

The Law is Not a Thing: Kafkan (Im)materialism and Imitation Jam

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One thing is made increasingly clear as one reads through Kafka's *The Trial*: we are never going to really find the heart of law, its ontological centre, in this book. As *The Trial* develops, we find ourselves as readers being dragged along through a wearying process wherein Josef K., the protagonist (usually called just 'K.') is by turns defiant, defeated, jubilant and eventually just plain dead. K. is accused of having done something but we are never told what it was (and he has no idea himself: the first line of the book is that 'Someone must have slandered Josef K., for one morning, without having done anything wrong, he was arrested' (Kafka 1989: 3). The depictions of the law in the book are far from flattering; the law appears here as incompetent, corrupt, complacent, power hungry, random, cruel and stupid. Yet none of this detracts from the law's power over K., its ability not only to ruin his life (which it effectively does), but also to, in a sense, to *produce* his life: what he does with his time, who he associates with, even who he falls in love with are all determined by law. *The Trial* is a novel therefore where law has no central object but this objectlessness does not mean that the law is not in turns tangible, menacing, stupid, awesome and horrifying.

In his 1921 essay 'Critique of Violence', Walter Benjamin explains how the law has no ontological basis, no pure and true basis for its authority. Instead, its origins come from violence, a violence which is then retroactively transformed into some mythical, authorizing

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basis. For this reason, the law must continue to be violent in order to permanently re-establish not only its right to exist but its existence *per se*. Thus he writes:

Where the highest violence, that over life and death, occurs in the legal system, the origins of law jut manifestly and fearsomely into existence...Its purpose is not to punish the infringement of the law but to establish new law. For in the exercise of violence over life and death, more than in any other legal act, the law reaffirms itself. But in this very violence something rotten in the law is revealed (Benjamin 1996: 242).

This ‘something rotten’ is the law’s own nonexistence, the fact that the law is not a thing (but very much wishes to be).¹ In this chapter, I will talk about how Kafka illuminates and expands upon what Benjamin is talking about, particularly in terms of the law’s relationship to materiality.² He shows how, insofar as the law as such has no material character, it must seek to establish its identity, its very existence, in relation to material things including legal texts, robes, wigs, gavels, human bodies and even blood. The law effectively seeks to transfer the tangibility of those objects onto itself in order to assert its own reality. Or perhaps more accurately, the law effects its own reality via the reality of its symbols. Insofar as this gives the material symbols an unexpected power over the law (in some sense the law needs these objects whereas they don’t need it at all), the relationship between law and materiality is highly fraught.

While under ordinary circumstances (that is to say circumstances in which the law is in charge of its own narrative) none of this is evident, the writings of Kafka serve to reveal what is ordinarily hidden from sight. As I will argue, Kafka shows us not only the way the law draws upon official material symbols to instantiate and serve it, but unofficial ones as well; how all of reality is enlisted to support the existence of the law. In this way Kafka demonstrates the building blocks by which a great nothing (the law itself) is constructed out of a lot of somethings. Just as critically, he also shows us that this seemingly asymmetrical relationship can sometimes be reversed. He

offers how those somethings do not always merely and obediently serve as the basis for law but also at times undermine and complicate it, creating a very problematic relationship between the law and the objects that collectively are associated with it (which, in Kafka's universe, is just about all objects). By looking at what the law is not (at thing) we can begin to see what it *is*, a desire for power, for tangibility and determination, a want that cannot be satisfied on its own terms. Although this desire may seem to exist in the hearts and minds of human practitioners of the law (judges, lawyers etc.) I think that for Benjamin the law in effect has an independent (non) existence even from these persons. It is more of a systemic than an individual desire, something that I think Kafka helps to better explain.

Having established this argument, I will then move on to discuss an actual court case in US law (*62 Cases of Jam v. United States*) to show how the fraught relationship that Kafka identifies can be seen in actual legal practice. Although Kafka's works tend to seem absurd and lampoonish vis-a-vis the reality that they purportedly engage with, I will argue that Kafka is actually showing us something about the law that we could not know or see without this turn to fanciful and even absurd depictions in *The Trial*. In the legal case, just as in *The Trial*, the question of the object, its ownership, its presence, its rights and even its agency become complicated by its association with and disruption of the way that the law is not a thing even as the law continues to present itself as tangible, indeed *more* tangible, than anything else. Ultimately, I will be arguing that the law's existence is so fraught, so vulnerable, that even a seemingly innocent and benign jar of imitation jam can, in some sense, call the law's own existence into question (even as that lack of existence is scrupulously covered over by the law's ongoing practice).

