts would seem to be a much more Kafkaesque protagonist than either of the parties in *Bangor Punta*.⁹⁸

95. *Id.* at 1152. Other courts have come out against Kafkaesque logic. *Santiago Negron v. Castro-Davila*, 865 F.2d 431, 437 (1st Cir. 1989) ("We reject this Kafka-like logic."); *Williams v. Sullivan*, 779 F. Supp. 471, 472 (W.D. Mo. 1991) (rejecting the Secretary of Health & Human Services' argument that he was not required to provide a Social Security claimant a transcript of the proceeding dismissing her claim, on grounds that dismissal was not a final decision, and stating: "This Court finds such Kafkaesque reasoning remarkable."); *Cole v. State*, 608 So. 2d 1313, 1330-31 (Miss. 1992) (Banks, J., dissenting) ("I find the net effect of the logic propounded by the trial court and embraced by the majority regarding the application of a three-year time bar to be truly Kafkaesque: for Cole to avoid the time bar, he must show he is incompetent and thus qualify for a time extension, yet Cole has been denied the opportunity to make such a showing on the grounds that he has failed to comply with the time bar. In this sense, this is not a case where the door is locked and the petitioner may not enter. This is a case where there is no door at all."); *In re Jennifer G.*, 695 N.Y.S.2d 871, 884 (N.Y. Fam. Ct. 1999) ("Hypocrisy and 'kafkaesque' reasoning, it appears, are not strangers to masking the neglect of PINS [person in need of supervision] children under the guise of legislative policy in order to conserve and build upon the public purse."); *In re Eric E.*, 475 N.Y.S.2d 759, 761 (N.Y. Fam. Ct. 1984) ("Such absurd 'Kafkaesque' reasoning results from a misreading of CPL §§ 710.20 and 710.30(1).").

96. *Bangor Punta Corp.*, 337 F. Supp. at 1152.

97. *Id.*

98. Similarly unavailing as a Kafkaesque victim is the corporate defendant in *Coltec Industries, Inc. v. Zurich Insurance Co.*, 2004 WL 413304 at *7 (N.D. Ill. Jan. 30, 2004), "a sophisticated contracting party" that "could [have] easily avoid[ed] this Kafkaesque scenario by including a choice-of-law provision in its policies." In like fashion, Justice Rehnquist seems to have reversed the traditional Kafkaesque roles in an opinion in which a power company and a federal agency were portrayed as the victims of a nearly Kafkaesque decision of the court of appeals in favor of an environmental group. *Vt. Yankee Nuclear Power Corp. v. Nat. Resources Def. Council*, 435 U.S. 518, 557 (1978). One wonders whether Kafka himself could have possibly contemplated the idea of the government being the victim rather than the perpetrator of anything worthy of being called Kafkaesque.

State v. Blake returned to the familiar ground of criminal trials.⁹⁹ Richard Blake was charged with first degree murder, and, after pleading insanity, was convicted of second degree murder in the shooting death of his young daughter.¹⁰⁰ On appeal, he argued, *inter alia*, that “his amnesia covering the period surrounding the homicide rendered him incompetent to stand trial.”¹⁰¹ “[F]aced with the question of whether [a claim of] amnesia, standing alone, renders a defendant incompetent to stand trial,” the Kansas Supreme Court held that it did not.¹⁰² In so holding, the court rejected the defendant’s contention that “memory [i]s an essential element, *per se*, of competency to stand trial”¹⁰³ and his claim that, because of his amnesia, it was “very much as though he were tried in absentia notwithstanding his physical presence at the time of trial.”¹⁰⁴ Writing for the court, Commissioner Foth observed that “defendant’s memory is unimpaired until a time moments before the shooting, and picks up again shortly thereafter; the

There is, however, at least one case involving large corporate defendants in which the term Kafkaesque may actually be appropriate. The issue in *Irish National Insurance Co. v. Aer Lingus Teoranta*, 739 F.2d 90 (2d Cir. 1984), was the application of the doctrine of forum non conveniens. Judge Van Graafeiland began his opinion:

The doctrine of *forum non conveniens* ostensibly is invoked to determine in which of two jurisdictions a case should be tried. In some instances, however, invocation of the doctrine will send the case to a jurisdiction which has imposed such severe monetary limitations on recovery as to eliminate the likelihood that the case will be tried. When it is obvious that this will occur, discussion of convenience of witnesses takes on a Kafkaesque quality – everyone knows that no witnesses ever will be called to testify. This appears to be such a case.

Id. at 91. Unlike *Bangor-Punta* and *Coltec Industries*, which involved corporate defendants claiming to be Kafkaesque victims, *Aer Lingus* involved a legal argument that was absurd to the point of being Kafkaesque. Judge Van Graafeiland’s opinion was so persuasive it has inspired an entire line of cases. See *Rudetsky v. O’Dowd*, 660 F. Supp. 341, 346 (E.D.N.Y. 1987) (quoting *Aer Lingus*, 739 F.2d at 91) (declining to rule that lack of a contingency fee system in England is a *per se* bar to dismissal on grounds of forum non conveniens, but denying defendant’s motion to dismiss); *Carlenstolpe v. Merck & Co.*, 638 F. Supp. 901, 905 (S.D.N.Y. 1986) (quoting *Aer Lingus*, 739 F.2d at 91) (rejecting plaintiff’s argument that Sweden does not provide an adequate alternative forum for products liability action but denying defendant’s motion to dismiss on other grounds); *Picketts v. Intl. Playtex, Inc.*, 576 A.2d 518, 527 (Conn. 1990) (quoting *Aer Lingus*, 739 F.2d at 91) (declining to decide whether Canadian discovery rules render British Columbia an inadequate forum for plaintiff’s products liability case but reversing trial court’s grant of dismissal on grounds of forum non conveniens); *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 683 (Tex. 1990) (Doggett, J., concurring) (legislature abolished forum non conveniens); see also *Reid-Walen v. Hansen*, 933 F.2d 1390, 1409 (8th Cir. 1991) (Timbers, J., dissenting) (“The majority’s reliance on . . . *Aer Lingus* . . . also strikes me as misplaced. . . . By culling that proposition [that a court deciding a forum non conveniens issue may consider severe monetary limitations on the recovery available in an alternative forum] from a passing reference made by the court in *Aer Lingus*, the majority has misconstrued the holding in that case.”).

99. 495 P.2d 905.

100. *Id.* at 906.

101. *Id.*

102. *Id.* at 908-09.

103. *Id.* at 909.

104. *Id.* (quoting *Wilson v. U.S.*, 391 F.2d 460, 466 (D.C. Cir. 1968) (Fahy, J., dissenting)).

obliterated period is a very short one.”¹⁰⁵ On that basis, Commissioner Foth concluded that Blake was not “a Kafkaesque defendant, on trial for he knows not what.”¹⁰⁶

Generally speaking, the first ten judicial opinions with references to Kafka offer a pretty fair introduction to the more than 400 that have followed. Seven of the opinions are in criminal cases, two involve literal rather than metaphorical citations of Kafka, and only one is in a civil case. In two of the ten, the court noted, but did not accept, one party’s claim that something was Kafkaesque, and in another two of the ten, the judge referring to Kafka was writing in dissent.

IV. HOW KAFKA HAS BEEN DEPLOYED

Given the sheer number of time that judges have referred to Franz Kafka and his literary works, it should come as no surprise that judges have framed their references in a variety of different ways. This part begins by examining various nouns and, by extension, various legal situations, to which the adjective “Kafkaesque” has been applied. It then discusses the opinions of several judges who have gone beyond the mere incantation of the word Kafkaesque either by quoting from Kafka’s work or by offering an extended explanation of how Kafka’s work applies to a particular legal situation. Next, I explore some of the other literary references that have been “bundled” with references to Kafka. I continue with a discussion of opinions in which Kafka himself has been made a hypothetical character. Then I turn to opinions in which judges do not pull Kafka into their cases, but, rather, see their cases as belonging in the world of Kafka’s fiction. The part concludes with Kafka references that do not fit neatly into any other category, but are just too well-written to leave out.

A. *Kafkaesque*

The simplest way to invoke Kafka is to call something “Kafkaesque.” Adjectival use of Kafka’s name is by far the most common way in which judges have referred to Kafka, and eight of the first ten judicial references to Kafka were of this type, using either the word “Kafkaesque” or “Kafka-like.” This section focuses on a specific subset of the adjectival invocations of Kafka, those in which the writer’s selection of the noun that was modified demonstrates a sophisticated understanding of Kafka’s work.

105. *Id.*

106. *Id.*

Thus, I am not particularly interested in bare declarations like: “[s]uch a Kafkaesque situation cannot be permitted,”¹⁰⁷ “[t]his is Kafkaesque,”¹⁰⁸ or “[t]hat is really Kafkaesque.”¹⁰⁹ I am twice as disinterested in those opinions in which a judge has opted for a half measure, referring to “something slightly *Kafkaesque*,”¹¹⁰ or something that “seems to me almost Kafkaesque,”¹¹¹ or to “a somewhat Kafkaesque development,”¹¹² an “al-

107. *Williams v. State*, 500 So. 2d 501, 503 (Fla. 1986) (holding that defendant’s failure to appear for sentencing does not allow trial court to sentence defendant outside state sentencing guidelines).

108. *U.S. v. Ramirez*, 2002 WL 31016657 at *2 (S.D.N.Y. Sept. 9, 2002) (decrying the enhancement provisions of the federal sentencing guidelines) (quoted in *U.S. v. Caicedo-Cuero*, 312 F.3d 697, 709 (5th Cir. 2002)).

109. *Blanca P. v. Super. Ct.*, 53 Cal. Rptr. 2d 687, 696 (Cal. App. 4th Dist. 1996) (explaining that “it is an outrageous injustice to use the fact parents deny they have committed a horrible act as proof that they did it”); see also *In re Juan P.*, 2001 WL 1600768 at *1 (Cal. App. 4th Dist. Dec. 14, 2001) (“This is the sequel to *Blanca P. v. Superior Court.*”).

110. *State v. Garcia*, 975 P.2d 793, 800 (Idaho App. 1999) (Schwartzman, J., concurring) (emphasis in the original) (observing that indigent inmate, incarcerated out of state, was denied the opportunity to appear telephonically at child support hearing then had his failure to appear used against him by the Bureau of Child Support Services).

111. *U.S. v. Arboleda*, 633 F.2d 985, 993 (2d Cir. 1980) (Oakes, J., dissenting) (objecting to majority’s rule under which “a defendant in a suppression hearing, even after establishing clearly that he was arrested in his home and that there was no arrest warrant for him or search warrant for the premises, has a further burden of asking whether the arresting officers had an arrest warrant for any third party”); see also *U.S. v. Barnes*, 604 F.2d 121, 175 (2d Cir. 1979) (Oakes, J., dissenting) (“The panel majority affirming the appellant’s convictions adopted an entirely new rule of law that so far as I know stands without precedent in the history of Anglo-American jurisprudence. The panel majority’s sanction of the trial of a defendant in a criminal prosecution before an anonymous petit jury, without disclosure of even the approximate community or neighborhood in which the jurors reside and absent requested inquiry into ethnic and religious backgrounds (much of which would be revealed by the usual name and address), strikes a Vermont judge as bizarre, almost Kafka-esque. It makes peremptory challenges for all practical purposes worthless, to me a sorry state of affairs.”) (citation omitted); *Davis v. Dalton*, 929 F. Supp. 467, 468 (D.D.C. 1996) (“Although Commander Davis was ultimately cleared of these charges [security violations, sexual harassment, reverse discrimination, and voyeurism] in a special court martial, the allegations set off an almost ‘kafkaesque’ series of events which included: (1) involuntary confinement in a mental hospital for three weeks; (2) revocation of plaintiff’s security clearances; (3) removal of plaintiff from his position of command; (4) initiation of ‘detachment for cause’ proceedings against plaintiff; and (5) institution of a Medical Board against plaintiff. Ultimately, plaintiff was denied promotion to Captain and was involuntarily retired from the Navy he had served so well.”); *Singh v. Atty. Gen.*, 510 F. Supp. 351, 357 (D.D.C. 1980) (“in almost Kafkaesque fashion, the government first concedes that Singh [who the government seeks to deny permanent residency status under sixth preference immigration classification] is clearly qualified for the job today . . . and then suggests that ‘nothing prevents (her) from filing the necessary applications,’ provided she first returns to India.”); *Hall v. N.Y. D.M.V.*, 745 N.Y.S.2d 892, 893 (N.Y. Sup. Ct. Monroe County 2002) (“The petitioner in this case is caught in a situation almost worthy of Kafka. He is suing for restoration of his driver’s license, which was revoked this year by the Department of Motor Vehicles for an offense that took place in 2001.”); *In re Terrence T.*, 588 N.Y.S.2d 731, 736 n. 10 (N.Y. Fam. Ct. 1992) (“It is ironical that in the adult criminal justice system which is at least punitive in nature, sentencing is to be pronounced without unreasonable delay while in the purely rehabilitative juvenile justice system a particularized time constraint is imposed for disposition, violations of which it is argued and has been held, requires dismissal. Such social engineering in implementation of advancing the individual and common good appears almost ‘Kafkaesque.’”) (citation omitted).

112. *Brewster v. Dukakis*, 3 F.3d 488, 493 (1st Cir. 1993) (referring to “the contentiousness surrounding the lawyers’ compensation [which] threatens to overshadow the main case . . . [which] furnishes the

most Kafkaesque” action,¹¹³ “an egregious, almost Kafkaesque, set of circumstances,”¹¹⁴ “procedures that verge on the Kafkaesque,”¹¹⁵ things that “border[] on the Kafkaesque,”¹¹⁶ or an “anomalous, perhaps even Kafkaesque” requirement.¹¹⁷ And I am also not much interested phrases such as “Kafkaesque suggestion”¹¹⁸ or “Kafka-like quality,”¹¹⁹ in which the word Kafkaesque modifies a completely generic noun.

However, opinions that offer synonyms for Kafkaesque are somewhat more informative. Examples of definition by synonym include: “bizarre

sole *raison d’etre* for the compensation” and explaining that “fee disputes, unlike Jack’s beanstalk or Pinocchio’s nose, cannot be permitted to grow and grow”).

113. *Heinmiller v. Dept. of Health*, 903 P.2d 433, 442 (Wash. 1995) (Pekelis, J., concurring) (“[T]o discipline a person not because she knew, but because she *should* have known that her conduct would be deemed by others to constitute an act of ‘moral turpitude’ makes the Department’s action almost Kafkaesque.”) (emphasis added).

114. *Truglio v. Julio*, 322 S.E.2d 698, 699 (W. Va. 1984) (referring to the circumstances under which plaintiffs were denied a hearing on their property damage claim).

115. *Ngwanyia v. Ashcroft*, 302 F. Supp. 2d 1076, 1085 (D. Minn. 2004) (referring to the government’s procedures for endorsement of employment authorizations for persons granted asylum in the United States).

116. *Navarro v. Pfizer Corp.*, 261 F.3d 90, 99 (1st Cir. 2001) (“Indeed, it borders on the Kafkaesque to suggest that the EEOC, acting some three years before Congress passed the FMLA, had invoked the authority delegated to the Secretary of Labor and written interpretations to govern an as-yet-unenacted statute.”); see also *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 557 (“To then nullify that effort [to obtain a construction permit] seven years later because one report refers to other problems, which problems admittedly have been discussed at length in other reports available to the public, borders on the Kafkaesque.”) (quoted in *County of Bergen v. Dole*, 620 F. Supp. 1009, 1066 (D.N.J. 1985)); *Santa Ana Food Mkt., Inc. v. Alcoholic Bev. Control Appeals Bd.*, 90 Cal. Rptr. 2d 523, 525, 527 (Cal. App. 4th Dist. 1999) (“Under the general rules, urged by the ABC below, the single criminal act of food stamp sales [by Huerta, an employee of the Market] was sufficient to justify the suspension [of the Market’s liquor license] because Huerta’s knowledge of her own criminal act was imputed to the Market. This reasoning and result border on the kafkaesque. Using the same reasoning, the Market’s license would be suspended if Huerta had robbed it or embezzled from it . . . [and] the Market would suffer a de facto punishment for being a victim.”); *Turner v. Woods*, 559 F. Supp. 603, 615 n. 11 (N.D. Cal. 1982) (“Conjoining the Secretary’s present interpretation that mandatory payroll deductions are ‘income’ even when withheld, with the *Vaessen* ruling that the same funds are again ‘income’ if refunded, would result in an injustice bordering on the Kafkaesque.”) (citing *Vaessen v. Woods*, 182 Cal. Rptr. 725 (Cal. App. 2d Dist. 1982)); *Emmett v. Ricketts*, 397 F. Supp. 1025, 1048 (N.D. Ga. 1975) (“The prosecutorial suppression of nearly all evidence concerning Deborah Kidd [a co-defendant who was given immunity for testifying against her fellow defendants in a murder trial] resulted in a criminal proceeding that bordered on the Kafkaesque, and it is this aspect of the case that the Court finds most disturbing.”); *Kersh v. Borden Chem.*, 121 F.R.D. 55, 58-59 (E.D. Mich. 1988) (characterizing a civil plaintiff’s accusations against the court as “border[ing] on the ‘Kafkaesque,’ ” where the plaintiff accused the court of, among other things “depriving him of sleep by scheduling the hearing on May 31st at 8:30 a.m.”).

117. *AMBAC Indem. Corp. v. Bankers Trust Co.*, 546 N.Y.S.2d 265, 270 (N.Y. Sup. Ct. N.Y. County 1989) (“It would be anomalous, perhaps even Kafkaesque, to require that, in order for a client to obtain disqualification of an attorney where disclosure of confidential and privileged information is threatened, the client must disclose that very information.”).

118. *Hughes*, 223 F. Supp. at 481.

119. *Desist*, 384 F.2d at 902.

and Kafkaesque,”¹²⁰ “disingenuous – indeed Kafkaesque,”¹²¹ “ironic, even Kafkaesque,”¹²² “[t]his distortion of reality is Kafkaesque,”¹²³ “so classically arbitrary and capricious as to be Kafkaesque,”¹²⁴ and “[t]his Kafkaesque design is counterintuitive.”¹²⁵

120. *State v. Olson*, 325 N.W.2d 13, 16-17 (Minn. 1982) (discussing many adverse consequences that would befall victim of domestic assault if her assailant were sent to prison); see also *Clontz v. Ohio Adult Parole Auth.*, 2000 WL 1033102 at *2 (Ohio App. 1st Dist. July 28, 2000) (“Any other interpretation [of the phrase ‘maximum cumulative prison term’], especially that urged by [the Ohio Adult Parole Authority] would produce a bizarre and Kafkaesque result.”).

121. *Petties v. Dist. of Columbia*, 238 F. Supp. 2d 88, 98 (D.D.C. 2002) (characterizing defendant school district’s argument, in context of IDEA claim, that “the burden is on the parents first to identify a fundamental change in a student’s educational program in order to raise the claim that there has been a change in placement even though DCPS [the school district] has not provided notice to the parents of the nature of the proposed change”).

122. *U.S. v. W. Elec. Co.*, 969 F.2d 1231, 1238 (D.C. Cir. 1992) (“To claim that AT&T has no interest under the [consent] decree in challenging one or more of the [Bell Operating] Company’s ‘return’ to the interexchange market, there to compete against AT&T with the same sort of local monopoly leverage that caused the government to bring suit against AT&T in the first place, has an ironic, even Kafkaesque, quality.”).

The relationship between irony and Kafka was also identified in Judge Ambro’s dissent in *Schlueter v. Varner*, 384 F.3d 69 (3d Cir. 2004), a habeas corpus case. Judge Ambro began his dissent from the majority’s decision to affirm the trial court’s denial of a habeas petition as follows:

It is an underlying assumption of our legal system that attorneys actively pursue the best interests of their clients. All too often, attorneys make mistakes. The sad reality is that there are not enough willing defense attorneys to represent competently the interests of the many criminal defendants who cycle through the courts. And thus, necessarily, we afford substantial leeway to attorneys when it comes to “mere ‘attorney error.’” *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000).

But the distinction between mistake and malfeasance is profound. There can be little semblance of justice when an attorney assigned to protect a defendant ignores a blatant conflict of interest, and another counsel does nothing while promising more than once to protect the defendant’s rights. If the facts are as Paul Schlueter has portrayed them, his trial counsel (George Blasco) disregarded his civil law partnership with the prosecutor (James Narlesky), and his appellate counsel (Philip Lauer) affirmatively misrepresented that he would timely file a petition for relief in order to forestall the inevitable accounting for his long-promised and paid-for legal services. Irony becomes Kafkaesque when the latter act of malfeasance shelters from review the former act of malfeasance.

Id. at 79 (footnote omitted).

123. *In re David D.*, 33 Cal. Rptr. 2d 861, 868 (Cal. App. 3d Dist. 1994) (discussing, *inter alia*, social worker’s statement to biological mother that mother “confused” her child by explaining to him that his current caretaker was a foster mother and that she was the child’s real mother) (quoted in *In re Elizabeth R.*, 42 Cal. Rptr. 2d 200, 212-13 (Cal. App. 3d Dist. 1995)).

124. *Family & Soc. Servs. Admin. v. Boise*, 667 N.E.2d 753, 754, 756 (Ind. App. 1996) (quoting trial court’s conclusion of law regarding State Employees’ Appeals Commission’s refusal to apply established standards to state employees’ request for position upgrade).

125. *Arevalo v. Ashcroft*, 344 F.3d 1, 8 (1st Cir. 2003) (discussing the incongruity of applying the clear and convincing evidence standard to requests for discretionary stays of deportation, which “would result in a peculiar situation in which adjudicating a stay request would necessitate full deliberation on the merits of the underlying case and, in the bargain, require the alien to carry a burden of proof *higher* than she would have to carry on the merits”) (emphasis in the original).

Even more informative are those opinions in which a judge has added value to the Kafka adjective by affixing it to an equally evocative noun, describing something as a “Kafka-like dream”¹²⁶ or characterizing a litigant as “a Kafkaesque victim of Star Chamber secret proceedings.”¹²⁷ References such as those, which are the subject of this section, show not just that a judge knows the dictionary definition of Kafkaesque, but also demonstrate genuine judicial appreciation for Kafka’s work and a commitment to memorable writing.

1. *Kafkaesque Proceedings*

To begin with the obvious, judges have often invoked Kafka to register disapproval of actions taken by some other tribunal or, in the case of appellate judges, disagreement with their own colleagues on the other side of a split decision.

a. *Accusing Other Tribunals*

Justice Levinson of the Hawaii Supreme Court once characterized the process by which a hospital revoked a physician’s privileges as “a kafkaesque ‘kangaroo court,’ called at the eleventh hour in an effort to comply with the hospital’s own by-laws and to rationalize a result which its board of trustees had already reached.”¹²⁸

In *O’Brien v. Henderson*, a pro se prisoner’s action for writs of mandamus and habeas corpus, Judge Edenfield of the Northern District of Georgia noted “the volume of petitioner’s pleadings and the difficulty of determining with exactitude the scope of his claims”¹²⁹ and then observed that “not even the most skilled of counsel, finding himself in the Kafkaesque situation of being deprived of his liberty by a tribunal [the Georgia Board of Parole] which will adduce no reasons for its decision, can complain concisely and clearly of his objections to such a decision.”¹³⁰

126. *People v. Colletti*, 242 N.E.2d 63, 66 (Ill. App. 2d Dist. 1968).

127. *Dockery*, 447 F.2d at 1191.

128. *Silver v. Castle Meml. Hosp.*, 497 P.2d 564, 575 (Haw. 1972) (Levinson, J., concurring). A Westlaw search on the phrase “kangaroo court” in Westlaw’s ALLCASES directory yields approximately 350 hits. Wow. Some hospitals, it turns out, are not run by kangaroos. In *Bender v. Suburban Hospital, Inc.*, 758 A.2d 1090 (Md. Spec. App. 2000), the plaintiff, a physician whose clinical privileges had been revoked, asserted that the hospital subjected her to “a ‘Kafkaesque process . . . designed to be . . . unreasonable . . . and to pervert, rather than obtain, the facts.’ ” *Id.* at 1107. The Maryland Court of Special Appeals disagreed, concluding, in the words of Judge Thieme, that “[w]hen examined in its totality, the entire multi-step fact-finding process meets or even exceeds the [Health Care Quality Improvement Act] standard of objective reasonableness.” *Id.* at 1108.

129. 368 F. Supp. 7, 10 (N.D. Ga. 1973).

130. *Id.*

In *United States v. Wright*, Judge Alley of the Army Court of Military Review wrote that “[t]hese consequences [confinement, a pending punitive discharge, and nearly \$1,000 in forfeitures] are so disproportionate to the misconduct [getting drunk and causing trouble] and the management of the case so dilatory as to be Kafkaesque.”¹³¹

In re Cox was a bankruptcy proceeding in which “[t]he parties contest[ed] the dischargeability of indebtedness resulting from transactions with a credit card, that boon and bane of mankind.”¹³² In the view of the credit card company, the debt was nondischargeable because it was “obtained ... by ... false pretenses, a false representation, or actual fraud...”¹³³ The court ruled against the credit card company, based upon its failure to demonstrate reasonable reliance upon a representation by the debtor (beyond that contained in the initial credit card agreement) that he intended to pay his credit card bill – which is an essential element of fraud.¹³⁴ Judge Queenan went on to criticize courts that have gone the other way:

Courts purporting to require reliance ignore all these considerations [including logical and mechanical impediments to finding reasonable reliance by the credit card company upon an implied representation of intent to pay]. The decisions are Kafkaesque. Many courts state reliance is necessary and then ignore the requirement altogether in concluding fraud has been committed. Other courts find reliance in a fashion which pays mere lip service to it. One court, for example, has said reliance by the issuer “is inherent in the system because a cardholder in using the credit card forces the issuer to honor its guarantee to the merchant.” Confusing reliance with the due care, other courts find reliance present because the issuer acted with ordinary diligence. Still others acknowledge that a credit card transaction is *sui generis* and find reliance from the fact charges were made under the card. These decisions attempt to fit a square peg into a round hole. A credit card transaction involves no reliance upon an implied representation of intent to pay.¹³⁵

In *Franklin v. District of Columbia*, another case concerning the language in which proceedings are conducted, Judge Green of the District of D.C. concluded:

131. 47 C.M.R. 309, 312 (Army Ct. Mil. Rev. 1973).

132. 182 B.R. 626, 627 (Bankr. D. Mass. 1985).

133. *Id.* (quoting 11 U.S.C. § 523(a)(2)(A)).

134. *Id.* at 636.

135. *Id.* at 637 (footnotes and citations omitted).

Contrary to the defendant's written "policy," the evidence at trial clearly established that the actual practice within [District of Columbia Department of Corrections] correctional institutions often subjects [limited English proficiency] Hispanic inmates to Kafkaesque hearings – hearings where adjudications are made and their futures are affected by officials speaking a language that they seldom understand regarding allegations that are too infrequently explained to them in words they understand.¹³⁶

In a juvenile dependency action in which the petitioner sought custody of his own daughter, while simultaneously facing criminal charges in the death of his girlfriend's daughter, Justice Rylaarsdam of the California Court of Appeals observed, in the context of a discovery dispute, that "as an involuntary participant in the pending juvenile dependency proceeding and as a criminal suspect [who had been denied discovery materials in the juvenile dependency action because they were subject to official information privilege in his criminal case], petitioner [was] thrust headlong into a 'Kafkaesque' judicial proceeding."¹³⁷

In *Nielson v. Nobart Color, Inc.*, an action was brought under the Employee Retirement Income Security Act ("ERISA"), Judge Shadur of the Northern District of Illinois spoke disparagingly of the process given an employee who sought to challenge a denial of benefits:

There is simply no excuse for the Kafkaesque nature of Nielsen's "trial": his appearance before Trustees at 10:00 a.m. in total ignorance of the appearance, in the same office, just a half-hour earlier, of two Nobart employees who had presented evidence to its Board of Directors as to Nielsen's alleged competitive activity. Excluding Nielsen from that earlier meeting, with his resultant unawareness of the nature of the evidence against him, certainly "inhibited" the speedy and fair processing of his claim.¹³⁸

In *Rodriguez-Roman v. INS* the Ninth Circuit reversed the Board of Immigration Appeals' decision to deny the asylum petition of a Cuban national who faced prolonged incarceration and perhaps even death for his unauthorized departure from Cuba.¹³⁹ In his opinion for the court, Judge Reinhardt criticized the Immigration Judge for writing a "Kafka-esque

136. 960 F. Supp. 394, 420 (D.D.C. 1997).

137. *Michael P. v. Super. Ct.*, 113 Cal. Rptr. 2d 11, 18 (Cal. App. 4th Dist. 2001) (citations omitted).

138. 1986 WL 15087 at *3 (N.D. Ill. Dec. 30, 1986) (footnote omitted).

139. 98 F.3d 416, 418-19 (9th Cir. 1996).

decision”¹⁴⁰ containing “stunning bureaucratic logic”¹⁴¹ and “analysis . . . too appalling to require any response.”¹⁴²

Curiously, in an order on several post-trial motions, Judge Pauley of the Southern District of New York referred to a trial he himself conducted as “often Kafka-esque,”¹⁴³ but did not indicate how, precisely, the trial merited that label. And finally, even if an entire judicial proceeding is not Kafkaesque, it might involve a Kafkaesque motion.¹⁴⁴

Sometimes, however, the mere fact that a proceeding is Kafkaesque is not enough to render it unlawful. In *Shango v. Jurich*, “Illinois prison officials appeal[ed] from two preliminary injunctions entered by the district court [in favor of] Plaintiff [Shango], an Illinois state prisoner, [who] claimed that prison officials had unlawfully transferred him [from one prison to another].”¹⁴⁵ In granting the injunctions, Judge Shadur of the Northern District of Illinois “[d]escrib[ed] both the reasons for the transfer and the [pre-transfer] hearing as ‘Kafkaesque,’ ”¹⁴⁶ in part because “the proceedings [were] ‘totally lacking in notice and a meaningful opportunity to be heard.’ ”¹⁴⁷ Writing for a unanimous panel of the Seventh Circuit, Judge Eshbach agreed with Judge Shadur that “[t]he transfer proceeding was indeed Kafkaesque [because] Shango could say nothing to refute the charge, for there was no charge against him. Prison authorities were attempting to rely upon their power to transfer him for no reason at all.”¹⁴⁸

140. *Id.* at 420. Specifically, the Immigration Judge (“IJ”) determined that even though Rodriguez, if he returned to Cuba, would be tried for violating laws that “were, at least in part, politically motivated,” *id.*, in a prosecution that “would be tantamount to persecution for political opinion,” *id.* (quoting the IJ’s decision), he “would not be punished for his beliefs, but for committing crimes against the socialist state of Cuba,” *id.* (quoting the IJ’s decision).

141. *Id.*

142. *Id.* at 421 n.6.

143. *Chere Amie, Inc. v. Windstar Apparel Corp.*, 2003 WL 22056935 at *3 (S.D.N.Y. Sept. 4, 2003). Similarly, Judge Richey began his opinion in *Johnson v. Secretary of Health & Human Services* by noting: “This Court has described the procedural history of this case as ‘Kafka-esque.’ Missed filing deadlines have been variously attributed to negligence, Christmas vacation schedules, and bureaucratic red tape. Inadvertent misplacement of documents has been attributed by counsel for defendant to ‘mysterious gremlins.’ ” 1984 WL 62854 at *1 (D.D.C. Mar. 16, 1984). In an earlier order in the same case, Judge Richey stated that “[t]he history of this litigation has a Kafka-like quality to it.” *Johnson v. Sec., Dept. of Health & Human Servs.*, 587 F. Supp. 1117, 1118 (D.D.C. 1984).

144. *Anvan Realty & Mgt. Co. v. Marks*, 680 F. Supp. 1245, 1246 (N.D. Ill. 1988) (terming “Kafkaesque” a motion that contained a “‘laundry list’ of grounds for moving to dismiss” that “rais[ed] in a conclusory fashion every conceivable ground on which a RICO complaint might be defective” but which “failed to provide plaintiffs with any basis for determining which aspects of the complaint defendants really wished to challenge”).

145. 681 F.2d 1091, 1092 (7th Cir. 1982).

146. *Id.* at 1096.

147. *Id.*

148. *Id.* at 1103. Judge Eshbach went on to note: “The nature of the hearing with which Shango was provided is a vivid illustration of the reason why the due process clause does not require a hearing where there is no limitation on official discretion.” *Id.*

Shango's Kafkaesque transfer proceeding was not unlawful, however, because, with respect to his transfer, "Shango had no liberty interest originating in the Constitution which would trigger the procedural protections of the Fourteenth Amendment."¹⁴⁹ In a subsequent proceeding in the same case, Judge Shadur found "Kafkaesque overtones" in the prison's decision, in a disciplinary proceeding, to withhold from Shango the identity of another inmate he was alleged to have hired to force a third inmate to have sex with him.¹⁵⁰

b. *Dissenting*

While judges have often criticized other tribunals by calling them Kafkaesque, the K-bomb is sometimes dropped a bit closer to home – in a dissenting opinion.

Perhaps the most pointed accusation of Kafkaesque reasoning leveled by a dissenter is that which appears in *Van Sickle v. State*.¹⁵¹ In that case, the issue was the trial judge's decision to admit, for impeachment purposes, "an F.B.I. 'rap sheet' which stated that appellant had been convicted of grand larceny in Guymon, Oklahoma in January, 1975."¹⁵² The problem was that while the appellant did, indeed, plead guilty to grand larceny in January, 1975,¹⁵³ "the judgment was deferred pending the outcome of probation, . . . appellant had completed his probation, and . . . in August, 1976, the case was discharged without judgment of guilt and with the plea being expunged from the record."¹⁵⁴

As to the admission of that material before the jury [i.e., the F.B.I. rap sheet which listed a 'conviction' which had subsequently been expunged], the majority conclude[d] that error was not preserved for appellate review,

149. *Id.* at 1098. However, in *Tellez v. Peters*, 1997 WL 51441 (N.D. Ill. Feb. 3, 1997), a prisoner (who, coincidentally, was incarcerated in one of the two prisons in which Shango had been held) successfully challenged, on due process grounds, the conduct of a disciplinary hearing that resulted in his being sentenced to one year in segregation. *Id.* at *9. Because he was sentenced to one year in segregation, Tellez had a constitutional right to "[a] written statement of reasons for the disciplinary action taken." *Id.* What he got was a decision that stated, in full: "REASONS: Based on staff observation. IA [internal affairs] report 'The identity of confidential sources is being withheld for security reason.' The committee finds information from the confidential source(s) to be reliable.' Seriousness of the charges. History of like behavior." *Id.* (quoting Pl.'s Ex. 23). In Magistrate Judge Pallmeyer's view, the foregoing decision was a "Kafkaesque summary [which did] not even tell Tellez what the [Adjustment] Committee found he had done." *Id.*

150. *Shango v. Jurich*, 608 F. Supp. 931, 939 (N.D. Ill. 1985).

151. 604 S.W.2d 93 (Tex. Crim. App. 1979).

152. *Id.* at 97.

153. *Id.*

154. *Id.*

and fault[ed] appellant for not presenting the necessary documentary proof to obtain exclusion of the evidence.¹⁵⁵

Judge Clinton continued his dissent:

The district attorney may become a loose cannon unless the accused has first secured him. Without himself presenting any evidence of a conviction and against protestations that there is none – it having been ordered expunged – the prosecutor is permitted to pretend that there has been because the accused fails to produce documentary proof to the contrary. “Where are your papers?” – heretofore alien to this country – is made a proper question in a court of law.

Kafkaesque, the majority now requires a citizen to be prepared to demonstrate that he is not a convict by immediately producing papers of an event that has been ordered obliterated from the pages of the history of his personal life. Patently, one who has been given to understand that he is not a convict should not be expected to anticipate a claim that he is and to be ready to prove that he is not.¹⁵⁶

Interestingly, in light of Judge Clinton’s dissent in *Van Sickle*, the Sixth Circuit, in a per curiam opinion, held that it was not “illogical and Kafkaesque”¹⁵⁷ for the district court to count as a predicate felony, for a charge of felon in possession, a sentence from a Michigan state court consisting of probation without a judgment of guilt, an adjudication available to first-time drug offenders.¹⁵⁸ Among other things, the court of appeals relied upon a Michigan Supreme Court case holding, for purposes of the state’s fourth-time habitual-offender statute, “[t]he conviction is the *finding* of guilt.”¹⁵⁹

In *In re Loss*, the Illinois Supreme Court ruled that Edward Loss was not qualified for admission to the Illinois bar, notwithstanding the opinion of the State Board of Law Examiners that Loss had demonstrated sufficient rehabilitation from a pre-law-school life that included problems with drugs and alcohol and a variety of criminal offenses.¹⁶⁰ Justice Simon dissented:

Edward Anthony Loss will not be permitted to practice law in this State, not because he has failed to follow the rules, but because

155. *Id.* at 100 (Clinton, J., dissenting).

156. *Id.*

157. *U.S. v. Hawkins*, 969 F.2d 169, 173 (6th Cir. 1992) (quoting Defendant/Appellant’s Br.).

158. *Id.*

159. *Id.* (quoting *People v. Preuss*, 461 N.W.2d 703, 711 (Mich. 1990)).

160. 518 N.E.2d 981, 985 (Ill. 1987).

we have. The court's departure from any concept of fairness or regularity has been complete, and I would say, almost Kafkaesque. Mr. Loss was forced to appear at an inquiry of a type which has never been convened before or since to defend himself against unknown charges. Unfettered by a previously announced standard of review or any rules as to admissibility of evidence, the court has now determined, not surprisingly, that its initial concerns as to Loss' fitness were justified. The court has misused its authority, and I dissent.¹⁶¹

In a dissenting opinion in an attorney disciplinary proceeding, Justice Sullivan of the Indiana Supreme Court objected to a thirty-day suspension from practice imposed by the court:

The court suspends Mr. Atanga from the practice of law for several ill-advised decisions that he made during the course of a kafkaesque series of events. Approximately one year after being admitted to the bar, Mr. Atanga traveled to Lafayette to represent without charge an indigent, troubled young woman for whom no local representation was apparently available. After Mr. Atanga agreed to represent the woman in another matter (also without charge), the judge granted his request to schedule the next hearing so that it did not conflict with a previously scheduled court appearance in Indianapolis. The day before the Indianapolis hearing, the judge called Mr. Atanga and, countermanding his earlier entry, ordered Mr. Atanga to be in Lafayette the next day. When Mr. Atanga did not appear the next day or at the subsequently scheduled contempt hearing, he was arrested in Indianapolis, placed in the Marion County jail overnight, transported to Lafayette the next day, fingerprinted, photographed, had his belongings confiscated, dressed in prison garb and, while so dressed, hauled into court not only to defend himself against contempt charges but also to represent his client, who had also been brought to court. At this hearing, a full complement from the local press corps was present.¹⁶²

161. *Id.* at 1000 (Simon, J., dissenting).