1 The miasmas and stench of the law

Before getting into an analysis of *The Trial* and the US Supreme Court case, let me begin this argument by briefly looking at another well-known novel by Kafka, *The Castle*. This book offers a very good example of how something that does not exist can nevertheless have

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a very strong and tangible—even an overwhelming—presence. In this case, the question of existence concerns the occupants of a castle that dominates a village that another protagonist, also named K., comes to visit one night. In that novel, this other K. is ceaselessly engaged in the attempt, very much like his counterpart in *The Trial*, with encountering the imagined inhabitants of the castle who are said to be all powerful and who have an outsized influence on the villagers despite the fact that we never are sure that they even exist. They are mostly only seen in glimpses, and even when they seem to be physically present there is some question of who exactly they are and whether they are the person that they are said to be.

It is not even clear that there *is* a castle in this village; the first time K. looks up to it, he only sees ‘a void’ (Kafka 2009: 5). Later he thinks he might see it, but it could also just be a collection of buildings that he visually organizes into a castle because he expects (even desires) it to be there (Kafka 2009: 11).

In his own comments on *The Castle*, Walter Benjamin tells us a parable about why Jews prepare a sabbath feast that he links up with Kafka’s novel, writing:

The legend is about a princess languishing in exile, in a village whose language she does not understand, far from her compatriots. One day this princess receives a letter saying that her fiancé has not forgotten her and is on his way to her.—The fiancé, so says the rabbi, is the Messiah; the princess is the soul; the village in which she lives in exile is the body. She prepares a meal for him because this is the only way in which she can express her joy in a village whose language she does not know.—This village of the Talmud is right in Kafka’s world. For just as K. lives in the village on Castle Hill, modern man lives in his own body: the body slips away from him, is hostile towards him.... The air of this village blows about Kafka, and this is why he was not tempted to found a religion. The pigsty which houses the country doctor’s horses; the stuffy back room in which Klamm, a cigar in his mouth, sits over a glass of beer; the manor gate which brings ruin to anyone who knocks on it—all these are part of this village. The air in the village is permeated with all the abortive and overripe elements that

form such a putrid mixture. This is the air that Kafka had to breathe throughout his life. He was neither mantic nor the founder of a religion. How was he able to survive in this air? (Benjamin 1999: 805-806).

This passage does a good job of explaining how for Kafka, there is a way for non-existent objects to serve as the centre of our life. Just as in the Talmudic story the princess can only respond to something unknown by doing something that she knows how to do (in this case to make dinner), so too in Kafka's *The Castle* we see that for the denizens of the village, even though the castle officials aren't really real for them, they integrate them nonetheless into the centre of their lives so that the ordinary things that they do, the material objects that they engage with, become ways to invite, celebrate and seek out the castle officials.

In this way, the castle *is* real for the villagers; their lives are organized around and permeated by the castle's imagined existence. Benjamin tells us that 'the air in the village is permeated with all the abortive and override elements that form such a putrid mixture.' The reality of the castle is produced by the most unlikely of sources: the stench from the pigsty, the close and dank rooms in which furtive meetings with and sightings of purported castle officials take place (or don't).

This miasma, if you will, the confluence of elements in this 'putrid mixture', is the basis of how organic actual life merges with the phantasmic evanescence from the castle itself, how real stench mix with metaphorical ones. It is in this gaseous interchange that the castle and its authority and power somehow get interchanged as well. Its imagined existence is mixed and merged with the humdrum reality of the village. Here the village's undeniably (and putrid) reality gets transferred (at least a little bit) over to the castle, allowing its non-existence to blur into existence in a way that has real life effects.

This exchange works both ways; the castle receives its existence via the transfer of materiality through these miasmatic emanations and the village in turn receives the magical animation of the castle; it is rescued from being entirely and only banal and humdrum matter and is infused with the mythical dynamic expression of the castle as such.³

This might appear to be a win-win situation in some ways, but I

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would hold out the view that the village is trading in its own power to judge and discern, its own sense of its own worthwhileness and its own agency in exchange for this mystical transfer with a force that doesn't otherwise exist. The danger is that this makes the village subject to what Benjamin calls 'mythic violence', where the external becomes a blank screen onto which would-be tyrants will project their own desires and rule over a community in the name of what it worships (whether that is God, nature, the state, or in the case I am interested in, the law) (Benjamin 1996: 248).

Virtually the same kind of mix of vapours and stench described in *The Castle* occurs at a particular moment in *The Trial* when K. first comes to one of a series of law courts that he is ordered to visit in order to commence his legal ordeal. This court is actually crammed into the attic of an otherwise ordinary apartment building (later we learn that nearly all the attics in this city have law offices in them; the line between 'the law' and normal life, a line that law itself likes to firmly draw, is very blurry in this novel, really to the point of indistinction). K. encounters what he initially takes to be just a room full of people who turn out to be students and officers of the court. It is only after a while that he sees that, although they all have ordinary clothing on, everyone is carrying a badge (although all different colours and shapes). This is the only identifying marker, the only object that definitively attests to the fact that he is in a court of law.

There is something hypnotic about the way that Kafka describes these kinds of spaces with all of the people, all of the kinetic energy, all the smells and sounds and sights of that dynamic courtroom. In seeing all of this, K. is overcome. He grows dizzy and almost faints. A woman who is married to the court usher there (and who is herself subject to frequent sexual predations by the law officers), comes up to him and says:

You are a little dizzy aren't you?... Don't worry....there's nothing unusual about that here, almost everyone here has an attack like this the first time...The sun beats down on the attic beams and the hot wood makes the air terribly thick and stifling...Then if you take into

consideration that a great deal of wash is hung out here to dry as well—the tenants can't be entirely forbidden from doing so—it will come as no surprise that you feel a little sick. But in the end people get quite used to the air (Kafka 1998: 73-74).

Here, as in *The Castle*, there is a kind of miasmic aspect to the courtrooms. The crazy mixture of legal pomp and ordinary life (the judges, the badges, the sheets, the heat, the smell) all combine to make K. 'a little sick'. Yet that sickness is not just a response to the smells of the courtroom. It also attests to the power and all too present emanations of the law itself in all of its boisterous presence. Here K. is getting a whiff of the full bore 'reality' of the law, and it is literally too much to take in all at once.

In describing the courts as she does, the woman seems to be saying that the problem with the courtrooms is everything *but* those legal aspects. It is the hot sun, the hot wood, the sheets that are hanging, never the law itself which is at fault. But when you consider, as Benjamin does, that for Kafka the law isn't something that stands above and beyond these scenes but is rather, in a sense, an emanation of and from that squalid and thick life, you can see that the law is not different from the hot sun and the hot wood and the thick air. The law *is* those things, or rather those things delineate the site where the law also is. The law can only be known by its material manifestations and, for all the way that they can be fickle and reluctant to convey any legal authority whatsoever, nonetheless these manifestations are what is available; they are the way in which the law can be both known and made real to itself and to its subjects.

2 From stool to throne

Another example in *The Trial* of how the law depends on objects for its existence – and even its prestige – comes when K. is visiting his unbelievably incompetent lawyer and is drawn away by the lawyer's nurse, a woman named Leni, into another room. In that room he sees a 'large painting [of a] man in a judge's robes; he was sitting on a throne, its golden highlights gleaming forth from the painting in several places'

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(Kafka 1998: 105). K. imagines that he is a high-ranking judge but Leni tells him that this judge is just an ‘examining magistrate’ (Kafka, 1998: 106). Disappointed, K. says ‘The higher judges stay in hiding [intimations of the impossibility of ever coming to the heart of the law] but yet he’s sitting on a throne’ (Kafka 1998: 106).

Leni’s replay is instructive. She says ‘That’s all an invention... he’s actually sitting on a kitchen stool with an old horse blanket folded over it’ (Kafka, 1998: 106). Here we see that somehow a kitchen stool and ‘an old horse blanket’ have been transformed into a throne. The painting has taken some ordinary objects and turned them into magnificent legal ones. It’s not that the throne was invented out of whole cloth; it took an actual object to serve as a basis for the imaginary one. This serves, I think, as a helpful way to understand the way objectivity works in relation to law more generally in *The Trial*. Objects in all of their ordinary materiality serve as the basis for the authority of the law, but in doing so they must be, as it were, transcended, turned from stools into thrones, in order to offer a suitably mystical aspect that does not entirely break with its actual material basis (the path of authority goes stool → throne → law after which the stool—and the throne too in some sense—become objects purportedly under the aegis of a legal system that they have actually helped to create).

In this sense I would say that legal objects are poised partway between the material and the phantasmic, having elements of both. If they were purely material they would not convey the authority and dignity of the law; the law is meant to be, in some way, above the merely human and ordinary. Yet, at the same time, these objects cannot be so disconnected from those objects as to spin off into pure meaninglessness (or thinglessness, as it were). One of the ways that Kafka’s work is at its most subversive is to expose the way that these semi mystical non-objects are connected to ordinary actual objects just as a law is connected to a throne which in turn is connected to a stool. Despite the exposure that this connection might threaten, Kafka shows us that the law cannot avoid this risk, the way that legal objects must both be and not be ordinary things at the same time. In order to,

as it were, have its cake and eat it too, that is to say, to have all of the advantages of non-existence (the phantasmic and mystical sources sense of the law that is a critical part of its authority) as well as all of the advantages of existence (the tangibility, the fear that it can inspire in its subjects), the law must remain in this nebulous and transitional condition.