162. *In re Atanga*, 636 N.E.2d 1253, 1258-59 (Ind. 1994) (Sullivan, J., dissenting). Sometimes, however, a disbarred attorney cannot even rally a dissenter to his side. In *The Florida Bar v. Mogil*, 763 So. 2d 303 (Fla. 2000), an attorney who had been removed from judicial office and disbarred in New York was disbarred in Florida for the same conduct. *Id.* at 306. In the Florida proceeding, he characterized his New York "disbarment under the facts at issue as 'Kafkaesque,' 'exceedingly draconian,' and 'an heinous and serious over-punishment.'" *Id.* at 307. After noting that Mogil "did not directly urge that the New York proceedings themselves were deficient or invalid for want of due process, infirmity of proof, or some other grave reason," *id.* (emphasis in the original), but only complained "that the presiding judge in his New York judicial removal case was 'an 85-year-old, long

Jara v. Municipal Court is another case about court-appointed interpreters, but in a civil rather than a criminal proceeding.¹⁶³ While the majority of an en banc panel of the California Supreme Court affirmed the denial of a petition for a writ of mandamus to compel the municipal court to provide an interpreter, at the court's expense, to an indigent civil defendant in a property damage action resulting from an automobile accident, Justice Tobriner dissented, stating:

The majority argues that the absence of an interpreter for the non-English-speaking defendant has not been shown to constitute a "substantial burden." I cannot agree with the majority's assessment of the confusion, the despair, and the cynicism suffered by those who in intellectual isolation must stand by as their possessions and dignity are stripped from them by a Kafka-esque ritual deemed by the majority to constitute, nonetheless, a fair trial.¹⁶⁴

State v. Jones involved double jeopardy.¹⁶⁵ Criticizing the majority, which held that a criminal defendant, whose first trial ended in a mistrial, had no "right to appeal the denial of his motion to dismiss the indictment on double jeopardy grounds prior to being put to trial a second time,"¹⁶⁶ Justice Webb of the North Carolina Court of Appeals wrote: "[T]he majority holds that being subjected to a rehearing or retrial does not 'affect a substantial right,' when the very right 'affected' is *the right not to be subjected to a rehearing or retrial*, a right guaranteed by our constitutions. They rely only on civil cases for this Kafkaesque proposition."¹⁶⁷ (Double jeopardy was also at issue in *Commonwealth v. Keenan*, in which Judge Cavanaugh explained that "where there is evidence of the Commonwealth's intentionally trying a defendant in a court which it knows or should know does not have jurisdiction, a subsequent prosecution is impermissible on the basis of the constitutional guarantees against being placed twice in jeopardy."¹⁶⁸ He went on to call such a litigation strategy "vexatious pursuit of a pattern of harassment"¹⁶⁹ and a "Kafkaesque scenario."¹⁷⁰).

retired Judge, who had great difficulty in hearing testimony . . . and who was *selected and highly paid unilaterally* by the politically appointed Commission on Judicial Conduct," *id.* (emphasis in the original), a unanimous panel of the Florida Supreme Court disbarred Mogil.

163. 578 P.2d 94, 94-95 (Cal. 1978).

164. *Id.* at 98 (Tobriner, J., dissenting).

165. 313 S.E.2d 264 (N.C. App. 1984).

166. *Id.* at 266 (Webb, J., dissenting).

167. *Id.* at 268.

168. 530 A.2d 90, 94 (Pa. Super. 1987).

169. *Id.*

170. *Id.*

In *State ex rel. Jackson v. McFaul*, the Ohio Supreme Court reversed the Ohio Court of Appeals by ruling that “habeas corpus will . . . lie to challenge a decision of the [Ohio Adult Parole Authority] in extraordinary cases involving parole revocation,”¹⁷¹ but held that the case before it was “not one of those extraordinary cases.”¹⁷² Justice Pfeifer dissented:

I dissent from the majority’s holding that this is not an extraordinary case which demands habeas corpus relief. On September 14, 1994, we granted Jackson a writ of habeas corpus discharging him from prison on the basis that he had been wrongly convicted of robbery. *State ex rel. Jackson v. Dallman* (1994), 70 Ohio St. 3d 261, 638 N.E.2d 563. However, Jackson remains in prison because the conviction which we determined was wrongful was used earlier in a Parole Board hearing to revoke Jackson’s parole.

Thus, the man who we determined up to the time of our decision had wrongfully served thirty months of prison time on an improper conviction continues to serve prison time based upon that same improper conviction. I consider this Kafkaesque result extraordinary, and one worthy of correction through habeas corpus relief.¹⁷³

In *State v. Sprattling*, the Hawaii Supreme Court affirmed a conviction for third-degree assault over the defendant’s argument that “the oral charge [at trial] failed to allege ‘bodily injury,’ an essential element of the offense.”¹⁷⁴ Justice Levinson dissented, observing:

[T]he jurisdictional defect inherent in an accusation omitting an essential element of an offense is, in and of itself, substantially prejudicial as a *per se* matter. The accusation is substantially prejudicial, not because it fails to notify the defendant of the charges against him or her, but because it fails to allege an offense within the statutorily conferred subject matter jurisdiction of the court and, therefore, nullifies any subsequent proceedings against the defendant. What the majority misapprehends is that the *Motta/Wells* post-conviction liberal construction rule is not simply animated by a concern that our criminal justice system must avoid convicting an accused pursuant to a Kafkaesque proceeding, in which the accused is never adequately informed of the conduct for which he or she is being criminally prosecuted, but also by a con-

171. 652 N.E.2d 746, 748 (Ohio 1995).

172. *Id.*

173. *Id.* at 749-50 (Pfeifer, J., dissenting).

174. 55 P.3d 276, 278 (Haw. 2002).

cern that we must avoid convicting an accused pursuant to a Manichaeian proceeding, in which the jurisdiction of the court is never established. To permit a conviction to stand simply because “might makes right” in this particular case would demean the integrity of our courts and embed a maxim that has no place in the criminal law of Hawai’i.¹⁷⁵

In *State v. Mowery*, Justice Celebrezze of the Ohio Supreme Court explained, in dissent, that “where a reviewing court upholds some rules of evidence but not others, that encourages disregard for all the rules of evidence and foreshadows their future devitalization.”¹⁷⁶ Such actions, Justice Celebrezze opined, amount to “Kafkaesque judicial alchemy,”¹⁷⁷ the inclusion of which rendered the majority’s opinion “demonstrably incorrect, plainly disingenuous, intellectually dishonest and institutionally flawed,”¹⁷⁸ not to mention “an exercise of raw judicial power.”¹⁷⁹

In *People v. Hobbs*, the California Supreme Court ruled that “a major portion or all of a search warrant affidavit may validly be sealed in order to protect the identity of a confidential informant.”¹⁸⁰ Justice Mosk dissented, and began his dissent by stating:

A search warrant containing no information other than the address of a home to be searched. Not a word as to what the government seeks to discover and seize.

A government informer, his – or, indeed, her – identity kept secret from the suspect, the suspect’s counsel, and the public.

Both the suspect and counsel barred from a closed proceeding before a magistrate. No record of the proceeding given to the suspect or counsel.

Based entirely on the foregoing, a court order approving an unrestricted search of the suspect’s home.

175. *Id.* at 296 (Levinson, J., dissenting) (citing *State v. Motta*, 657 P.2d 1019 (Haw. 1983); *State v. Wells*, 894 P.2d 70 (Haw. 1995)).

176. 438 N.E.2d 897, 905 (Ohio 1982). At issue in *Mowery* was the Ohio rule of evidence rendering a person incompetent to testify against his or her spouse when the spouse has been charged with a crime. *Id.* at 904 (citation omitted).

177. *Id.*

178. *Id.*

179. *Id.*

180. 873 P.2d 1246, 1248 (Cal. 1984).

Did this scenario occur in a communist dictatorship? Under a military junta? Or perhaps in a Kafka novel? No, this is grim reality in California in the final decade of the 20th century.¹⁸¹

In *Griffith v. State*, Ryan Griffith, a juvenile, was charged with six crimes.¹⁸² In response to a petition by the State, the juvenile court waived jurisdiction, and Griffith was tried and convicted of all six counts in the Superior Court.¹⁸³ Griffith appealed, and the Indiana Court of Appeals ruled that the trial court was without jurisdiction to hear three of the six charges, ordered the trial court to vacate the convictions on those three charges, and “remanded [the case] to the juvenile court to conduct further proceedings not inconsistent with [its] opinion.”¹⁸⁴ In his dissent, Judge Baker observed:

Here, Griffith held two victims at gunpoint, took possession of a vehicle through threat of force, and murdered David Whitlock. Inherent in the trial court’s waiver of jurisdiction was a finding that it is in Griffith’s best interest – and that of the community – to be removed from the juvenile justice system. In a Kafkaesque step, the majority’s decision to reverse the trial court and keep Griffith’s theft, carrying a handgun without a license, and criminal confinement charges in juvenile court actually results in committing Griffith to a system where the trial court found that his best interests will not be met.¹⁸⁵

In *Kimberlin v. Quinlan*, a divided en banc panel of the D.C. Circuit denied appellee Kimberlin’s suggestion for a rehearing of a case involving application of the direct evidence rule “to reconcile the extension of *Bivens* liability to constitutional torts based on motive . . . with the Supreme Court’s determination . . . that qualified immunity should afford officials substantial protection not merely from ruinous financial liability, but also from the burdens of litigation, including the burdens of discovery.”¹⁸⁶

Dissenting, Judge Edwards found it “incomprehensible that this court has refused to rehear a case which is so clearly of great importance, and which rests upon a rule that is concededly ‘completely arbitrary and unrelated to the strength of the plaintiff’s case.’ ”¹⁸⁷ Judge Edwards continued:

181. *Id.* at 1263.

182. 791 N.E.2d 235, 237 (Ind. App. 2003).

183. *Id.*

184. *Id.*

185. *Id.* at 242-43.

186. 17 F.3d 1525, 1525 (D.C. Cir. 1994) (citing *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388 (1971); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

187. *Id.* at 1527.

Even assuming the validity of heightened pleading requirements generally, *Kimberlin* creates a regime under which a civil rights plaintiff must prove more to survive a motion to dismiss than he or she must prove in order to win at trial. This rule is nothing short of Kafkaesque, and ours is the only circuit that has failed to recognize this fact.¹⁸⁸

c. Setting Out General Principles

Not only do judges invoke Kafka to criticize other tribunals and their own colleagues, they also use Kafka to make more general observations about how judicial proceedings should, and should not, be conducted.

For example, Justice Reynoso of the California Supreme Court began his opinion in *People v. Aguilar* by noting: “The right of a criminal defendant to an interpreter is based on the fundamental notion that no person should be subjected to a Kafkaesque trial which may result in the loss of freedom and liberty.”¹⁸⁹ Judge Reinhardt of the Ninth Circuit has suggested that at least in some circumstances, “a trial without counsel”¹⁹⁰ is a “Kafkaesque contest.”¹⁹¹ Judge Young of the District of Massachusetts has written about how one particular application of *Teague v. Lane*¹⁹² “runs the risk of reducing certain habeas petitions to Kafkaesque proceedings in which the petitioner loses but never knows why.”¹⁹³ Judge Ford of the Ohio Court of Appeals once observed that:

Close examination of the trial court’s judgment in this case reveals that beneath the placid surface of the trial court’s judgment entry lies a judicial tangle of Kafkaesque proportions . . . [which] behoove[d] this court to undertake a review of proper procedure . . . in order to provide a guide through the lower court proceedings.¹⁹⁴

In *Levine v. Torvik*, an appeal from the district court’s decision to grant a writ of habeas corpus, Judge Ryan of the Sixth Circuit quoted, approvingly, Judge Rice’s conclusion that the position advocated by the state “would result in dragging [petitioner] ‘Levine into a Kafkaesque cycle of

188. *Id.* (citing *Kimberlin v. Quinlan*, 6 F.3d 789 (D.C. Cir. 1993)).

189. 677 P.2d 1198, 1199 (Cal. 1984).

190. *Bradshaw v. Zoological Socy.*, 662 F.2d 1301, 1316 (9th Cir. 1981).

191. *Id.*

192. 489 U.S. 288 (1989).

193. *Nadworny v. Fair*, 744 F. Supp. 1194, 1213 (D. Mass. 1990).

194. *Wickliffe Firefighters Assn. v. City of Wickliffe*, 586 N.E.2d 133, 135 (Ohio App. 11th Dist. 1990). While Judge Ford has only referred to Franz Kafka once, he has penned more than his share of memorable opinions. See Parker B. Potter, Jr., *Surveying the Serbonian Bog: A Brief History of a Judicial Metaphor*, 28 Tul. Mar. L.J. 519, 541-44 (2004).

proceedings from which there is no escape’ ”¹⁹⁵ Confronted with a complaint alleging wrongful termination filed by an employee who had not yet been terminated, Justice Sills of the California Court of Appeals opined that “any rule of procedural law that allows one to be sued for conduct in which one has not engaged because one is ‘expected’ to do the wrong thing in the future is Kafkaesque.”¹⁹⁶

In *Thompson v. Superior Court*, the question before the California Court of Appeals was “whether the People are required to present evidence supporting ‘Three Strikes’ prior conviction allegations at preliminary hearings.”¹⁹⁷ Writing for a unanimous panel which held that such evidence is not required, notwithstanding the United States Supreme Court’s decision in *Apprendi*,¹⁹⁸ Justice Aldrich explained that “requiring proof of strike priors at preliminary hearings would create procedural impracticalities,”¹⁹⁹ and, after detailing those impracticalities, concluded that “[t]his Kafkaesque scenario is not mandated by law.”²⁰⁰

In *United States v. 15 Bosworth Street*, the government appealed the district court’s decision in favor of the claimants who were the owners of a building seized by the government because of its alleged use by drug dealers and who asserted an “innocent owner” defense.²⁰¹ In an opinion that vacated and remanded the district court decision, Judge Selya²⁰² of the First Circuit conclude[d] . . . that the lower court took an empty record (a record which, as a matter of law, contains inadequate evidence to ground a finding

195. 986 F.2d 1506, 1519 (6th Cir. 1993). In *Levine*, a federal habeas corpus proceeding, the state argued that the district court lacked the authority to grant a stay of state court action for the purpose of preventing further proceedings that would moot the state court decision about which the petitioner was complaining.

196. *Lee v. Bank of Am.*, 32 Cal. Rptr. 2d 388, 393 (Cal. App. 4th Dist. 1994). *Lee*, in which an employee was suing her employer, is one of those rare opinions in which the term Kafkaesque was used to characterize the actions of David rather than Goliath.

197. 110 Cal. Rptr. 2d 89, 91 (Cal. App. 2d Dist. 2001).

198. *Id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

199. *Id.* at 98.

200. *Id.* at 99.

201. 236 F.3d 50, 52 (1st Cir. 2001).

202. In a previous article, I reported that among American judges, Judge Bruce Selya is the most prolific judicial user of the phrases “Serbonian bog” and “paint the lily.” See Potter, *supra* n. 194, at 546-50. Judge Selya also leads the field with seven references to Franz Kafka. Giving him a run for his money are: Justice David Borden of the Connecticut Court of Appeals (with six Kafka references), Justice David Sills of the California Court of Appeals (six), Judge Harold Greene of the District of D.C. (five), Judge Milton Shadur of the Northern District of Illinois (five), Bankruptcy Judge Jack Schmetterer of the Northern District of Illinois (five), Judge Charles Moylan of the Maryland Court of Special Appeals (five), Judge Jack Weinstein of the Eastern District of New York (four), Judge Malcolm Wilkey of the D.C. Circuit (three), Judge James Oakes of the Second Circuit (three), Judge Richard Posner of the Seventh Circuit (three), Judge Stephen Reihardt of the Ninth Circuit (three), Judge Joyce Hens Green of the District of D.C. (three), Justice Daniel O’Hern of the New Jersey Supreme Court (three), and Justice Stanley Mosk of the California Supreme Court (three).

concerning the innocence of the owners), gave lip service to the accepted allocation of the burden of proof, and effectively inverted that burden.²⁰³

Judge Selya continued:

The claimants attempt to fend off this conclusion in two principal ways. First, noting that the district court called its holding a factual determination, they proceed to clasp the standard of review as if it were a life preserver. But this argument sinks under its own weight. When nomenclature diverges from substance, substance controls. See *Johnson* [v. *Watts Regulator Co.*], 63 F.3d [1129,] 1138 [(1st Cir. 1995)]. It would bring a Kafkaesque quality to the adjudication of cases if trial courts could inoculate themselves against meaningful appellate review by the simple expedient of creative labeling. We reject that notion.²⁰⁴

Judge Selya turned to Kafka yet again when the First Circuit rejected a criminal defendant's argument that, at sentencing, "to undermine a defendant's safety valve proffer, the government may not rely on an assessment simpliciter of the plausibility of the proffer, but, rather, must affirmatively produce rebuttal evidence."²⁰⁵ In Judge Selya's words:

By his own admission, the appellant was engaged in large-scale narcotics trafficking; he had delivered over 300 grams of heroin worth tens of thousands of dollars in a relatively compressed time frame. Based on the activities in which he was engaged and the officers' observations of him, the appellant's portrayal of himself as someone who was paid very little and who knew next to nothing about the details of the transactions in which he participated beggars credulity. Equally as striking, the appellant's denial that he was engaged in counter-surveillance during the March 30 meeting was belied by his actions and refuted by the observations of experienced narcotics agents.

To say that the sentencing court must close its eyes to such realities would border on the Kafkaesque. Were we to yield to the appellant's importunings and insist upon extrinsic evidence, district courts would be bound to accept even the most arrant nonsense from a defendant's mouth so long as the government could not directly contradict it by independent proof. A rule to that ef-

203. *15 Bosworth St.*, 236 F.3d at 55.

204. *Id.*

205. *U.S. v. Marquez*, 280 F.3d 19, 23 (1st Cir. 2002).

fect would turn the burden of persuasion inside out. We therefore decline to embrace it.²⁰⁶

Finally, in a remarkable three-page opinion, seemingly directed as much toward the state legislature as toward the parties, Judge Sherman of the New York Supreme Court began by stating that “[t]his case illustrates one of the many procedural difficulties caused by the fragmented jurisdiction of the Civil Court of the City of New York and the State Supreme Court in a multi-tier court system”²⁰⁷ and concluded by noting that “[a] Unified Court system would not only prevent these procedural anomalies, worthy of a Franz Kafka novel, but also ease the burdens of litigation and reduce calendar congestion.”²⁰⁸

2. *Kafkaesque Bureaucracies*

The most common target for judicial use of the Kafka adjective would appear to be bureaucracy.²⁰⁹

In *Cantrell v. Celotex Corp.*, Judge Painter took great pains to protect the Ohio Court of Appeals from “be[ing] accused of perpetuating a Kafkaesque bureaucracy, in which people are required to submit to hearing matters which no one contests.”²¹⁰ In that case, a worker’s compensation claimant appealed an adverse decision of the Industrial Commission to the court of common pleas.²¹¹ The court of common pleas dismissed the appeal because it was filed beyond the statutory time limit.²¹² The claimant

206. *Id.* at 24-25 (citing *U.S. v. Aymelek*, 926 F.2d 64, 68 (1st Cir. 1991) (explaining that a sentencing judge is “free to question, and ultimately to discount,” a defendant’s allocation); *U.S. v. Royer*, 895 F.2d 28, 30 (1st Cir. 1990) (“The guidelines do not require a sentencing judge to play the ostrich, burying his head in the sand, struthiously accepting every allocation at face value, and ignoring the stark reality of events.”)).

207. *Mantilla v. Aras*, 368 N.Y.S.2d 935, 936 (N.Y. Sup. Ct. N.Y. County 1975) (footnote omitted).

208. *Id.* at 937.

209. While *Hudson v. State*, 333 So.2d 587 (Ala. Crim. App. 1975), does not involve bureaucracy per se, it contains a Kafka references that is just too good to leave out. In that case, the defendant was charged with assault with intent to murder. *Id.* at 588. After he shot his victim, the victim sought assistance at the gate of a nearby Air Force base, but was turned away “and had to drive himself, with one lung filling with blood, to Jackson Hospital where he finally got medical attention.” *Id.* at 589. In reversing the trial court’s decision to admit evidence concerning the victim’s ordeal, Judge Cates of the Alabama Court of Criminal Appeals noted:

This testimony, with its Kafkaesque bureaucratic bumbling to frustrate binding wounds of a man who had been set upon by thieves, could only have prejudiced the jury against the appellant as the prime cause of [the victim’s] misery. But it sheds no light on the issues framed by the plea of not guilty and the indictment.

Id. at 591.

210. 663 N.E.2d 708, 711 (Ohio App. 1st Dist. 1995).

211. *Id.* at 709.

212. *Id.* at 711.

appealed to the Ohio Court of Appeals, which acknowledged the Industrial Commission's concession that the claimant's counsel never received formal notice of its adverse decision, but still affirmed on grounds that when the claimant discovered that his attorney had not received notice, his remedy was not a direct appeal to the court of common pleas, but, rather, a statutory administrative "savings procedure," which he failed to pursue.²¹³ In the court's view, the principle of protecting the integrity of jurisdictional prerequisites absolved it from charges of fostering a Kafkaesque bureaucracy.

In an opinion arising out of a suit brought by the State of North Carolina against the U.S. Department of Health, Education, and Welfare, under Title VI of the Civil Rights Act, Judge Dupree of the District of North Carolina observed:

We are left with an image of Gulliver being held down while the Lilliputians fasten thousands of strings around his limbs. No litigant should have to battle a Kafkaesque bureaucracy in which it is beckoned to the administrative hearing or negotiation table while being pressured into compliance through the threat of "deferrals" which are part and parcel of the original controversy.²¹⁴

In *American Security Council Education Foundation v. FCC*, Judge Wilkey of the D.C. Circuit criticized the defendants for charging the plaintiff with filing an untimely complaint with the FCC when plaintiff's "delay" resulted from nothing more than scrupulously following the FCC's own rules for filing a complaint.²¹⁵ He called the defendants' argument "Kafkaesque" bureaucracy in the ultimate."²¹⁶

In *Rodriguez v. City of New York*, Judge Birns of the Appellate Division of the New York Supreme Court described a patient's on-going difficulties in receiving hospital treatment—or even a telephone call—from the Bronx Memorial Hospital and concluded that he had faced "a Kafka-like bureaucracy."²¹⁷

213. *Id.* at 711-12.

214. *N.C. v. Dept. of HEW*, 480 F. Supp. 929, 939 (E.D.N.C. 1979). In this case, "deferrals" would result in a program-by-program assessment of the University of North Carolina's compliance with Title VI while it was at the same time undergoing a comprehensive evaluation of the same issues. *Id.* ("A serious issue also exists as to whether a fund recipient, as here, can be forced into a protracted, wide-ranging Title VI enforcement proceeding, evaluating its entire body of federal grants and programs, and at the same time be compelled to administratively litigate hundreds of new grant and program proposals as to their compliance with Title VI. The inquiries are, in reality, the same: has the University of North Carolina violated Title VI? To litigate this issue in one large proceeding and in many lesser ones is illogical and wasteful.")

215. 607 F.2d 438, 473-74 (D.C. Cir. 1979) (Wilkey, J., dissenting).

216. *Id.* (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 557 (1978)).

217. 446 N.Y.S.2d 50, 51 (N.Y. App. Div. 1st Dept. 1982) (Birns, J., dissenting).

In a case involving a sixty-five day delay between the filing of a petition for mitigation of forfeiture and the Department of Justice's disposition of that petition,²¹⁸ Judge Mansfield of the Second Circuit wrote: "The defendants have offered no plausible explanation for their long delay in disposing of the petition. On the contrary, the record reveals bureaucracy at its worst, with government officials relying on a confusing, internally inconsistent, Kafkaesque set of regulations as the ground for the otherwise inexplicable delay."²¹⁹

Substantially longer was the delay faced by Sik On To in *Hi-Hat Restaurant, Inc. v. INS*:

If To's petition had been granted in 1975 when it was made, rather than taking a stormy and convoluted course through the INS, BIA, and the Ninth Circuit, To would have been a legal resident for the past eight years, could have received visits from his family (from which he has been separated for ten years) and probably would have become a United States citizen by now. Although this court is not unacquainted with other cases in which litigants were prejudiced by administrative and appellate delay, the present case illustrates a Kafkaesque extension of the principle.²²⁰

In a case about federal student financial-aid payments, Judge Bruggink of the Court of Federal Claims commented on "the Kafka-esque nature of the bureaucratic bungling reflected in the record."²²¹ In a dissenting opinion in *Mosby v. Devine*, Justice Flanders of the Rhode Island Supreme Court characterized the majority's construction of two gun licensing statutes as creating "an administrative scheme [that] allows government regulation to sink to its most Kafkaesque and insidious depths of arbitrariness."²²² The statutes at issue involved state-level permitting and local permitting, and the problem with the majority's decision, according to Justice Flanders, is that it gives effective control over local permitting to the state—through a nice bit of definitional sleight-of-hand—rather than allowing the local permitting statute "to constitute an alternative method of obtaining a gun permit."²²³

218. *Johns v. McKinley*, 753 F.2d 1195 (2d Cir. 1985). The object of the forfeiture was the cab of a tractor trailer in which the petitioner had attempted to smuggle his girlfriend over the border between the United States and Canada and which also served as the petitioner's primary residence. *Id.* at 1197.

219. *Id.* at 1206 (Mansfield, J., dissenting).

220. 569 F. Supp. 776, 777 (D. Or. 1983) (citing *U.S. v. Loud Hawk*, 564 F. Supp. 691 (D. Or. 1983)).

221. *San Juan City College, Inc. v. U.S.*, 58 Fed. Cl. 26, 30 (Fed. Cl. 2003).

222. 851 A.2d 1031, 1078 (R.I. 2004).

223. *Id.*

As for what makes a bureaucracy Kafkaesque, it is difficult to find a better illustration than the following single sentence from Judge Miner's opinion in *Kurnik v. Department of Health & Rehabilitative Services*: "Appellant's Kafkaesque experience with that agency was characterized by no information, misinformation, unanswered letters, unreturned phone calls, unfulfilled promises, and classic bureaucratic runaround the sum total of which amounted almost to studied indifference if not purposeful neglect on the part of the agency."²²⁴

While judges often write critically about bureaucracies they consider to be Kafkaesque, they sometimes reach the opposite conclusion. In a case that involved the operation of the Office of Foreign Assets Control, Judge MacKinnon of the D.C. Circuit observed: "This is not, as the majority implies, a case where some hapless corporation finds itself caught in the coils of a Kafkaesque bureaucracy that is systematically attempting to deprive it of its rights."²²⁵

Finally, in the same way that a Kafkaesque proceeding is not necessarily unlawful, it is sometimes the case that a person may lawfully be subjected to a Kafkaesque bureaucracy. In *Ascolese v. Southeastern Pennsylvania Transportation Authority*, a Title VII action in which the plaintiff alleged, among other things, that she was subjected to a hostile or abusive work environment when she encountered difficulties in obtaining light-duty work during her pregnancy,²²⁶ Judge Pollak of the Eastern District of Pennsylvania explained that with one exception, the plaintiff's "difficulties were entirely of a bureaucratic character [and] [w]hile perhaps Kafkaesque, these difficulties did not involve the element of immediate personal threat that ordinarily contributes the most to the 'hostility' or 'abusiveness' of a work environment."²²⁷ *Sears, Roebuck de Puerto Rico, Inc. v. Soto-Rios* was a § 1983 action brought by an employer against the state agency that administers the Puerto Rico workers' compensation system.²²⁸ In granting the defendants' motion for summary judgment, Judge Perez-Gimenez explained that the plaintiff had failed to state a constitutional claim because "[t]he government's conduct, no matter how Kafkaesque, is not 'shocking,' nor does it 'violate universal standards of decency.'"²²⁹ Finally, in *United*

224. 661 So. 2d 914, 917 (Fla. 1st Dist. App. 1995).

225. *Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 877-78 (D.C. Cir. 1984) (MacKinnon, J., dissenting).

226. 902 F. Supp. 533, 537-38 (E.D. Pa. 1995).

227. *Id.* at 544. Judge Pollak did, however, state: "This is not to say that misfeasances of a bureaucratic nature can never establish the existence of work difficulties sufficiently pointed, and gender-defined, so as to satisfy the Harris standard, but rather that such difficulties must be intense, comprehensive and sustained." *Id.* (citing *Harris v. Forklift Systems*, 510 U.S. 17 (1993)).

228. 920 F. Supp. 266, 269. (D.P.R. 1996).

229. *Id.* at 273 (quoting *Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir. 1990)).

States v. Ripa, an interpleader action brought by the United States to determine rights to \$359,000 seized by the United States Customs service from Benedetto Romano at the Canadian border (plus approximately \$130,000 in interest),²³⁰ Judge Sack of the Second Circuit found that the facts of the case tended to support the defendant's "characteriz[ation] [of] their travails as 'Kafkaesque,'"²³¹ but "conclude[d], nonetheless, that Romano has not presented us, as an Article III court, with a legal basis upon which to deliver him from these circumstances."²³² In the words of Judge Sack: "We are no more able to relieve Romano of the absurdity of his situation than we are able to relieve Kafka's Joseph K of the absurdity of his."²³³

230. 323 F.3d 73, 75 (2d Cir. 2003). The money was seized in 1983 by the United States Customs Service, when Romano attempted to take it across the border into Canada without having completed the required currency reporting forms. *Id.* At the time of the seizure, the Internal Revenue Service placed a tax lien on the funds. *Id.* The government brought a civil suit for forfeiture (based upon the incident at the border), which suit was stayed during the pendency of an unsuccessful prosecution for tax evasion against Romano. *Id.* Finally, fifteen years after the seizure, Romano also prevailed in the civil forfeiture suit. *Id.* What remained, then, were the government's tax lien, a claim to one-third of the money asserted by Romano's attorney, Glen Ripa, and Romano's claim that he should be granted relief from paying interest and penalties on the taxes that were assessed against him in 1983. *Id.*

231. *Id.* at 76 (quoting Appellant's Br. at 27). Romano's Kafkaesque situation was composed of the following:

The United States Customs Service wrongfully seized a large sum of money from Romano, which he alleges made it impossible for him to pay taxes he owed the IRS on those funds. Although the government paid interest on the seized money, it did so at a rate so low in comparison to the penalties and interest the IRS was charging him on the unpaid taxes that, ultimately, the amount Romano owed the government in taxes and interest on the fund far exceeded the amount in the fund. Meanwhile, the civil proceedings over title to the seized funds were delayed by related criminal prosecutions, which also eventually proved meritless. When Romano finally prevailed in the civil suit over the seized currency, his money had been eaten up by taxes and penalties on it that, he says, he could not have paid because the government had wrongfully seized his money.

Id.

232. *Id.*

233. *Id.* (citing Franz Kafka, *The Trial* (Willa & Edwin Muir, trans., Alfred A. Knopf, rev. ed. 1992)). Not every tax case, however, results in an unhappy ending. In *Eddy v. U.S.*, 1994 WL 369913 (N.D. Ohio Mar. 9, 1994), the plaintiff had his federal tax refund wrongfully intercepted by the State of Arizona due to mistaken identity. *Id.* at *1. After Eddy filed suit, he received a check in the amount of his federal tax refund from the State of Arizona, but declined to dismiss his claims in order to seek a declaratory judgment on the constitutionality of the federal statute under which his tax refund was intercepted, 26 U.S.C. §§ 6402(c) *et seq.*, as well as "compensatory damages for the costs, pain and suffering purportedly incurred by him as a result of the alleged constitutional deprivation." *Id.* Eddy ended up getting his refund, but nothing else. Judge Bell characterized the case as follows:

Newspaper accounts concerning Eddy's initial predicament depict a "Kafkaesque" nightmare in which an unbridled government bureaucracy haunts unwary citizens. It is somewhat ironic that Eddy's attorney credits these articles with awakening the Arizona state bureaucrats to the necessity of rebating Eddy's misappropriated tax payments. Wherever the credit may lie, reckoning has indeed come with dawn, and the midnight specters have made

3. Kafkaesque Litigants

In addition to using the term Kafkaesque to criticize other tribunals or to decry bureaucracy, judges have frequently used the term to empathize with unfortunate litigants who come before them.

As Judge Alarcon said in *Denton v. United States*, “[t]his case chronicles the Kafkaesque plight of a hapless citizen whose claims to widow’s benefits regrettably must be denied despite clear evidence that she has been the victim of bureaucratic error.”²³⁴ Judge Brody of the Appellate Division of the New Jersey Superior Court has written of “the Kafkaesque predicament of having to defend against evidence that was totally undisclosed.”²³⁵ In *People v. Jones*, Justice Mosk of the California Supreme Court noted that unlike a criminal defendant faced with generic rather than particularized testimony, a defendant tried under a continuous-course-of-conduct charge “does not find himself in the Kafkaesque predicament of having to answer numerous charges of unspecified criminal misdeeds.”²³⁶ In *Green v. City of Montgomery*, a class action brought by officers claiming that the defendants discriminated against them in retaliation for exercising their first-amendment rights, Judge Thompson of the Middle District of Georgia stated that “[a]lthough [he was] sympathetic to [Officer] Henderson’s apparently Kafkaesque fate, [he was] not convinced that such treatment was motivated by any first-amendment activity on his part.”²³⁷

In *Werts v. Vaughn*, the Third Circuit affirmed the district court’s denial of a petition for a writ of habeas corpus.²³⁸ Among other things, the petitioner claimed that he was denied due process by the prosecutor’s statement, during his closing argument, that “if Tyrone Moore [a prosecution witness] had indicated he was going to testify against him [defendant/petitioner] and sent back to the Detention Center with these other in-

amends by means of a \$1,125.00 check. This break in events casts a new light on these proceedings, forcing us to close the chapter on Kafka and the United States alike.

Eddy’s claim for declaratory judgment is moot, and the remainder of his complaint must be dismissed for its failure to state a claim upon which relief can be granted.

Id. at **4-5.

234. 638 F.2d 1218, 1218 (9th Cir. 1981).

235. *Fisher v. Hundley*, 572 A.2d 1174, 1175 (N.J. Super. App. Div. 1990) (quoted in *Daley v. Dept. of Corrections*, 751 A.2d 1089, 1093 (N.J. Super. App. Div. 2000)). The petitioner in *Fisher* was a prison inmate appealing from an adverse decision in a disciplinary proceeding in which prison officials denied him access to the evidence against him in order to protect the confidentiality of its informants.

Id.

236. 792 P.2d 643, 655 n. 4 (Cal. 1990) (Mosk, J., dissenting).

237. 792 F. Supp. 1238, 1271 (M.D. Ala. 1992).

238. 228 F.3d 179, 206 (3d Cir. 2000).

dividuals, he would be sent back as a marked man.”²³⁹ In the petitioner’s view, the prosecutor’s closing argument impermissibly encouraged the jury to conclude that the petitioner had threatened the witness with bodily harm.²⁴⁰ Writing in dissent, Judge McKee observed:

In concluding that the prosecutor’s remarks did not deny Werts due process in the context of this trial we place defense counsel on the horns of a Kafkaesque dilemma. Had counsel not explored the possible bias here, his stewardship would have fallen short of that guaranteed by the Sixth Amendment’s right to counsel. However, having made an appropriate (indeed required) inquiry into the circumstances of Moore’s release, the majority concludes that defense counsel invited the prosecutor’s highly improper and prejudicial “reply.”²⁴¹

Justice Peck of the Vermont Supreme Court has noted that “it is clearly advisable and expected of law enforcement officers that they inform defendants of the offense charged *before* making an arrest if circumstances permit, as a safeguard against Kafka-like bewilderment on the part of arrestees,”²⁴² even though such notification is not technically required by the Vermont rules of criminal procedure.²⁴³ In *Little v. York County Earned Income Tax Bureau*, the Pennsylvania Superior Court affirmed a trial court order upholding a \$20,000 jury verdict awarded to a taxpayer who was arrested and held in jail for five days for not paying taxes she had actually paid.²⁴⁴ In the words of Judge Cercone, writing for the majority:

We cannot say that the jury’s verdict of \$20,000 was excessive when faced with the parade of horrors which resulted in Little’s imprisonment. She was shown to be – and appellant admits such – an upstanding citizen who had complied with all tax laws according to appellant’s advice. The Kafkaesque scenario of her experience provided the jury with an adequate basis upon which to provide recovery.²⁴⁵

239. *Id.* at 207 (McKee, J., dissenting).

240. *Id.* at 208.

241. *Id.* at 211.

242. *State v. Peters*, 450 A.2d 332, 333 n. 1 (Vt. 1982) (emphasis in the original).

243. *Id.*

244. 481 A.2d 1194, 1196-97 (Pa. Super. 1984).

245. *Id.* at 1202.

4. Kafkaesque Journeys Through Kafkaesque Labyrinths

Some of the most memorable Kafka references are those in which judges invoke Kafka to create vivid mental images. Such images include Judge Moylan's "Kafkaesque hall of mirrors,"²⁴⁶ Judge Maher's "Kafkaesque shadows,"²⁴⁷ Judge Mack's "Kafkaesque chain of secrecy,"²⁴⁸ and Justice Franchini's "Kafkaesque quagmire."²⁴⁹ Writing in dissent from an opinion affirming the trial court's decision to deny a criminal defendant's motion to quash the indictment against her, Justice Levy of the Texas Court of Appeals wrote: "The fog permeating this indictment is Kafkaesque in its thick and intimidating vagueness."²⁵⁰

Judge Wilkey of the D.C. Circuit once wrote of "the Kafkaesque specter of supplicants wandering endlessly from one jurisdiction to another in search of a proper forum only to find that it lies elsewhere."²⁵¹ In a Social Security disability benefits case, Judge Kane of the District of Colorado "outline[d] the criteria and legal principles by which the [Administrative Law Judge] and the Secretary [of Health and Human Services] should be guided, with the hope that future claimants will not feel themselves engaged in a Kafkaesque pursuit of justice."²⁵² Similarly, Justice O'Hern of the New Jersey Supreme Court once mentioned "the . . . futile 'Kafkaesque journey' [of] a citizen who encounters an unreasoning bureaucracy."²⁵³

Judge Baime of the Appellate Division of the New Jersey Superior Court characterized "the efforts of David and Barbara Rosen to secure appropriate residential services for their [profoundly retarded quadriplegic] daughter"²⁵⁴ as "a Kafkaesque journey through an endless bureaucratic

246. *Glenn v. State*, 511 A.2d 1110, 1111 (Md. Spec. App. 1986) (discussing "the case law on both consummated and inchoate criminal homicide . . . in Maryland and throughout the common law world" which was characterized as "a case law still sadly riddled with imprecise generalities, elusive half-truths, and grandiose jabber").

247. *Maurer v. McManus*, 409 N.W.2d 747, 750 (Mich. App. 1987).

248. *Ridge v. Police & Firefighters Ret. & Relief Bd.*, 511 A.2d 418, 425 n. 11 (D.C. 1986) (citing Franz Kafka, *The Trial* (1956)) (discussing actions of administrative agency that failed to give claimant proper notice of proceeding that made ruling adverse to his interests).

249. *In re Forfeiture of Two Thousand Seven Hundred Thirty Dollars and No Cents (\$2,730.00) in Cash*, 809 P.2d 1274, 1277 (N.M. 1991) (explaining that target of forfeiture "was indigent because the city confiscated his cash, and he was unable to challenge the confiscation because he was indigent").

250. *Moallen v. State*, 699 S.W.2d 926, 929 (Tex. App. 1st Dist. 1985) (Levy, J., dissenting).

251. *Eisel v. Sec. of the Army*, 477 F.2d 1251, 1257 (D.C. Cir. 1973) (citing Franz Kafka, *The Trial*, 268-78 (Knopf 1937)) (discussing various possible rules for jurisdiction over habeas corpus proceedings brought by armed forces reservists).

252. *Pettyjohn v. Sullivan*, 776 F. Supp. 1482, 1485 (D. Colo. 1991).

253. *Sperling v. Bd. of Rev.*, 720 A.2d 607, 610 (N.J. 1998) (O'Hern, J., concurring in part and dissenting in part) (discussing plaintiff's quest for workers compensation and/or temporary disability benefits for injury suffered somewhere between work and home) (quoting *Rosen v. N.J. Div. of Developmental Disabilities*, 607 A.2d 1030, 1031 (N.J. Super. App. Div. 1992)).

254. *Rosen*, 607 A.2d at 1031.

labyrinth”²⁵⁵ initiated by the New Jersey Division of Developmental Disabilities. In yet another workers’ compensation case, Justice McGraw of the West Virginia Supreme Court decried “bureaucratic indifference [that forced petitioners’ attorneys] to lead their clients on a Kafkaesque journey through a labyrinth of administrative bungling.”²⁵⁶ In *Cannon v. Heckler*, Judge Stern of the District of New Jersey reminded the Secretary of Health and Human Services of the court’s previous instructions “not to create a ‘Kafkaesque labyrinth’ for [a social security] claimant.”²⁵⁷ Similarly, in *Petite v. Reno*, Judge Oberdorfer of the District of D.C. reminded the defendant of a previous order in the case “describ[ing] in some detail the ‘Kafkaesque labyrinth of administrative confusion’ that had attended this [Title VII] action.”²⁵⁸ And in *State v. Johnson*, Justice Zimmerman of the Utah Supreme Court, in a concurring opinion, linked Kafka and the labyrinth in the following way:

As I noted in my separate opinion in *State v. Hygh*, 711 P.2d 264, 271-72 (Utah 1985) (Zimmerman, J., concurring), much of the existing federal fourth amendment warrantless search and seizure law is rather Kafkaesque, consisting as it does of rules built upon a series of contradictory and confusing rationalizations and distinctions. Police officers and judges attempting to make their way through this labyrinth often imperil both the rights of individuals and the integrity and effectiveness of law enforcement.²⁵⁹

255. *Id.*

256. *Meadows v. Lewis*, 307 S.E.2d 625, 644 (W. Va. 1983). As for what, precisely, constitutes a “labyrinth of administrative bungling,” Justice McGraw provided the following description and commentary:

Petitions were processed and hearings scheduled for matters upon which determinations had already been made, consequently resulting in proceedings at which only the hearing examiner appeared. Claims were periodically opened, closed, reopened, reclosed, etc., for no cognizable reason other than the commissioner’s repeated justification of “clerical error.” In *Meadows*’ case, one of the two reasons given for termination of TTD benefits at one point was his failure to submit to surgery which had already been performed over two months prior to entry of the termination order. In *Reichard*’s case, the commissioner inexplicably took almost five months to *acknowledge* receipt of a petition to reopen which the commissioner subsequently determined established a *prima facie* case for reopening. It is apparent that the commissioner has acted fully, in utter disregard not only of mandatory duties imposed by law, but also of the plight of injured workers who desperately need the prompt resolution of their claims.

Id. (emphasis in the original).

257. 627 F. Supp. 1370, 1373 (D.N.J. 1986).

258. 822 F. Supp. 815, 816 (D.D.C. 1993).

259. 745 P.2d 452, 456 (Utah 1987) (Zimmerman, J., concurring).

In *In re Riccardo*, Judge Hardin of the Bankruptcy Court for the Southern District of New York quoted a *New York Times* Op-Ed piece “in which the writer, a victim of social security number theft, describe[d] as ‘a Kafkaesque maze’ the six-month battle of trying to clear [her] name [with] phone companies, the credit bureaus and two collection agencies.”²⁶⁰ In an order dealing, *inter alia*, with a discovery dispute, Judge Belot of the District of Kansas noted that “it [was] equally plausible that the FDIC’s failure to produce is attributable at least in part to the Kafkaesque maize that is endemic to governmental bureaucracy and that retards even inter-governmental requests for information.”²⁶¹ While it seems unlikely that Judge Belot actually intended to refer to government bureaucracy as Kafkaesque corn—unless, of course, legal writing in the Midwest typically relies upon crop-based metaphors and other vegetable nuances that are unfamiliar to those of us outside America’s breadbasket—there is at least one intentional linkage of Kafka and food.

In *In re Commitment of Schulpius*, the Wisconsin Court of Appeals affirmed the trial court’s denial of the appellant’s request for release from commitment as a sexually violent person.²⁶² Writing in dissent, Judge Schudson noted that the appellant, Schulpius, had been confined for approximately four years in direct violation of multiple court orders directing that he be given a supervised-release placement.²⁶³ Judge Schudson then observed:

¶ 61 Interestingly enough, in the most fundamental way, the parties’ positions are not far apart. Both Schulpius and the State seek compliance with court orders; both want enforcement of the law the legislature enacted, not a charade. But can any remedy give Schulpius his due, prevent such Kafkaesque confinement of others, and, at the same time, protect the community? I believe so; but to understand how, one must think through each of the several options.

¶ 62 Damages? That’s silly; Schulpius’ new-found wealth would be of little benefit behind bars, and the status quo would continue. Financial penalties for government officials or departments? That’s spittin’ into the wind; the government could continue to violate court orders and, ultimately, the penalties would

260. 248 B.R. 717, 721 (Bankr. S.D.N.Y. 2000) (quoting Stacy Sullivan, *How I Lost My Good Name*, N.Y. Times A19 (Apr. 17, 2000)).

261. *Comeau v. Rupp*, 810 F. Supp. 1127, 1166 (D. Kan. 1992).

262. 678 N.W.2d 369, 370 (Wis. App. 2004).

263. *Id.* at 387. Those orders were ultimately vacated due to a judicial finding that Schulpius was no longer a suitable candidate for supervised release. *Id.* at 379.

pass on to the taxpayers. Continued confinement with, again, the *false* promise of possible supervised release? What could more certainly *reduce* incentives for confined predators to cooperate in treatment?

¶ 63 And where would such remedies lead? Just play them out – any one of them. *Any remedy short of supervised release actually endangers our community more than release itself.* The status quo would continue. The State, rather than creating a Milwaukee County facility to house, treat and supervise predators, would keep Schulpius and other predators confined even when courts ordered their supervised release. Wisconsin then would need to increase staff and eventually build institutions to make room for all the unlawfully confined predators who qualify for the supervised release that will never come.

¶ 64 Then what would happen? What, in all likelihood, would Wisconsin really do? Now swallow hard; here's the last bite of Kake-Kafkaesque. Faced with tight budgets and overcrowded institutions, Wisconsin could solve this fiscal and constitutional riddle in only one way: by no longer seeking commitment of sex predators in Milwaukee County (and, eventually, in other counties claiming to be unable to provide suitable facilities). Thus, quite certainly, judicial acquiescence in this governmental misconduct leaves not only a constitutional stain, but a *more endangered community*.²⁶⁴

Other than Judge Schudson's reference to Kake-Kafkaesque—a bittersweet torte, one must presume—the cupboard is bare; Judge Schudson seems to be the only judge ever to cook up a food-related reference to Franz Kafka.²⁶⁵

264. *Id.* at 390-91 (emphasis in the original).

265. However, Judge Schudson's cupboard of metaphors is far from bare, as demonstrated by the conclusion of his opinion:

¶ 70 To repeat: a *sex predator commitment law that, in the most fundamental way, cannot function as written cannot stand.* This proposition, I trust, is so clear that, I fear, I belabor what should simply be known, without words. And yet, finding that my voice is crying out alone, I persist.

¶ 71 Thus I struggle to state the obvious: if the constitutionality of Wis. Stat. ch. 980 depends on the substantive rights it declares, the unconscionable removal of those rights destroys its constitutionality. I search for metaphors – without strings, a Stradivarius is silent . . . without wings, an eagle dies.

¶ 72 Thus, while appreciating the meticulous manner in which the Majority has traced the history of this case, and while finding little fault with the Majority's articulation of certain legal principles, I see a very different drama. The Majority, perhaps distracted by an ugly charade, has failed to perceive the classic tragedy Schulpius and the State have performed on our constitutional stage.

5. Wordplay Inspired by Kafka

While the mental images some judges have painted using Kafka as pigment are vivid and compelling, so too are many of the Kafka references that are primarily verbal.

It is not difficult to discern Judge Robinson's opinion of a proposed statutory interpretation that would require "input[ing] to Congress a Kafkaesque obscurantism."²⁶⁶ Equally persuasive is Justice Neely's reference, in a case about a West Virginia state mental hospital, to the "tragic impact of the hospital's Kafkaesque lack of coordination."²⁶⁷ Judges have also written of "Kafkaesque nonsense,"²⁶⁸ a "Kafka-like perverse effect,"²⁶⁹ a "Kafkaesque air of unreality,"²⁷⁰ a "Kafkaesque comedy of errors,"²⁷¹ the

¶ 73 Accordingly, I respectfully dissent.

Id. at 393 (emphasis in the original).

266. *Citizens to Save Spencer County v. U.S. EPA*, 600 F.2d 844, 896 (D.C. Cir. 1979) (Robinson, J., dissenting) (footnote omitted). Other judges have used Kafka to comment on the process of statutory interpretation. See e.g. *Wright v. Bekins Moving & Storage Co.*, 775 P.2d 857, 860 (Or. App. 1989) (Newman, J., dissenting) ("The legislature never intended a Kafkaesque system that cuts off a claimant's remedy, even though he has no notice that he must act to preserve his rights."). And judges have also used Kafka to comment on the wisdom of legislative action. See e.g. *Suffolk Sanitary Corp. v. Town Bd. of Brookhaven*, 375 N.Y.S.2d 740, 749 (N.Y. Sup. Ct. Suffolk County 1975) ("Nevertheless, it is apparent that the Legislature's ill-conceived rate-setting statute has placed the plaintiff in a Kafkaesque position. It is clearly entitled to a substantial rate increase which it cannot obtain without either seeking agreement from those who do not care to agree or obtaining relief from judicial authorities who are powerless to fix rates and can only declare whether a particular rate sought to be charged is reasonable.").

267. *E.H. v. Matin*, 284 S.E.2d 232, 236 (W. Va. 1981).

268. *Irwin v. Citibank (S.D.), N.A.*, 1993 WL 837921 (Pa. Phila. County. Ct. 1993). In *Irwin*, which discussed the constitutionality of a federal banking statute that allowed one state to establish interest rates for other states, Judge Avellini explained:

True, Congress may, and probably should, limit the loan charges imposed by out-of-state banks and their credit card affiliates. Moreover, Congress may, and probably should delegate that responsibility to a federal agency. Congress may not, however, "go to the ball game and authorize the page boys to legislate, [because] the delegation would be unconstitutional." Although state lawmakers are hardly congressional pages, they are equally incompetent to legislate for the nation. For such Kafkaesque nonsense, We The People will require a new Constitution.

Id. at *4 (citations omitted).

269. *Newland v. Bd. of Govs. of Cal. Community Colleges*, 566 P.2d 254, 258 (Cal. 1977) (discussing statutory amendment "providing that a person convicted of a Felony sex crime who applies for a certificate of rehabilitation and who is otherwise fit, can obtain certification to teach in the community college system but that an otherwise fit person, convicted of a Misdemeanor sex crime, is forever barred").

270. In his concurring and dissenting opinion in *State v. Marshall*, 690 A.2d 1 (N.J. 1997), Justice O'Hern wrote:

The Court's response to defendant's request is that the State has agreed to furnish to defendant any documents he can identify as being in the State's possession. There is a

“Kafkaesque compartmentalization of truth,”²⁷² “the Kafkaesque trappings of the ‘third degree,’ ”²⁷³ a “Kafkaesque parody,”²⁷⁴ a “Kafkaesque twist,”²⁷⁵ and a “Kafkaesque trap of circular reasoning.”²⁷⁶ None of those phrases, abstract though they might be, leaves any doubt as to either the judge’s meaning or his understanding of Kafka.

In light of Kafka’s status as a writer of literature, it is somehow fitting that some judges have couched their Kafka references as literary metaphors. In *Welsh v. City of Philadelphia*, Judge Caesar of the Pennsylvania Court of Common Pleas characterized the facts of that case as “[t]he

Kafkaesque air of unreality to this analysis. See Franz Kafka, *The Trial* (1937). Like the accused in *The Trial*, who was forced to defend himself without being told the charges against him, Marshall is denied access to possibly exculpatory evidence unless he can first identify that evidence.

Id. at 103. Justice Handler, in turn, agreed with Justice O’Hern: “Justice O’Hern is surely correct in arguing that to allow defendant access only to those documents he can identify as being in the State’s possession has a certain Kafkaesque feel to it.” *Id.* at 135 (Handler, J., dissenting).

271. *Peterson v. Lacy*, 1998 WL 883302 at *1 (S.D.N.Y. Dec. 17, 1998) (characterizing the process through which state prisoner was denied conditional release in an order declining to accept the magistrate judge’s report and recommendation and granting prisoner’s petition for a writ of habeas corpus) (quoted in *Peterson v. Tomaselli*, 2004 WL 2211651 at *2 (S.D.N.Y. Sept. 30, 2004)).

272. *Nienhouse v. Super. Ct.*, 42 Cal. Rptr. 2d 573, 578 (Cal. App. 1st Dist. 1996) (rejecting interpretation of constitutional provision pertaining to use of hearsay in preliminary hearings that would allow the state to elicit an inculpatory hearsay statement from a law enforcement officer but would preclude the defendant from eliciting exculpatory hearsay statements from the same law enforcement officer on cross examination).

273. *Argueta v. State*, 764 A.2d 863, 867 (Md. Spec. App. 2001) (explaining the concerns that gave rise to the Supreme Court’s decision in *Miranda v. Arizona*, 384 U.S. 436 (1966)). In *Argueta*, Judge Thieme quoted the following passage from Judge Moylan’s opinion in *Jones v. State*, 753 A.2d 587 (Md. Spec. App. 2000):

Miranda’s concern was with an interrogation environment so oppressive as to give rise to a presumption of compulsion in the context of the Fifth Amendment privilege against “compelled” self-incrimination. The concern was with the Kafkaesque trappings of the “third degree.” The drum-like refrain of the *Miranda* analysis repeated and re-echoed the theme of “incommunicado interrogation” in a “police-dominated atmosphere.”

Id. at 593.

274. *Marciniak v. Brown*, 10 Vet. App. 198, 204 (Vet. App. 1997) (Steinberg, J., dissenting) (“Such a presumption [that public officers have discharged their official duties properly] accords regularity to the actions of officials of the very government that has twice lost the entire claims file. In a rather Kafkaesque parody, that irregularity – losing the file – is what has become ‘regular’ in this case.”).

275. *Reeves v. Hopkins*, 928 F. Supp. 941, 965 (D. Neb. 1996) (explaining that Nebraska Supreme Court’s decision that it had authority to sentence criminal defendants, under “independent” standard of review, subjected defendant Reeves to “a ‘new ball game,’ one with a Kafkaesque twist. If Reeves lost, he died.”).

276. *Lipton v. County of Orange, N.Y.*, 315 F. Supp. 2d 434, 451 (S.D.N.Y. 2004) (“To deny plaintiff [alleging he was subject to a retaliatory transfer from one prison to another] a trial on what plainly is a jury question of pretext involving credibility would ensnare him in a Kafkaesque trap of circular reasoning” when “the very conduct that offered to justify the transfer was the same constitutionally protected conduct that would have created the motive for the alleged retaliation.”) (citation omitted).

Kafkaesque tale of Ms. Welsh's effort to save her home and business."²⁷⁷ After recounting, in rather colorful language, a series of mindless (or worse) bureaucratic machinations inflicted upon an applicant for a building permit by "government run amok," in the form of Prince George's County, Maryland, and the Washington Suburban Sanitary Commission, Judge Wilner of the Maryland Court of Special Appeals concluded his summary of the facts: "The Kafkaesque drama was now complete."²⁷⁸

Judge Dalzell of the Eastern District of Pennsylvania began his opinion in *Simmons v. DiDario* by stating: "This Kafkaesque case involves a United States Air Force colonel who returned from service in Operation Desert Storm to find that he was suspended without pay at his civilian job because of charges that, to this day, have never been made against him."²⁷⁹ He concluded by stating that "[t]he remedies available to Dr. Simmons are, in the Court's opinion, modest in view of the bad faith treatment he suffered in this Kafkaesque drama."²⁸⁰

Sometimes, of course, in the absence of an entire Kafkaesque drama, there might be a part of one. In *State v. Flemming*, Justice Moeller of the Arizona Supreme Court spoke of the "Kafkaesque scene" that would be created if the state were to prosecute a revocation of probation three years after the defendant's probation had expired.²⁸¹ Similarly, in *People v. Coronado*, Justice Weiner discussed a "Kafkaesque scene" involving an "administrative web in which defendant, after having confided to a probation officer for purposes of probation, [found] himself entwined as he was directed toward the state hospital" for indefinite confinement as a mentally disordered sex offender.²⁸²

Finally, and most dramatically, some judges have taken a global view in their use of Kafka. In a case concerning the constitutionality of placing a prison inmate in administrative segregation on the basis of allegations that he or she is a flight risk, Judge Motz of the District of Maryland ruled that "substantive due process requires that in a case where an inmate challenges an allegation that he is an escape risk, he be given an opportunity within a reasonable time after being placed on administrative segregation

277. 1987 WL 582723 at *5 (Pa. Phila. County Ct. 1987). After more than twenty years of complaining to the city about the deleterious effect of sewer-line construction near her home and repeated assurances that her home was structurally secure, the city ordered Ms. Welsh to vacate her house, demolished it, and billed her \$4,821.30 for the work. *Id.* at *6.

278. *Prince George's County v. Blumberg*, 407 A.2d 1151, 1155, 1162 (Md. Spec. App. 1979).

279. 796 F. Supp. 166, 166 (E.D. Pa. 1992).

280. *Id.* at 172.

281. 907 P.2d 496, 502 (Ariz. 1995) (quoted in *State v. Adler*, 931 P.2d 1082, 1088 (Ariz. 1996)).

282. 163 Cal. Rptr. 746, 749-50 (Cal. App. 4th Dist. 1980) (Wiener, J., dissenting).

to appear before a hearing officer.”²⁸³ In explaining his decision, Judge Motz stated:

While a hearing officer’s decision is entitled to extreme deference, it must be based on his or her independent judgment. Otherwise, prisons will become a Kafka-esque world in which, solely on the basis of information for which no one is held personally accountable, an inmate can be placed alone in a cell for almost twenty-four hours a day, weeks and months on end.²⁸⁴

Judge Glasser of the Eastern District of New York has written of “the Kafkaesque world of [the federal sentencing] guidelines.”²⁸⁵ In a special

283. *Jackson v. Bostick*, 760 F. Supp. 524, 525, 531 (D. Md. 1991).

284. *Id.* at 531.

285. *U.S. v. Donofrio*, 817 F. Supp. 321, 325 (E.D.N.Y. 1993). Judge Glasser is hardly the only judge to turn to Kafka for help in expressing an opinion on the federal sentencing guidelines or their application in particular cases. For example, in the view of Judge Weinstein of the Eastern District of New York:

Much of the difficulty with the guideline sentencing and minimum sentences lies not so much in the fault of the legislature or even the Sentencing Commission, but in the decisions of our courts and their self-imposed barriers to justice. . . . The Kafkaesque result in the instant case [addition of five years without parole to the five year sentence already imposed on a twenty-eight year old female defendant who was the mother and sole caretaker for three young children] comes from a combination of a lapse of the usual exercise of sound discretion by the United States Attorney to allow a defendant to plead to a five year minimum in a case such as this and from a decision by the Drug Enforcement Agency (the “DEA”) to deliver in a suitcase 1,013 grams of heroin instead of the 400 grams swallowed in balloons expected by the defendant. The tendency of the DEA to escalate the size of drug deals by pressing prospective defendants to buy or accept delivery of ever higher quantities of narcotics in what are ironically referred to by it as “reverse buys” is well known. It is usually offset by realistic pleas and sentences by prosecutors and judges. In this instance the system of balances has been ignored to the severe detriment of the defendant, her children and the taxpayers.

U.S. v. Ekwunoh, 888 F. Supp. 364, 365 (E.D.N.Y. 1994); *see generally U.S. v. Andrews*, 301 F. Supp. 2d 607 (W.D. Tex. 2004).

On the other hand, some judges have rejected claims by criminal defendants that the guidelines operate, in their cases, in a Kafkaesque manner. As Judge Bauer of the Seventh Circuit recently said:

Jackson is simply incorrect that the base offense level for Count One should be based on the amount of cocaine found in his possession at the time of his arrest, and not on the aggregate amount of cocaine which he obtained during the entire period of drug dealing charged in the indictment. . . . Jackson contends that using the aggregate amount is speculative and that “basing a prison term on mere speculation is Kafkaesque.” Jackson is hardly in the position of Josef K. See Franz Kafka, *The Trial*. It is clear what offense Jackson was charged with and Jackson was given an opportunity to defend himself against the charges. The district court heard evidence and made a conservative estimate of the quantity of drugs attributable to Jackson, using, among other things, Jackson’s own statement to come up with a figure. The district court did not commit error in any sense.

U.S. v. Jackson, 121 F.3d 316, 321 (7th Cir. 1997) (citation omitted); *see also U.S. v. Griffiths*, 41 F.3d 844, 845 (2d Cir. 1994) (rejecting defendant’s argument that two-level enhancement for possession of a

concurrence in *State v. Huff*, Judge Monroe of the Alabama Court of Civil Appeals quoted a newspaper column in which “United States House Judiciary Committee Chairman Henry Hyde, R-Ill., was quoted as referring to the ‘Kafkaesque world of civil asset forfeiture.’”²⁸⁶ *GreenPoint Credit Corp. v. Perez* was an “unfair debt collections act involv[ing] an illegal threat by a finance company to put an elderly woman in jail for a debt that she did not owe, on a mobile home she did not own.”²⁸⁷ Judge Hardberger’s list of six evidentiary bases supporting a \$5 million jury verdict in Perez’s favor included the following:

The threat of being put in jail is calculated to put fear and anxiety into every citizen’s heart. It is the very tool used by our justice system to control bad behavior in our society. Even a hardened criminal may think twice before doing something that will cause him to be locked away from society. If a criminal may be frightened by jail, how much more mental and physical anguish would be suffered by a woman in the position of Mrs. Perez? Compound this with the uncontradicted testimony that she did not even understand what fault she had committed. Mrs. Perez found herself in a truly kafkaesque world, where her reputation and peaceful old age were in immediate jeopardy.²⁸⁸

B. Quoting and Explaining

While some judges have simply used the word “Kafkaesque,” confident that readers would be able to determine its meaning and application to the case at hand, other judges have gone further, either by including quotations of Kafka or by presenting their own interpretations of one of Kafka’s works. This section discusses opinions by those judges who have gone to the greatest lengths to help their readers understand both Kafka’s writings and the application of some aspect of Kafka’s fiction to a very real court case.

stolen gun, whether or not the defendant had scienter (an element of possession of a stolen firearm in interstate commerce) “is Kafkaesque [because] the Sentencing Guidelines . . . empower a trial court to punish a defendant post conviction for conduct the defendant could not be convicted of in the first place”).

Even sentencing at the state level, which, of course, does not involve the federal guidelines, has inspired several references to Kafka. See e.g. *People v. Statum*, 2003 WL 141468 at *3 (Cal. App. 2d Dist. 2003) (“At an initial sentencing hearing, the trial court stated: ‘To me, on this factual basis . . . to originally ask for 25 to life is Kafkaesque, to be frank with you in my view.’”); *Williams v. State*, 500 So. 2d 501, 502-03 (Fla. 1986); *State v. Olson*, 325 N.W.2d 13, 16-17 (Minn. 1982).

286. 765 So. 2d 7, 8 (Ala. Civ. App. 1999) (quoting *The Birmingham News* (May 10, 1999)).

287. 75 S.W.3d 40, 43 (Tex. App. San Antonio Dist. 2002).

288. *Id.* at 46.

Quesnell v. State was an appeal from “a lower court order denying [Joyce Quesnell’s] motion . . . to vacate an earlier order of hospitalization committing her to Western State Hospital.”²⁸⁹ Specifically, Quesnell argued “that the commitment proceeding below was conducted in violation of her constitutional guarantees to due process of law and trial by jury.”²⁹⁰ The Washington Supreme Court reversed and remanded.²⁹¹ Writing for the court, Justice Finley quoted, approvingly, from a monograph on law and psychiatry:

[I]t is unfair to demand of a psychiatric patient – especially if he is poorly educated and indigent – that he prove his sanity or nondangerousness. We would not ask that he prove his innocence of a criminal charge, and then consider his mere opportunity to do so adequate protection against false or unfair accusations by a district attorney. Yet, this is exactly what we ask the mental patient to do. To make matters worse, such a person must rebut charges of mental illness, charges as amorphous as anything with which K., Kafka’s protagonist in *The Trial*, had to contend. It is obvious that such a ‘defendant’ is alm[o]st completely helpless and has small chance of winning his battle. . . .²⁹²

The appellant in *In re J.M.* was involuntarily committed to Torrance State Hospital for mental health treatment.²⁹³ In an opinion reversing the trial court’s denial of appellant’s challenge to the order for involuntary treatment, Judge Schiller of the Pennsylvania Superior Court restated the rule that “[w]here, as here, the [MHPA [Pennsylvania Mental Health Procedures Act]] has provided for specific procedural protections, and the procedures mandated are not followed, involuntary commitment is improper.”²⁹⁴ He continued:

The importance of this principle cannot be overstated. The failure of the county in this case to follow the required procedures left appellant detained against her will with no way to get out, or to fully

289. 517 P.2d 569, 570 (Wash. 1974).

290. *Id.*

291. *Id.* at 580.

292. *Id.* at 576, n. 18 (quoting T. Szasz, *Law, Liberty, and Psychiatry* 69 (1963)). In *State v. Schuller*, 1992 WL 80713 at *2 n. 3 (Ohio App. 12th Dist. April 20, 1992) (Jones, J., dissenting), Judge Jones explained a reference to Kafka by noting that “[i]n Franz Kafka’s famous novel *The Trial*, the central character, after being arrested, was required to prove his innocence to avoid conviction.”

293. 685 A.2d 185, 186-87 (Pa. Super. 1996).

294. *Id.* at 192-93 (quoting *Cmmw. v. C.B.*, 452 A.2d 1372, 1375 (Pa. Super. 1982)).

understand the proceedings against her. To her the experience of the literary figure of Joseph K. became very real.²⁹⁵

Judge Schiller explained his reference to Joseph K. by quoting from *The Trial*: “‘You can’t go out, you are arrested.’ ‘So it seems,’ said K. ‘But what for?’ he added. ‘We are not authorized to tell you that. Go to your room and wait there. Proceedings have been instituted against you and you will be informed of everything in due course.’”²⁹⁶

In a concurring and dissenting opinion in a case in which a majority of the Pennsylvania Supreme Court affirmed four orders of the Orphans Court Division of the Lycoming County (Pennsylvania) Court of Common Pleas that terminated the parental rights of two mothers, Justice Nix wrote:

We who sit as appellate judges must always guard against becoming emotionally isolated from human nature and the human consequences of our decisions lest in our endeavors to render dispassionate justice we lose our compassion. Kafka, in describing judges in a fictional judiciary, wrote:

“. . . 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

295. *Id.* at 193.

296. *Id.* (quoting Franz Kafka, *The Trial* 3 (1925)). Orders of commitment and accusations of mental illness are, of course, fertile ground for claims of Kafkaesque procedures. In a case in which an employer suggested that one of its employees was suffering from paranoia, Judge Stern of the District of New Jersey noted that it was “almost Kafkaesque that Kyriazi was deemed in need of psychiatric attention for suspecting that her superiors were secretly acting against her, when the supervisors’ own secretly recorded memoranda reveal that they were doing just that.” *Kyriazi v. W. Electric Co.*, 461 F. Supp. 894, 941 (D.N.J. 1978). In a discussion of the various methods of dealing with adjudicated juvenile delinquents, Justice Neely of the West Virginia Supreme Court observed:

While the conservatives talk about punishment as “retribution” and the cornerstone of “responsibility,” the liberal, child advocates speak in terms of the “right to punishment.” Once the rehabilitative model is accepted, the next fight is always to show that “treatment” is often a caricature something worthy of a story of Kafka or a Soviet mental hospital. Therefore, while the conservatives throw up their hands because they believe punishment works better than treatment, the juvenile advocates return increasingly to punishment on the grounds that punishment is much less punishing than “treatment.”

State ex rel. D.D.H. v. Dostert, 269 S.E.2d 401, 415-16 (W. Va. 1980) (footnotes omitted).

In *Wagenmann v. Pozzi*, 1986 WL 715 at *6 (D. Mass. Jan. 7, 1986), Judge Freedman concluded that Ronald Wagenmann “was falsely arrested and committed to the Northampton State Hospital under what could be described as Kafkaesque procedures.” Finally, *Sanderlin v. U.S.*, 794 F.2d 727, 729 (D.C. Cir. 1986), involved a criminal defendant who was committed to a mental hospital after being found not guilty by reason of insanity, despite never having raised that defense. In ruling that the government was obligated to initiate civil commitment proceedings, Judge Mikva observed the government’s “reliance on defendant’s passivity to establish the touchstone of the commitment procedure is most troublesome. Its Kafkaesque features are obvious; its conformity to statutory requirements is scant.” *Id.* at 733.

human 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.”

F. Kafka, *The Trial* 148-49 (M. Brod ed. 1969). One cannot ignore the human result of the majority’s decision today.²⁹⁷

B.B. v. Department of Children & Family Services was another child custody case which involved, in the words of Judge Gross of the Florida District Court of Appeals, “[a] tragic, Kafkaesque scenario.”²⁹⁸ Factually:

[T]wo little girls have been removed from the custody of their mother for over seventeen months. Even though the children are now six and eight years old, there has never been any report or indication that the mother has inflicted any type of injury upon these children. Their removal was based on fatal injuries suffered by an infant sibling. The mother is a suspect because she is one of many persons who had access to the infant. A criminal investigation is pending, but there is no end in sight. Release of autopsy and investigative reports concerning the infant’s death would not be in the best interest of the criminal investigation, since potential suspects could read them and adjust their stories. The Department [of Children and Family Services] cannot try the dependency case without going into the circumstances of the infant’s death and without obtaining the investigative records of the Sheriff’s Office and the autopsy report of the Medical Examiner.²⁹⁹

After characterizing the foregoing scenario as Kafkaesque, Judge Gross quoted extensively from *The Trial*:

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

297. *In re William L.*, 383 A.2d 1228, 1231, 1247, 1250 n. 6 (Pa. 1978) (Nix, J., concurring in part and dissenting in part).

298. 731 So. 2d 30, 33 (Fla. 4th Dist. App. 1999).

299. *Id.*

was himself implicated and had all sorts of worries to distract him.³⁰⁰

Given the size and complexity of government child protective agencies, and the importance of the interests at stake in child custody adjudications, it is not surprising that child custody cases are a major inspiration for judicial references to Kafka.

In *Beit v. Probate & Family Court Department*, the issue was “whether a judge may impose sanctions on an attorney who fails to appear for trial without having secured a timely continuance.”³⁰¹ According to Justice Abrams of the Massachusetts Supreme Judicial Court:

The issues raised by this appeal were foreshadowed in Kafka’s, *The Trial*. “[C]onscious of his own rights, he asked through the telephone what would happen if he failed to put in an appearance. ‘We shall know where to find you,’ was the answer. ‘And shall I be punished for not having come of my own accord?’ asked K., and smiled in anticipation of the reply. ‘No,’ was the answer. ‘Splendid,’ said K., ‘then what motive could I have for complying with this summons?’ ‘It is not usual to bring the powers of the Court upon one’s own head,’ said the voice, becoming fainter and finally dying away. ‘It is very rash not to do so,’ thought K. as he hung up; ‘for after all one should try to find out what those powers are.’”³⁰²

The passage quoted above is among the most extensive of all judicial quotations of Kafka.

In *Bruno v. Department of Police*, the Louisiana Court of Appeals affirmed the New Orleans Civil Service Commission’s decision to uphold the termination of police officer Vincent Bruno.³⁰³ Bruno was terminated for violating the department’s policy concerning the conduct of officers on sick leave, but in Bruno’s appeal from an adverse decision from the Civil Service Commission, Judge Garrison had “no doubt that the *real* reason for the dismissal of Officer Bruno was his activity as the union leader of the police strike and the closing down of Mardi Gras which followed.”³⁰⁴ In a dissent from the majority opinion, which affirmed the Civil Service Commission, Judge Garrison stated that “[t]his case appears to me to involve the officially sponsored railroading of a veteran police officer . . . [that]

300. *Id.* at 33 n. 2 (quoting Franz Kafka, *The Trial* 146 (The Modern Library 1964) (1937)).

301. 434 N.E.2d 642, 643 (Mass. 1982).

302. *Id.* at 643 n. 1 (quoting Franz Kafka, *The Trial* 290 (Vintage Books 1969)).

303. 451 So. 2d 1082, 1088 (La. App. 4th Cir. 1983).

304. *Id.* at 1083, 1088 (emphasis in the original).

gr[ew] out of a classic union-busting effort of a kind rarely seen in present day city administrations.”³⁰⁵ Judge Garrison went on to state that “[a]t another level, the case addresses itself to the use of the machinery of justice to accomplish injustice.”³⁰⁶ According to Justice Garrison, “[t]he writer Kafka, makes the point that sometimes those in power are not overly concerned about the existence of actual guilt so long as the proper law enforcement procedures are followed.”³⁰⁷ Garrison explained himself by paraphrasing Kafka:

In *The Trial* Joseph K. is arrested but never told the reason for his arrest. At the court he is never told what the charges are. The court chaplain informs him that he will probably be convicted, however he does not know what the charges are either. Ultimately, two formally dressed men arrive at his home to pick him up. He is taken to an abandoned quarry where he is executed.³⁰⁸

Shortly after summarizing *The Trial*, Judge Garrison quoted from Chapter 12 of Lewis Carroll’s *Alice in Wonderland*.³⁰⁹

In an opinion affirming the trial court’s denial of a motion to suppress evidence collected as a result of a search of the defendant’s baggage at O’Hare Airport, Judge Posner of the Seventh Circuit noted that the law-enforcement officer who conducted the search identified himself as a law-enforcement officer, and told the defendant he was conducting a narcotics investigation.³¹⁰ Judge Posner then contrasted that circumstance with that of “Joseph K. (in Kafka’s novel, *The Trial*) [who] was never told the reason why he was being investigated.”³¹¹ In Judge Posner’s view, the law-enforcement officer in the case before him rendered himself non-Kafkaesque by stating the reason for his interaction with the defendant.

Creamer v. Raffety involved a challenge to a Willcox, Arizona police policy “that would subject anyone incarcerated on any offence to a strip and body cavity search.”³¹² Explaining the court’s ruling that the policy was overbroad, Judge Hathaway of the Arizona Court of Appeals pointed out that:

305. *Id.* at 1101 (Garrison, J., dissenting).

306. *Id.*

307. *Id.* at 1102.

308. *Id.* at 1102 n. 3.

309. *Id.* at 1102-03 (“It is all very well for the Queen to announce ‘Sentence first – verdict afterwards,’ but in New Orleans the Superintendent of Police cannot do that and neither can the City Administration.”). Several other judges have also paired up a reference to Franz Kafka with a reference to Lewis Carroll. See *infra* pt. IV(C)(3).

310. *U.S. v. Notorianni*, 729 F.2d 520, 520-22 (7th Cir. 1984).

311. *Id.* at 523 (quoted in *U.S. v. Tavolacci*, 895 F.2d 1423, 1426 (D.C. Cir. 1990)).

312. 699 P.2d 908, 913, 920 (Ariz. App. Div. 2 1984).

The interaction of the blanket strip search policy with an incomplete bail list creates a Kafkaesque scheme whereby Mr. Creamer or any other misdemeanant could suffer a massive intrusion upon the right to privacy in the future at the hands of law enforcement personnel stretching the limits of their discretion to release and acting on little or no justification.³¹³

By way of explaining his reference to Kafka, Judge Hathaway wrote: “In *The Trial*, Franz Kafka described the archetypal encounter of the ordinary mortal with the capriciousness and irrationality of modern bureaucracies.”³¹⁴

In *Seevers v. Arkenberg*, a legal malpractice case, Judge Barker of the Southern District of Indiana began her order (granting defendant’s motion to dismiss and granting in part defendant’s motion for summary judgment) as follows:

In *The Trial*, Franz Kafka depicts the plight of Joseph K., a young man entangled in the arcane and inscrutable webs of the law. Unable to navigate “the system”’s labyrinthine [sic] ways on his own, Joseph K. implores the aid of a distinguished yet equally cryptic attorney. Instead of illuminating his client’s situation, however, the attorney only compounds the darkness. Thus the legal system, which should mediate between an individual and society, itself became a vehicle of alienation used by the attorney against his own client.

The present case, though not as fantastic as Kafka’s version, uncomfortably echoes the estrangement produced when attorneys manipulate the law to beguile laymen. Here the plaintiffs, Gloria and Shawn Seevers, believed defendant Arkenberg to be their champion and guide in the legal arena, until events revealed a startling metamorphosis: Arkenberg had not protected the plaintiffs because, unbeknownst to them, he represented an adverse interest. This situation, detailed below, gave rise to the present action.³¹⁵

Given Judge Barker’s obvious acquaintance with Kafka’s writings, it is difficult to imagine that she did not intend to suggest, by using the word “metamorphosis,” that defendant Arkenberg behaved like a cockroach when he violated his duty of loyalty to the plaintiffs.

313. *Id.* at 920-21.

314. *Id.* at 921 n. 3.

315. 726 F. Supp. 1159, 1161 (S.D. Ind. 1989).