And what is true for these legal objects is, in fact, also true for K. himself. K. is after all something of a legal object in his own right. Perhaps more accurately, he is a legal subject, but in Kafka's telling of it there is not a great deal of difference between subjects and objects of the law, precisely because in either case something real (a person in K's case) is being bestowed with a status that stems from something not quite as real. The legal difference between objects and persons has had a troubled history going all the way back to early Roman law, but in either case, law is concerned above all not with those who fall within its taxonomizing categories, but rather with reproducing itself (or perhaps more accurately just producing itself) through its engagements with such categories.

The legal person, like the legal object, becomes a site upon which that transfer of reality is happening, and in both cases the transfer benefits the law itself far more than the object/subject in question (indeed, in K.'s case the transfer ends up first ruining and then ending his life, perhaps demonstrating the sad fate for legal subjects/objects more generally).

3 Feeling the law

This complicated relationship between objects (or subjects) and law does not, as already noted, mean that the law is not experienced as real and powerful. Indeed, *The Trial* is full of allusions to the way that the law is experienced as a tangible, real thing. Initially when K. is first arrested, he keeps insisting that it must be a mistake. One of the men that arrests him says:

‘There’s no mistake. After all, our department, as far as I know, and I only know the lowest level, doesn’t seek out guilt among the general

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population, but, as the Law states, is attracted by guilt and has to send its guards out. That's the Law. What mistake could there be?

I don't know that law', said K.

'All the worse for you', said the guard.

'It probably exists only in your heads', said K.; he wanted to slip into his guards' thoughts somehow and turn them to his own advantage or accustom himself to them. But the guard merely said dismissively 'You'll feel it eventually' (Kafka 1998: 8-9).

In saying that the law 'is attracted by guilt', the guard is alluding to a particular form of intimacy between the law and its subjects. Saying the law is attracted by guilt suggests not only that it has a way to sniff out guilt but also that in some way it loves and needs guilt. The law needs people to be guilty so that it can be justified, so that it can, in fact, exist. This offers that there is a strong affective dimension to law, part of the way that it renders itself real via those who interact with it.

This affective relationship is not unidirectional. A bit later, K. talks to Fräulein Bürstner, a woman who lives in the same rooming house as K. Talking to him about the arrest and its aftermath, she tells K. that 'The court has a strange attraction, doesn't it?' (Kafka 1998: 29). Here Fräulein Bürstner is attesting in part to the way that she herself is interested in the law (she follows this by stating that she will become a secretary at a law firm soon). But it also suggests that same sensual relationship that the guard mentioned too. If the law is attracted by guilt the subjects of law find the law itself 'attractive' in turn.

This mutual attraction, if you will, is manifested via a set of legal objects that collectively constitute the site of the law's intermingling with the human populations that it purportedly rules over and judges. Both conversations alluded to above take place in a room that is normally Fräulein Bürstner's bedroom but which at the time of K.'s arrest was turned into a mini courtroom. Kafka tells us that during this initial hearing in Fräulein Bürstner's bedroom, 'the nightstand by her bed had been shoved to the middle of the room as a desk for the hearing and the inspector was sitting behind it' (Kafka 1998: 12). Later

on that furniture was then rearranged back to its original positions so that Fräulein Bürstner might have been none the wiser as to what took place there (except for a few small continuity errors), but K. comes to her room late at night to apologize for the way her room was taken over.

It seems clear that K.'s real motivation in coming to Fräulein Bürstner's bedroom is not about the use of her room per se. Instead, it seems that he has fallen in love with her (when it seems clear that he did not think of her that way up till now). Having her bedroom chosen to serve as the site of K.'s initial legal engagement somehow turned these ordinary pieces of bedroom furniture into legal objects, thereby also transferring the mystical element of law's attraction to Fräulein Bürstner herself. This will in fact be the first of a string of women that K. will be enamoured with via their connection, however remote and tangential, to his own legal travails.⁴ When ordinary objects and persons get swept up into the drama of the law's own self-assertion (if the night table had been left where it was, one gets the feeling that the almost magical performance of law could not have taken place), everything is transformed.⁵

In the magical exchange of substance and authority that Kafka chronicles throughout *The Trial*, we see the objects and subjects both promoting and thwarting the rule of law. The complex mixture of collateral effects in the face of law's self-assertion means that there are many times when the law as such is not necessarily in control of the process. Not all of the responses to law—K.'s falling in love with Fräulein Bürstner is a good example—are part of what the law would seem to want were it truly in control. Kafka shows us that there are vast and unintended consequences to the production of legal objects/subjects, and in many cases this could work to counter not only to what the law 'wants' but even to the promulgation of the law as an indisputable source of authority and judgment.