Bexar County Sheriff's Civil Service Commission v. Davis involved the termination of a Sheriff's Department employee for violating workplace rules regarding sexual harassment.³¹⁶ The issue on appeal to the Texas Supreme Court was "whether respondent, a public employee who could not be discharged except for cause, should have been provided with the names of his employer's witnesses before either his pretermination or his post-termination hearing."³¹⁷ The court held that the Constitution imposed no such requirement upon the government.³¹⁸ Writing in dissent, Justice Doggett argued that "[d]ue process demands that termination procedures be more than some Kafkaesque tale in which the query 'who is accusing me of this?' is answered only by 'we'll tell you when we get there.'" ³¹⁹ Justice Doggett dropped a footnote to explain his use of Kafka:

Charged on grounds unstated, accused by persons unknown, and tried in courts he cannot locate, Joseph K., a character depicted by Kafka, asks about this system cloaked in secrecy:

[T]hough I am accused of something, I cannot recall the slightest offense that might be charged against me. But that even is of minor importance, *the real question is, who accuses me?*³²⁰

Obviously, the majority did not fully share Justice Doggett's concern, stating, in Justice Phillips's words, that it "[d]id not, of course, endorse the Kafkaesque proceedings 'shrouded in mystery' against which the dissenting opinion warns . . . hold[ing] only that the plaintiff in this case received all the process due him under the United States Constitution."³²¹

United States v. Real Property Located at 2323 Charms Road was the government's appeal of the district court's award of attorney's fees (under the Equal Access to Justice Act) and storage fees to a claimant who successfully warded off a civil forfeiture proceeding.³²² The government prevailed on appeal to the Sixth Circuit over a dissent by Judge Merritt who noted that:

The key allegations of the complaint are in the passive voice . . . [t]he source of the information is not stated [and that] [n]o specific person is alleged to have seen, heard, smelled or touched anything

316. 802 S.W.2d 659, 660 (Tex. 1990).

317. *Id.*

318. *Id.*

319. *Id.* at 668 (Doggett, J., dissenting).

320. *Id.* at 668 n. 5 (quoting Franz Kafka, *The Trial* 16 (1937)) (emphasis added by the court).

321. *Id.* at 664 n. 7.

322. 946 F.2d 437, 438 (6th Cir. 1991).

that would make [the airplane the government tried to seize through forfeiture] a drug plane.³²³

Judge Merritt went on to argue:

The government's use of language here is the same linguistic double talk used by the police as they ensnared the hapless Joseph K. in Kafka's *The Trial*. How is either Joseph K. or the owner of property to reply when the case against him is based on unknown sources, unidentified people and an undescribed investigation?³²⁴

Mendiola v. State is another courtroom translation case which resulted in a murder conviction for the defendant.³²⁵ Throughout the trial, simultaneous translation was provided by a bailiff (rather than a certified official interpreter), who by his own admission, sometimes failed to provide full word-for-word translation.³²⁶ However, because the appellant did not object to specific instances of faulty translation, at trial, and did not identify any on appeal, the Texas Court of Appeals ruled that the defendant failed to preserve any error for appellate review.³²⁷ Justice Yanez dissented, observing that "[a] defendant who is subjected to ineffective translation must 'guess' at what is going on around him [and that] [a]n atmosphere is created where the defendant is hindered in effectively assisting his own defense, a milieu worthy of Kafka but unworthy of this court's imprimatur."³²⁸ The justice continued by quoting Kafka:

Naturally, therefore, the records of the case, . . . were inaccessible to the accused and his counsel, . . . consequently one did not know with any precision, what charges to meet; . . . accordingly it could be only by *pure chance* that it contained really relevant matter. . . . [E]vidence . . . could be *guessed* at from the interrogations. In such circumstances the Defense was naturally in a very ticklish and difficult position.³²⁹

In addition to quoting Kafka, Justice Yanez quoted, but did not translate, a work by Pablo Neruda titled "El Hombre Invisible."³³⁰ Touché.

323. *Id.* at 438-39, 444-45 (Merritt, J., dissenting).

324. *Id.* at 445.

325. 924 S.W.2d 157, 159 (Tex. App. Corpus Christi Dist. 1995).

326. *Id.* at 161, 162 n. 3.

327. *Id.* at 163.

328. *Id.* at 167 (Yanez, J., dissenting).

329. *Id.* (quoting Franz Kafka, *The Trial* 144 (Willa & Edwin Muir, trans., Random House 1956 (1937)) (emphasis in original)).

330. *Id.* The text of the poem: "ésta es la palabra, yo no soy superior a mi hermano pero sonrío, porque voy por las calles y sólo yo no existo, la vida corre como todos los ríos, yo soy el único invisible." *Id.* (quoting Pablo Neruda, *Odas Elementales* 8 (1980)).

Kafka was also quoted in *Garcia v. State*, yet another courtroom translation case.³³¹ In his opinion for the Texas Court of Criminal Appeals, Judge Keasler quoted the “babble of voices” language from *Negron*,³³² and concluded his opinion by stating: “‘They deafened my ears with their gabble.’ So said Kafka’s Joseph K of his trial. Garcia might well make the same assertion.”³³³

In *Rice v. Wood*, an en banc panel of the Ninth Circuit held that it was a non-structural harmless error for the death penalty to be imposed upon a criminal defendant who was absent from the courtroom when the jury returned the sentence.³³⁴ Judge Nelson dissented, and concluded his dissent with an invocation of Kafka:

The majority’s ruling in this case is the ultimate triumph of procedure over substance; the person is now irrelevant to the process. This is the nightmare world of *The Trial*; it is not American Justice. Like Josef K, David Lewis Rice was sentenced to death *in absentia*, and, like Josef K, Rice will go to his grave asking, ‘Where is the judge whom I have never seen?’³³⁵

United States v. Canady was another case about a criminal defendant who was sentenced in absentia.³³⁶ In explaining the court’s holding that the trial judge “violated [Marcus] Canady’s Sixth Amendment right to open public trial”³³⁷ by mailing him the verdict, rather than announcing it in open court,³³⁸ Judge Walker of the Second Circuit pointed out that “[o]urs is not the system of criminal administration that left Franz Kafka’s Joseph K. wondering ‘Where was the Judge whom he had never seen? Where was the high Court, to which he had never penetrated? even as his death sentence was carried out.’”³³⁹ While the court of appeals did “not equate the district court’s decision to mail Canady’s verdict to the actions of the Court in Kafka’s *The Trial*, [it] hesitate[d] to excuse even such a minor violation of the public trial right.”³⁴⁰ In between his two references to *The Trial*, Judge Walker elaborated on his concerns, describing “[t]he traditional Anglo-American distrust for secret trials” by referring to “the

331. 149 S.W.3d 135, 136 (Tex. Crim. App. 2004).

332. *Id.* at 142 (quoting *U.S. ex rel. Negron v. N.Y.*, 434 F.2d 386, 388 (2d Cir. 1970)).

333. *Id.* at 145-46 (quoting Franz Kafka, *The Trial* 51 (Penguin 1953)).

334. 77 F.3d 1138, 1145 (9th Cir. 1996).

335. *Id.* at 1146, 1150 (Nelson, J., dissenting) (quoting Franz Kafka, *Der Prozess* 194 (1935, 1979)).

336. 126 F.3d 352, 355 (2d Cir. 1997).

337. *Id.* at 362.

338. *Id.*

339. *Id.* (quoting Franz Kafka, *The Trial* 228-29 (Willa and Edwin Muir, trans., Schocken Books 1992) (1937)).

340. *Id.* at 363.

notorious use of the practice by the Spanish Inquisition . . . the excesses of the English Court of Star Chamber, and . . . the French monarchy's abuse of the *lettre de cachet*."³⁴¹

Mediterranean Construction Co. v. State Farm Fire & Casualty Co. was an action by a construction company against its insurer, which had declined to provide a defense against a suit brought against it by a partner in a joint venture.³⁴² State Farm moved for summary judgment, and a hearing was scheduled.³⁴³

On the morning of the hearing, the clerk telephoned counsel to report that the court (Judge Horn) had granted the motion and [that] there would be no hearing. Despite this, counsel for both sides appeared, but were denied permission to argue the merits, object to the evidence, or respond to the other side's papers.³⁴⁴

The California Court of Appeals reversed, based upon the hearing requirement in the California Code of Civil Procedure.³⁴⁵ In his opinion for a unanimous panel, Justice Crosby likened the trial court's action to "the nightmare world of Franz Kafka's *The Trial* where Josef K. was left wondering, 'Where was the Judge whom he had never seen.'"³⁴⁶

In *Rose v. Superior Court*, a state prisoner appealed the trial court's denial of his petition for a writ of habeas corpus.³⁴⁷ The trial court held no hearing on his petition, and in its "terse minute order,"³⁴⁸ it "made no factual findings . . . [and gave] not so much as a hint why [it] ruled as it did."³⁴⁹ In an opinion and order remanding the case to the trial court, issued by a unanimous panel of the California Court of Appeals, Justice Gilbert first quoted from a Gilbert and Sullivan operetta,³⁵⁰ and then commented that "Rose, like Kafka's condemned prisoner Josef K., has been left to wonder, 'Where was the Judge whom he had never seen?'"³⁵¹ The original opinion in *Rose* was ultimately vacated after rehearing,³⁵² but both

341. *Id.* at 362 (quoting *In re Oliver*, 333 U.S. 257, 268-69 (1948)).

342. 77 Cal. Rptr. 2d 781, 783 (Cal. App. 4th Dist. 1998).

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.* at 785 n. 9 (citing *Canady*, 126 F.3d at 363).

347. 92 Cal. Rptr. 2d 313, 317 (Cal. App. 2d Dist. 2000).

348. *Id.*

349. *Id.*

350. *Id.* at 321 ("Courts, nonetheless, must not assume that all petitioners in habeas proceedings are attempting to 'throw dust in [their] eyes . . . or [to] hoodwink a judge who is not over-wise', and to perjure themselves 'as a matter of course.'") (quoting "Lord Chancellor's Song," Sir William Gilbert, *Iolanthe* (1882), Act I).

351. *Id.* (quoting Franz Kafka, *The Trial* 228-29 (Willi and Edwin Muir, trans., Schocken Books 1992)).

352. *See Rose v. Super. Ct.*, 96 Cal. Rptr. 2d 843 (Cal. App. 2d Dist. 2000).

Gilbert and Sullivan³⁵³ and Kafka³⁵⁴ made it into the opinion as modified after rehearing.

In *Bulen v. Navajo Refining Co.*, Justice Trieweiler of the Montana Supreme Court rejected, in quite detailed fashion, a claim of Kafkaesque judicial operations made by a defendant that was sanctioned for discovery abuses:

¶ 36 The Appellants further contend, in reliance on *In re the Adoption of R.D.T.*, 778 P.2d 416, 418 [(Mont. 1989)], that the District Court's use of deposition testimony solicited subsequent to the Appellant's discovery responses invoked the wisdom of hindsight and that doing so results in a Kafkaesque nightmare. The Appellants, however, have misconstrued our holding in *Adoption of R.D.T.* and Franz Kafka.

¶ 37 In *In re the Adoption of R.D.T.*, we held that the "court must strive to avoid the wisdom of hindsight in determining whether a pleading was valid when signed" 778 P.2d at 418. We did not establish a shield to protect litigants and their attorneys who engage in discovery abuse from evidence of their transgression just because such evidence was discovered after the document in question was signed. In this case, the discovery abuse occurred at the time Gallagher signed the Defendants' discovery responses and reply brief. The subsequent testimony was simply evidence that the Defendants violated Rule 11, M.R.Civ.P., when the documents were signed, not knowledge gained via the wisdom of hindsight.

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

Emboldened by the mere sound of his own cool words in that strange assembly, K. simply snatched the notebook from the Examining Magistrate and held it up with the tips of his fingers, as if it might soil his hands, by one of the middle pages so that the closely written,

353. *Id.* at 849-50.

354. *Id.* at 852.

blotted, yellow-edged leaves hung down on either side. “These are the Examining Magistrate’s records,” he said, letting it fall on the table again. “You can continue reading it at your ease, Herr Examining Magistrate, I really don’t fear this ledger of yours *though it is a closed book to me . . .*”

Franz Kafka, *The Trial* 41 (1914) (emphasis added). K.’s attempt to defend himself is, as the Appellants describe it, a “nightmare” because K. is prohibited from accessing information about his case. This is precisely the nightmare discovery rules were developed to alleviate. The purpose of the Montana Rules of Civil Procedure is to “secure the just, speedy, and inexpensive determination of every action.” If anyone in this case is guilty of creating a “Kafkaesque” nightmare, it was the Defendants, who refused to comply with the Rules of Civil Procedure and refused to disclose information necessary for the proper preparation of the Plaintiffs’ case.³⁵⁵

Equal parts legal and literary analysis, Judge Triewiller’s opinion in *Bulen* is a perfect conclusion to this section.

C. *Literary Fellow Travelers*

In previous sections, I have mentioned opinions referring to Kafka that also refer to George Orwell,³⁵⁶ Jorge Luis Borges,³⁵⁷ a Gilbert & Sullivan operetta,³⁵⁸ Jonathan Swift’s novel *Gulliver’s Travels*,³⁵⁹ and Lewis Carroll’s *Alice in Wonderland*.³⁶⁰ It is in fact, fairly common for a judge to bundle a reference to Kafka with references to other, presumably more familiar, literary figures and works. Those literary fellow travelers are the subject of this section. I begin with George Orwell, continue with Joseph Heller’s novel *Catch-22*, and conclude with several highly evocative but less frequently cited fellow travelers.

355. 9 P.3d 607, 616 (Mont. 2000).

356. *White v. State*, 95 Cal. Rptr. 175, 181 (Cal. App. 3d Dist. 1971) (Friedman, J., concurring and dissenting).

357. *State v. Hurd*, 734 N.E.2d 365, 367 (Ohio 2000).

358. *Rose*, 96 Cal. Rptr. at 321 n. 2.

359. *State v. Dept. of Health, Educ. & Welfare*, 480 F. Supp. 929, 939 (E.D.N.C. 1979).

360. *Bruno v. New Orleans Dept. of Police*, 451 So. 2d 1082, 1102-03 (La. App. 4th Cir. 1983).

1. *George Orwell*

George Orwell is, by a slight margin, the most common literary fellow traveler, having been invoked in at least seventeen judicial opinions that also refer to Kafka. As noted above, in *White v. State*, Justice Friedman of the California Court of Appeals spoke of “insidious evolutionary forces which propel us toward a collective, Orwellian society”³⁶¹ in a dissenting opinion that found malice on the part of a police department that “was a bland cloak for official indifference, shunting [a] citizen in Kafkaesque fashion from agency to agency.”³⁶²

In *People v. Collier*, a trial court opinion in a criminal case, Judge McQuillan of the New York Supreme Court managed to mention Kafka, George Orwell, and *Catch-22*³⁶³ in his discussion of the undercover activities of Detective Alvarez of the Bureau of Special Services.³⁶⁴ He invoked Orwell in a discussion of privacy:

The citizens of this nation have an immense passion for privacy. We have chosen not to live in a fishbowl environment. Our form of government contemplates that there ought never to be certain types of surveillance and infiltration of persons and associations. Free citizens in a free society must never fear their government as an all-seeing intruder. Such fear can only promote anomie.

361. *White*, 95 Cal. Rptr. at 181 (Friedman, J., concurring and dissenting).

362. *Id.* at 184.

363. 376 N.Y.S.2d 954 (N.Y. Sup. Ct. N.Y. County 1975). Judge McQuillan’s opinion appears to be the second to combine references to Kafka and Orwell, the first to combine references to Kafka and *Catch-22* and, therefore, the first to combine references to all three.

364. Of all the police agencies that have ever merited references to Kafka, Orwell, or *Catch-22*, the Bureau of Special Services, known by the acronym BOSS, would seem to be one of the most deserving of such treatment.

BOSS was formed in October 1912 under the name Radical Bureau, and in the decades which followed, it changed names several times: the Neutrality Squad in 1915, the Radical Squad in 1923, the Bureau of Criminal Alien Investigation in 1931, the Public Relations Squad in 1945, the Bureau of Special Services and Investigations in 1946, the Bureau of Special Services in 1955 But its function remained essentially the same – to investigate and control trouble-making subversives, whoever they happened to be. During World War I, according to . . . Anthony Bouza, a former BOSS official, it was the “bomb throwers, German agents, and anarchists”; after the war it was the Communists and the labor agitators; during World War II it was the “bundists, fascists and other extremist groups.” In the 1950’s focus shifted back to the Communists, but, according to Bouza, the agency settled into a “rut of inactivity and disuse.” The FBI had preempted the “espionage area” and the “Communist field,” it seemed, and left BOSS with little to do.

Id. at 960 (quoting Zimroth, *Perversions of Justice: The Prosecution and Acquittal of the Panther* 47 (Viking 1974)).

Alvarez's reports that defendant was "in deep thought," that defendant "seemed to have something on his mind," his speculative interpretation of the meaning of defendant's "facial expressions," and his summary conclusion that defendant "seemed to shy away from the real answer" evoke remembrances of the Thought Police in Orwell's "1984":

"There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. . . . You had to live – did live, from habit that became instinct – on the assumption that every sound you made was overheard, and, except in darkness, every moment scrutinized."³⁶⁵

About twenty pages earlier, commenting more directly on Detective Alvarez, Judge McQuillan wrote:

The "catch 22" quality of [the detective's] answer, pregnant with innuendos – and not atypical of much of the evidence supporting the charges, particularly the conspiracy counts – becomes apparent upon a close second reading of the answer: "some sort of organization trying to" do what? "Attempts being formed" by whom? When? Where? Does the adverb "supposedly" connote anything more than a tentative assumption? Finally, how can any one, in an American court of law, deal with an accusation that he "supposedly was indirectly in control of the whole ballgame"? The elusiveness of the charge is something Kafka's characters might recognize – something hauntingly similar to accusing a person of having an "over-all plan to harass society's power structure."³⁶⁶

After characterizing Detective Alvarez's two-year undercover project as an "open-ended, free-wheeling, people-watching mission unrelated to a proper police function"³⁶⁷ and a "sweeping, free-wheeling, penetrating and extremely protracted infiltration of the entire Lower East Side community . . . [as contrasted with the situation] in which an undercover police officer courageously infiltrates a conspiracy of international drug dealers or an armed band of hi-jackers,"³⁶⁸ Judge McQuillan dismissed the indictments

365. *Id.* at 987.

366. *Id.* at 966.

367. *Id.* at 982.

368. *Id.* at 989.

(for conspiracy, possession of a weapon, and possession of stolen property) against the defendant.³⁶⁹

People v. Privitera was the appeal of a physician and others who were convicted under California state law for conspiring to sell, and actually selling, laetrile, an unapproved drug for the treatment of cancer.³⁷⁰ A split panel of the California Court of Appeals reversed the convictions.³⁷¹ Writing for the majority, Justice Staniforth discussed nineteen cancer patients who had testified at trial, in support of the defendant physician:

To these nineteen cancer victims the enforcement of Health and Safety Code section 1707.1 [under which laetrile was an unapproved drug], the denial to them of medical treatment albeit unorthodox, albeit unapproved by a state agency, must surely take on a Kafkaesque, a nightmare, quality. No demonstrated public danger, no compelling interest of the state, warrants an Orwellian intrusion into the most private of zones of privacy.

The state has in the name of protecting the cancer victim criminalized the doctor who is willing to innovate, willing to try an unapproved drug with the consent of his patient. From the terminal patient's viewpoint a new depth of inhumanity is reached by a broad sweep of this law so interpreted. No compelling interest of the state requires Dr. Privitera's nineteen cancer patients to endure the unendurable, to die, even forbidden hope.³⁷²

Ultimately, the California Supreme Court, sitting en banc, reversed the Court of Appeals, in a split decision.³⁷³ As her dissent, Justice Bird reprinted Judge Staniforth's majority opinion, quoted above.³⁷⁴

In *United States v. Finazzo*, the Sixth Circuit affirmed the district court's suppression of evidence "obtained from electronic eavesdropping devices which FBI agents secretly installed by breaking into [the defendant's] offices."³⁷⁵ In an opinion joined by Judge Cecil, Judge Merritt noted that "[t]he novels of Kafka and George Orwell evoke some of the same fears and concerns we feel when we contemplate the possibility that wholesale eavesdropping and wiretapping by federal and local police could spread and become customary."³⁷⁶ Judge Merritt went on to observe that:

369. *Id.* at 992.

370. 141 Cal. Rptr. 764, 766 (Cal. App. 4th Dist. 1977).

371. *Id.* at 785-86.

372. *Id.* at 784.

373. *People v. Privitera*, 591 P.2d 920 (Cal. 1979).

374. *Id.* at 927.

375. 583 F.2d 837-38 (6th Cir. 1978).

376. *Id.* at 841.

Orwell's image of 1984 is no longer fiction if we should hold that hundreds of police officers across the country in every town and village have the power to break into homes and offices to plant electronic monitoring devices if they can obtain permission from a local magistrate in a secret hearing.³⁷⁷

In *Vargas v. Brown*, Judge Pettine of the District of Rhode Island granted a petition for habeas corpus relief to a prisoner who argued that "he was denied due process by the state trial court's refusal to enquire into the voluntariness of a prior statement made by . . . a witness at trial before permitting the prosecution to use that statement in impeaching [that witness's] testimony."³⁷⁸ After setting out the facts underlying the petition, which include a three-to-four-hour interrogation of a Spanish-speaking witness by non-Spanish-speaking detectives that concluded with the witness signing a statement typed by the detectives in English,³⁷⁹ Judge Pettine summarized the facts of the case:

Surely, this is a scene worthy of Kafka or Orwell: a man is interrogated for several hours in a language he poorly apprehends; he signs a statement in this language, which purports to be 'his'; then, he is given an interpreter who translates 'his' statement into a comprehensible tongue in order that the man can understand what it was that he has said.³⁸⁰

Russell v. National Mediation Board addressed "the question of whether jurisdiction exists under the Railway Labor Act, 45 U.S.C. §§ 151-188, to review refusal by the National Mediation Board to process an employee's application to hold an election among a class of employees after the Board determined that those employees apparently desired to terminate collective representation."³⁸¹

After criticizing the Board for "playing games with the plaintiffs and with this court,"³⁸² Judge Jolly of the Fifth Circuit stated, in a footnote: "Equally disturbing is the Board's response, when asked why Russell had not been informed of the 'preferred' method of petitioning [the Board], that they had never been asked. Mr. Orwell, meet Mr. Kafka."³⁸³ However, despite the court's determination "that certain of the Board's positions

377. *Id.* at 842.

378. 512 F. Supp. 271-72 (D.R.I. 1981).

379. *Id.* at 276.

380. *Id.*

381. 714 F.2d 1332, 1334 (5th Cir. 1983).

382. *Id.* at 1342.

383. *Id.* at 1342 n. 12.

were Orwellian and Kafkaesque,”³⁸⁴ a subsequent Fifth Circuit panel affirmed the district court’s denial of attorneys’ fees under the Equal Access to Justice Act.³⁸⁵

In *Bangert v. Hodel*, employees of the United States Department of the Interior sought to enjoin, on constitutional grounds, the Department’s program of random urinalysis and reasonable-suspicion drug testing.³⁸⁶ Toward the end of an order granting a preliminary injunction against random urinalysis and denying a preliminary injunction against reasonable-suspicion drug testing, Judge Greene of the District of D.C. painted the following word-picture:

By contrast, if relief is not granted to the plaintiffs, the injury to them and the other Interior Department employees will be irreparable, for the humiliation and indignity to which the employees would be subjected under the testing program could never be undone.

Indeed, if the injunction does not issue, the following scene may become both familiar and commonplace: as the tourists view the majestic Interior Department buildings from the outside, there being lectured by their tour guides on the freedoms under our system of government, on the inside of these buildings platoons of bureaucrats will march in unending streams toward the Department’s toilets for their next urination procedure under the steady gaze of the government’s urination inspectors. As the toilets are reached, these inspectors will make certain that the candidates’ outer garments are removed and nothing untoward has been hidden, that the water in the bowl is sufficiently blue, the urine is at the correct temperature of between 90.5 and 99.8 degrees Fahrenheit, and the cup is sufficiently full. If the cup is not filled as required by the regulations, the employee will at this point be required to drink more liquids and then urinate again; and if the urine temperature is not satisfactory, the employee will likewise have to urinate again, this time under the direct visual observation of the inspector. It may be expected that all this time many other presumably trusted and valued civil servants of the United States will stand in line, awaiting their turn at this procedure. Only a Kafka, an Orwell, or a Gogol could do true justice to such a scene, or perhaps, in keeping

384. *Russell v. Natl. Mediation Bd.*, 764 F.2d 341, 343 (5th Cir. 1985) (citing *Russell*, 714 F.2d at 1342 nn. 11-12).

385. *Id.* at 342.

386. 705 F. Supp. 643-45 (D.D.C. 1989).

with the farcical aspects of this tragedy, those modern masters of the absurd, Samuel Beckett or Eugene Ionesco.³⁸⁷

Who needs novelists or playwrights when judges write like that?

In *State v. Schuller*, the Ohio Court of Appeals affirmed the defendant's conviction for driving while under the influence of alcohol.³⁸⁸ As a factual matter, the defendant had been found by police officers asleep behind the wheel of his car, which was parked in his driveway.³⁸⁹ He had a can of beer between his legs and a blood alcohol concentration of .177.³⁹⁰ Judge Jones did not concur in the majority's opinion, writing, to the contrary: "I vigorously dissent because the Kafkaesque result under the majority opinion is outrageous."³⁹¹ In Judge Jones's view, the defendant was "convicted of Driving Under the Influence of Alcohol . . . without a scintilla of evidence that he drove a vehicle even one foot, or that he intended to do so."³⁹² After musing that the majority's reasoning would make it

wholly illegal for a football fan, listening to the Ohio State-Michigan game on the radio, to leave the confusion caused by the kids in his house on Saturday afternoon and retreat to his automobile parked in the driveway, and partake of a six pack of beer, the virtues of which have been extolled by the media for hours,³⁹³

Judge Jones concluded by stating: "The law has been applied, public policy has been served, and in true Orwellian fashion, another 'drunk driver' has been removed from the 'streets.'"³⁹⁴

In *State v. Roman*, Justice Berdon of the Connecticut Supreme Court, writing in dissent, quoted the reference to Kafka and Orwell in *Vargas v. Brown*³⁹⁵ to support the proposition that:

Before a statement resulting from custodial police interrogation can be introduced, a defendant whose primary language is other than English must be advised in his or her primary language of the following rights: (1) to continuous word-for-word interpretation in

387. *Id.* at 655-56 (citations omitted).

388. 1992 WL 80713 at *2 (Ohio App. 12th Dist. Apr. 20, 1992).

389. *Id.* at *1.

390. *Id.*

391. *Id.* at *2. Judge Jones went on to explain that "[i]n Franz Kafka's famous novel *The Trial*, the central character, after being arrested, was required to prove his innocence to avoid conviction." *Id.* at *2 n. 3.

392. *Id.* at *2.

393. *Id.* at *4.

394. *Id.*

395. 512 F. Supp. 271 (D.R.I. 1981).

that language; and (2) to respond in that language, or alternatively to be interrogated only in the defendant's primary language.³⁹⁶

In the majority opinion from which Justice Berdon dissented, the court affirmed the trial court's ruling that the police did not unconstitutionally coerce or violate the due process rights of the defendant by giving him *Miranda* warnings and a *Miranda* waiver form in Spanish and then conducting a subsequent interrogation in English.³⁹⁷ In affirming the trial court, the Supreme Court rejected the defendant's contention "that, because of his linguistic impairment [presumably, speaking English as a second language], the federal constitution required continuous interpretation during his custodial interrogation."³⁹⁸

United States v. Heinz was a case about the Sixth Amendment right to counsel.³⁹⁹ In *Heinz*, the Fifth Circuit reversed the district court's decision to suppress several tape recordings of telephone conversations between a cooperating defendant and a suspect who had invoked his right to counsel during a search of his office, but who had not yet been indicted.⁴⁰⁰ According to the court, Heinz's Sixth Amendment right to counsel had not yet attached at the time the government recorded his telephone conversations.⁴⁰¹ While concurring with the majority's Sixth Amendment analysis, Judge Parker dissented in part, based upon his concern "about the prosecution team's utilization of a prosecutorial *alter ego* to secure statements from a target defendant who was, at the time of the clandestine interrogation, represented by counsel on the matters about which the prosecutorial *alter ego* inquired."⁴⁰² In Judge Parker's view:

No alleged 'chinese wall' should be allowed to provide team prosecutors access to the ill-gotten gains from such prosecutorial *alter ego* interrogations. In today's world of advanced technology, such a rule runs an undue and unacceptable risk of sanctioning Orwellian investigative techniques and creating Kafkaesque judicial administration.⁴⁰³

National Treasury Employees Union v. United States Department of the Treasury involved a request for a preliminary injunction against the

396. 616 A.2d 266, 275-76 (Conn. 1992).

397. *Id.* at 268-69.

398. *Id.* at 270.

399. 983 F.2d 609 (5th Cir. 1993).

400. *Id.* at 612.

401. *Id.* at 612-13.

402. *Id.* at 614.

403. *Id.* at 619 (citing George Orwell, *Nineteen Eighty-Four* (1949); Franz Kafka, *The Trial* (1925)).

Treasury Department's use of an employee questionnaire. In the words of Judge Greene:

By requiring employees to answer incriminating questions, coupled with a warning that the answers could be used against the employee, the government is effectively coercing a waiver of immunity. An employee who is discharged for refusing to answer under these circumstances is, in fact, being discharged for a refusal to waive his constitutional privilege. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977).

The Court concludes that Customs is engaged in the Kafkaesque maneuver of attempting to reassure concerned employees falsely that the answers they provide will not be used against them – unless they are used against them. Similarly, government counsel at the hearing on the motion strenuously insisted that the answers would not go to the Department of Justice, only to concede subsequently that there was no impediment to that at all. Employees should not be so misled; nor should courts. A tribunal would plainly be justified in assuming the very real possibility of abuse by government officials when confronted with forms which ask highly personal questions and the answers are demanded through “1984”-like means. The Court finds that the answers to Question 19, the other answers on the SF-85P, as well as the answers to the other two forms, are compelled.⁴⁰⁴

Perhaps needless to say, Judge Greene granted the injunction.⁴⁰⁵

In *McElroy v. United States*, brought under the Federal Tort Claims Act (“FTCA”), several plaintiffs sued for damages resulting from negligence or intentional torts allegedly committed by government agents working as members of the Organized Crime and Drug Enforcement Task Force.⁴⁰⁶ Specifically, the plaintiffs claimed, and proved at trial, that due to a clerical error in a search warrant, members of the task force bashed in the front door of their unit in a duplex (the actual suspect lived on the other side), took them to the floor roughly, and handcuffed them.⁴⁰⁷ Ruling in the defendants' favor on the negligence claim, Judge Sparks of the Western

404. 838 F. Supp. 631, 639 (D.D.C. 1993) (footnote omitted).

405. Imagine the conversations that must have taken place around the keg when the Treasuries played the Interiors in the federal softball league. (And imagine the lines in the locker room after the beer party if the game happened to be played at the home field of the Interiors . . .). As for who should umpire the debate over which agency's employees had it worse, who better than Judge Greene, who decided both *Bangert* and *National Treasury Employees Union*?

406. 861 F. Supp. 585, 587 (W.D. Tex. 1994).

407. *Id.* at 588, n. 1.

District of Texas noted that “[t]he FTCA does not waive the United States’ sovereign immunity in all cases where the acts or omissions of a federal employee are challenged,”⁴⁰⁸ and cited, in particular, the discretionary function exception.⁴⁰⁹ After stating that the discretionary function exception applied to bar the plaintiffs’ claims, Judge Sparks explained his decision in the following way:

The Court should also mention the obvious underlying policy reasons for exempting the United States from actions in negligence arising out of the discretionary decisions of its law enforcement agents and officers. Were negligence actionable under these circumstances, law enforcement tactics would become hesitant, apprehensive, and less effective. In light of the rampant drug problem in this country, public policy assigns a high priority to the aggressive enforcement of the drug laws. Furthermore, by exempting negligence under these circumstances the Court does not sanction intentional police intrusions into the lives of innocent citizens. The Court is well aware of democratic peoples’ aversion to that type of Orwellian or Kafkaesque police activity.⁴¹⁰

In addition to granting judgment to the defendants on the plaintiffs’ negligence claims, Judge Sparks also ruled in favor of the defendants on the plaintiffs’ intentional tort claims.⁴¹¹

Blanca P. v. Superior Court was a case about accusations of child molestation, parental responses to therapy, and the so-called “confessional dilemma.”⁴¹² Regarding cases in which “the parent *has* complied with the service plan, but for some reason has not convinced a psychologist or social worker that it would be safe to return the child to the parent,”⁴¹³ Justice Sills of the California Court of Appeals wrote:

Let us be plain. The idea that, despite enduring countless hours of therapy and counseling (much of it predicated on the possibly erroneous assumption that her husband is a child molester), a parent who has faithfully attended required counseling and therapy sessions must still relinquish her child because she has not quite “in-

408. *Id.* at 591.

409. *Id.*

410. *Id.* at 592 n. 13.

411. *Id.* at 595-96.

412. 53 Cal. Rptr. 2d 687, 689-90 (Cal. App. 4th Dist. 1996).

413. *Id.* at 694 (emphasis in the original).

ternalized” what she has been exposed to has an offensive, Orwellian odor.⁴¹⁴

The confessional dilemma,

[O]ne of the most troublesome problems in juvenile dependency jurisprudence [is] the dilemma faced by a parent who is *falsely* accused of sexually molesting his or her child. If the parent denies what any decent person must regard as a horrible act, that denial itself – as the agency’s argument here illustrates – may end up preventing reunification.⁴¹⁵

According to Justice Sills:

In considering this problem of the “confession dilemma,” a few basic (and for the most part commonplace) truths must be kept in mind. Few crimes carry as much (or as much deserved) social opprobrium as child molestation. Most people would rather be accused of bank robbery. The crime is usually done in secret. Proof is often difficult. Perpetrators are not likely to admit their guilt. The victims of molestation may be too young, too frightened, too embarrassed or too dependent to provide credible evidence against the molester. And innocent children need protection.

But by the same token, it cannot be denied that it is an outrageous injustice to use the fact parents deny they have committed a horrible act as proof that they did it. That really is Kafkaesque. And by the same token it is also unjust to use the fact that a parent denies molesting his or her child as the reason to terminate reunification services – at least when (assuming we can be certain of such matters) the parent has been falsely accused. Further, it is undeniable that false accusations of child molestation do happen. In such a case, “denial” – in both its legal and psychological senses – should not become, perversely, the very fact which demonstrates the futility of reunification services.⁴¹⁶

In a footnote following the reference to Kafka, Justice Sills added:

414. *Id.* at 695-96 (citing *In re Jamson O.*, 878 P.2d 1297, 1320 (Cal. 1994) (Baxter, J., dissenting) (“Under this radical new standard, any parent who is not sufficiently sensitive in a way that pleases Department-paid therapists will risk being found unfit. This is the Orwellian new rule: If a therapist thinks a parent should be more loving and demonstratively affectionate, the parent loses the child – period and forever.”)).

415. *Id.* at 696 (emphasis in the original).

416. *Id.* at 696-97 (footnotes omitted).

Judging from Dr. LaCalle's report, Blanca is not likely to be acquainted with the tradition of dystopian literature exemplified by authors such as Orwell, Huxley and LeGuin. But consider the eloquence of this testimony, ironically elicited by the deputy county counsel at the 18-month review hearing in response to a question as to whether Blanca would believe her daughter "if she said she was molested":

They keep telling me, just say – admit, say, say say it's true that. [¶] And to me, they – they wash my head here, say, say, say. But I don't believe it. The truth is, I don't believe it, because I know my husband. I have been with him for 12 years.⁴¹⁷

And in another footnote, Justice Sills demonstrated how the Kafkaesque can also be a Catch-22:

If the [dependency] court believes a molest [sic] occurred and the family member *could have been responsible* a "true finding" is made and wardship declared. If a father denies molest [sic] and a true finding is made, he suffers the ultimate Catch 22 – he can either admit and take a chance that the department will allow him to begin reunification with his family or he can deny and no reunification will occur. [¶] But the irony does not end there. If the spouse supports her husband's denial, she cannot be trusted to protect the child and she too will not be allowed to reunify with the child., a [sic] current assertion is that the mother must have known all along and failed to protect. That then becomes a protective issue and reason to remove the child from the mother. [¶] Still worse, if the child denies the molest [sic], this can be seen as part of a "child abuse accommodation syndrome" and an additional reasons [sic] why the child should have no contact with the parents Thus, all members of the family can deny a false molest [sic] allegation and, in each instance, the system uses the denial as evidence of guilt.⁴¹⁸

In the end, the court granted the mother's petition for a writ of mandate commanding the juvenile court to vacate its order terminating parental

417. *Id.* at 696 n. 8.

418. *Id.* at 697 n. 10 (quoting Alexander, *Big Mother: The State's Use of Mental Health Experts in Dependency Cases*, 24 Pac. L.J. 1465, 1482 n. 81 (1993) (quoting San Diego Grand Jury, *Child Sexual Abuse, Assault, and Molest Issues*, Rep. Nos. 8, 2, 3 (June 29, 1992)).

rights, and to hold another hearing on the molestation allegations against the father.⁴¹⁹

United States v. Su was a case in which Kafka was initially invoked by a party.⁴²⁰ In *Su*, a criminal prosecution for conspiring to make false statements to obtain immigrant visas by fraud and for obtaining visas unlawfully, one defendant moved to suppress certain statements he had made to an agent of the Immigration and Naturalization Service (“INS”).⁴²¹ It was undisputed that defendant Chan was separated from the other two defendants and placed in a cubicle to await his turn to be interviewed by an INS agent.⁴²² He was given *Miranda* warnings at the beginning of his interview, which was conducted by an agent in a separate cubicle.⁴²³ According to Chan, he was in government custody from the time he was placed in the first cubicle to await his interview,⁴²⁴ and, Chan further argued, any conclusion to the contrary “would be ‘virtually Kafkaesque.’”⁴²⁵ Judge Mukasey of the Southern District of New York disagreed on both legal and literary grounds:

My disagreement with Chan’s legal conclusion is set forth in the text. I chafe also at his literary allusion. Chan may be arguing that his experience at INS recalls the surreal and threatening experiences of Joseph K. in Franz Kafka’s *The Trial*, presumably the work to which Chan refers. That argument is hyperbole for reasons set forth in the text. It is also peculiarly inapposite because when government agents told K. of his arrest at his home, they told him also that he was free to go about his business; he was not taken into custody – which was part of what made this encounter the first of K.’s many Kafkaesque experiences. Franz Kafka, *The Trial* 21 (Compact Books ed.) (1925)). But in no sense can the conclusion that Chan was not in custody before he entered Heerlein’s cubicle be characterized, even hyperbolically, as Kafkaesque; Orwellian maybe, but certainly not Kafkaesque.⁴²⁶

One can only hope that Judge Mukasey’s discussion of Kafka and Orwell brought a smile to the face of the literature teacher who introduced him to those two authors.

419. *Id.* at 701.

420. 1997 WL 695655 *5 (S.D.N.Y. Nov. 6, 1997).

421. *Id.* at *1.

422. *Id.*

423. *Id.* at **1-2.

424. *Id.* at *5.

425. *Id.*

426. *Id.* at *5 n. 1.

Arguably, the most famous judicial opinion with a reference to Kafka is Justice Scalia's dissent in *PGA Tour, Inc. v. Martin*.⁴²⁷ In *Martin*, a seven-member majority of the United States Supreme Court ruled that the Americans With Disabilities Act ("ADA") requires the PGA Tour to allow disabled golfer Casey Martin to use a golf cart while playing in its tournaments.⁴²⁸ Justice Scalia dissented, referring to:

[T]his Court's Kafkaesque determination that professional sports organizations, and the fields they rent for their exhibitions, are "places of public accommodation" to the competing athletes, and the athletes themselves "customers" of the organization that pays them; its Alice in Wonderland determination that there are such things as judicially determinable "essential" and "nonessential" rules of a made-up game; and its Animal Farm determination that fairness and the ADA mean that everyone gets to play by individualized rules which will assure that no one's lack of ability (or at least no one's lack of ability so pronounced that it amounts to a disability) will be a handicap.⁴²⁹

Franz Kafka, Lewis Carroll, and George Orwell in one sentence is quite the literary trifecta, even for a judicial stylist of Justice Scalia's magnitude.⁴³⁰ And, in keeping with Justice Scalia's contrarian tendencies, it seems somehow fitting that while most other judges who invoke Orwell are inspired by *Nineteen Eighty-Four*, Justice Scalia turned, instead, to another Orwell classic, *Animal Farm*. However, given the uproar that ensued when city leaders in Prague proposed naming a public square in Kafka's honor—the proposal was withdrawn "after scholars insisted that Kafka would be aghast at the idea"⁴³¹—it seems somewhat anomalous, if not ironic, for Justice Scalia to mention Kafka in an opinion about golf. But, on the other hand, "[s]ome critics have seen [Kafka's] work as a flatly bourgeois depiction of middle-class despair"⁴³² and, as any dedicated golfer will attest, the golf course can be the source of its own special form of bourgeois middle-class despair.

427. 532 U.S. 661, 691 (2001). See Michael Frost, *Justice Scalia's Rhetoric of Dissent: A Greco-Roman Analysis of Scalia's Advocacy in the VMI Case*, 91 Ky. L.J. 167, 171 (2003) (quoting several literary references in Scalia's dissent as examples of "language that attracts public attention").

428. *Id.* at 691.

429. *Id.* at 705.

430. And in the very next sentence, Justice Scalia wrote, to conclude his opinion: "The year was 2001, and 'everybody was finally equal.'" *Id.* (quoting Kurt Vonnegut, *Harrison Bergeron*, in *Animal Farm and Related Readings* 129 (1997)).

431. Litowitz, *supra* n. 1, at 104 (citing Kate Connolly, *Kafka Would Hate to be a Square, say Prague Officials*, 14 London Guardian Foreign Papers (Feb. 16, 2000)).

432. Litowitz, *supra* n. 1, at 133 (citing Georg Lukacs, *Against a Mislplaced Realism*, in *The World of Franz Kafka* (J.P. Stern ed., 1980)).

In *In re Leon G.*, the Arizona Supreme Court determined that the state's Sexually Violent Persons ("SVP") statute did not violate the federal substantive due process rights of those committed pursuant to it.⁴³³ While Justice Feldman concurred with the analysis and disposition of the issues covered in the majority opinion, he wrote "separately only to note that in this court [one of the plaintiffs] raised an as-applied challenge to the SVP statutes, describing the conditions under which the SVP inmates or patients are held in an almost Kafkaesque manner."⁴³⁴ After drawing the distinction between civil commitment and punitive incarceration, Judge Feldman noted that:

If the state is, in fact, incarcerating rather than treating the mentally ill, we will have improperly approved a system that has been described as follows: "By committing individuals based solely on perceived dangerousness, the Statute in effect sets up an Orwellian 'dangerousness court,' a technique of social control fundamentally incompatible with our system of ordered liberty guaranteed by the constitution."⁴³⁵

In *United States v. Andrews*, Judge Biery of the Western District of Texas was called upon to sentence a "strapping, six foot two inch tall 220 pound twenty eight year old"⁴³⁶ criminal defendant who had stolen the identity, and seemingly the life savings of his neighbor, "an elderly lady, slight in stature, who appeared to the Court to weigh perhaps a hundred pounds dripping wet."⁴³⁷ The sentence Judge Biery imposed, 120 months, included an upward departure of 105 months from the sentence the defendant would have received under the federal sentencing guidelines.⁴³⁸ Judge Biery began his opinion with a speech written by Charles Dickens for his

433. 26 P.3d 481, 490 (Ariz. 2001) (Feldman, J., concurring).

434. *Id.*

435. *Id.* (quoting Adam J. Falk, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment after Kansas v. Hendricks*, 25 Am J.L. & Med 117, 117 (1999)).

436. 301 F. Supp. 2d 607, 609 (W.D. Tex. 2004). Judge Biery noted that a co-defendant had "died and will therefore have to face whatever karmic or spiritual punishment awaits her," *id.*, and suggested that "[p]erhaps Dante's Eighth Circle [of Hell] would be apropos." *Id.* (citing Dante Alighieri, *The Divine Comedy (The Inferno)* Canto XXX (1321)). One can only imagine the shape Dante's masterpiece would have taken had the sentencing guidelines been in place during his time.

437. *Id.* at 608.

438. *Id.* at 607-08.

character Mr. Bumble,⁴³⁹ referred to comedian Flip Wilson's character "Geraldine,"⁴⁴⁰ and concluded with a literary crescendo:

Within the parameters of the rules of law cited, and our revered concepts of checks and balances and separation of powers, ultimately one human being must don a black robe and sit in judgment of another. It is an art – not a science to be imposed by computerized formulae and statistics. It is the constitutional duty of the judicial branch to practice that art conscientiously, courageously and independently of our legislative and executive friends and colleagues. Indeed, the Court has had an occasional case where those who supported longer prison terms and circumscribed judicial discretion had a change of the human heart when their friend or loved one was perceived to be living a Kafkaesque/Orwellian Guideline Nightmare. *United States v. Kimmel*, SA-01-CR-376-FB (W.D.Tex. Aug. 13, 2002); *United States v. Barnes*, No. DR-00-CR-599(1)-FB (W.D.Tex. May 23, 2001). Behold, the Ox returns.⁴⁴¹ Those who prey upon the elderly, and the financially unsophisticated who hope to become elderly with secure pensions, do greater economic damage and scar the social contract far more deeply than petty criminals serving longer sentences. They are often those to whom much opportunity and education have been given and of whom much better is expected. They corrupt their opportunities and education not to satisfy a physiological craving, but greedily to accumulate and consume, and to worship at the altar of ill-gotten wealth. Dante Alighieri, *The Divine Comedy* (*The Inferno*) Canto VII (1321) (Fourth Circle of Dante's *Inferno* is oc-

439. "If the law supposes that . . . the law is . . . a idiot . . . and the worst I wish the law is, that his eye may be opened by experience – by experience." *Id.* at 607 (quoting Charles Dickens, *The Adventures of Oliver Twist* 327 (Country Life Press 1900) (1897)). According to Judge Biery, "Mr. Bumble might feel the same about the sentencing law in this case." *Id.*

440. *Id.* at 609, n. 3 (attributing to Geraldine the catch phrase "The Devil made me do it").

441. The Ox plays a part in parable about lawyers that was once published by Noah Webster:

A Farmer came to a neighboring Lawyer, expressing great concern for an accident which he said had just happened. One of your Oxen, continued he, has been gored by an unlucky Bull of mine, and I should be glad to know how I am to make you reparation. Thou art a very honest fellow, replied the Lawyer, and wilt not think it unreasonable that I expect one of thy Oxen in return. It is no more than justice quoth the Farmer, to be sure; but what did I say? – I mistake – It is *your* Bull that has killed one of *my* Oxen. Indeed says the Lawyer, *that alters the case*: I must inquire into the affair; and if – *And If!* said the Farmer – the business I find would have been concluded without an *if*, had you been as ready to do justice to others as to exact it from them.

Id. at 611 n. 4 (quoting Noah Webster, *The American Spelling Book* (Hartford, Hudson & Goodwin 1788)) (emphasis in the original).

cupied by the Avaricious, whose sin is excessive greed). They need to receive a message: The punishment will fit the crime.

The Court finds 120 months fits defendant Andrews.

It is so ORDERED.⁴⁴²

On appeal, Judge Biery's sentence was vacated and the case was remanded for sentencing by a different district judge, on grounds that his "decision was fatally infected with antagonism toward the United States Sentencing Guidelines."⁴⁴³

2. *Catch-22*

Running a close second to Orwell as a literary fellow traveler with Kafka is Joseph Heller's novel *Catch-22*.⁴⁴⁴ Interestingly, while judges have often invoked the name of George Orwell without naming one of his books, judicial references to *Catch-22* generally omit the name of its author. Like *Collier* and *Blanca P.*, discussed above, the opinions discussed below also combine references to Kafka and *Catch-22*.

Prince George's County v. Blumberg, cited above for its "Kafkaesque drama," also involved what Judge Wilner called "a 'Catch-22' masterpiece"⁴⁴⁵ created by the government's argument that a permit applicant's suit was bared because he had failed to exhaust his administrative remedies by appealing to an administrative tribunal that lacked the authority to grant him the relief he sought.⁴⁴⁶

In *SEC v. Dimensional Entertainment Corp.*,

442. *Id.* at 611-12.

443. *U.S. v. Andrews*, 390 F.3d 840, 843 (5th Cir. 2004).

444. According to Judge Greene of the District of Columbia Circuit, "The *Catch-22* label from Joseph Heller's book of the same name has been applied so often to so many situations that it has by now acquired the status of a cliché." *Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 876 (D.C. Cir. 1984) (Greene, J., concurring). After so noting, Judge Greene continued:

But it is difficult to imagine a situation where that label is more apt: a corporation is summarily designated by a governmental agency as a "Cuban national," but it is not allowed effectively to defend itself against that designation on the theory that, because it is a "Cuban national," the designating agency need not permit it to be represented by counsel to challenge the designation. If there are precedents in American law to such circular processes, they have not been pointed out to us.

Id. Judge Ginsburg also mentioned *Catch-22* in her opinion for the court, *id.* at 869 n. 5, and Judge McKinnon mentioned "the coils of a Kafkaesque bureaucracy," *id.* at 878, in his dissent, but none of the three judges referred to both Kafka and *Catch-22*.

445. 407 A.2d 1151, 1162, 1164 (Md. Spec. App. 1979).

446. *Id.* at 1164.

[t]he less easily resolved question posed by [the] case [was] whether the SEC should be awarded summary judgment [in a civil action against Sam Ford] on its securities claims on the basis of Ford's wire fraud conviction, when the same jury [that found Ford guilty of wire fraud also] acquitted him on those [criminal securities] charges.⁴⁴⁷

In response to that question, "[t]he defendant, with a literary flair, ask[ed] '(i)s it consistent with traditional principles of equity to hoist a convicted defendant on the petard of his acquittals? Collateral estoppel, Catch 22 or Kafka?'"⁴⁴⁸ Judge Tenney did "not share the defendant's melodramatic sentiments,"⁴⁴⁹ and granted summary judgment to the SEC, reasoning that Ford's "wire fraud conviction necessarily rest[ed] on factual findings that constitute the securities violations alleged here."⁴⁵⁰

Dodson v. United States Department of the Army, like *Dimensional Entertainment*, contains a Kafka/Catch-22 double-dip drawn directly from a party's brief: "Overall Dodson argues that, through an incorrect record placed into his OMPF—an EER 110—followed by a 'Kafka[esque] nightmare of Catch 22s, Army bungling, and the Army repeatedly violating its own regulations,' the Army has erroneously barred him from reenlisting."⁴⁵¹

In *United States ex rel. Green v. Peters*, Judge Shadur began his opinion by stating that "[a]ll too often the representatives of the Illinois Attorney General's office appear in the federal court system wearing false—or at least misleading—colors."⁴⁵² At issue in *Peters* was the Attorney General's role in impeding access to habeas corpus relief for convicted criminal defendants who were, for various reasons attributable to the State, effectively denied the appeal they are guaranteed under state law.⁴⁵³ After criticizing the Attorney General for making "the Catch-22 argument that habeas corpus does not lie because petitioners have not exhausted their state remedies,"⁴⁵⁴ Judge Shadur reconsidered his choice of literary references: "Perhaps 'Kafkaesque' might be a more elegant and appropriate characterization than 'Catch-22,' given Kafka's *The Trial* and the judicial-system con-

447. 493 F. Supp. 1270, 1277 (S.D.N.Y. 1980).

448. *Id.* (quoting Ford Mem. at 10).

449. *Id.*

450. *Id.*

451. 988 F.2d 1199, 1205 (Fed. Cir. 1993).

452. 1994 WL 8258 at *1 (N.D. Ill. Jan. 8, 1984).

453. *Id.*

454. *Id.* at *3. That argument was a Catch-22 because chronic understaffing in the appellate defendants' office resulted in direct appeals that were often filed after a defendant had served most or all of his or her sentence. *Id.*

text in which the Attorney General has asserted his outrageous positions.”⁴⁵⁵

In another case from Illinois, *Eaglin v. Welborn*, the Seventh Circuit affirmed the district court’s granting a petition for a writ of habeas corpus.⁴⁵⁶ At trial, the defendant attempted to deny that he had committed the crime of soliciting murder for hire and to assert an entrapment defense.⁴⁵⁷ The trial court “refused to instruct the jury on the entrapment defense because Eaglin was also denying that he had any intent to kill, one of the essential elements of the crime charged, and, therefore, was denying that he had committed the crime.”⁴⁵⁸ In the view of Judge Will,

[t]his case is a classic example of life being stranger than fiction. It has both *Catch-22* and Kafkaesque qualities. The refusal to allow Eaglin to assert both that he had not sought to have anyone killed and therefore was not guilty of the crime charged, and that any of his arguably incriminating acts of statements were induced by entrapment, was a form of *Catch-22*.⁴⁵⁹

After stating the facts of the case, including the lack of a real hit man,⁴⁶⁰ the fact that the defendant “never paid a penny to have anyone killed,”⁴⁶¹ and actually stated on a number of occasions that he did not want anybody to be killed,⁴⁶² Judge Will observed that “Franz Kafka could have made much of this scenario.”⁴⁶³

In *Streett v. United States*, Dr. Streett and his wife were the subjects of an Internal Revenue Service investigation who sought to quash a third-party summons served upon their accountant on Fifth Amendment grounds.⁴⁶⁴ Prior to the hearing on the Streetts’ motion to quash, the United States moved to quash subpoenas the Streetts had served on several IRS employees. The Magistrate Judge granted the government’s motion to quash, and the Streetts objected.⁴⁶⁵ Before Judge Michael of the Western District of Virginia, the government argued that the information the Streetts sought through their subpoenas was privileged, within the meaning of Fed. R. Civ. P. 45(c)(3)(A) by virtue of 26 C.F.R. § 3001.9000-1, which

455. *Id.* at *3 n. 8.

456. 41 F.3d 268, 275 (7th Cir. 1994). The petitioner’s victory was short-lived; the case was reheard en banc, and the full court reversed the trial court. See *Eaglin v. Welborn*, 57 F.3d 496 (7th Cir. 1995).

457. *Id.* at 269.

458. *Id.*

459. *Id.* at 272.

460. *Id.*

461. *Id.* at 273.

462. *Id.*

463. *Id.*

464. 1996 WL 765882 at *1 (W.D. Va. Dec. 18, 1996).

465. *Id.* at *1.

requires IRS approval before IRS employees may testify in court.⁴⁶⁶ In rejecting the government's argument, Judge Michael noted:

The Supreme Court in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), upheld a similar regulation under challenge and concluded that a federal employee refusing to obey a subpoena based on such a regulation could not be held in contempt of court as a consequence of his noncompliance. The Supreme Court and Justice Frankfurter (in a concurring opinion) carefully delineated the limits of *Touhy*. The decision pointedly avoided the traps of a potential Kafkaesque Catch-22: you can reach the employees by the legal process, but you cannot subject them to judicial review; you can subject the agency head to judicial review, but you cannot reach him by the legal process. See *Joseph Heller, Catch-22* (1955). Justice Frankfurter summarized the distastefulness of such an outcome: "To hold now that the [agency head] is empowered to forbid his subordinates, though within a court's jurisdiction, to produce documents and to hold later that the [agency head] himself cannot in any event be procedurally reached would be to apply a fox-hunting theory of justice that ought to make Bentham's skeleton rattle." 340 U.S. at 473 (Frankfurter, J., concurring); *id.* at 469 ("The validity of the superior's action is in issue only insofar as we must determine whether the [agency head] can validly withdraw from his subordinates the power to release department papers.") (opinion of the Court).⁴⁶⁷

Judge Michael, of course, deserves extra credit for adding Jeremy Bentham's skeleton to the mix, and Bentham, in turn, deserves mention for the measures he took to keep his skeleton from rattling.⁴⁶⁸

In the first line of his opinion in *Peterson v. Lacy*, Judge Patterson of the Southern District of New York declared: "In this habeas corpus petition, to misquote Yogi Berra, 'It's Catch-22 all over again.'" ⁴⁶⁹ The

466. *Id.* at *3.

467. *Id.*

468. In addition to his contributions as a legal scholar and political philosopher, Bentham was a scientist.

After Bentham's death, in accordance with his directions, his body was dissected in the presence of his friends. The skeleton was then reconstructed, supplied with a wax head to replace the original (which had been mummified), dressed in Bentham's own clothes and set upright in a glass-fronted case. Both this effigy and the head are preserved in University College, London.

2 *Encyclopaedia Britannica* 110 (15th ed. 2003).

469. 1998 WL 883302 at *1 (S.D.N.Y. Dec. 17, 1998).

“Kafkaesque comedy of errors”⁴⁷⁰ that inspired Judge Patterson’s evocative *ménage à trois*⁴⁷¹ involved the petitioner’s ill-fated attempt to serve a state-court sentence that was to run concurrently with a federal sentence for a parole violation.⁴⁷² The petitioner’s difficulties stemmed, in large measure, from the repeated failure of state prison officials to release him to federal custody for the purpose of being sentenced on his parole violation.⁴⁷³ Ultimately, Judge Patterson rejected a report and recommendation from a Magistrate Judge and granted the petitioner a writ of habeas corpus.⁴⁷⁴

People v. Henley addressed the question “[w]hen the prior conviction of . . . a [serious] felony [in which the defendant inflicts great bodily injury on any person other than an accomplice] is alleged for purposes of the three strikes law, must the prosecution prove that the injured party was not an accomplice?”⁴⁷⁵ Answering that question in the affirmative for a unanimous panel of the California Court of Appeals, Justice Thaxter explained that “[p]lacing the burden of proof on [the defendant]/appellant while restricting his proof to the record of a proceeding in which he had no opportunity to litigate the issue can aptly be described as a ‘Catch 22.’”⁴⁷⁶ In a footnote, Judge Thaxter noted that “[a]ppellant uses another literary reference, ‘Kafkaesque,’ to describe the predicament he faced because of the lower court’s ruling.”⁴⁷⁷

In *Bowers v. Radiological Society of North America, Inc.*, the issue was the interplay between the statute of limitations and the continuing violation doctrine in the context of a Title VII sexual harassment claim.⁴⁷⁸ Ruling in favor of the plaintiff on the defendant’s motion for summary judgment, which was based upon an argument that the plaintiff knew long before filing suit that she had been harassed, Judge Bucklo of the Northern District of Illinois explained:

The law here is a bit tricky, but the key point is that it is the *actual*, and not the imagined, accrual of the cause of action that triggers the continuing violation doctrine. It would be neither fair nor in

470. *Id.*

471. Picture, if you will, Yogi Berra, Joseph Heller, and Franz Kafka setting down together to throw back a couple of brewskis – pilsner, I would presume, if Kafka is buying. For a discussion of judicial uses of the alleged Yogi Berraism “*déjà vu* all over again,” see Parker B. Potter, Jr., *A Good Piece of Paper Spoiled: An Eighteen-Hole Round-up of American Hole-in-One Jurisprudence*, 2 DePaul J. Sports L. & Contemp. Problems 152, n. 107 (2004).

472. *Peterson*, 1998 WL 883302 at *1.

473. *Id.*

474. *Id.* at 10.

475. 85 Cal. Rptr. 2d 123, 124 (Cal. App. 5th Dist. 1999).

476. *Id.* at 129 (citing Joseph Heller, *Catch 22* (1961)).

477. *Id.* at 129 n. 6.

478. 98 F. Supp. 2d 951, 954 (N.D. Ill. 2000).

accord with the law to say that if Bowers failed to file charges preparatory to bringing a lawsuit that she would have lost on a motion to dismiss or summary judgment because her cause of action had not accrued that she must later lose the claims on which she could not then have sued if the harassment subsequently did indeed ripen into actionable behavior. That would be a genuine Catch-22: heads, defendant wins, tails, plaintiff loses. The law is not so Kafkaesque.⁴⁷⁹

Nicholson v. Williams was a class action against various agencies of the City of New York filed by mothers whose children had been taken away because those mothers had been abused by their husbands or boy-friends.⁴⁸⁰ As Judge Weinstein of the Eastern District of New York described the situation in the fact section of his order:

For the mother and her children the situation is devastating. Even a Kafka would be hard put to address her Catch-22 situation: "You have a right to your child, abused mother, but the child will be taken." "You have a right to due process before your child is taken, but we will take your child first." "You have a right to counsel to defend your rights in court, but we will assign counsel in a way that prevents her from protecting you." "The judge will protect you, but she cannot do so until effective counsel is available to you and such counsel is not available."⁴⁸¹

The foregoing quotation leaves little doubt as to the resolution of the case; Judge Weinstein granted the plaintiffs the preliminary injunction they were seeking.⁴⁸²

Pontarelli v. United States Department of the Treasury was a case about the procedure by which felons may seek restoration of the right to possess firearms.⁴⁸³ 18 U.S.C. § 925(c) "allows convicted felons to apply to ATF [the Bureau of Alcohol, Tobacco and Firearms] for restoration of their firearms privileges, and gives district courts jurisdiction to review a 'denial' by ATF of a felon's application."⁴⁸⁴ However, "[s]ince 1992, Congress has provided in each ATF appropriations bill that 'none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities.'⁴⁸⁵ That ban, in

479. *Id.* at 955 (emphasis in the original) (footnote omitted).

480. 203 F. Supp. 2d 153, 163 (E.D.N.Y. 2002).

481. *Id.* at 227.

482. *Id.* at 260.

483. 285 F.3d 216, 217 (3d Cir. 2002).

484. *Id.*

485. *Id.*

turn, “prevents ATF from acting upon – and thus from denying – felons’ § 925(c) applications.”⁴⁸⁶ The question presented in *Pontarelli* was whether “the district courts have jurisdiction under 18 U.S.C. § 925(c) to review convicted felons’ applications for restoration of their firearms privileges when ATF, pursuant to Congress’s mandate, is unable to do so.”⁴⁸⁷ The majority of an en banc panel of the Third Circuit concluded: “Section 925(c) gives district courts jurisdiction to review applications only after a ‘denial’ by ATF. The appropriations ban renders ATF unable to deny individual felons’ applications, and thus effectively suspends § 925(c)’s jurisdictional grant.”⁴⁸⁸ Concurring in the judgment, Judge McKee “agree[d] that the tension between the legislative history of the appropriations ban on the Secretary’s investigation mandated under 18 U.S.C. § 925(c) requires the result the majority reaches,”⁴⁸⁹ but was “not persuaded that *Congress actually intended* to repeal [the courts’] subject matter jurisdiction under § 925(c).”⁴⁹⁰ In Judge McKee’s view, Congress did not intend to repeal the courts’ jurisdiction, but only to “[create] a situation that leaves the jurisdictional grant in place while making its exercise absolutely impossible,”⁴⁹¹ thus “plac[ing] the applicant as well as the courts in a *Catch-22* reminiscent of a Kafka novel.”⁴⁹² Judge McKee concluded by observing that he felt like a circus worker who had “been handed the shovel, and invited to clean up after the elephant.”⁴⁹³

In addition to the opinions in which Kafka and *Catch-22* are paired up in the same sentence or phrase, as in “Kafkaesque *Catch-22*”⁴⁹⁴ or “*Catch-22* reminiscent of a Kafka novel,”⁴⁹⁵ there are several others that employ both literary references, but deploy them more distantly from one another, to describe different things.

Wickham v. Hall was the case of a woman who was discharged from the United States Army only to have her discharge revoked on grounds that

486. *Id.*

487. *Id.*

488. *Id.* at 231.

489. *Id.*

490. *Id.* (emphasis in the original).

491. *Id.*

492. *Id.* at 236. Why a “*Catch-22*” would not be reminiscent of Heller novel is a question for a bigger brain than mine.

493. *Id.* at 238. Not long after *Pontarelli* was decided, the big shovel came out. In *U.S. v. Bean*, 537 U.S. 71, 78 (2002), the Supreme Court unanimously held that “the absence of an actual denial of [an applicant’s] petition by ATF precludes judicial review under § 925(c),” thus reversing the Fifth Circuit’s determination that “the District Court had jurisdiction to review ATF’s (in)action.” *Id.* at 73 (citing *U.S. v. Bean*, 253 F.3d 234 (5th Cir. 2001)). Justice Thomas, it should be noted, announced the decision of the Court without reference to either Kafka or *Catch-22*.

494. *Streett*, 1996 WL 765882 at *3.

495. *Pontarelli*, 285 F.3d at 236.

it was obtained fraudulently.⁴⁹⁶ After the Army revoked Wickham's discharge, it attempted to institute court-martial proceedings against her for fraudulently obtaining her discharge.⁴⁹⁷ Wickham challenged the court-martial, seeking to have the Army's charges against her tried in a civilian court.⁴⁹⁸ The question presented to the Fifth Circuit was "whether Article 3(b) [of the Uniform Code of Military Justice] may constitutionally confer court-martial jurisdiction over a person who has received a discharge that is later challenged by the issuing service on the ground [that] it was fraudulently procured."⁴⁹⁹ Writing for the majority, which ruled in favor of the Army, Judge Clark noted that while Wickham's argument for trial in a civilian court "presupposes that an unfair resolution of the issue awaits her before the military tribunal . . . military courts are not Kafkaesque Star Chambers."⁵⁰⁰

Writing in dissent, Judge Thornberry argued that Wickham was not questioning the fairness of the result that awaits her in a military court, but arguing that "since she is not a soldier, she may not be tried as a soldier."⁵⁰¹ While Kafka entered both the majority and the dissenting opinions in the context of commenting on the quality of military justice, Judge Thornberry turned to *Catch-22* to describe the reasoning of the majority which, in his view, "implicitly indulged in the impermissible assumption that Wickham is guilty of the fraudulent act with which she is charged."⁵⁰² That is, "[i]n order to exercise jurisdiction over Wickham a court-martial must necessarily presume that she is a servicewoman. However, she would only be a servicewoman if she is guilty of the very offense for which it wishes to try her; fraudulent separation from the service."⁵⁰³ According to Judge Thornberry:

There is no way out of this catch-22; the Army wishes to try her to prove her guilt, but it cannot try her unless her guilt has already been proved. The fallacy inherent in an argument is often most clearly revealed by the illogical consequences of its application. If Wickham is tried by court-martial and then acquitted, it will mean that she was validly discharged. If she was validly discharged, then she was a civilian all along, and was not subject to military jurisdiction. Of course, if the military lacked jurisdiction to try her,

496. 706 F.2d 713, 714 (5th Cir. 1983).

497. *Id.* at 715.

498. *Id.*

499. *Id.*

500. *Id.* at 717.

501. *Id.* at 724.

502. *Id.* at 719.

503. *Id.* at 720.

of what value is the determination by a court-martial that she is innocent, and therefore a civilian? The argument circles endlessly back to its source, confounded as it is by its own impermissible premise.⁵⁰⁴

In *State v. Huff*, Judge Borden of the Connecticut Court of Appeals declined to address “a potential defect in the jury charge which [defendant’s counsel] did not raise at trial,”⁵⁰⁵ explaining that “do[ing] so would turn this appeal into a ‘Kafkaesque academic test [in] which [the trial judge] may be determined on appeal to have failed because of questions never asked of him or issues never clearly presented to him.’”⁵⁰⁶ In a later section of the opinion, Judge Borden addressed the trial court’s rulings that sustained two objections to the defendant’s closing argument.⁵⁰⁷ At issue was the defendant’s attempt to argue that his failure to flee from a subsequent encounter with the person he was alleged to have earlier robbed and assaulted was an indication of a consciousness of innocence.⁵⁰⁸ However, the defendant did not testify, thus providing the jury with no evidence that he had not recognized the alleged victim, which “was a necessary predicate for an inference that the defendant’s failure to flee was a sign of his innocence.”⁵⁰⁹ Without the defendant’s testimony, Judge Borden observed that “the jury would have been placed in the realm of speculation, not reasonable inference, by the defendant’s final argument.”⁵¹⁰ Judge Borden then went on to explain that:

[D]efense counsel’s argument placed the state in a Catch-22 situation. Before the state’s final closing argument, it requested that the jury be excused so that it could obtain some guidance from the court as to how far it could properly go in responding to that part of the defendant’s final argument which had been permitted, without running afoul of the prohibition against commenting on a defendant’s failure to testify. *State v. Allen*, 517 A.2d 1043, [1048] [Conn. App. 1986]. The state’s only rebuttal to defense counsel’s argument, namely, to point out the absence of evidence on the issue of recognition, might have implicated the defendant’s right not to testify, since the defendant would be the natural person to supply the missing evidence. *Id.* at 1049. The defendant cannot have

504. *Id.* at 721.

505. 523 A.2d 906, 910 (Conn. App. 1987).

506. *Id.* (quoting *State v. Cosby*, 504 A.2d 1071, 1075 (Conn. App. 1986)). The phrase “Kafkaesque academic test” has a long and distinguished history. See *infra* pt. V(C).

507. *Id.* at 911.

508. *Id.*

509. *Id.* at 912.

510. *Id.*

his constitutional cake and eat it too. He cannot exercise his constitutional right not to testify and, at the same time, ask the jury to draw an inference of innocence supportable solely by testimony which only he could have given. See *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1268 (2d Cir. 1969) . . . (accused who invokes constitutional privilege not to testify may not “impose on the prosecution shackles that would be unavailable to a man who testifies in his own defense”).⁵¹¹

People v. Tilbury was another case involving the rights of a person found not guilty of a criminal offense by reason of insanity: “The question before [the California Supreme Court was] whether appellant, who has been found not guilty by reason of insanity and committed to a state hospital, is entitled to a jury trial on the issue of his eligibility for placement in a community mental health program as a supervised outpatient.”⁵¹² In California, one year as an outpatient in a community mental health program is a necessary prerequisite for the unconditional release of a person who has been found not guilty by reason of insanity.⁵¹³ The court held that “the relevant factors do not, singly or in combination, support the conclusion that it violates due process for a judge [rather than a jury] to consider an insanity acquittee’s application for placement in a community mental health program.”⁵¹⁴ In dissent, Justice Mosk first noted the court of appeals’ observation that

Tilbury could be caught in a classic Catch-22: although under [*In re*] *Franklin*[, 496 P.2d 465 (Cal. 1972),] Tilbury would have the right to a jury review of his fitness for unrestricted release, it is possible that during his almost 24-year term of confinement no jury would have the chance to undertake this review, because a judge might deny access to the prerequisite supervised outpatient program.⁵¹⁵

After discussing an opinion from the Supreme Court of Canada, Justice Mosk noted: “Our statutory scheme does not offend due process in quite the same manner. But if the offensive elements in our scheme are different, they are no less Kafkaesque.”⁵¹⁶

Finally, *American-Arab Anti-Discrimination Committee v. Reno* addressed a petition for “a permanent injunction enjoining the INS from us-

511. *Id.* at 912-13.

512. 813 P.2d 1318, 1319 (Cal. 1991).

513. *Id.* at 1320.

514. *Id.* at 1326-27.

515. *Id.* at 1328.

516. *Id.* at 1333.

ing confidential information in adjudicating [petitioner's] IRCA [Immigration Reform and Control Act] applications."⁵¹⁷ In *American-Arab Anti-Discrimination Committee*, the petitioners' applications were denied based upon classified information linking them to the Popular Front for the Liberation of Palestine ("PFLP").⁵¹⁸ In granting the petitioners' request for an injunction on due process grounds, Judge Wilson of the Central District of California explained that "[t]he INS's reliance on undisclosed, classified information in this case imposes on plaintiffs the nearly impossible burden of proving two negatives – that they are not members of the PFLP, and that the PFLP does not advocate any of the statutorily-disapproved doctrines."⁵¹⁹ Judge Wilson went on to note that "the D.C. Circuit [had] likened such a position to the dilemma faced by Joseph K. in Franz Kafka's *The Trial*, and [had] concluded that '[i]t is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.'" ⁵²⁰ While Judge Wilson granted petitioners the injunctive relief they sought, he rejected their argument that he was not entitled to conduct an in camera ex parte review of the classified information on which INS based its decision.⁵²¹ Judge Wilson justified his decision in the following way:

Accepting plaintiffs' position regarding the in camera submission would place the Court in a "Catch-22" position of needing to make a determination as to the procedural fairness of allowing the INS adjudicator to consider the information while simultaneously the Court would be unable to examine the information. "Blindfolded" judging is not required.⁵²²

3. *Other Fellow Travelers*

George Orwell and *Catch-22* are the dynamic duo of fellow travelers, and Judge Greene is a superhero in his own write⁵²³ for referring to Kafka, Orwell, Gogol, Samuel Becket and Eugene Ionesco within a single sentence.⁵²⁴ But even after Judge Greene's impressive literary roll-call, there remain several more pairings with Kafka worthy of note.

517. 883 F. Supp. 1365, 1369 (C.D. Cal. 1995).

518. *Id.*

519. *Id.* at 1376.

520. *Id.* (quoting *Rafeedie v. INS*, 880 F.2d 506, 516 (D.C. Cir. 1989)).

521. *Id.* at 1376 n. 11.

522. *Id.*

523. John Lennon, *In His Own Write* (Simon & Schuster 1964).

524. *See Bangert v. Hodel*, 705 F. Supp. 643, 655-56 (D.D.C. 1989).

Franz Kafka has been paired up with Lewis Carroll in at least four opinions, two of which have already been mentioned.⁵²⁵ *United States v. Schultz* was a criminal case in which the defendant moved for a new trial on grounds that “one of the jurors ingested controlled substances so as to ‘materially and substantially impair [his] ability to intelligently understand and comprehend the evidence and legal instructions in this case and prevented an intelligent deliberation thereon, and did render him unfit to perform his duties as a juror.’”⁵²⁶ As Judge Woods described the right at issue:

To a society which values the jury system and rule by law, it is almost inevitable, in order to avoid the kind of nightmares described so graphically in *Alice in Wonderland* or by Kafka, that defendants would be found to have a due process right to a ‘sane and competent jury’ – as indeed they have been.⁵²⁷

Ultimately, however, Judge Woods denied the defendant’s motion for a new trial or an evidentiary hearing.⁵²⁸

In re Chicago Lutheran Hospital Assn. involved an application for compensation and reimbursement filed by a Chapter 11 debtor’s attorney.⁵²⁹ In declining to grant the attorney the full amount requested, Judge Ginsberg noted that the attorney “has not proved that all of the attorney services in question were necessary to preserve or maximize the value of the secured creditors collateral,”⁵³⁰ and went on to observe that:

Franz Kafka or Lewis Carroll would be proud of an argument that it was necessary, for the good of the secured creditor, that the debtor, over the objection of the secured creditor, use up large amounts of the secured creditor’s cash collateral in a futile reorganization effort; or that it was necessary for the secured creditor’s interest that the debtor, again over the opposition of the secured creditor, unsuccessfully seek to effect sales of the hospital property at prices which were inadequate to satisfy the secured creditor’s claim; and finally, that it was necessary for the good of the secured creditor that the debtor’s attorneys spend large amounts of time

525. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 705 (2001) (Scalia, J., dissenting); *Bruno v. Dept. of Police*, 451 So. 2d 1082, 1102-03 (La. App. 4th Cir. 1983).

526. 656 F. Supp. 1218, 1219 (E.D. Mich. 1987).

527. *Id.* at 1220 (citing *Sullivan v. Fog*, 613 F.2d 465, 465 (2d Cir. 1980)).

528. *Id.* at 1225.

529. 89 B.R. 719, 722 (Bankr. N.D. Ill. 1988).

530. *Id.* at 729.

preparing briefs advocating their rights to be paid out of the secured creditor's collateral.⁵³¹

Charles Dickens is another common Kafka companion. Judge Biery's recent opinion referring to *Oliver Twist's* Mr. Bumble,⁵³² discussed *supra*, is one of at least five opinions that link the twentieth-century Czech and the Victorian-era Englishman.

In *State ex rel. D.D.H. v. Dostert*, Justice Neely of the West Virginia Supreme Court "endeavor[ed], with some apprehension, to clarify the proper procedures at the dispositional stage of a juvenile proceeding"⁵³³ and went on to note that the facts of the case before the court "constitute[d] a veritable primer on how a juvenile should not be handled by the courts under either [the court's] prior rulings or the applicable sections of Chapter 49 of the W. Va. Code."⁵³⁴ Early in his opinion, Justice Neely observed that "the control of juveniles and the treatment of juveniles (if that expression can be used without conjuring Kafkaesque images) are frequently irreconcilable goals."⁵³⁵ Later in his opinion, Justice Neely explained:

Some things we have enough knowledge to treat and other things we do not have enough knowledge to treat. Broken homes, uncaring parents, learning disabilities, Dickensian poverty, parental abuse, and an unhealthy environment are all things which the State, "solicitous of the welfare of its children but also mindful of other demands upon the State budget for humanitarian purposes," can begin to cure.⁵³⁶

Finally, toward the end of his opinion, Justice Neely wrote about the fight "to show that 'treatment' [for juvenile offenders] is often a caricature – something worthy of a story of Kafka or a Soviet mental hospital."⁵³⁷ Still in West Virginia, still within the realm of mental health, and just over a year later, Justice Neely began his opinion in *E.H. v. Matin* by stating: "Once again this Court's attention must be focused on the 'Dickensian Squalor of unconscionable magnitudes' of West Virginia's mental institutions."⁵³⁸ After presenting a dispassionate accounting of various shortcomings at the Huntington State Hospital, Justice Neely summed up his discus-

531. *Id.* at 729 n. 12.