The upshot of this analysis of *The Trial* as I read it is that, although the law may exist mainly as a desire (actually as a desire to exist), it must pay a price for its dependence on material things that serves to reduce the very control that it seeks to assert into the world. This tracks

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well with Benjamin's understanding of the police; although the law imagines itself – and through that imagination, manifests itself into the world – as something that is rational and in control at all times, the fact is that the police, in their arbitrary and physical violence (what could be called their 'lawless behaviour'), demonstrate the way that the law remains 'rotten', unable to duplicate in the real world what it seeks in its phantasmic heart. Benjamin writes 'the "law" of the police really marks the point at which the state, whether from impotence or because of the immanent connections within any legal system, can no longer guarantee through the legal system the empirical ends that it desires at any price to attain' (Benjamin 1996: 243).

This helps us understand a bit more how the law is a desire that does not necessarily reside in the conscious desires of its practitioners (in this case the police, but what Benjamin says about the police is also true to some extent of all of its practitioners). In both of Kafka's novels, it is not clear that the law's existence (such as it is) stems from the conscious power and determination of the clerks and magistrates. They too are in some ways subjects of law, caught up in the same magical exchange as the subjects and objects of law. In *The Castle*, the desire for law exists as much in the townspeople as in the castle's denizens (assuming they actually exist). The law's desire can be read more as a constellative system, a relationship between subjects and objects, practitioners and practitioners, than as any kind of hydraulic force where one side does law to the other. Here once again we can see how the law, for all of its desire for control and certainty, is not nearly as in charge of itself or the world around it as it thinks, allowing for all sorts of unexpected vulnerabilities even amidst its displays of awesome, and violent, power.

4 62 cases of Jam vs. United States

In this way, we can see from Kafka's treatment of law in *The Trial* that the law is not quite as determinate, neither of itself nor of the objects and subjects which serve to give it its reality, as might be expected. Kafka shows us that the law *is* powerful but not all powerful, that there are many ways in which the law is subverted and diverted by its

very own expression. Having laid out the quality of legal objects and subjects in Kafka's *The Trial*, I will now move on to consider a Supreme Court case in the United States which suggests something of this same quality. In moving from a literary rendition to a legal one, I recognize that we are talking about entirely different worlds of meaning. In dealing with court cases, none of Kafka's subversive intent is present. We do not see the random intermingling of cooking cabbages and hanging laundry with courts of law. Instead we are fully within the law's own self-imagination, its sense of total control and easy authority. What I will attempt to do in my reading of one US supreme court case is to show how the ambiguity that Kafka makes so clearly visible in *The Trial* is at least somewhat evident even in this most confident and authoritative kind of legal narrative.

The case that I will look at has the wonderful name of *62 Cases of Jam v. United States* (340 U.S. 593 (1951)). The case concerned the question of what it means to be 'imitation' jam as opposed to jam full stop. Insofar as this gets at the question of what is 'really real' vs. what is only 'kind of real', this case addresses, if from a completely different perspective than Kafka's, the way that the law engages with objects, how it makes those objects serve its own interests and how those objects can sometimes fight back, as it were.

The context for the case *62 Cases of Jam v. United States* arose in 1949 (the case was decided in 1951) when the government seized the aforementioned 62 cases of what had been labelled 'Delicious Brand Imitation Jam' that had been manufactured in Colorado and shipped to New Mexico. The bottles of jams were of assorted fruit flavours and contained 55% sugar, 35% fruit and 20% pectin. To count as 'proper jam' a higher proportion of fruit to sugar was required by statute. The manufacturer had believed that adding the word 'imitation' to the label allowed them to use any combination of ingredients that they wanted, since it suggested that this was not, in fact, jam but rather something else. The government argued that this product was too close to actual jam for the label 'imitation' to really count as offering a sufficient distinction. Their position is summarized in the court case

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as offering that:

[the substance in question] was found to have the appearance and taste of standardized jam, and to be used as a less expensive substitute for the standard product. In some instances, products similar to those seized were sold at retail to the public in response to telephone orders for jams, and were served to patrons in restaurants, ranches and similar establishments, who had no opportunity to learn the quality of what they received (*62 Cases of Jam* [henceforth *62 Cases*], 595).

In other words, this ‘imitation’ jam was, the government argued, too close to actual jam so that people who ate it could not tell that it was something else. In its ruling, the US Supreme Court ended up reversing a lower court decision, arguing that the cases of ‘Imitation Jam’ were properly labelled and the seizure of the cases was incorrect.

In the majority decision that he wrote, Justice Frankfurter noted that the original congressional statute of 1906 that dealt with food standards expressed the desire that the statute was meant to be ‘a working instrument of government and not merely as a collection of words’ (*62 Cases*, 596). Frankfurter wrote that ‘our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort’ (*62 Cases*, 596).