532. *U.S. v. Andrews*, 301 F. Supp. 2d 607 (W.D. Tex. 2004).

533. 269 S.E.2d 401, 405 (W. Va. 1980).

534. *Id.* at 406.

535. *Id.* at 408-09.

536. *Id.* at 411 (quoting *State ex rel. Harris v. Calendine*, 233 S.E.2d 318, 331 (W. Va. 1977)).

537. *Id.* at 416.

538. 284 S.E.2d 232, 232-33 (W. Va. 1981) (quoting *State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109, 120 (W. Va. 1974)).

sion as having “focused on the tragic impact of the hospital’s Kafkaesque lack of coordination.”⁵³⁹

McMahon v. Shearson/American Express, Inc. was an appeal to the Second Circuit by an attorney against whom sanctions had been imposed under Rule 11 of the Federal Rules of Civil Procedure.⁵⁴⁰ In a discussion of Rule 11 sanctions, Judge Cardamone explained:

Over the last several decades burgeoning and voluminous discovery requests of dubious merit with attendant escalation of needless costs made the prospect of a *Jarndyce v. Jarndyce* mentality in modern American litigation a distinct possibility, with lawyers engaged in “stages of an endless cause, tripping one another up on slippery precedents, groping knee deep in technicalities, running their . . . heads against walls of words, and making a pretense of equity with serious faces, as players might.” C. Dickens, *Bleak House*, 12-13.⁵⁴¹

In a subsequent discussion of appellate court sanctions, Judge Cardamone noted “the ‘Kafkaesque dream’ of courts being besieged by motions to sanction attorneys for making frivolous motions for sanctions.”⁵⁴²

Kafka and Dickens are most closely linked in *Jenkins v. State*.⁵⁴³ In that case, Joseph Jenkins sued in state court “for damages resulting from his alleged fraudulent conviction of murder in 1957 and wrongful incar-

539. *Id.* at 236.

540. 896 F.2d 17, 18 (2d Cir. 1990).

541. *Id.* at 21. *Jarndyce v. Jarndyce* was a case discussed in *Bleak House*. *Fossa v. Fossa*, 869 A.2d 58, 60 n. 8 (R.I. 2005). In that per curiam opinion, the Rhode Island Supreme Court explained:

Quite frankly, the travel of this case reminds us of the mythical case of *Jarndyce v. Jarndyce*, which Dickens so devastatingly satirized over 150 years ago in *Bleak House*. He describes that pertinent case as follows:

“[*Jarndyce v. Jarndyce*] drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises.” Charles Dickens, *Bleak House* 7-8 (George Ford & Sylvère Monod eds., W.W. Norton & Co. 1985) (1853).

We wish to emphasize, however, that the Rhode Island court system is *not* the Court of Chancery of the Victorian era, and we are determined to see to it that our cherished system never descends to anything approaching that ignominious level.

Id.

542. *Id.* at 24 (quoting *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir. 1986)).

543. 615 So. 2d 405 (La. App. 4th Cir. 1993).

ceration for thirty years.”⁵⁴⁴ The suit was removed to federal court.⁵⁴⁵ Jenkins filed a second suit in state court, and then moved to remand the first case back to state court.⁵⁴⁶ His motion to remand was denied, and ultimately the case was dismissed for failure to prosecute.⁵⁴⁷ Based upon the decision in the federal case, the State moved to dismiss the second state action on grounds of res judicata.⁵⁴⁸ The trial court, relying upon La. Rev. Stat. Ann. § 13:4232,⁵⁴⁹ denied the State’s motion to dismiss, and the Louisiana Court of Appeals affirmed, explaining:

In the present case, plaintiff alleges that he has been the victim of a horrendous injustice. His interest in proceeding with the law suit outweighs any interest in the strict application of res judicata, especially considering that his predicament is the result of his attorney’s conduct and not his own.⁵⁵⁰

Judge Byrnes concurred with reasons:

[La. Rev. Stat. Ann. §] 13:4232(1) should be reserved for truly exceptional circumstances and applied sparingly. However, there is something disturbing about using an unusual combination of arcane procedural technicalities to allow the justice system to prevent the respondent from redressing what may have been an outrageous injury inflicted upon him by that very system of justice. The rigid application of res judicata to these facts seems more like some legalistic nightmare from Charles Dickens’ *Bleak House* or Franz Kafka’s “Vor Dem Gesetz” than the American justice system. This is one of those exceedingly rare instances that cries out for the application of [La. Rev. Stat. Ann. §] 13:4232(1). I fear that to do otherwise would be to cast our justice system in a poor light and supply munitions to the literary armory of some contemporary Dickens or Kafka.⁵⁵¹

While many of Kafka’s fellow travelers are venerable literary figures, Kafka has also been linked to at least one piece of American popular culture: Rod Serling’s *Twilight Zone*. In *State v. Leach*, the Ohio Court of

544. *Id.* at 406.

545. *Id.*

546. *Id.*

547. *Id.*

548. *Id.*

549. That statute provides, in pertinent part: “A judgment does not bar another action by the plaintiff: (1) When exceptional circumstances justify relief from the res judicata effect of the judgment.” La. Rev. Stat. Ann. § 13:4232(1).

550. *Jenkins*, 615 So. 2d at 406-07.

551. *Id.* at 407.

Appeals rejected a criminal defendant's argument that the trial court erred in imposing consecutive sentences without specifically "indicat[ing] what facts of the case applied to the [required statutory] findings" that supported the imposition of consecutive sentences.⁵⁵² After noting that the trial court articulated reasons for its ruling and that "nothing in the statutory scheme . . . requires the court to note specific factors for each individual finding,"⁵⁵³ Judge Gallagher, writing for the majority, stated that "[r]equiring anything more than is expressly stated in the statute would turn the imposition of a legally sufficient consecutive by a trial court into an episode of *The Twilight Zone*."⁵⁵⁴ Judge Karpinski concurred and dissented:

The majority here predicts that requiring a reason to be aligned with its related finding would turn the trial court into an episode of *The Twilight Zone*. On the contrary, to require anything less turns the appellate court into a Kafkaesque episode in which the burden falls on appellate judges to divine the nexus between a finding and all the facts in a record. In other words, if the trial court is not required to provide the nexus, this burden would fall on the reviewing court. The reviewing court, therefore, would not be reviewing a specific reasoning process; it would be walking around with a divining rod.⁵⁵⁵

While no other twilight zone reference is quite as explicit as Judge Karpinski's, the other two leave little doubt that their authors also intended to invoke Serling's topsy-turvy fictional world by referring to the twilight zone.⁵⁵⁶

552. 2004 WL 637769 at *3 (Ohio App. 8th Dist. Apr. 1, 2004).

553. *Id.*

554. *Id.* at *4.

555. *Id.* at *6. One is left to wonder whether, in Judge Karpinski's view, the creator of *The Twilight Zone* qualified as a divining Rod.

556. Three other cases combine a reference to Kafka with the phrase "twilight zone," but in two of those cases, the source of the twilight zone reference would appear to be Justice Van Orsdel of the District of Columbia Court of Appeals rather than Rod Serling, see *Haney v. Pagnanelli*, 830 A.2d 978, 981 (Pa. Super. 2003) (quoting *Frye v. United States*, 293 F. 1013, 1014 (D.C. 1923) ("Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony [deduced] from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.)); *Trach v. Fellin*, 817 A.2d 1102, 1120 (Pa. Super. 2003) (Klein, J., dissenting) (quoting *Frye*, 293 F. at 1014), while in the third, the source would appear to be Justice Jacobs of the New Jersey Supreme Court, see *Sperling v. Bd. of Rev.*, 720 A.2d 607, 607 (N.J. 1998) (quoting *Janovsky v. Am. Motorists Ins. Co.*, 93 A.2d 1, 3 (N.J. 1952)).

In addition to quoting the "twilight zone" language from *Frye*, in Judge Klein's dissent, *Trach* has become celebrated in its own right for stating that: "Clearly, however, our supreme court did not intend that trial courts be required to apply the *Frye* standard every time scientific experts are called to

In *Wagenmann v. Adams*, Judge Selya of the First Circuit began with a quotation from seventeenth-century poet George Herbert,⁵⁵⁷ and then proceeded to lay out the remarkable story of a man illegally arrested for allegedly attempting to disrupt his daughter's wedding. According to the father of the bride, the successful plaintiff in a § 1983 action against the police officers who arrested him, he had traveled from his home in New York to Massachusetts to reconcile with his daughter and give her a gift on the eve of her nuptials.⁵⁵⁸ In the words of the inimitable Judge Selya: "What awaited Wagenmann in Massachusetts was not reconciliation but instead, a doorway into the twilight zone. His passage through this phantasmagoric portal culminated in his arrest, imprisonment, and commitment to a mental institution."⁵⁵⁹ In a discussion of the defendants' unsuccessful argument that the trial court had awarded excessive compensatory damages, Judge Selya quoted the trial judge's comment that "[p]laintiff undoubtedly experienced a horrific thirty-six hours . . . under what could be described as Kafkaesque procedures."⁵⁶⁰ In another case originating in Ohio, Judge Ryan of the Sixth Circuit, quoting the district court, characterized the State, in a habeas corpus action, as advocating a position that "would result in dragging '[the petitioner] into a Kafkaesque cycle of proceedings from which there is no escape . . .'"⁵⁶¹ Judge Ryan further noted that the district court had also described the petitioner's plight as a "'twilight zone' scenario."⁵⁶²

Literature and popular culture are not the only sources of fellow travelers for judicial references to Kafka; history, too, has provided its share of judicial glosses on Kafka. The paragon of this genre is Judge Walker of the Second Circuit, who mentioned Kafka, the Spanish Inquisition, the English Court of Star Chamber and the French *lettre de cachet* in his discussion of the repugnance of secret trials.⁵⁶³ As noted above, judges have also written of "Kafkaesque victim[s] of Star Chamber secret proceed-

render an opinion at trial, a result that is nothing short of Kafkaesque to contemplate." 817 A.2d at 1110. That phrase has been quoted in at least four subsequent opinions, all from Pennsylvania courts. See *Commw. v. Dengler*, 843 A.2d 1241, 1243 (Pa. Super. 2004); *Ford ex rel. Pringle v. Phila. Housing Auth.*, 848 A.2d 1038, 1054 (Pa. Commw. 2004); *Campbell-Perfilio v. Penn DOT*, 2004 WL 2212894 at *18 (Pa. Com. Pl. Ct. June 10, 2004); *Haney*, 830 A.2d at 982 (quoting *Trach*, 817 A.2d at 1110). Judging by the early returns, this short line of cases seems likely to become a full-fledged parade, at least in Pennsylvania.

557. 829 F.2d 196, 199 (1st Cir. 1987) ("Marry your son when you will; your daughter when you can.").

558. *Id.* at 201.

559. *Id.*

560. *Id.* at 216.

561. *Levine v. Torvik*, 986 F.2d 1506, 1519 (6th Cir. 1993).

562. *Id.*

563. *Canady*, 126 F.3d at 362.

ings”⁵⁶⁴ and “Kafkaesque Star Chambers.”⁵⁶⁵ Finally, in an opinion in which he referred to both Kafka and Orwell while affirming the district court’s decision to suppress certain evidence obtained from electronic eavesdropping devices,⁵⁶⁶ Judge Merritt of the Sixth Circuit reported that the eighteenth-century British jurist Lord Camden had “criticize[d] the Star Chamber Judges who issued search warrants without parliamentary authority and thereby ‘usurped a general superintendence . . . and exercised a legislative power over all matters relating to the subject.’”⁵⁶⁷

Kafka has even been given a biblical running buddy. *Shaw v. United States* was the case of a Deputy Assistant Secretary of Defense who challenged his termination from a noncareer executive assignment.⁵⁶⁸ As a noncareer employee, Shaw was subject to removal upon the change of presidential administrations and, in fact, as a Nixon appointee, he was terminated early in the Carter administration.⁵⁶⁹ Despite being subject to termination by an incoming administration, Shaw wanted more information about why, precisely, he “no longer had the confidence of his superiors and was no longer suitable to them.”⁵⁷⁰ While he ultimately ruled against Shaw, Judge Nichols of the U.S. Court of Claims expressed sympathy for his position:

It is understandable to the court that [Shaw’s] inability to generate a conversation on such matters [i.e., why the new administration had lost confidence in him] might induce a feeling in the victim like one of Kafka’s heroes, or of the prophet Job, who said ‘would that mine enemy had written a book,’ meaning, let me know what I am accused of.⁵⁷¹

D. Drawing Kafka into the Case

Some of the more entertaining judicial references to Kafka are those that bring the long-dead author back to life and employ him as a character, or at least a presence, in the analysis of the case at hand. So hoary is this rhetorical device that it has been utilized in the titles of at least three law

564. *U.S. v. Dockery*, 447 F.2d 1178, 1191 (D.C. Cir. 1971) (Wright, J., dissenting).

565. *Wickham v. Hall*, 706 F.2d 713, 717, 724 (5th Cir. 1983).

566. *U.S. v. Finazzo*, 583 F.2d 837 (6th Cir. 1978).

567. *Id.* at 843 (quoting 19 Howard’s State Trials at 1069).

568. 640 F.2d 1254, 1255 (Ct. Cl. 1981).

569. *Id.* at 1256.

570. *Id.*

571. *Id.* at 1258.

review articles, in which Kafka meets, respectively, Torquemada,⁵⁷² Scheherezade,⁵⁷³ and Charles Dickens.⁵⁷⁴ And, as noted above, Franz Kafka was introduced to George Orwell by Judge Jolly of the Fifth Circuit in footnote 12 of *Russell v. National Mediation Board*.⁵⁷⁵ In addition to depicting Kafka performing the aforementioned meet-and-greets, judges have personified Kafka as a writer, as an imaginer of things to write about, and as an ironic observer.

1. *Kafka as Writer*

Several invocations of Kafka as writer have already been quoted: “[o]nly a Kafka, an Orwell, or a Gogol could do true justice to such a scene,”⁵⁷⁶ and “Franz Kafka could have made much of this scenario.”⁵⁷⁷ There are others.

In the most curious of those references, Judge Nettlesheim of the U.S. Claims Court invoked the image of Kafka not as an author, but as a stenographer: “The backdrop for this case before the court after argument on cross-motions for summary judgment is an administrative process that would have invited Franz Kafka to take notes.”⁵⁷⁸ In *Siano v. Blum*, the Appellate Division of the New York Supreme Court vacated a decision by the State Commissioner of Social Services to terminate Leonard Siano’s home assistance, explaining, in an unsigned memorandum decision, that in the administrative process to which Siano was subjected, “[t]he final blow was struck at the fair hearing he had requested to protest his case’s termination, the minutes of which read as though written by Kafka.”⁵⁷⁹

*Winkler v. State School Building Authority*⁵⁸⁰ was a taxpayer suit brought to challenge the issuance of certain revenue bonds the School Building Authority proposed to issue. In a concurring opinion replete with erudite historical references and discussions of economic theory, which focused, *inter alia*, on the differences between government and business,

572. John C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Administrative Proceedings*, 97 Colum. L. Rev. 1289 (1997). Dubin’s article has been cited in at least nine judicial opinions.

573. Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 Geo. Immigr. L.J. 51 (1999).

574. Anna Lou Dehavenon, *Charles Dickens Meets Franz Kafka: The Maladministration of New York City’s Public Assistance Programs*, 17 N.Y.U. Rev. L. & Soc. Change 231 (1989-90).

575. 714 F.2d at 1342 n. 12.

576. *Bangert*, 705 F. Supp. at 656. Judge Greene is too modest; it is difficult to see how Kafka, Orwell, or Gogol could improve upon his colorful description of drug testing in the national parks.

577. *Eaglin*, 41 F.3d at 273.

578. *O’Connell v. U.S.*, 14 Cl. Ct. 309, 310 (Cl. Ct. 1988).

579. 433 N.Y.S.2d 450, 451 (N.Y. App. Div. 1st Dept. 1980).

580. 434 S.E.2d 420 (W. Va. 1993).

Justice Neely observed that “Reaganomics was really Keynes as restated by Kafka.”⁵⁸¹

Finally, in *State v. Whiting*, the Ohio Court of Appeals reversed the trial court’s decision to dismiss a murder indictment against Terry Lee Whiting on grounds that too much time—fourteen years—had elapsed between the murder for which Whiting was indicted and the date of the indictment.⁵⁸² Judge Young dissented, observing that “[f]rom the eyes of the defendant, this case is a horror story which could have been written by Franz Kafka”⁵⁸³ and that “[t]his court is appending another chapter to the sorry tale by sending the case back for another hearing on an issue that the state cannot possibly win.”⁵⁸⁴

2. *Kafka as Imaginer*

Before a writer can set pen to paper, he or she must think up something to write about. Several judges have invoked the image of Kafka exercising his imagination.

Fish v. Simpson tells an extraordinary tale of a canny interloper who manipulated the legal system to the point where he was able to have the lawful tenant of an apartment he coveted served with a court order granting him immediate possession.⁵⁸⁵ After recounting the facts of the case, Judge Silberman of the New York City Civil Court noted that the “infamous Order to Show Cause . . . without a hearing resulted in the police forcibly reinstating [the interloper’s] occupancy to the subject premises and the commencement of the instant proceedings in a manner only Franz Kafka would have thought possible.”⁵⁸⁶

581. *Id.* at 440 (Neely, J., concurring).

582. 1997 WL 568018 at *2 (Ohio App. 2d Dist. Sept. 5, 1997).

583. *Id.* at *4. Judge Young identified Kafka as the “Austrian novelist of *The Trial* and other works wherein he recorded modern man’s fate of having been caught in an incomprehensible nightmare world.” *Id.* at *4 n. 1. Judge Young concluded his dissent by stating: “I would affirm and end this Kafkian nightmare.” *Id.* at *5. While approximately 310 opinions use the adjective “Kafkaesque,” only one other opinion, *Ragland v. Karmy*, 1995 WL 1056008 at *6 (Vir. Cir. Oct. 24, 1995), uses the adjective “Kafkian.”

584. 1997 WL 568018 at *4.

585. 477 N.Y.S.2d 946, 949-51 (N.Y.C. Civ. Ct. 1984).

586. *Id.* at 951. As it turns out, Kafka references in landlord-tenant disputes are not uncommon in New York. *Corbin v. Harris*, 400 N.Y.S.2d 309 (N.Y. Sup. Ct. Kings County 1977), involved a pair of landlords caught between an administrative mandate to restore their building to lawful occupancy by reducing the number of dwelling units from three to two, and a tenant who was immune from judicial enforcement of her obligation to pay rent due to the illegality of her unit, an illegality that could not be corrected while the tenant still resided in the illegal third unit. In the words of Judge Hirsch of the New York Supreme Court:

In way of clarification, at this point, we have a situation in which the landlords, who are in violation of the law because of the “illegality” of their basement apartment, cannot evict

In *State of Maine v. Thomas*, a declaratory judgment action brought by several states and environmental groups to compel the Environmental Protection Agency to fulfill its promise to promulgate air pollution regulations, the First Circuit affirmed the district court's dismissal on jurisdictional grounds, with Judge Selya observing that "[e]ven Kafka would have found it difficult to devise a more twisted antilogy" than the argument advanced by the plaintiffs to the effect that the six-year-old promise they sued to enforce was not a final agency action.⁵⁸⁷

Atwater v. District of Columbia Department of Consumer & Regulatory Affairs was another administrative law case.⁵⁸⁸ At issue was the jurisdiction of an administrative law judge, as opposed to the Superintendent of Insurance, to resolve the plaintiff's claims under the consumer protection provisions of the District of Columbia's compulsory no-fault motor vehicle insurance statute.⁵⁸⁹ In response to the District's claim that the case should be remanded to the Superintendent of Insurance, Judge Schwelb stated, for a unanimous panel of the District of Columbia Court of Appeals:

Given this history, remanding the action now would have the effect of telling Mr. Atwater, four years after he filed the complaint in the office which the District now says is the right one, that because the case was assigned by the agency to be heard by one of its offices rather than by another, he must begin the process all over again. As Mr. Atwater justifiably remarks, "Franz Kafka could not imagine a more horrific bureaucratic scenario."⁵⁹⁰

their tenant to remove the violation. They cannot obtain rent even at the reduced rental, as the tenant simply refuses to pay, and to add to the Kafkaesque situation, they are obligated to supply their unwanted "guest" with free gas, electricity and hot water. For six and one-half years this injustice has been perpetuated. The tenant has been tenacious both in her refusal to remove herself and in her refusal to pay rental for the apartment she occupies. The landlords are frustrated in their inability to register the premises as a multiple dwelling and thwarted by the inflexibility of statutory technicalities.

The law, as pertains to this instance, is punctilious, uncompromising and embarrassing in its result, most certainly, inconsistent with our preferred concepts of law as sagacious and venerable. Fortunately, the rigid confines of statutory law can, on appropriate occasion, be tempered with the more pliable remedies of Equity.

Id. at 311. Remarkably, a similar situation arose in yet another case from New York, *Aponte v. Santiago*, 630 N.Y.S.2d 869 (N.Y.C. Civ. Ct. Bronx County 1995). In *Aponte*, the court relied in part on the decision in *Corbin* in granting the landlords a judgment of possession. 630 N.Y.S.2d at 871.

587. 874 F.2d 883, 886, 889 (1st Cir. 1980) (quoted in *Nat. Resources Def. Council, Inc. v. Adminstr. U.S. EPA*, 902 F.2d 962, 993 (D.C. Cir. 1990)).

588. 566 A.2d 462 (D.C. 1989).

589. *Id.* at 463.

590. *Id.* at 469.

Pettibone Corp. v. Payne (In re Pettibone Corp.) involved an attempt by Pettibone, a corporation subject to bankruptcy protection, to discharge a tort claim against it which arose “22 months after the first claims bar date, 3 ½ months before confirmation.”⁵⁹¹ In a suit for declaratory and injunctive relief, “Pettibone argue[d] that publication notice to unknown creditors almost two years before [tort claimant] Payne was injured comprised adequate notice to Payne, and that Payne’s suit should be barred since she failed to file a timely claim.”⁵⁹² Judge Schmetterer of the Bankruptcy Court for the Northern District of Illinois understood Pettibone’s argument to be based on one of two implications: (1) “that, once Payne was hurt, she should have immediately ascertained whether any parties that might be liable were in bankruptcy and, if so, race to the court file to see if a claim should be filed before any Plan was confirmed;”⁵⁹³ or (2)

that *uninjured* persons who wish to protect themselves in the event of future injuries have the burden of monitoring national financial papers (such as those in which Pettibone published) to read notices about business they have no claims against because they are on notice of claim bar dates affecting any future injuries caused by such companies.⁵⁹⁴

As to the second implication, Judge Schmetterer opined that “Franz Kafka would have been able to accept such a legal principle in one of his stories; the Bankruptcy Code and the Fifth Amendment to the United States Constitution cannot.”⁵⁹⁵

Finally, in *Walthall v. United States*, the Ninth Circuit affirmed the district court’s decision that the Commissioner of Internal Revenue was not obligated to provide Robert and Dorothy Walthall with direct notice of an audit of a tax-shelter partnership in which they had invested.⁵⁹⁶ Judge Noonan concurred and dissented, beginning his opinion in the following way:

Cornwallis surrendered to Washington to the tune of *The World Turned Upside Down*. The surrender ended taxation without representation. The American republic has taken another turn when the government can successfully take the position that although it knows the identities of the taxpayers adversely affected by its action it has no obligation to tell them of the actions because the tax-

591. 151 B.R. 166, 169 (N.D. Ill. 1993).

592. *Id.* at 172.

593. *Id.*

594. *Id.* (emphasis in the original).

595. *Id.*

596. 131 F.3d 1289, 1295 (9th Cir. 1997).

payers failed to follow government regulations that were not in existence.

That the government knew the names and interests of the taxpayers is not disputed. That in 1985 (and indeed for five years) the regulations were not in existence is not disputed. So the government rests its case by pointing to 26 U.S.C. § 6223(c)(2) which says, “The Secretary shall use additional information furnished to him by the tax matters partner or any other person in accordance with regulations prescribed by the Secretary.” No regulations, no need to use the additional information. Q.E.D.

Kafka could have designed such a world. I do not believe that Congress did.⁵⁹⁷

A bureaucracy so absurd that Kafka could not have designed it must be a dreadful bureaucracy indeed.

3. *Kafka as Observer*

Not only have judges conjured up images of Kafka hunched over his writing desk or engaged in the process of imagining what to write about next (whatever that may have looked like), judges have also inserted Kafka into their opinions as a detached ironic observer of the factual scenarios they are confronted with. Such is the Kafka, who, along with Lewis Carroll, would have been proud of the bankruptcy lawyer’s argument in *In re Chicago Lutheran Hospital Assn.*,⁵⁹⁸ quoted at length in part IV(C)(3), *supra*, or the Kafka who, in *Nicholson v. Williams*,⁵⁹⁹ “would [have been] hard put to address [the] Catch-22 situation”⁶⁰⁰ of abused mothers and their children, discussed in part IV(C)(2), *supra*.

In *Carmona v. Insurance Arbitration Forums, Inc.*, an unsigned memorandum decision of the Appellate Division of the New York Supreme Court recounted an amazing story of bureaucratic misadventure involving the New York Arbitration Commission and the New York State Insurance Department and concluded by noting that “[o]nly Kafka could have appreciated the sequence of events and the conclusion.”⁶⁰¹

Terry Oilfield Supply Co. v. American Security Bank, N.A. returns us to the Kafkaesque world of bankruptcy.⁶⁰² In that case, Terry Oilfield Supply

597. *Id.* at 1297.

598. 89 B.R. at 719.

599. 203 F. Supp. 2d at 153.

600. *Id.* at 227.

601. 469 N.Y.S.2d 356, 358 (N.Y. App. Div. 1st Dept. 1983).

602. 195 B.R. 66 (Bankr. S.D. Tex. 1996).

received certain real property interests by means of two court-authorized post-petition transfers from the reorganized debtor.⁶⁰³ When the debtor sought to have Terry defend its title to that property as a claim in its bankruptcy, Judge Hughes ruled that “[t]he court-approved contract alienate[d] the debtor’s property from the bankruptcy estate [such that] the estate cannot get it back,”⁶⁰⁴ further explaining:

It is one thing to assert that the mere existence of a bankruptcy puts people who had pre-petition dealings with the debtor on notice that their property may be challenged in the reorganization, but even Kafka would fail to appreciate the idea that those who have dealt with the debtor in possession are required to participate in every proceeding to assure themselves that the debtor will not mistakenly act as if it still owns the property it has sold.⁶⁰⁵

In *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, the California Supreme Court ruled that under California’s unfair competition law (“UCL”), “a private, for-profit corporation may maintain on behalf of the general public an unfair competition action against a retailer who, in violation of the Penal Code, sells cigarettes to minors.”⁶⁰⁶ Justice Brown dissented, calling the case a “poster child for [the] sort of abusive litigation”⁶⁰⁷ that uses the California UCL as “a means of leveraging settlements at the expense of the public interest.”⁶⁰⁸ By Justice Brown’s calculation, the suit before the court was one of eight nearly identical actions filed by the same attorney, against almost 2000 defendants, seeking injunctive relief, more than \$50 billion in restitution, and attorney’s fees.⁶⁰⁹ She also observed that the corporate plaintiff, Stop Youth Addiction (“SYI”), had no employees, did no business other than filing lawsuits, and had virtually no source of funding other than the attorney’s fees it won in successful lawsuits.⁶¹⁰ Moreover, it seems that SYI did not even have to file a lawsuit in order to get paid. Justice Brown noted that the record from another SYI suit included “evidence of attempts by . . . [Stop Youth Addiction’s attorney] to obtain . . . payments from franchise defenders *prior* to filing the lawsuit (in which they would be accused of committing a crime), in exchange for dropping their names from the action.”⁶¹¹ “[I]t also appear[ed] from the

603. *Id.* at 72.

604. *Id.* (citing 11 U.S.C. § 549(a)(2)(B)).

605. *Id.*

606. 950 P.2d 1086, 1089 (Cal. 1998).

607. *Id.* at 1107.

608. *Id.* (citation omitted).

609. *Id.*

610. *Id.*

611. *Id.* (citation omitted) (emphasis in the original).

record in [another case brought by SYI] and from concessions during oral argument that Stop Youth Addiction employed children as decoys in privately run ‘sting’ operations to obtain evidence of illegal cigarette sales by some or all of the defendants.”⁶¹² Near the end of her extensive dissenting opinion, Justice Brown argued that “[t]he result the majority reaches is not compelled by law or logic.”⁶¹³ She continued:

This case is proof of the comment, made by the author of the Law Revision Commission’s report, that UCL litigation is like a Bosnian war zone: “Anyone may attack for any reason and it appears that nobody can negotiate – not only are there factions, but it is unclear who has *authority* to bind anyone to peace or a final resolution.”

It is equally evident that no means exists in these cases – short of an actual trial – to assure the public that any of the small retailers that may *already* have settled rather than pay the cost of lawyers are factually guilty of having committed the underlying crime on which these suits rest. Allegations in the record that plaintiff’s counsel offered to forego even *filing* suit against individual defendants in exchange for fees, testimony that counsel is compensated exclusively from such fees, and evidence that he systematically offers to settle on terms that include attorney fees but no legally binding relief are equally disturbing. They suggest the use of the UCL as a means of generating attorney fees without any corresponding public benefit.

Any empathy for the result the majority reaches vanishes when the logistics of this suit are considered: In order to obtain evidence of alleged unlawful activity, Stop Youth Addiction’s agents must induce minors to commit crimes – repeated violations of section 308 – by purchasing cigarettes. It thus appears from the record that Stop Youth Addiction and its attorney have filed this and related UCL actions against thousands of retailers alleging violations *of the same penal law that Stop Youth Addiction has violated in obtaining evidence to support these suits*. And while retailers may have done so inadvertently, Stop Youth Addiction has acted deliberately. The result is so exquisitely ridiculous, it would confound

612. *Id.*

613. *Id.* at 1114.

Kafka. In a case that abounds with moral ironies, the worse is this:
The avenger may be guilty of the greater crime.⁶¹⁴

It is one thing to suggest that a bureaucracy is so absurd that Kafka could not have designed it; it is another thing entirely—and a stronger indictment—to suggest that a legal scenario is so ridiculous that Kafka could not even understand it.

Fierro v. INS was the case of a man who defended against INS deportation proceedings “on the ground that he [was] an American citizen because his father was naturalized before [he, the deportee] reached the age of eighteen . . . well within what the Government calls ‘the “window of opportunity” to gain derivative citizenship.’ ”⁶¹⁵ Incorrectly, INS found that the plaintiff was over eighteen at the time his father received his citizenship.⁶¹⁶ In response, Judge Young of the District of Massachusetts wrote:

The consequences of this error deserve far greater consideration than the Government seems willing to admit: Imagine for a moment the agony of living one’s life in exile, knowing that the decision to deport hinged, at least partially, on an error of basic arithmetic. Kafka himself would recoil at such a blunder.⁶¹⁷

Judge Young was so concerned with the INS’s actions that Kafka alone was not enough; he began his order with a quotation from Robert Bolt’s *A Man for All Seasons*.⁶¹⁸

E. *Imagining the Case into Kafka’s Fictional World*

As discussed in the previous section, some judges invoke Kafka as a character in their opinions, setting him to work writing, imagining, or observing the facts of their cases. Other judges have made Kafka references in exactly the opposite way, by projecting the facts of their cases into the fictional world created by Kafka.

614. *Id.* (emphasis in the original).

615. 81 F. Supp. 2d 167, 168 (D. Mass. 1999).

616. *Id.*

617. *Id.*

618. *Id.* at 167 (Judge Young’s order began: “Consider this famous exchange from Robert Bolt’s *A Man for All Seasons*: Roper: So now you’d give the Devil benefit of law! More: Yes. What would you do? Cut a great road through the law to get to the Devil? Roper: I’d cut down every law in England to do that! More: Oh? And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? This country’s planted thick with laws from coast to coast – man’s laws, not God’s – and if cut them down – and you’re just the man to do it – d’you really think you could stand upright in the winds that would blow then? Yes, I’d give the Devil benefit of law, for my own safety’s sake.”) (quoting Robert Bolt, *A Man for All Seasons* 66 (1962)).

In *Fuerst v. Secretary of Health, Education & Welfare*, Judge Bauman of the Southern District of New York was called upon to decide whether the Secretary of Health, Education & Welfare correctly determined that Leah Fuerst was not disabled within the meaning of the Social Security Act because she continued to work after her diagnosis of (and treatment for) breast cancer, a medically determinable impairment.⁶¹⁹ While Judge Bauman ruled against the claimant, based upon his understanding of the relevant statutes and case law, he also took a swipe at the rules under which he was constrained to decide the case: “The Court cannot help but feel that something is wrong here – that the HEW rules would have been incorporated in a Kafka novel had they existed at the time.”⁶²⁰

City of Los Angeles v. Workers’ Compensation Appeals Board involved a police officer’s application for workers’ compensation and the officer’s claim that his psychiatric problems stemmed, in part, from his treatment by the police department as it investigated a charge that he had plotted to have his wife killed.⁶²¹ In an opinion remanding the case to the Compensation Appeals Board, Justice Stevens of the California Court of Appeals quoted extensively from the report of an independent medical examiner in psychiatry who stated:

Further, like a scene in a Franz Kafka story, allegations that are unclearly stated, unstated, not familiar, and do not fit with what one observes of the reality about him also have a befuddling disorganizing effect upon the mind and make it very difficult to function mentally. One’s mind feels disintegrated, scattered and damaged in such circumstances. That is different qualitatively and more devastating quantitatively than the unpleasant empty, weak psychotic feeling that characterizes depression. To be sure, a loss of self-esteem secondarily accompanies a loss of self-integrity. With an apt metaphor, like a cracked (‘crazed’, ‘crazy’) vessel, a disintegrated ego cannot hold self-esteem.⁶²²

In *Johnson v. Verrilli*, the defendant physicians in a medical malpractice action moved for summary judgment, arguing that a prospective parent’s mental and emotional distress resulting from the still birth of a child are not compensable under New York law.⁶²³ Justice Beisner of the New

619. 354 F. Supp. 185, 185 (S.D.N.Y. 1973).

620. *Id.* at 187-88. Judge Bauman continued, a bit wistfully, one must imagine, by explaining that “the remedy [to HEW’s Kafkaesque rules] must be provided by an agency with a heart or the Congress – not by the Courts.” *Id.*

621. 174 Cal. Rptr. 25, 25-28 (Cal. App. 2nd Dist. 1981).

622. *Id.* at 28 n. 3.

623. 511 N.Y.S.2d 1008, 1009 (N.Y. Sup. Ct. Dutchess County 1987).

York Supreme Court denied the motion.⁶²⁴ In so doing, he noted that under the existing precedent, a mother has no cause of action to recover for emotional distress arising from a still birth unless she suffers independent physical injury, while the stillborn fetus has no cause of action at all.⁶²⁵ In Justice Beisner's view, those two rules lead to situations, such as the one before him, in which "[t]here is an injury without a remedy."⁶²⁶ Moreover, Judge Beisner found the situation to be more than merely inequitable in light of the source of the rule allowing parental recovery accompanied by physical injury: a case in which "the defendants performed an emergency caesarean section on the plaintiff and the fetus died in the course of delivery."⁶²⁷

Ironically, one of plaintiffs [sic] allegations of omissions in the present case is the defendants' failure to perform a caesarean section. Plaintiffs' plight would fit comfortably in a Franz Kafka story. Had defendants performed the caesarean, section, they give their patient a cause of action. The inference is chilling.⁶²⁸

Pilon v. United States Department of Justice was a case about "one of the more disturbing phenomena of the Washington scene – the leaking of false information to damage the reputation or livelihood of an official."⁶²⁹ As Judge Greene characterized the case: "in actions reminiscent of Franz Kafka's novel *The Trial*, Department of Justice officials leaked confidential information concerning plaintiff with considerable abandon . . . while at the same time plaintiff was told that he could not be allowed access to the facts underlying the investigation the government had conducted of him."⁶³⁰

In a concurring opinion that must be read to be appreciated, Justice Steigmann of the Illinois Court of Appeals lambasted the Illinois Environmental Protection Agency for maintaining a highly publicized "State Remedial Action Priorities List" of allegedly polluted properties which lacked a mechanism by which an owner of an allegedly polluted property could challenge a listing he or she believed to be erroneous.⁶³¹ Because "[t]he record shows that the IEPA has *in effect* found States Land guilty of violat-

624. *Id.* at 1011.

625. *Id.* at 1009-10.

626. *Id.* at 1010.

627. *Id.* (citing *Zinn v. Long Island Jewish Med. Ctr.*, 476 N.Y.S.2d 8 (N.Y. App. Div. 2d Dept. 1984)).

628. *Id.* at 1010-11 (citation omitted).

629. 796 F. Supp. 7, 8 (D.D.C. 1992) (footnote omitted).

630. *Id.* (footnote omitted).

631. *Sts. Land Improvement Corp. v. EPA*, 596 N.E.2d 1164, 1168 (Ill. App. 4th Dist. 1992) (Stiegmann, J., concurring).

ing the [Environmental Protection] Act and might very well choose to let the matter lie forever in its current state of limbo, thus denying States Land any semblance of due process,”⁶³² Justice Steigmann concluded that “[t]he regulation at issue and the IEPA’s utilization of it in this case are truly right out of the novels of Franz Kafka.”⁶³³

Justice Arabian of the California Supreme Court began his concurring opinion in *Rappleyea v. Campbell* by stating:

Defendants, an out-of-state couple who unwisely chose to represent themselves, *timely* presented their answer for filing. But in a story line worthy of a Kafka novel, an innocent \$70 error [in the filing fee, which was attributable to misinformation provided by court personnel] at the outset led, after a series of misadventures, to a \$200,000 default judgment.⁶³⁴

In *In re Washington*, the Ohio Supreme Court reversed the court of appeals and held that “sufficient evidence existed to support the trial court’s finding that the [eight-year-old] appellee committed rape.”⁶³⁵ Judge Wright dissented:

This case was originally filed because the “appellee showed no remorse for the rapes.” To have remorse, a person must understand the nature and consequences of the wrong. I cannot seriously believe that an eight-year-old child intended to commit a rape and then callously ignored the consequences.

It appears from the facts that the parents attempted to resolve this problem. Somehow, in a manner that defies explanation, the problem turned into a court case and is now before this state’s highest court. Perhaps I am missing something, but this strikes me as a scenario out of a Franz Kafka novel.⁶³⁶

In *Valona v. United States Parole Commission*,⁶³⁷ a federal parolee argued that he should be released from supervision because the Parole Commission had failed to conduct a review of his status, as required by statute, five years after his release.⁶³⁸ The district court dismissed on grounds that the petitioner had not exhausted his administrative reme-

632. *Id.* at 1170.