Here, we see Justice Frankfurter exhibiting a common legal concern that words cannot produce perfect determination. One could imagine that this ephemeral quality of words (where even an act of congress has to insist that it be read in a certain way) is different from and in contrast to the solidity of objects, but *62 Cases* suggests a certain ephemeralness of objects as well, a question that even suggests the non-solidity (non-thingness), therefore, of law itself. Since law, as I have been arguing, depends both on the ability of words to be precise and, perhaps even more critically, for objects, what these words refer to, to be undoubtedly solid, to be only what they are said to be, this poses quite a challenge to legal authority.

In his opinion, Justice Frankfurter contrasts the current case to a previous case, *Federal Administrator v. Quaker Oats* in which the

Quaker Oats company created a product containing, so it claimed, 'enriched farina'. Because the enrichment in question was the addition of vitamin D to ordinary farina wheat, the court ruled that although it was accurately labelled, the product could not be sold because it was an adulteration of farina—it was not what farina is and farina has to mean what it means (words have to mean something, refer to a singular object, for law to succeed in making its judgments). Justice Frankfurter quotes from *Quaker Oats* writing: 'The Statutory purpose to fix a definition of identity of an article of food sold under its common or usual name would be defeated if producers were free to add ingredients, however wholesome, which are not within the definition' (*62 Cases*, 598-599).⁶

Justice Frankfurter notes that there is a key difference between the Quaker Oats case and *62 Cases* in that 'in that case it was conceded that although the Quaker product did not have the standard ingredients, it "purported" to be a standardized food' (*62 Cases*, 599). The label 'imitation' was not used in the previous case, so this presented a different legal question. The problem in the current case, Justice Frankfurter states, is that in the section of the 1906 Act that dealt with imitations, 'Congress did not give an esoteric meaning to "imitation." It left it to the understanding of ordinary English speech' (*62 Cases*, 599).

Here we get to the nub of the issue. Justice Frankfurter writes that 'in ordinary speech there can be no doubt that the product which the United States here seeks to condemn is an "imitation" jam. It looks and tastes like jam; it is unequivocally labelled "imitation jam"' (*62 Cases*, 599). For Frankfurter, the original statute used words like 'purports' and 'represents' to address fake versions of things, but the 'imitation jam' here admits of its own falseness. Perhaps more accurately, even if the brand added the term 'imitation' in the best of faith, this term does not perfectly convey a truth that can be pinned down. It seems to convey not a full status or truth but something that is somewhere between something real and something merely symbolic.

Admitting his own concern about this question, Justice Frankfurter writes: 'In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of

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the statute beyond the point where Congress indicated it would stop' (62 *Cases*, 600). He concludes the opinion by stating that 'we must presume [the administrator who began the case's] present misconception results from a misreading of what was written in the *Quaker Oats* case' (62 *Cases*, 601). In other words, if an object proclaims its difference from another thing in its label, then the fact that it cannot be readily distinguished from that other thing is not in and of itself enough of a reason to block its sale.

In his very brief dissent, Justice Douglass noted that the case had a deep conflict within itself insofar as, according to section 403 (g), the product in question was 'jam' but in 403 (c) it was 'not jam' (62 *Cases*, 601). Justice Douglass is implying therefore that, not unlike Schroedinger's cat, the substance in question both is and isn't jam—just as we saw in *The Trial* how certain objects could be and not be certain things at the same time. For Justice Douglass the word "imitation," it would appear, is inadequate to express its true and deeply contested status.

5 Miasmatic objects

In 62 *Cases*, we see not just the 'anxiety' that Justice Frankfurter expressed about being faithful to the meaning of Congress' words, but perhaps a deeper anxiety about the meaning of words and what they refer to. As previously noted, the law stakes its reputation on careful parsing of words, so the danger of a random interpretation must be mitigated by a great deal of legalistic performance; as with the wigs and robes by which the law establishes its authority more generally, the conventions of legal writing and reasoning serve to demonstrate that something serious and systematic is afoot here. This is no mere guessing game or clever word play; the worry that the law will be perceived in this way is evident in the attention that Justice Frankfurter gives to questions of 'ordinary English and its relationship to law.

Justice Frankfurter's anxiety may be compounded by the fact that the case in question was considered a jurisdiction *in rem*, meaning that it constituted a power over objects rather than the usual cases which

were *in personam*, which involved a jurisdiction over persons. In this case, the defendants were the cases of jam as such. It was their quality and their aspects that were at issue. The case falls under a form of libel law (a question of ‘misbranding’), though the subject of that libel is not a person but rather an object. Notice the language when Justice Frankfurter tells us that the Quaker Oats enriched farina “purported” to be a standardized food.’ And further, in citing from the opinion of the lower court of Appeals of the Tenth Circuit that they reversed, he says that the jam itself “purported” to be a fruit jam’ (62 *Cases*, 595). In both cases, the object as such is the subject of inquiry, as if to say that somehow the object in question was itself a liar, further muddying the distinction between objects and subjects (or persons).

This is important because even though, as I stated above, objects and subjects of the law share many similarities, there is one way in which objects are different. People as such may or may not buy into the performance of legal authority. Those who do will try to be obediently subject to its power and reasoning (although even when they do, as was the case with K. many unexpected things might still occur). With objects on the other hand, there is no question of seeking to be an obedient legal object. On the one hand, an object of the law is in a sense *more* subjected to legal definitions because it is formally mute but, on the other hand, the very idea that an object could lie or misrepresent itself suggests a form of legal objecthood/personhood that complicates the assumptions and presuppositions of legal reasoning. If a case of jam can lie about itself, it isn’t all that mute after all; it may in fact, speak volumes about the nature of law itself. For if cases of jam can talk, as it were, where is the firm bedrock, the distinct categorizations upon which legal reasoning is based?

One could argue that in fact the jam is not ‘purporting’ anything, that the manufacturers who chose to label it ‘imitation’ are the ones who are agents. Yet I don’t think that the Justices are merely being poetic when they ascribe agency to these legal objects. If we recall that law is a systemic desire for authority and existence, then the tangibility of objects as such cannot be factored out of the equation. The law’s

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practitioners, its objects and its subjects are all suspended within a web of interrelationship, and legal terminology must itself reflect this interrelatedness.

All of these concerns make more sense when we return to Kafka's insights about the law in *The Trial*. Here again we see the two-way nature of the relationship between the law and objects. If in fact the law's own materiality is, as it were, borrowed or transferred from objects, then those objects have a form of exchange with the law in which they give up some of their materiality, but they receive some kind of legal objecthood—or even a kind of personhood—in exchange (a dark corollary of this could be *Citizens United*, where corporate personhood is not out of the question). This perhaps helps to explain how objects like cases of jam could be said to 'purport' something about themselves, how they can be liars or truth tellers (or some combination of the two).

The miasmatic emanations of materiality that Kafka describes in both *The Trial* and *The Castle* suggest that the law lies in between the two states of total non-existence and absolute existence, and from this position a kind of murky materiality is projected onto the world that affects law and material objects alike. From this context, it makes sense that the word 'imitation' would pose a challenge to the law insofar as it is only a word and what it refers to is only 'ordinary English speech'. If objects effectively lend their materiality to the law and become a bit less solidly object-like as a result, then the line between what is an object and what is not (or what is one kind of object and what is another) becomes a bit harder to define, and the question of what is an imitation of what becomes more complicated and troubling.

Even the name of the case '*62 cases of Jam v. United States*' suggests the miasmatic quality of objects as regards the law's interpretation of them. Was the object in question '62 cases of Jam' or '62 cases of not jam'? The very concept of being called 'imitation jam' suggests the problem here: what *is* imitation jam after all? There could be no definite name to this case that would perfectly define what the original object in question was; even though the law made a ruling (although there was a dissent), the nature of what has been determined remains an open,

quite possibly unanswerable, question.

While on some level Justice Frankfurter's opinion is fairly straightforward, all of his concerns about 'ordinary English', about the distinction between the thing called jam and other things that approach but don't quite become jam (and then those other things that are not jam like at all), suggests that the law can never fully resolve such issues insofar as the very tools that it uses to establish its authority and its existence—in this case legal terminology and language— have the effect of calling those very things into question.⁷

Here we see evidence for the distinction between legal materials and legal matters that Hyo Yoon Kang and Sara Kendall have set out in this collection. If legal materials are meant to serve as the basis for legal matters, then we see that these materials, both in Kafka's novels and in *62 Cases*, are not doing what they are supposed to; they are failing to serve as the meek background of and underpinning for legal matters. Benjamin suggests as much when he writes of Kafka that his parables 'don't simply lie down at the feet of doctrine the way Haggadah lies down at the feet of Halakah. Having crouched down, they unexpectedly cuff doctrine with a weighty paw' (Benjamin 2005: 326).

All of this suggests that Kafka has identified a kind of Faustian bargain between the law and its objects. The law takes its materiality from them, but the strange kind of legal status that it offers these objects in exchange – the miasmic emanations of reality that are constituted between the law and the material world – works to undermine and trouble the law itself.