633. *Id.*

634. 884 P.2d 126, 132 (Cal. 1994).

635. 662 N.E.2d 346, 349 (Ohio 1996).

636. *Id.* at 350.

637. 165 F.3d 508 (7th Cir. 1998).

638. *Id.* at 509.

dies.⁶³⁹ Commenting on the dismissal, which the court of appeals reversed, Judge Easterbrook of the Seventh Circuit said: “Only in the world of Kafka would a court dismiss a claim that an agency has taken too long to reach a decision on the ground that the agency has yet to reach a decision – and that the aggrieved party can’t complain until it does (by which time, of course, the claim will be moot).”⁶⁴⁰

In an accounting proceeding to recover from Herbert Bricker’s estate the value of medicaid payments made on his behalf, but for which he was not eligible, Judge Holzman of the New York Surrogate’s Court observed that “requiring a person to pay for hospital services imposed upon him while he was being detained in the hospital because the hospital was erroneously of the opinion that he was not competent to make his own decisions is worthy of a nightmare recounted in a novel by Kafka.”⁶⁴¹

F. *References Too Good to Leave Out*

This section presents Kafka references that do not fit neatly into any of the categories I have already discussed but are just too well phrased to leave out of an article devoted to memorable judicial writing. The first part of the section discusses Kafka references in a judge’s own words while the second part is devoted to Kafka reference made by parties that judges have found compelling enough to quote verbatim.

1. *Bon Mots from the Bench*

Law Research Service, Inc. v. Crook is too good to leave out because in that opinion, Judge Friendly of the Second Circuit dropped the K-bomb on a particularly unlikely target: “Collier [on Bankruptcy] tells us in somewhat Kafkaesque terms . . .”⁶⁴² In *Falkowski v. EEOC*, Judge McGowan began the background section of his opinion by observing: “The history of Ms. Falkowski’s struggles with the EEOC stretches back to 1973 and encompasses an intervening volume of courtroom litigation and agency proceedings that for sheer sinuosity falls nothing short of Kafkaesque.”⁶⁴³

In *Self v. Board of Review*, the New Jersey Supreme Court ruled that “employees who are unable to get to work because of [a] lack of transpor-

639. *Id.* at 510.

640. *Id.*

641. *In re Est. of Bricker*, 702 N.Y.S.2d 535, 536-39 (N.Y. Sur. Ct. Bronx County 1999). However, based upon a variety of other factors, Judge Holzman ultimately ruled that the New York Department of Social Services was entitled to \$26,000 of the \$34,913.44 it sought from Bricker’s estate.

642. 524 F.2d 301, 313 (2d Cir. 1975) (quoting Collier, *Bankruptcy* P 9.29(2), at 369 (14th ed. 1972)).

643. 719 F.2d 470, 472 (D.C. Cir. 1983).

tation” had “left work voluntarily without good cause attributable to such work” and, thus, were not eligible for unemployment benefits.⁶⁴⁴ Justice O’Hern dissented:

There is a difference between quitting and being fired from a job. Only in the regulatory world do the concepts get confused.

The fact is that these two claimants didn’t quit their jobs. They were fired after they couldn’t get to work for two days because they had lost their ride. No reading of this record will disclose evidence to support a contrary finding. . . .

The supervisor knew he had fired the claimants. In fact, they testified that he was the one who told them to apply for unemployment insurance. These claimants were hardworking building maintenance employees. They wanted work, not a handout. Had they been given a few days to arrange transportation, they might have been able to return to work. Under these circumstances, only a legal fiction of Kafkaesque subtlety can convert their discharge into a voluntary quit.⁶⁴⁵

In *Dobbert v. Wainwright*, the United States Supreme Court denied Ernest Dobbert’s application for a stay of his death sentence.⁶⁴⁶ In a dissent joined by Justice Brennan, Justice Marshall wrote of his concern over “[t]he ‘right’ of the State to a speedy execution,”⁶⁴⁷ further observing that “[t]he frenzied rush to execution that characterizes this case has become a common, if Kafkaesque, feature of the Court’s capital cases.”⁶⁴⁸

Grillo v. Coughlin was a § 1983 action by a state prison inmate who claimed that altered documents were used against him in a prison disciplinary proceeding.⁶⁴⁹ During that proceeding, “it emerged that the copies of two documents served on [the inmate] differed from the copies submitted to the hearing officer as evidence against him.”⁶⁵⁰ In a unanimous opinion reversing the district court’s grant of summary judgment in favor of the prison officials on the inmate’s evidence tampering claim, Judge Laval of the Second Circuit rejected the district court’s conclusion that the inmate

644. 453 A.2d 170, 171, 174 (N.J. 1982).

645. *Id.* at 174 (O’Hern, J., dissenting) (citation and footnote omitted).

646. 468 U.S. 1231 (1984).

647. *Id.* at 1241 (Marshall, J., dissenting).

648. *Id.* at 1242 n. * (Marshall, J., dissenting) (citations omitted).

649. 31 F.3d 53, 54 (2d Cir. 1994).

650. *Id.*

received a fair hearing that cured any constitutional violation that may have resulted from a false accusation against him:

A hearing in which the false accusation or evidence is shown to the factfinder but concealed from the accused would not comport with . . . due process standards . . . It is but a slight turn of Kafka for the accused to be required to mount his defense referring to prison documents that, unbeknownst to him, differ from those before the hearing officer. Unquestionably, the right of an accused to know the evidence against him and to marshal a defense is compromised when the evidence he is shown differs from the evidence shown to the factfinder.⁶⁵¹

In *Ellis v. Ellis*, Hubert Ellis argued that he was entitled to alimony from his ex-wife, based upon substantial disparities in their annual incomes.⁶⁵² The majority of a panel of the Florida District Court of Appeal, relying on *Canakaris v. Canakaris*,⁶⁵³ held “that the trial court reasonably denied the former husband’s request for alimony because he has failed to show either that he needs it or that his former wife has the ability to pay it.”⁶⁵⁴ Judge Harris dissented:

In any event, this unemployable and unemployed husband whose income is substantially less than his employable and employed wife receives no alimony but instead is required to stand ready to pay alimony if the wife proves unable to continue to earn sufficient salary from the family business awarded to her. . . .

No one recognizes more than I that there is no such doctrine as the doctrine of comparable fairness. The doctrine was first “floated” by the plurality opinion in *Kennedy v. Kennedy*, 622 So.2d 1033 (Fla. 5th DCA 1993). It was immediately sunk in *Kennedy v. Kennedy*, 641 So.2d 408 (Fla.1994), in a most summary and unique fashion – summary because no reason was given and unique because even though the supreme court lacked jurisdiction, it nevertheless declared the doctrine DOA. In any event, there must be somewhere in the Constitution, perhaps in the “penumbra” of the specific rights granted therein, perhaps even in the specific right granted in Article I, Section 2 of the Florida Constitution (“[a]ll natural persons are equal before the law . . .”) some right of fairness. Even though *Canakaris* has become Kafka’s

651. *Id.* at 56.

652. 699 So. 2d 280, 282 (Fla. 5th Dist. App. 1997).

653. 382 So. 2d 1197 (Fla. 1980).

654. *Ellis*, 699 So. 2d at 283.

doorkeeper in so far as a review of fairness is concerned, still we can consider whether the trial court relied on the correct principles of law. Rewarding a wife who “stuck by her man” is not such a principle.⁶⁵⁵

In *In re Devon B.*, the Connecticut Supreme Court held that the trial court abused its discretion when it denied a motion by Tammy M., the homeless and mentally handicapped mother of Devon B., to join the state department of mental retardation as a necessary party in Devon’s child dependency proceeding.⁶⁵⁶ Judge Katz, writing for the majority of an en banc panel of the court, and Judge Sullivan, who dissented, also disagreed about which result would be more Kafkaesque. The issue was precisely how to insure Tammy M.’s compliance with various steps intended to help address her retardation and homelessness.⁶⁵⁷ The department of children and families argued that there was no need to join the department of mental retardation as a necessary party because the two departments were “already working together to fashion appropriate services for the respondent [Tammy M.]”⁶⁵⁸ who, in turn, could be ordered to continue working with the department.⁶⁵⁹ In the majority’s view, “[o]rdering the *respondent* to continue to work with the department of mental retardation does not insure that the department will provide her with the necessary services to help her regain custody of her child.”⁶⁶⁰ Judge Katz elaborated:

Indeed, although Terreri’s testimony [for the department of children and families] indicated that he had contacted the department of mental retardation about parenting classes for the respondent, there was nothing in the record to indicate that it in fact had arranged any classes. Furthermore, any suggestion by the petitioner that it is up to the *respondent* to take certain initiatives is Kafkaesque.⁶⁶¹

Writing in dissent, Judge Sullivan noted that “under the majority’s reasoning, any number of persons and entities—such as the department of correction, the probation department, police departments, schools, teachers, counselors, physicians, grandparents, in short, anyone whose participation

655. *Id.* at 284 (citing Franz Kafka, “Before the Law,” from *The Trial* (definitive ed., Willa Muir & Edwin Muir, trans., Alfred A. Knopf 1984)).

656. 825 A.2d 127, 129 (Conn. 2003).

657. *Id.* at 135.

658. *Id.* at 135-36.

659. *Id.* at 136.

660. *Id.* (emphasis in the original).

661. *Id.* at 136 n. 18 (emphasis in the original) (citing Franz Kafka, *The Trial* (W. Muir & E. Muir, trans., Alfred A. Knopf rev. ed. 1982)).

could facilitate reunification of parent and child—must be treated as necessary parties in a neglect proceeding.”⁶⁶² In his view, “it is the prospect of a proceeding requiring the presence of all these parties that is Kafkaesque.”⁶⁶³

Finally, in *Triplett v. Azordegan*, the issue was the timeliness of a § 1983 action, filed in 1974, in which the plaintiff alleged that he “was deprived of his constitutional rights under color of state law by virtue of his being drugged before confessing to a 1954 murder.”⁶⁶⁴ The plaintiff was convicted, and served seventeen years in state prison before he was released, and all charges were dismissed, in 1972, by order of the Plymouth County District Court, “on grounds of the involuntary confession.”⁶⁶⁵ The defendants in plaintiff’s action argued that they were entitled to summary judgment because “the plaintiff knew all the operative facts in 1955 and should have sued then.”⁶⁶⁶ After noting that it was “clear that the issues surrounding the confession were raised at trial and in post trial motions, but failed to affect the conviction,”⁶⁶⁷ Judge McManus of the Northern District of Iowa pointed out that “[i]t is almost too evident to warrant comment that plaintiff, having been convicted of murder by virtue of a confession which in 1955 was deemed legal and admissible, could not have, at that time, pursued a § 1983 claim.”⁶⁶⁸ He then rejected the state’s statute of limitations defense: “To hold that plaintiff had to ignore the criminal proceedings and immediately sue under § 1983 would mean that plaintiff would have had to pursue a technically possible, but at the time frivolous suit. To so argue is to read Kafka into law.”⁶⁶⁹

2. *From the Mouths of Litigants*

The focus of this article is on judicial invocations of Kafka, and indeed, the most compelling Kafka references are those penned (or key-stroked) by a judge in his or her own voice.⁶⁷⁰ But no small number of Kafka references have entered judicial opinions as direct quotations from

662. *Id.* at 139.

663. *Id.* at 140.

664. 478 F. Supp. 872, 874-75 (N.D. Iowa 1977).

665. *Id.*

666. *Id.* at 875.

667. *Id.*

668. *Id.* (citations omitted).

669. *Id.* (quoted in *Woods v. Candela*, 825 F. Supp. 43, 46 (S.D.N.Y. 1993)).

670. Perhaps the ultimate example of the term being expressed in a judge’s own voice is the following sentence, penned by Judge Friedman: “While he [a criminal defendant] would not use this adjective, his experience has been somewhat Kafkaesque.” *Commw. v. Reefer*, 2001 WL 34058295 at *3 (Pa. Com. Pleas Allegheny County Ct. May 1, 2001), *rev’d*, *Commw. v. Reefer*, 831 A.2d 599 (Pa. 2003) (prison term shortened due to lack of resources to care for medical condition).

hearing transcripts or parties' briefs. This section begins with opinions in which a writing judge has quoted a Kafka reference from the winning side and concludes with the opinions representing the more common situation, in which a judge quotes a Kafka reference from the party he or she is ruling against.

a. *Kafka References from the Winning Side*

When a litigant claims that something or another is Kafkaesque, and the judge agrees—a situation that is more than a little rare—the result is nearly as powerful as a statement in a judge's own words. In addition to the opinions discussed above in which several courts concurred with litigants that they had been subjected to Kafkaesque procedures or bureaucracies, only to rule against the Kafkaesque victims, there is one opinion in which a court agreed, in part, with a litigant's invocation of Kafka, and another opinion in which a part of a court agreed with such a claim.

Turning first to the court that agreed in part, Virgil Reed appealed the trial court's decision to uphold the suspension of his general manager's license by the Kansas Racing Commission ("KRC").⁶⁷¹ The charges against him included perjury.⁶⁷² On appeal to the Kansas Supreme Court, Reed argued that the trial court erred in upholding the KRC's decision because "the KRC found him guilty of conduct not specified in the amended hearing notice in connection with the perjury charge,"⁶⁷³ thus depriving him of due process.

Reed emphasize[d] that the trial court erred when it found that the perjured matters were stated "to the extent known." According to Reed, the trial court's reasoning create[d] a "Kafka-like" dilemma: Despite the notice requirements of the prehearing conference order limiting the charges, he "should have been prepared to defend himself on all possible charges of perjury arising from the emergency hearing . . . as long as those unknown charges were 'similar' to those actually alleged." Reed insists that he did not even know during the hearing what he was charged with.⁶⁷⁴

The court sided with Reed to the extent of reversing the KRC's perjury findings on matters not specified in the prehearing conference order.⁶⁷⁵

671. *Reed v. Kan. Racing Comm.*, 860 P.2d 684, 696 (Kan. 1993).

672. *Id.* at 688.

673. *Id.* at 690.

674. *Id.* at 691.

675. *Id.* at 696.

And then there is the dissenting opinion of Judge Smith in *Florida Department of Environmental Regulation v. Falls Chase Special Taxing District*.⁶⁷⁶ In that case, the court of appeals affirmed the trial court's ruling that the appellant Department of Environmental Regulation ("DER") "was without jurisdiction to regulate dredge and fill activities on the land in question"⁶⁷⁷ and that the appellees were not required to exhaust their administrative remedies before filing suit.⁶⁷⁸ Writing in dissent—that is, in favor of the DER's position—Judge Smith quoted the appellee's claim that their situation—which, in their view, involved "an eight month [administrative] run-around"⁶⁷⁹—was "identical to the situation in which Joseph K. was faced in his search for justice in Kafka's unfinished novel, *The Trial*."⁶⁸⁰ Judge Smith disagreed with the appellee's characterization of their plight, and pointed out that "the Department's rules offered a clearly effective remedy from March 1979 onward, requiring nothing but a request from [appellees],"⁶⁸¹ which request appellees did not make, seemingly for strategic reasons.⁶⁸²

b. *Kafka References from the Losing Side*

While a judge will occasionally put the weight of his or her robe behind a litigant's assertion of Kafkaesque victimhood, it is far more common for a judge to quote a litigant's Kafka-clad claim only to reject it. Some of the opinions rejecting a party's invocation of Kafka are relatively quotidian,⁶⁸³ while in others, the litigant's claim, the judge's response, or

676. 424 So. 2d 787 (Fla. 1st Dist. App. 1982).

677. *Id.* at 793.

678. *Id.* at 796-97.

679. *Id.* at 811-12 (citation omitted).

680. *Id.* (quoting Appellee's Br. at 22).

681. *Id.*

682. *Id.*

683. See e.g. *U.S. v. Footman*, 215 F.3d 145, 155 (1st Cir. 2000) ("Footman argues . . . that it is Kafkaesque to say his consent [to the interception of telephone calls he made from prison] was voluntary" when he was forced "to choose between making no phone calls and agreeing to have his phone calls recorded"); *U.S. v. Atropine Sulfate 1.0 mg. (Article of Drug) Dey-Dose*, 843 F.2d 860, 864 n. 7 (5th Cir. 1988) ("This statement explicitly supports a result characterized as 'kafkaesque' by counsel for Dey at oral argument."); *U.S. v. Giacalone*, 853 F.2d 470, 482 (6th Cir. 1988) ("In their brief on appeal, defendants characterize the district court's ruling as 'Kafkaesque' because all the evidence relating to the government's compliance with the minimization [of intercepted communications] issue remained in the government's possession. . . . We find defendants' argument without merit."); *Inland-boatman's Union of the Pacific v. Durta Group*, 279 F.3d 1075, 1083 n. 8 (9th Cir. 2002) ("The union termed the process [of arbitration and settlement] 'Kafka-esque' in its argument to the district court. The fallacy in the union's position may be seen . . ."); *People v. Pack*, 248 Cal. Rptr. 240, 242 (Cal. App. 2d Dist. 1988) ("The People argue that Pack has not shown a reasonable possibility that the evidence sought [mental health records of the victim and complaining witness in a rape case] might have resulted in a different verdict. Pack argues his situation is 'Kafkaesque' in that, because of the confidential nature of the records, he is unable to view them to ascertain if they are relevant."); *Global Land*,

both, are enough to bring a smile to the face of the connoisseur of colorful writing.

For example, in *Polanco v. Pan American University*, the trial court granted Pan American University a default judgment against Polanco.⁶⁸⁴ Polanco appealed. His brief, however, failed to include a listing of points of error, in violation of the Texas Rules of Appellate Procedure.⁶⁸⁵ While otherwise deficient, the brief ended on a high note:

Even within the Texas judiciary's well earned reputation for meeting out "Frontier Justice", the lower court's conduct cannot be condoned, for it would confirm the Kafkaesque nature of this "trial". Moreover, this Court must admonish by opinion and order, the lower court, to maintain the standards of fairness and competence in an orderly and civilized society – not one controlled by the exigencies of electoral politics.⁶⁸⁶

In an opinion for a unanimous panel of the Texas Court of Appeals, Judge Hinojosa wrote, presumably with tongue in cheek:

These statements and subtitles [in Polanco's brief], which do not at any point refer to any part of the record before us hardly qualify as "points of error" under Tex.R.App.P. 74(d). This Court would humbly point out to appellant that, although we have a bit more to travel before we reach the advanced stage of the enlightened judiciary found in the East Coast, in Texas we do have certain appellate rules, albeit archaic, which require appellants to designate specific points of error. These rules make it easier for frontier Courts of Appeals to "figger out" what specific actions of the trial judge the appellant complains are erroneous. This is especially important when appellant files a brief with this Court replete with assertions and allegations regarding various matters, (for example, a federal action, ex parte communications, conflicts of interest, and other issues), the substance of which is not in the record before this Court.⁶⁸⁷

Inc. v. City of Peekskill (In re Karta Corp.), 296 B.R. 305, 311 (S.D.N.Y. 2003) ("Plaintiffs argued the situation is 'kafka-esque'. This cannot be.")

684. 818 S.W.2d 97, 98 (Tex. App. Corpus Christi Dist. 1991).

685. *Id.*

686. *Id.* at 99.

687. *Id.*

Among the things the court of appeals was able to “figger out” was that Pan American University was entitled to hold the default judgment it had been granted by the trial court.⁶⁸⁸

In *Andresen v. State*, a criminal defendant attacked the pre-sentence report prepared on him and did so in a way that involved, in the words of Judge Moylan of the Maryland Court of Special Appeals, considerable “sound and fury.”⁶⁸⁹ Somewhere between the sound and the fury was the defendant’s suggestion that the pre-sentence report resembled “the secret inquisition described by Franz Kafka.”⁶⁹⁰ Judge Moylan, on the other hand, found that “[t]he report was actually rather routine.”⁶⁹¹

Gay v. Waiters’ & Dairy Lunchmen’s Union, Local No. 30 was an employment discrimination action brought by a group of black male waiters and applicants for positions as waiters, against various unions and hotels.⁶⁹² In an attempt to make their prima facie case, plaintiffs presented statistical evidence which they attempted to bolster by presenting five types of circumstantial evidence of discrimination including “‘a series of obstacles’ confronting applicants at the hotels, which they characterize[d] as ‘something out of a Kafka novel.’”⁶⁹³ Writing for a unanimous panel of the Ninth Circuit, Judge Wallace found the plaintiffs’ circumstantial evidence unpersuasive for a variety of reasons,⁶⁹⁴ and the court of appeals affirmed the district court’s decision that the plaintiffs had failed to make their prima facie case.

In *Schmitt v. State*, a criminal defendant argued that “Kafka himself would have been proud of the result” of his trial and appeal, and that “[t]he absolute absurdity of [the] circular reasoning [to which he had been subjected by the trial and appellate courts] would be laughable, were it not for the fact that we are dealing here with not a work of fiction, but rather with a real-life case.”⁶⁹⁵ In the defendant/appellant’s view, Kafkaesque reasoning denied him the opportunity to be heard on the merits of an admissibility issue that went against him at trial.⁶⁹⁶ However, Judge Moylan pointed out that the appellate court had, in fact, ruled on the merits of appellant’s argument,⁶⁹⁷ thus completely undercutting the appellant’s attempt to dress himself in the clothes of a Kafkaesque victim.

688. *Id.* at 100.

689. 331 A.2d 78, 127 (Md. Spec. App. 1975).

690. *Id.*

691. *Id.* at 128.

692. 694 F.2d 531, 534 (9th Cir. 1982).

693. *Id.* at 553.

694. *Id.*

695. 779 A.2d 1004, 1010 (Md. Spec. App. 2001) (quoting Appellant’s Br.).

696. *Id.*

697. *Id.* at 1011.

In re Kramer was an attorney discipline action. In the Decision and Recommendation of the Disciplinary Review Board (“DRB”), included as an appendix in the New Jersey Supreme Court’s order of disbarment, the DRB quoted the special master who, in turn, quoted soon-to-be-former attorney Steven Kramer:

As to respondent’s non-compliance with R. 1:20-20, the special master found that, as of the date of his report, respondent still had not complied with the rule and had not properly applied for reinstatement:

Despite the fact that respondent’s non-reinstatement is clearly his own fault, in his answer to Count Four he has the temerity to proclaim “. . . the suspension was supposed to be for six months. It has lasted two and one half years without any more explanation (i.e. none) than that given to the Joseph created by Kafka.”⁶⁹⁸

In *Kalmin v. Department of Navy*, a former civilian employee of the Naval Sea Systems Command (“NAVSEA”), sought various documents relating to his employment under the federal Freedom of Information Act.⁶⁹⁹ After ruling that “[a]ll of the documents [plaintiff sought] . . . appear to be entitled to the immunity from production on the several grounds the Navy claims for them,”⁷⁰⁰ Judge Jackson went on to observe:

Kalmin is acutely aware that the Navy, for reasons neither he nor the Navy has chosen to articulate, suspects that he is emotionally unstable. He vehemently denies it, and he has submitted a lengthy affidavit of his own, and the declaration of the psychologist and report of the psychiatrist who have, respectively, treated and examined him. In his own affidavit he relates the course of a Kafkaesque persecution to which he has been subjected by his NAVSEA superiors; the psychologist and psychiatrist attest to the absence of any mental pathology on his part which might suggest that his perception of it is hallucinatory.⁷⁰¹

The defendant in *United States v. Nickens* was convicted of importing and possessing cocaine despite arguing at trial that he “was a respectable citizen traveling for recreational and medical reasons who was caught up in a Kafkaesque plot”⁷⁰² involving, among other things, a luggage switch that

698. 800 A.2d 111, 126 (N.J. 2001).

699. 605 F. Supp. 1492 (D.D.C. 1985).

700. *Id.* at 1496.

701. *Id.*

702. 955 F.2d 112, 125 (1st Cir. 1992).

he was unable to recognize due to his color blindness.⁷⁰³ In *Baldwin v. Labor & Industry Review Commission*, four workers who had filed worker's compensation claims asked to withdraw their claims, due to the alleged bias of the administrative law judge ("ALJ"), were denied that relief, failed to appear at their hearings, and had their applications dismissed with prejudice, and lost on appeal to the state circuit court.⁷⁰⁴ In a subsequent appeal, the Wisconsin Court of Appeals rejected the plaintiffs' argument, on the issue of administrative exhaustion and futility, that "requiring an applicant to proceed with a hearing before a biased ALJ . . . is a 'useless Kafkaesque' and 'unworkable burden,' because it is much more difficult, if not impossible . . . to correct bias on review."⁷⁰⁵ Justice Cane's response, for a unanimous panel: "We disagree."⁷⁰⁶

Ojavan Investors, Inc. v. California Coastal Commission involved a challenge to permit conditions imposed upon plaintiff's predecessors in title by the California Coastal Commission. In affirming the trial court's dismissal on statute of limitation grounds, Justice Boren of the California Court of Appeals wrote:

Contrary to appellants' assertion, there is nothing fundamentally unfair or "Kafkaesque" about their inability because of a lack of standing to have challenged coastal development permits issued years ago to other parties and their present inability to challenge, because of the statute of limitations, the same permits which now affect them. To the contrary, it would be illogical and unfair to grant third parties, such as appellants, the right to challenge permits when such a challenge would be time barred if brought by the party who was initially granted the permit. A permit holder also must have legal confidence after a definite point in time in investing financial resources to implement an approved development. Once the 60-day statute of limitations has run, the permit issued must be deemed good as against the world.⁷⁰⁷

In *Oliveto v. Circuit Court*, a public defender turned to her client, after the sentence was announced in a criminal case, and said: "Ridiculous."⁷⁰⁸ In an opinion for a divided panel of the Wisconsin Court of Appeals, Judge Eich wrote:

703. *Id.* at 115.

704. 599 N.W.2d 8, 11-12 (Wis. App. 1999).

705. *Id.* at 20.

706. *Id.*

707. 32 Cal. Rptr. 2d. 103, 108 (Cal. App. 2d Dist. 1994).

708. 519 N.W.2d 769, 770-71 (Wis. App. 1994).

The suggestion in Oliveto's brief that the only way Judge Curry could have heard her remark was either through inadvertence or "eavesdropping on protected attorney-client communications" (emphasis added) adds nothing to her argument. The same may be said, we think, for her characterization of Judge Curry's action as "Kafka[esque]," her assertion that the judge was simply using the contempt proceedings as "a club . . . on [her] client," her admonition that we "should swiftly put an end to [Judge Curry's] invitation to join in a trip to Wonderland," or her statement that the court's instruction to consider her act as contempt was "the Judge[s] . . . little secret."⁷⁰⁹

The defendant in *United States v. Jones* was charged with "making a false, fictitious or fraudulent claim to the United States Department of Agriculture [USDA] . . . by inflating the number of meals provided through the USDA Summer Food Service Program he sponsored."⁷¹⁰ He pled guilty, but then attempted to withdraw his plea, on grounds that "when he entered his plea, he took vicarious responsibility for the actions of others, conduct which does not satisfy the government's burden of proving that he acted intentionally to submit false claims."⁷¹¹ The defendant also argued the facts of the case, contending:

[A]t all times, he knew he did not claim more meals than he served but only bought less milk. He urges "the fallacy" of the government's case is "that many children do not like and, therefore, do not drink milk." Because Mr. Jones "deemed it wasteful" to throw out unopened milk cartons, he simply put them on ice and served them with another meal. Hence needing less milk, he ordered less milk, causing the auditors, mechanically matching up meals to milk, to conclude Mr. Jones was claiming more meals when, in fact, he "re-served unused, unopened containers of milk." Mr. Jones believes this misunderstanding thus placed him in the "Kafkaesque predicament" of the police investigating a "crime" which did not occur. He urges here, therefore, that although he initially accepted responsibility for the "proper administration of the program" and entered a plea, the district court abused its discretion

709. *Id.* at 776 n. 7. It is not apparent from the context whether Attorney Oliveto was referring to Alice's wonderland, or some other otherworldly locale.

710. 172 F.3d 63 (table), 1999 WL 61390 at *1 (10th Cir. Feb. 10, 1999).

711. *Id.* at *2.

in preventing him from withdrawing the plea when he discovered he had not understood its factual basis.⁷¹²

The court of appeals was not persuaded, explaining that, with respect to the defendant's assertions of error by the trial court, "the record dwarfs this showing, devoid as it is of any representation by Mr. Jones that he is innocent of the conduct charged."⁷¹³

This section concludes with an invocation of Kafka which, along with other instances of inflammatory language by counsel for both parties, inspired Judge Morgenstern-Clarren to remind the attorneys of the principles of civility.⁷¹⁴ Judge Morgenstern-Clarren's opinion speaks for itself:

This case involves important property and liberty rights. . . . Neither side, however, seems willing to consider that there may be some merit to the other's viewpoint and hence some reason to accommodate competing concerns and compromise these discovery issues. This is complicated by the fact that counsel appear to have forgotten that the dispute is between their clients and not between them personally. The full record must be reviewed to appreciate the tenor of the arguments, but a few quotations from the attorneys' communications will illustrate the point:

It has been my experience that when bank's [sic] cause unfair prosecutions, they never realize the impropriety of this conduct until it is far too late. Sort of the arrogance of power in it's [sic] finest glory. (Letter from Mr. Mann's criminal counsel to KeyBank's counsel).

In the face of overwhelming evidence of fraud, [Mr. Mann] offers a series of flimsy, disingenuous arguments that collapse under the slightest scrutiny . . . contains astounding representations . . . [and includes] a shameless effort to bolster th[e] flimsy premise. . . . (Response of KeyBank to Mr. Mann's Motion to Compel).

As you well know, we won't be attending the above-mentioned deposition and I would ask that you quit wasting our time. Perhaps you know of some law that you can use to compel our attendance. Otherwise, please do not expect us on the 9th day of January 1998.

712. *Id.*

713. *Id.* at *3.

714. See *KeyBank Natl. Assn. v. Mann (In re Mann)*, 220 B.R. 351, 358 (Bankr. N.D. Ohio 1998).

(Letter from Mr. Mann's criminal counsel to KeyBank's counsel).

Defendant's Motion demonstrates a disturbing lack of concern for accuracy – as evidenced by the first page where [Mr. Mann's counsel] misspells the names of KeyBank counsel, his own co-counsel, and last but not least, the name of the Bankruptcy Judge to whom this matter is assigned. While these errors are obviously harmless, the additional inaccuracies and misrepresentations set forth by [Mr. Mann's] criminal counsel in [Mr. Mann's] Motion are far less amusing and raise serious concerns of attorney misconduct. (Response of KeyBank).

[KeyBank's] Counsel interestingly has submitted a premature, pedantic motion (Motion of Mr. Mann for Protective Order).

[Mr. Mann's arguments are] downright silly. Filing a Motion to Compel under these circumstances is inexcusable. [And seeking sanctions is] adding yet another layer of Kafkaesque absurdity. (Response of KeyBank to Mann's Motion to Compel).

Mr. Mann capped off this exchange with the threat that KeyBank's "counsel has been informed that he will certainly be called personally to testify in the criminal matter." (Mr. Mann's Motion for a Protective Order).

The rhetorical excesses in this case were not designed to resolve the discovery disputes and, not surprisingly, they did not accomplish that end. As between lawyers, exchanges of the sort quoted are time-consuming to create and aggravating to receive. Moreover, they have a tendency to develop a life of their own as each side seeks to raise the bar of verbal intimidation. From the viewpoint of this judicial officer, communications like this are not a sign of strength or a mark of steely endurance. They are, instead, an indication that one either lacks civility or has chosen not to employ it. The ABA "Guidelines to Litigate By" suggest that judges adopt this viewpoint: "We will bring to lawyers' atten-

tion uncivil conduct which we observe.” Consider it done.⁷¹⁵

V. KAFKA’S GREATEST HITS

While the basic focus of the previous part is on the ways in which judges have referred to Kafka, as a matter of writing style, that part also gives a good idea of the general categories of cases that have inspired judges to put down their hornbooks and head for the fiction shelf. Criminal cases predominate, but commitment proceedings and child custody disputes have also generated their share of references to Kafka. In this part, I focus on four lines of cases that have perpetuated particularly memorable invocations of Kafka in specific areas of the law.

A. “Kafkaesque judicial nightmare”

The phrase “Kafkaesque judicial nightmare,” part of the jurisprudence of the Equal Access to Justice Act (“EAJA”)⁷¹⁶ for more than twenty years, entered that area of the law in *Cinciarelli v. Reagan*, a suit brought to recover attorneys’ fees under the EAJA.⁷¹⁷ The interesting issue in *Cinciarelli* was whether, and how, to award attorneys’ fees incurred in bringing a successful suit for fees under the EAJA.⁷¹⁸ As Judge Wright of the D.C. Circuit explained:

The proper application of EAJA in this situation is not as easy to discern, however, because EAJA’s requirement that fees be awarded only when the government’s position is not substantially justified complicates the issue. Whenever the government defends an EAJA claim on the ground that its litigation position in the underlying action was substantially justified and the government loses, the court has in effect decided that this position was unreasonable or, at best, barely reasonable. It would seem to follow in most cases that the decision to contest the EAJA application could not have been substantially justified because the position that the government claimed was “substantially justified” in the underlying action will have been shown to have been unreasonable. In these cases the victorious EAJA plaintiff should receive fees for its pur-

715. *Id.* at 358-59.

716. 28 U.S.C. § 2412 (2000).

717. 729 F.2d 801, 803 (D.C. Cir. 1984).

718. *Id.* at 809.

suit of the EAJA action. Of course in cases at the margin – where the government’s position in the underlying litigation on the merits was not found to be substantially justified but the question was a close one – it cannot be said that the government’s decision to contest an EAJA fee application is not substantially justified. An award of fees in these marginal situations would seem in tension with EAJA’s “substantially justified” test.

This situation admits of no wholly satisfactory resolution. If we apply a *per se* rule that the government pays fees for EAJA litigation whenever it defends an EAJA suit on the basis that its position in the action on the merits was substantially justified and loses, we force the government to pay fees in those marginal cases when defense of the EAJA suit, though unsuccessful, was substantially justified. Yet if we require every victorious EAJA plaintiff to make a separate claim for fees for bringing the first EAJA suit, and permit the government to claim that its first EAJA defense was substantially justified on the merits, we face the distinct possibility of an infinite regression of EAJA litigation. A successful EAJA plaintiff will bring another suit claiming fees for bringing the EAJA suit, and the government will defend on the ground that its EAJA defense was substantially justified. If the plaintiff wins this suit, yet a third suit will be required to recover fees for the second suit recovering fees. And if the government contests this suit and loses, yet a fourth suit will have been spawned, and so on. In our opinion the *per se* fee-shifting rule is the least objectionable exit from this Kafkaesque judicial nightmare; in most cases a loss on the generous “substantially justified” EAJA threshold strongly indicates that the government is clinging to an unreasonable position. We need not definitively resolve the question here, however, and we decline to do so because no party has briefed or argued it.⁷¹⁹

The phrase “Kafkaesque judicial nightmare” has been used in twenty subsequent opinions pertaining to the issue of awarding attorneys’ fees incurred in actions to recover attorneys’ fees.⁷²⁰

719. *Id.* at 809-10 (footnote omitted).

720. Seven of those opinions were written by U.S. District Court judges, six by U.S. Court of Appeals judges, and two by judges of the U.S. Court of Appeals for Veterans Claims. One each came from the U.S. Supreme Court, the U.S. Claims Court, the U.S. Court of International Trade, the California Supreme Court and the California Court of Appeals. Moreover, the phrase “Kafkaesque judicial nightmare” has had a good long run; it first appeared in 1984 and has been used as recently as 2002, in *Jolin, Inc. v. Ruegg*, 2002 WL 423147 at *10 (Cal. App. 6th Dist. 2002) (quoting *Est. of Trynin*, 782 P.2d 232, 238 (Cal. 1989)).

While most judges have been content simply to quote *Cinciarelli*, a few have offered their own embellishments. In the second reported “Kafkaesque judicial nightmare” case, *Cornella v. Schweiker*, Judge Henley of the Eighth Circuit noted that the question of fees for litigating fees was “a bit like looking into a mirror only to see another mirror’s reflection, and has been described as a ‘Kafkaesque judicial nightmare.’”⁷²¹ About six years after it was first identified, the “Kafkaesque judicial nightmare” hit the big time. In *Commissioner, INS v. Jean*, U.S. Supreme Court Justice Stevens noted: “As petitioners admit, allowing a ‘substantial justification’ exception to fee litigation theoretically can spawn a ‘Kafkaesque judicial nightmare’ of infinite litigation to recover fees for the last round of litigation over fees.”⁷²² With a single sentence, Justice Stevens added a piscine dimension to the nightmare—the spawning—and the Supreme Court supplanted the D.C. Circuit as the anchor for the “Kafkaesque judicial nightmare” line of cases.

Substantively, the Kafkaesque judicial nightmare of fees-for-fees litigation under the EAJA has been mentioned by judges dealing with EAJA requests arising from a wide variety of underlying suits against the government. *Cinciarelli* involved the impermissible termination of the temporary active duty status of a brigadier general in the Marine Corps reserve.⁷²³ In *Cornella*, the plaintiff had sued over the denial of Social Security disability benefits.⁷²⁴ *Hatian Refugee Center v. Meese* arose out of a successful challenge to the operation of the “‘Hatian Program’ . . . instituted by the Immigration and Naturalization Service (INS) in the summer of 1978 to accelerate the processing of the applications made by Haitians for asylum.”⁷²⁵ In *American Academy of Pediatrics v. Bowen*, the plaintiff

721. 741 F.2d 170, 171 n. 1 (8th Cir. 1984) (quoting *Cinciarelli*, 729 F.2d at 810).

722. 496 U.S. 154, 163 (1990) (quoting *Cinciarelli*, 729 F.2d at 810).

723. *Cinciarelli*, 729 F.2d at 803.

724. 741 F.2d at 171. Social Security disability benefits were also at issue in *Trichilo v. Secretary of Health & Human Services*, 823 F.2d 702 (2d Cir. 1987), *Seymore v. Secretary of Health & Human Services*, 738 F. Supp. 235 (N.D. Ohio 1990), and the class action *McDonald v. Bowen*, 693 F. Supp. 1298 (D. Mass. 1988).

725. 791 F.2d 1489, 1492 (11th Cir. 1986). In *Hatian Refugee Center*, Judge Hoffman characterized Judge Wright’s “Kafkaesque judicial nightmare” comment in *Cinciarelli* as dictum, *id.* at 1500, an observation also made by Judge Garrity in *MacDonald*, 693 F. Supp. at 1305 n. 4.

Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988) also arose out of the INS response to Hatian refugees. Specifically,

[t]he lawsuit began as a challenge to the practice, instituted by the Immigration and Naturalization Service (INS), of holding mass exclusion hearings for the plaintiff class composed of Hatian refugees. It evolved quickly into a broad-based challenge to INS’s policy of detaining the class members, during the pendency of their applications for asylum, without any possibility of parole.

Id. at 763. See also *Commr., INS v. Jean*, 496 U.S. 154 (1990).

successfully challenged “an interim final rule concerning the medical care and treatment of handicapped infants”⁷²⁶ promulgated by the Secretary of Health and Human Services. *United Construction Co. v. United States*⁷²⁷ arose from a claim by an asphalt contractor against the United States, which had contracted with the plaintiff for the construction of several parking lots.⁷²⁸ In *Bonanza Trucking Corp. v. United States*, the plaintiff obtained a judgment that enjoined the government from revoking licenses to cart bonded merchandise and to operate a container station.⁷²⁹ *Streicher v. Washington*, was a successful challenge to the legality of involuntary civil commitments to Saint Elizabeth’s Hospital in Washington, D.C.⁷³⁰ In *SEC v. Morelli*, the Securities and Exchange Commission brought an unsuccessful civil action for alleged insider trading against several defendants, one of whom recovered attorneys’ fees and expenses.⁷³¹ Both *Barrera v. West*⁷³² and *Cullens v. Principi*⁷³³ involved claims for veterans’ benefits. The interesting thing about the various Kafkaesque judicial nightmare cases involving the EAJA is that many of them amount to a double-dip of Kafka; not only is there the nightmare of fees-for-fees litigation, there is often something Kafkaesque in underlying case.

While the “Kafkaesque judicial nightmare” originated in an EAJA fee-shifting case, it has been invoked in the context of other federal fee-shifting provisions including those found in the Internal Revenue Code (26 U.S.C. § 7430),⁷³⁴ the Labor Management Reporting and Disclosure Act (29 U.S.C. § 412),⁷³⁵ the Individuals with Disabilities Education Act (20

726. 795 F.2d 211, 212 (D.C. Cir. 1986) (citing 48 Fed. Reg. 9630 (1983)).

727. 12 Cl. Ct. 514 (Cl. Ct. 1987). In *United Construction Co.*, Judge Nettesheim opined that “[t]he reasoning of the D.C. Circuit [in *Cinciarelli*] is impressive. *Id.* at 517.

728. See *United Constr., Inc. v. U.S.*, 10 Cl. Ct. 257 (Cl. Ct. 1986).

729. 669 F. Supp. 430 (Ct. Intl. Trade 1987).

730. 1992 WL 73508 (D.D.C. Mar. 20, 1992).

731. 1995 WL 9387 (S.D.N.Y. Jan. 11, 1995).

732. 13 Vet. App. 418 (Vet. App. 2000).

733. 18 Vet. App. 11 (table), 2001 WL 1181761 (Vet. App. 2001).

734. See *Buchanan v. U.S.*, 755 F. Supp. 319, 320 (D. Or. 1990) (“an action [by a taxpayer] against the United States for wrongful levy by the Internal Revenue Service”). In *Buchanan*, Judge Panner noted that while “the reasoning of the per se ‘fees for fees’ approach [established in *Cinciarelli*] is sound,” *id.* at 321, he was obligated to follow the alternative approach adopted by the Ninth Circuit, *id.*

735. *Kinney v. Intl. Bhd. of Elec. Workers*, 939 F.2d 690 (9th Cir. 1991) (plaintiff prevailed in suit alleging that the union had illegally removed him from elected office in union local and that union had imposed unlawful trusteeship on the local).

U.S.C. § 1415(e)(4)(B)),⁷³⁶ and the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988).⁷³⁷

Curiously, despite having disrupted the slumbers of any number of federal judges, the Kafkaesque judicial nightmare seems far less daunting to state-court judges. One such fearless jurist, Justice Kaufman of the California Supreme Court, has written, in the context of a statutory fee request following a will contest:

One final point deserves mention. It has sometimes been argued, as a reason for denying fees for fee-related services, that permitting such awards will result in the "Kafkaesque judicial nightmare" of an "infinite regression of [fees] litigation" in which each request for fee-related fees is contested and results in yet another request for fee-related fees. . . . Experience in statutory fee-shifting contexts suggests that this perceived problem is largely theoretical and seldom arises in practice. In any event, we are confident that trial courts, in the exercise of the broad discretion granted them in ruling on fee applications, have the means to resolve this problem should it arise.⁷³⁸

So, it would seem that one judge's nightmarish walk in the dark is another judge's stroll through a brightly lit park.

B. "[R]esembles More a Scene from Kafka . . ."

"[R]esembles more a scene from Kafka . . ." made its debut in Judge Wald's opinion for the D.C. Circuit in *Gray Panthers v. Schweiker*.⁷³⁹ At issue was the constitutionality of a regulation, implemented by the Department of Health and Human Services, under which disputes concerning Medicare benefits involving amounts less than \$100 would be resolved by means of notice and a "paper hearing."⁷⁴⁰ In an opinion holding that the Secretary's dispute resolution mechanism did not provide Medicare beneficiaries with due process, Judge Wald explained:

736. *Curtis K. by Delores K. v. Sioux City Community Sch. Dist.*, 895 F. Supp. 1197 (N.D. Iowa 1995) (parents successfully sued school district, alleging that their disabled children had been excluded from school or had been denied due process in the formulation of individualized education programs).

737. *Schultz v. Amick*, 955 F. Supp. 1087 (N.D. Iowa 1997) (plaintiff was prevailing party in action under 42 U.S.C. § 1983 arising out of application of excessive force by police officers during post-arrest jail intake).

738. *In re Est. of Trynin*, 782 P.2d 232, 238 (Cal. 1989) (quoting *Cinciarelli*, 729 F.2d at 810). Justice Kauffman's opinion in *Estate of Trynin* was subsequently cited in *Jolin, Inc. v. Ruegg*, 2002 WL 423147 (Cal. App. 6th Dist. 2002), which involved requests for fees and costs incurred in a declaratory judgment action.

739. 652 F.2d 146 (D.C. Cir. 1980).

740. *Id.* at 148.

It is universally agreed that adequate notice lies at the heart of due process. Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose and resembles more a scene from Kafka than a constitutional process. Without notice of the specific reasons for denial, a claimant is reduced to guessing what evidence can or should be submitted in response and driven to responding to every possible argument against denial at the risk of missing the critical one altogether.⁷⁴¹

Judge Wald's phrase has had a long and interesting career, appearing in fourteen more opinions.⁷⁴² What is of greatest interest in this line of cases is the range of agencies that have been involved in cases that have inspired judges to turn to Kafka; while there is only a single Kafkaesque judicial nightmare—fees-for-fees litigation—there are any number of administrative agency processes and procedures that resemble a scene from Kafka.

Gray Panthers involved Medicare beneficiaries. Subsequent “resembles more a scene from Kafka” cases have involved recipients of Social Security Old Age, Survivors and Disability benefits,⁷⁴³ Social Security Supplemental Security Income beneficiaries,⁷⁴⁴ Medicaid beneficiaries,⁷⁴⁵

741. *Id.* at 168-69 (footnote omitted).

742. Six of those opinions were written by judges of the Bankruptcy Court for the Northern District of Illinois, five were written by U.S. District Court judges (one in the Northern District of Illinois), two by U.S. Court of Appeals judges (both in the Seventh Circuit), and one by a judge of the New York Supreme Court. Unlike the “Kafkaesque judicial nightmare” line of cases, in which the Supreme Court's opinion in *Jean* was a fresh start that relegated *Cinciarelli* to irrelevance, the “resembles more a scene from Kafka” line is bifurcated; Judge Wald's opinion in *Gray Panthers* is cited as the source of the phrase by all but those in the Seventh Circuit, who now cite to Judge Cummings's opinion in *Chi. Cable Communs. v. Chi. Cable Commn.*, 879 F.2d 1540, 1546 (7th Cir. 1989) and Judge Wood's opinion in *Crosby v. Ward*, 843 F.2d 967, 982 (7th Cir. 1988), which, in turn, quotes *Gray Panthers*.

743. *Ellender v. Schweiker*, 575 F. Supp. 590 (S.D.N.Y. 1983). Judge Cooper held that the Social Security Administration violated the due process rights of a class of recipients who were sent notices of alleged overpayments that merely advised them of the allegation that they had been overpaid, and the amount of the alleged overpayment, but were not told “when the alleged overpayments occurred, the amount of overpayment in each time period, the amount of prior repayments, and the reason for the overpayment.” *Id.* at 600.

744. *Ford v. Shalala*, 87 F. Supp. 2d 163 (E.D.N.Y. 1999). Judge Sifton held that the Social Security Administration provided inadequate notice to claimants regarding initial or continuing eligibility for SSI benefits because the agency's notices “do not contain all of the financial information and financial calculations necessary to explain and understand increases, reductions, suspensions, or terminations of SSI benefits.” *Id.* at 170.

745. *Tripp v. Coler*, 640 F. Supp. 848 (N.D. Ill. 1986). Judge Moran ruled that the forms used by the Illinois Department of Public Aid to notify Medicaid recipients that their benefits were going to be restricted or cut off for overuse were inadequate because those forms: (1) did not identify specifically the alleged overuser but, instead, were addressed to “you and/or members of your family” *id.* at 858; (2) gave only “ultimate reasons” for the decision rather than specific ones, *id.* (citing *Dilda v. Quern*, 612 F.2d 1055, 1057 (7th Cir. 1980) (requiring reasons for decision that are “specific enough to inform the recipient how the agency's decision was reached” rather than mere “ultimate reasons”)); and (3) did “not identify the legal standard by which a recipient's use is judged as being medically necessary,” *id.*

unemployment insurance claimants,⁷⁴⁶ persons with tort claims against debtors in bankruptcy proceedings,⁷⁴⁷ unscheduled creditors in bankruptcy proceedings,⁷⁴⁸ a bankruptcy creditor listed in the petition with an incorrect address who was subsequently omitted from the debtor's schedules of creditors,⁷⁴⁹ New York taxpayers whose tax refunds were treated as overpayments and offset against alleged debts to governmental agencies,⁷⁵⁰ "poor, disabled, legal permanent residents who are attempting to become naturalized United States citizens."⁷⁵¹ There are, as well, several "resem-

746. *Crosby*, 843 F.2d at 986 (holding that the Illinois Department of Employment Security violated the due process rights of unemployment insurance claimants "by failing to provide them with adequate notice of the work search rules of thumb and the precise issues to be determined [during claimant interviews] by [DES claims] adjudicators"); see also *Barcia v. Sitkin*, 2003 WL 21345555 at *9 (S.D.N.Y. June 10, 2003) (denying defendant's motion to modify consent decree in case brought by unemployment benefits claimants in part because notice of claim reopening provided by New York State Unemployment Insurance Appeal Board "does not give a specific reason for reopening the case, so claimants have the virtually impossible task of trying to respond to every procedural issue that the Board might consider").

747. *Pettibone Corp.*, 151 B.R. at 172-73 (holding that publication notice of bar date is not "reasonable notice" to a person with a tort claim against the debtor arising two years after publication of bar date); see also *Kewanee Boiler Corp. v. Smith (In re Kewanee Boiler Corp.)*, 198 B.R. 519, 529 (Bankr. N.D. Ill. 1996) (holding that 1988 discharge did not limit products liability claim arising out of 1989 malfunction of boiler manufactured in 1952).

Judge Schmetterer, author of *In re Pettibone* has already been mentioned (see *supra* pt. IV(D)(2)) for opining that "Franz Kafka would have been able to accept such a legal principle in one of his stories; the Bankruptcy Code and the Fifth Amendment to the United States Constitution cannot." 151 B.R. at 172.

748. *In re Walker*, 149 B.R. 511, 513 (Bankr. N.D. Ill. 1992) (holding that "unscheduled creditor [was allowed] to file complaint objecting to discharge or dischargeability after the bar date established by the Bankruptcy Rules when that creditor received actual notice of the bankruptcy case, but no actual or formal notice of the bar date for filing such claims"); see also *OakFabco, Inc. v. American Std., Inc. (In re Kewanee Boiler Corp.)*, 297 B.R. 720, 730-31 (Bankr. N.D. Ill. 2003). As Judge Schmetterer explained in *In re Kewanee Boiler Corp.*:

A claimant who is not noticed and therefore is not allowed to participate in the Chapter 11 process is not bound by it. A holding to the contrary would modify the Bankruptcy Code's required treatment of creditors, and also endorse a Kafka-like view of American law that would be unconstitutional under the Due Process clause of the Fifth Amendment.

Id. at 729.

749. *In re O'Shaughnessy*, 252 B.R. 722, 732 (Bankr. N.D. Ill. 2000) (holding that creditor "was not provided timely or reasonable notice of the claims bar date or the date by which its complaint objecting to the dischargeability of its debt . . . was to be filed").

750. *Butler v. Wing*, 677 N.Y.S.2d 216, 223 (N.Y. Sup. Ct. N.Y. County. 1998) (holding that pre-offset notice to taxpayers was inadequate when that notice "only set forth an amount of a claimed overpayment, [but did] not provide any information as to the nature of the overpayment" and did "not include any information as to the time period for which the [overpayment] claim is being made or the basis for the claim").

751. *Campos v. INS*, 70 F. Supp. 2d 1296, 1299 (S.D. Fla. 1998) (finding that INS failed to provide plaintiffs with adequate notice of reasons for denying medical waivers of language and civics requirements for citizenship and enjoining INS from scheduling final citizenship interviews of plaintiffs).

bles more a scene from Kafka” opinions in which the court held that the situation before it was not Kafkaesque.⁷⁵²

C. “Kafkaesque Academic Test”

The wonderfully evocative phrase “Kafkaesque academic test” has been used in fifteen judicial opinions, but never outside the state of Connecticut, making it the most localized of the four phrases discussed in this part. The phrase was first penned by Judge Borden of the Connecticut Court of Appeals in *State v. Crosby*.⁷⁵³ In *Crosby*, the determinative issue was the correct application of the *Evans* doctrine, under which objections not made at trial may be revived on appeal, based upon a determination of “(1) whether the record supports the defendant’s claim that the trial court’s action raises a question of fundamental constitutional dimension; (2) if so, whether the trial court’s action was erroneous; and (3) if there was error, whether it requires reversal.”⁷⁵⁴ The *Crosby* court held that the defendant’s claim—that he was denied his constitutional right to confrontation by the trial court’s decision to grant the State’s motion in limine to exclude evidence of the narcotics convictions of one of its witnesses⁷⁵⁵—failed to meet the first prong of the *Evans* test.⁷⁵⁶ After explaining the court’s decision, Judge Borden went on to a more general discussion of the “by now all too familiar *Evans* bypass.”⁷⁵⁷

We are aware that this conclusion means that we do not review the defendant’s sole claim on appeal. This highlights a phenomenon that we cannot but note with dismay. That phenomeno[n] is the great frequency with which the principal issues in many of the criminal appeals before this court arrive necessarily swaddled in the hopeful mantle of *Evans* because trial counsel failed to present the appellate issue properly to the trial court in the first place. . .

752. See e.g. *Chi. Cable Communs. v. Chi. Cable Commn.*, 879 F.2d 1540 (7th Cir. 1989) (holding that Chicago Cable Commission provided cable television franchisees with adequate notice of alleged violation of local origination regulation because Commission’s notice specifically apprised franchisees of the alleged violations and told franchisees how to respond); *In re Marino*, 195 B.R. 886, 892 (Bankr. N.D. Ill. 1996) (holding that due process rights of unscheduled creditor would not be violated by denying motion to extend the bar date for filing complaints objecting to dischargeability when creditor’s attorney received actual notice of the bankruptcy filing two months before the bar date, but did not receive formal bar date notice from the clerk of the bankruptcy court).

753. 504 A.2d 1071 (Conn. App. 1986).

754. *Id.* at 1072 (citing *State v. Grant*, 502 A.2d 945, 948 (Conn. App. 1986)); see also *State v. Evans*, 327 A.2d 576 (Conn. 1973).

755. *Crosby*, 504 A.2d at 1072.

756. *Id.* at 1074.

757. *Id.* at 1072 (quoting *Grant*, 502 A.2d at 948).

. . .

[*Evans*] is not designed to protect defendants or their counsel who, “through neglect, inattention or as a trial strategy refrain from making proper objection or raising in the trial court any available constitutional defenses, confident that if the outcome of the trial proves unsatisfactory without making objections and taking exceptions and raising any available constitutional issue they may still prevail by assigning error or raising the constitutional issue for the first time on the appeal.” . . . Thus, the “*Evans* trial court bypass to this court is a narrow constitutional path and not the appellate Champs Elysees.” . . . Apparently, the defense trial and appellate bar has not heeded this “word to the wise” . . . and has continued to regard it, if not as a Champs Elysees, at least as a Boulevard Saint Michel.

. . .

The trial of a criminal case, and the ensuing appeal from a judgment of conviction, are not separate and distinct proceedings divorced from one another. They are part of the continuum of the process of adjudication. Stated in the most elementary terms, the trial seeks to determine whether the state has proven the defendant guilty beyond a reasonable doubt. The appeal seeks to determine whether, in the process of that adjudication, the trial judge committed error which requires either a new trial or a judgment of acquittal.

The trial judge presiding over a criminal case is not engaged in taking a Kafkaesque academic test which he may be determined on appeal to have failed because of questions never asked of him or issues never clearly presented to him. Criminal defendants and their counsel, like civil litigants and their counsel; . . . must take some modicum of responsibility for conserving scarce judicial resources. They must diligently ensure that, “subject to certain sharply delineated constitutional exceptions”; . . . an appeal presents for review rulings which the trial court made, and that the appeal is thus truly part of the adjudicative continuum.⁷⁵⁸

Several of the subsequent “Kafkaesque academic test” cases follow precisely the pattern set out in *Crosby* – an appeal by a criminal defendant that

758. *Id.* at 1075.

is unsuccessful for failure to meet the first prong of the *Evans* test.⁷⁵⁹ The phrase has also been used in criminal cases that did not involve application of the *Evans* doctrine⁷⁶⁰ and has even been used in several civil cases.⁷⁶¹

As noted, the phrase “Kafkaesque academic test” has been used exclusively by Connecticut judges. Judge Borden was the first, in *Crosby*, and

759. See e.g. *State v. Banta*, 544 A.2d 1226, 1237 (Conn. App. 1988) (quoting *Crosby*, 504 A.2d at 1075) (rejecting criminal defendant’s constitutional challenge to state felon-in-possession statute); *Huff*, 523 A.2d at 910 (quoting *Crosby*, 504 A.2d at 1075) (affirming guilty verdict on assault charge over defendant/appellant’s claim, unraised at trial, that the trial court erred in failing to instruct jury on the definition of “serious physical injury”); *State v. Farrar*, 508 A.2d 49, 57 (Conn. App. 1986) (quoting *Crosby*, 504 A.2d at 1075) (rejecting defendants’ “chimerical claim” that trial court precluded their counsel from interviewing victim and victim’s family members during trial, noting that “defendants’ appellate counsel, who was not their trial counsel, has permitted zeal of advocacy to overwhelm any modicum of fidelity to the record”); see also *State v. Reddick*, 545 A.2d 1109, 1112 (Conn. App. 1988) (quoting *Crosby*, 504 A.2d at 1075) (“In *State v. Vasquez* . . . this court refused to review an identical claim [concerning completeness of *Miranda* warnings] which had not been raised below.”); *State v. Vasquez*, 520 A.2d 1294, 1296 (Conn. App. 1987) (quoting *Crosby*, 504 A.2d at 1075) (declining to review criminal defendant’s claim of error, based upon allegedly defective content of *Miranda* warnings because issue was not raised in the trial court and defendant made no *Evans* argument).

760. See e.g. *State v. Gebhardt*, 851 A.2d 391, 395-96 (Conn. App. 2004) (quoting *State v. Hansen*, 510 A.2d 465, 467) (Conn. App. 1986) (declining to review criminal defendant’s claim that certain evidence excluded at trial was actually admissible, when defendant’s argument on appeal was not made to the trial court); *Hansen*, 510 A.2d at 467 (quoting *Crosby*, 504 A.2d at 1075) (holding that failure to raise issue at trial did not deprive criminal defendant of right to appeal on that issue when the controlling law changed, in his favor, after trial).

In *Gebhardt*, Judge Flynn opined that deciding to review a claim not made before the trial judge “would be nothing more than a trial by ambush of the trial judge.” 851 A.2d at 396 (quoting *State v. Charles*, 745 A.2d 842, 846 (Conn. App. 2000)).

761. See e.g. *Burnham v. Karl & Gelb, P.C.*, 745 A.2d 178, 188 (Conn. 2000) (quoting *Skrzypiec v. Noonan*, 633 A.2d 716, 726 n. 13 (Conn. 1993)) (declining to consider, on appeal, plaintiff’s claim that she was wrongfully discharged for refusing to work under allegedly unsafe conditions when her wrongful discharge claim at trial and intermediate level of appeal was based upon retaliatory discharge); *Skrzypiec*, 633 A.2d at 726 n. 13 (quoting *Misiurka v. Maple Hill Farms, Inc.*, 544 A.2d 673, 675 (Conn. App. 1988)) (affirming trial court’s admission of trial testimony when party opposing admission argued, at trial, that the testimony was irrelevant but argued, only on appeal, that the testimony was highly prejudicial); *Hunte v. Amica Mut. Ins. Co.*, 792 A.2d 132, 138 (Conn. App. 2002) (quoting *Brehm v. Brehm*, 783 A.2d 1068, 1071 (Conn. App. 2001)) (declining appellate review of “plaintiff’s claim that it was inequitable for the [trial] court to render judgment in favor of the defendant . . . because the record does not contain a written memorandum of decision on this issue or a signed copy of an oral decision . . .”); *Brehm*, 783 A.2d at 1071 (quoting *Burnham*, 745 A.2d at 187) (declining to review ex-husband’s claim that trial court imposed unlawful conditions on his ability to open the judgment in his divorce proceeding because “the defendant did not raise this claim before the trial court”); *Misiurka*, 544 A.2d at 675 (quoting *Zeller v. Mark*, 542 A.2d 752, 754 n. 4) (Conn. App. 1988) (declining to review plaintiff/appellant’s claim that trial court erred in granting intervening plaintiff’s motion for apportionment because appellant “failed to state distinctly the reasons for his objection to the trial court thereby denying the trial opportunity to re-examine its ruling at a time when it could still be modified and any defect cured”); *Zeller*, 542 A.2d at 754 n. 4 (quoting *Crosby*, 504 A.2d at 1075) (affirming trial court’s decision to strike plaintiff’s claim of slander and declining to consider, on appeal, additional allegedly slanderous statement that was neither included in the complaint nor otherwise presented to the trial court); *DiSorbo v. Grand Assocs. One Ltd. Partn.*, 512 A.2d 940, 943 (Conn. App. 1986) (quoting *Hansen*, 510 A.2d at 467) (affirming trial court’s ruling that certain evidence was inadmissible as irrelevant when party seeking reversal offered new theory of relevance and admissibility on appeal that was not argued at trial).

he was followed by five of his colleagues on the Connecticut Court of Appeals⁷⁶² and by two Justices of the Connecticut Supreme Court.⁷⁶³ While Judge Borden was the first to use the phrase, and was the first to use it to describe a situation that did not involve application of the *Evans* doctrine, it was Judge Spallone, in *DiSorbo*, who first used the phrase in a civil case. Subsequently, Judge Borden followed suit, noting, in his first and only use of the phrase outside the criminal context, that considering on appeal a statement that was neither included in a slander plaintiff's complaint nor presented to the trial court "would amount to an improper variation on that 'Kafkaesque academic test.'" ⁷⁶⁴ In light of Judge Borden's initial authorship of the phrase and its origins in criminal law, it is interesting to note that when it finally made its way into an opinion from the Connecticut Supreme Court,⁷⁶⁵ Justice Norcott used the phrase in a civil case and attributed it to an opinion by Judge O'Connell⁷⁶⁶ rather than to any one of the six opinions by Judge Borden⁷⁶⁷ that contained the phrase. It may be, however, that the phrase is finally returning to its roots; after a string of four uses in civil cases, the most recent use of the phrase appears in a criminal case.⁷⁶⁸

D. "*Kafkaesque Spectre of an Incomprehensible Ritual . . .*"

Two of the first ten judicial references to Kafka came in cases involving a criminal defendant's right to an interpreter.⁷⁶⁹ In a *per curiam* opinion of only slightly more recent vintage, on the same topic, the First Circuit explained:

The necessity for an interpreter to translate from a defendant's native language into English when the defendant is on the stand, and from English into the defendant's native language when others are testifying, has been elevated to a right when the defendant is indigent and has obvious difficulty with the language, Clearly, the right to confront witnesses would be meaningless if the accused could not understand their testimony, and the effectiveness

762. Judges Spallone (twice), O'Connell, Stroughton, Lavery, and Flynn (twice).

763. Justices Norcott and Sullivan.

764. *Zeller*, 542 A.2d at 754 n. 4.

765. *Skrzypiec*, 633 A.2d 716.

766. *Misiurka*, 544 A.2d 673. In fairness to Justice Norcott, however, at the time he wrote *Skrzypiec*, *Misiurka* was the most recent civil case to use the phrase, and *Misiurka* did, in fact, quote *Zeller*, Judge Borden's first (and only) opinion to use the phrase in a civil case.

767. *Banta*, 544 A.2d 1226; *Zeller*, 542 A.2d 752; *Huff*, 523 A.2d 906; *Hansen*, 510 A.2d 465; *Farrar*, 508 A.2d 49; *Crosby*, 504 A.2d 1071.

768. *Gebhardt*, 745 A.2d 178.

769. See *supra* pt. IV.

of cross-examination would be severely hampered. . . . If the defendant takes the stand in his own behalf, but has an imperfect command of English, there exists the additional danger that he will either misunderstand crucial questions or that the jury will misconstrue crucial responses. The right to an interpreter rests most fundamentally, however, on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.⁷⁷⁰

After framing the issue in the foregoing manner, the court of appeals affirmed the appellant's conviction.⁷⁷¹ In doing so, the court characterized the appellant as "a foreign-born national with a limited ability to speak and comprehend English"⁷⁷² who had "admitted to the court some ability to communicate and understand"⁷⁷³ and who had "some ability to understand and communicate, but clearly ha[d] difficulty."⁷⁷⁴ After wondering "how high must the language barrier rise before a defendant has a right to an interpreter,"⁷⁷⁵ the court ruled against the appellant, basing its decision on the wide discretion that must be granted to the trial court in determining whether a defendant needs an interpreter,⁷⁷⁶ and its finding that the trial court demonstrated its sensitivity to the appellant's plight by: (1) appointing interpreters for the appellant's co-defendants, who had moved the court for such relief;⁷⁷⁷ (2) asking the appellant's "counsel whether the appellant was able to communicate and understand English, to which appellant's counsel responded in the affirmative;"⁷⁷⁸ and (3) telling "the appellant that if, at any point in the proceedings, there was something he did not understand, he need only raise his hand and the testimony would be repeated."⁷⁷⁹ In short, the *Carrion* court, like the court in *United States v. Desist*,⁷⁸⁰ identified a set of circumstances that did not create the Kafkaesque spectre of a criminal trial conducted in a language incomprehensible to the defendant.⁷⁸¹

770. *U.S. v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973).

771. *Id.* at 15.

772. *Id.* at 14.

773. *Id.*

774. *Id.*

775. *Id.*

776. *Id.* at 14-15 (citing *Perovich v. U.S.*, 205 U.S. 86, 91 (1907); *U.S. v. Sosa*, 379 F.2d 525, 527 (7th Cir. 1967); *U.S. v. Barrios*, 457 F.2d 680 (9th Cir. 1972)).

777. *Id.* at 15.

778. *Id.*

779. *Id.*

780. 384 F.2d 889 (2d Cir. 1967).

781. Several other courts have issued decisions similar to *Carrion*, acknowledging that trial in a foreign language is Kafkaesque, but then explaining why the case before it was not Kafkaesque.

Conceptually, the finely turned phrase in *Carrion*, “Kafkaesque spectre of an incomprehensible ritual that may terminate in punishment,” has much in common with the first phrase discussed in this section, “Kafkaesque judicial nightmare.” Just as there is a single Kafkaesque judicial nightmare—fees-for-fees litigation—the phrase under discussion here has been applied to a single factual circumstance: the trial of a criminal defendant in a language he or she does not understand. However, several of the “Kafkaesque spectre” cases following *Carrion* have added shadings and nuances to the right established in that case.⁷⁸²

For example, in *Martinez v. State*, the Indiana Court of Appeals held that “[w]hen no interpreter was present for voir dire both Martinez’ right to the assistance of counsel and his right to be meaningfully present at every stage of the proceedings were placed in jeopardy.”⁷⁸³ Judge Garrard ex-

Cmmw. v. Garcia, 399 N.E.2d 460 (Mass. 1980), is a case in which a criminal defendant who had a qualified interpreter throughout his probable cause hearing, suppression hearing, and trial, contended “that he could not understand what transpired at trial.” *Id.* at 470. In affirming the defendant’s conviction, Justice Quirico noted that judgment of the fluency of a defendant is “uniquely within the province of the trial judge, who is in direct contact with the defendant,” *id.*, explained that “[u]nless the record reveals blatant insensitivity to a language problem with the result that the defendant was deprived of a fair trial, an appellate court will not disturb” the trial court’s exercise of discretion with regard to providing an interpreter, *id.*, and held that “[t]he record in the present case amply demonstrate[d] the judge’s continued sensitivity to [the defendant’s] language problem,” *id.* Specifically, the trial judge vanquished the Kafkaesque spectre by conducting a hearing in which he directly questioned the defendant. *Id.* at 471.

Ko v. U.S., 722 A.2d 830 (D.C. 1990), decided under both federal constitutional principles and the District of Columbia’s Interpreter Act, *id.* at 834, involved “fourteen different witnesses who used the Cantonese, Mandarin or Fukinese dialects,” *id.* at 831, and who testified through six interpreters, some retained by the prosecution, others appointed by the trial court, *id.* at 835. At issue on appeal were the procedures the trial court used to assess the competence of interpreters and the fact that some of the interpreters were paid by the prosecution, thus calling into question their impartiality. In ruling “that the trial judge managed to resolve complex interpretation issues without compromising minimal requirements of fundamental fairness,” *id.* at 836, the appellate court rejected the defendant’s argument that the District of Columbia Interpreter Act “required the trial judge to make a separate on-the-record determination, with respect to each of the fourteen witnesses who testified through an interpreter, that the particular interpreter was able to proved ‘effective communication’ with that witness,” *id.* at 835.

782. Unlike the other three lines of cases discussed in this section, in which the original source of the phrase invoking Kafka was ultimately eclipsed by a subsequent opinion which became the reference of choice, the “Kafkaesque spectre” line marches in lockstep; each opinion that uses the phrase cites *Carrion* as the source.

783. 449 N.E. 2d 307, 310 (Ind. App. 1983). In addition to recognizing the sixth-amendment rights of a criminal defendant who does not speak English, Judge Garrard also noted:

Furthermore, however, it would be fundamentally unfair within the meaning of the fourteenth amendment to subject to trial and conviction one who had no comprehension of what was occurring. From the state’s viewpoint it would be no more than an “invective against an insensible object” and from the accused’s “a babble of voices” or “the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.”

Id. at 309 (citations omitted).

Martinez was ultimately reversed on appeal to the Indiana Supreme Court, which identified evidence in the record showing the defendant’s ability to speak English and held that “[t]his record

plained that “there can be no doubt that it [impaneling the jury] is a critical stage of the proceedings”⁷⁸⁴ and went on to observe:

While it remains arguable that Martinez was not substantially harmed since he understood some English and his counsel did voir dire the jury, we think the same cannot be said for preserving the integrity of our judicial system. Our courts have already noted that we should be concerned with providing not only justice, but with satisfying the appearance of justice.⁷⁸⁵

In *State v. Neave*, Justice Day of the Wisconsin Supreme Court addressed the issue of interpreters for criminal defendants in the following way:

We do not hold that there is federal constitutional right to an interpreter. We do hold that as a matter of judicial administration, and to avoid questions of effective assistance of counsel and questions of whether inability to reasonably understand testimony resulted in a loss of an effective right to cross-examination, or whether the right had been waived by a defendant or his attorney with the defendant’s assent and how such assent was demonstrated, we adopt the rule herein announced. We also conclude that it removes the feeling of having been dealt with unfairly which is bound to arise when part or all of a trial is incomprehensible because of a language barrier.

The languages that were part of immigrant communities in this country from continental Europe have largely disappeared as succeeding generations used English as their primary or in most cases their only language. But today new groups from the southern portions of our own hemisphere and from portions of Asia seek to make their home among us and still speak and understand only languages other than English. Fairness requires that such persons who may be defendants in our criminal courts have the assistance of interpreters where needed. If the defendant is personally unable

does not demonstrate that Defendant was harmed by not having had the trial court sua sponte appoint an interpreter prior to trial.” *Martinez v. State*, 451 N.E.2d 39, 41 (Ind. 1983). Curiously, however, the Indiana Supreme Court reported that “[d]efendant did have a court appointed interpreter throughout the trial, beginning with the selection of the jury,” *id.* (emphasis added), while the court of appeals reported that “no interpreter was present on February 22 when the jury was picked,” 449 N.E.2d at 308.

784. *Id.* at 310 (citation omitted).

785. *Id.* at 310-11 (citing *Faretta v. Cal.*, 422 U.S. 806 (1975); *Mayberry v. Pa.*, 400 U.S. 455, 465 (1970)).

to pay for the services of an interpreter, one will be provided at public expense.⁷⁸⁶

The interesting twist in *Neave* is the court's decision to ground the right to an interpreter on the concept of judicial administration rather than on constitutional principles.

In *State v. Woo Won Choi*, the Washington Court of Appeals accepted review because, in its view, the right to an interpreter and thus, to be free from the Kafkaesque spectre, "is of constitutional stature."⁷⁸⁷ However, where the defendant's attorney "advised the court that he had had 'many, many meetings' with [the defendant], that he was confident that [the defendant] could understand and answer questions, that [the defendant's] brother was present to assist, and that counsel would advise the court if problems occurred,"⁷⁸⁸ the court of appeals found "no error in the [trial] court's relying on counsel's representation in concluding that [the defendant] did not need an interpreter."⁷⁸⁹ That is, under the circumstances, the court of appeals did not establish a requirement that trial courts must, on their own inquire into the language skills of criminal defendants. The trial court in *United States v. Mosquera* was faced with the dilemma of providing eighteen Spanish-speaking defendants in a complex narcotics and money-laundering case with adequate access to charging documents, pleadings, and other materials that were written in English.⁷⁹⁰ In an attempt to provide sufficient access, and over the government's objection, Judge Weinstein entered the following order:

Every non-English speaking criminal defendant shall be provided in this case with a translation of the indictment and relevant portions of the statutes referred to in the indictment.

Where a plea of guilty is entered in this case, such a defendant shall be provided with a translation of 1) the statutes referred to if they are different from those in the indictment, and 2) the written plea agreement.

Any pre-sentence report in this case shall be provided to defendant in translation whether there is a plea or finding of guilt at trial.

786. 344 N.W.2d 181, 184 (Wis. 1984) (footnote omitted).

787. 781 P.2d 505, 508 (Wash. App. Div. 1 1989).

788. *Id.* at 509.

789. *Id.*

790. 816 F. Supp. 168, 170 (E.D.N.Y. 1993).

Other documents shall be translated in accordance with this order or as otherwise ordered by the court. With each translation, the government may include a statement indicating that the translation is solely for the benefit of the defendant and that there may be errors in the translation which may not form the basis for appeal since the original document in English governs. We need not address at this time the more complex issue of whether the government is required to translate additional documents that may be needed for trial. In the instant case, that problem has been addressed by the appointment of an Administrative Coordinating Counsel, who is funded by CJA. She can decide, subject to court supervision, for all defendants, which documents require translation. Costs will be paid by CJA unless the court orders otherwise.⁷⁹¹

In *People v. Escalante*, a criminal defendant forced to sit through the cross examination of two government witnesses without his translator was allowed to argue the issue on appeal, despite failing to raise it in his post-trial motion, as a matter of plain error.⁷⁹² Finally, in *State v. Lopes*, the

791. *Id.* at 178.

792. 627 N.E.2d 1222, 1227 (Ill. App. 2d Dist. 1994). In his opinion, Judge Bowman described the factual circumstances of the case in the following way:

The court appointed an interpreter for defendant at the preliminary hearing. An interpreter participated at all of the pretrial proceedings. At trial, defense counsel and the court engaged in the following colloquy:

“MR. STEINBERG [Defense counsel]: * * * Nicole Okerblad [the interpreter] is leaving Kaneville. I talked to her babysitter [sic] at 10 after 1:00. It’s my understanding that the distance is not that great. The babysitter [sic] said we should be seeing her at any minute.

THE COURT: Let’s go ahead and see –

MR. STEINBERG: Well, I’d prefer to have an interpreter here.

THE COURT: Well, I know you would, but I’m not waiting for anybody.

* * * * *

MR. STEINBERG: Judge, for the record the defendant is now present. Nicole Okerblad is not here and I would object for the record that this proceeding is happening without the interpreter.

THE COURT: Well, the matter’s been set for trial. It’s not my job to make sure an interpreter is present. If she shows up, fine. If she doesn’t, I’m not going to worry about it. Objection is on the record. Let’s go ahead.”

Louisiana Supreme Court ruled that a criminal defendant who does not understand English has a right to a court-appointed translator, even if he or she is not indigent.⁷⁹³

VI. CONCLUSION

There is no easy way to summarize this article, given the panorama of situations that have inspired judges to refer to Franz Kafka and the kaleidoscopic compendium of ways they have found to do so. However, two things are certain. First, as part of the judicial lexicon, Kafka is here to stay; during the time it has taken to research and draft this article, well over a dozen new cases with Kafka references have been reported. Second, no judge has ever invoked Kafka to help him or her say something nice about a bureaucracy, a legal argument, or another tribunal. In other words, hundreds and hundreds of judges who probably collectively agree on little else, all recognize that something Kafkaesque is something to be avoided in their courtrooms and corrected, if possible, in the world outside the courthouse. Thus, it would seem that Kafka's works, and in particular his novel *The Trial*, belong on the short list of required readings for all of us who have a hand in the justice system. The better we understand the workings of Kafka's nightmare world, the better able we will be to keep from replicating it with our own work.

Id. at 1228 (brackets in the original). Based upon the foregoing scenario, the appellate court ruled that "the [trial] court's refusal to wait for the interpreter constituted an abuse of discretion which violated defendant's sixth amendment right to be present at trial and confront the witnesses against him." *Id.*

793. 805 So. 2d 124, 128 (La. 2001). Of course, the effect of this ruling is blunted, at least somewhat, by a Louisiana statute which makes "[a] defendant who is convicted of an offense . . . liable for all costs of the prosecution or proceeding," *id.* at 129, including "the costs for any necessary foreign language interpreter," *id.* Whether it is Kafkaesque to require a criminal defendant to pay for the proceeding that resulted in his or her conviction is a question for another day (and, presumably, another author).