Of course very little of this anxiety is manifestly present in Justice Frankfurter's ruling (although Justice Douglass' dissent, while only a paragraph long, does a better job of expressing the anxiety of a case where a thing can be a thing and not a thing at the same time). The law is invested in not appearing to be anxious about such things; to openly admit this would be to destroy the efficacy of its own performance, its production of its own material existence. It is not Justice Frankfurter's job, but rather Kafka's to expose the depth of that anxiety. When we read *The Trial*, we are initially drawn, of course, to K.'s anxiety as a

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subject of the law. We want to know, as K. does, what he is charged with, what has he done, how can he best defend himself and what will happen to him.

What emerges more slowly in the text is the anxiety of the law itself. There are moments in the text where we get a glimpse at a much less confident form of law than what K. himself experiences. This can be seen, for example, in the case of the two guards, named Franz and Willem, who initially arrest K. When we first meet them at the time of the arrest they are menacing and corporeal (Willem's fat belly keeps bumping up against K. in a way that seems both intimate and menacing at the same time) (Kafka 1998: 6). Later, however, due to irregularities in the way they arrested K. (Willem ate K.'s breakfast for one thing) and due to K.'s own complaints, the two of them are flogged. Willem is stripped naked and now his corpulence is a source of pity rather than fear (K. unsuccessfully tries to bribe the flogger to not whip them) (Kafka 1998: 82-83).

The woeful anxiety of these two hapless guards suggests a deeper anxiety of the law more generally. Insofar as throughout *The Trial*, all manifestations of the law are portrayed as being below some kind of infinite and mysterious hierarchy, any one magistrate or officer of the court is subject to that same potential switching from object of fear to object of pity. We see that the law is, in effect, afraid even of itself.

This is subversive because pity for the law is highly destructive to its own sense of privilege vis-a-vis the humans and objects that it stands in judgment of. It suggests a larger lack of control or determination despite the law's powerful desire to be read otherwise. In *62 Cases v. United States*, you get only small hints of this concern. You see questions about what words can actually determine, what objects actually are and how the interaction between objects and words actually work. There is a legal architecture that holds all of this together, but reading that architecture alongside Kafka reveals that miasmic element entering into the picture, that transfer of materiality, producing what could be called the revenge of materiality as those miasmas complicate and undermine easy determinations.

Although it is true that *The Trial* is a work of legal fantasy and 62 *Cases* is an ordinary legal document, reading them side by side exposes both the realistic and accurate elements of Kafka's novel and the fantastic aspects of Justice Frankfurter's decision. Because it is a work of fiction, Kafka is able to write about things that the law could never speak about. Having that perspective serves to ensure that the law's hidden anxieties can never quite be assuaged no matter how confidently it performs its continuous and never-ending demonstrations of its existence.

Endnotes

1. For a related argument see Fish (1990). See also Teubner (2013).
2. For a good overview of Benjamin's reading of Kafka see Fitzpatrick (2017).
3. Henk van Houtum has an interesting essay that addresses the way that Kafka deals with boundaries and marginality more generally. See Van Houtum (2010).
4. For a reading of Kafka, the law and gender, as well as race and class, see Boa (1996).
5. In an as yet unpublished article, Yael Plitmann describes the fascinating story of the Keraites, a sect of Judaism who, when fenced out of juridical authority by the state of Israel, reproduced legal authority by using the material settings of a courtroom and other legal objects to the point where the state ultimately allowed them de jure status. Plitmann (2019).
6. Quoted from *Federal Security Administrator v. Quaker Oats* 318 US 218 (1943).
7. For a great and justly celebrated analysis of how Kafka himself both asserts and subverts the practices of language, including legal language, see Minkkinen (1994).

References

- Aristodemou M, MacMillan F and P Tuitt eds 2017 *Crime, Fiction and the Law* Birkbeck Law Press Abingdon
- Benjamin W 2005 'Letter to Gershom Scholem on Franz Kafka' in Eiland and Jennigs eds 2006

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- 1999 'Franz Kafka: on the Tenth Anniversary of his Death' in Eiland and Smith eds 1999:
- 1996 'Critique of Violence' in Bullock and Jennings eds 1996
- Boa E 1996 *Kafka: Gender, Class and Race in the Letters and Fictions* Clarendon Press New York
- Bullock M and M W Jennings eds 1996 *Walter Benjamin: Selected Writings Vol. 1, 1913-1926* Belknap Harvard University Press Cambridge, MA
- Eiland H and M W Jennings eds 2006 *Walter Benjamin: Selected Writings Vol. 3, 1935-1938* Belknap Harvard University Press Cambridge MA
- and G Smith eds 1999 *Walter Benjamin: Selected Writings Vol. 2, 1927-1934* Belknap Harvard University Press Cambridge MA
- Fish S 1994 *There's No Such Thing as Free Speech, and It's a Good Thing, Too* Oxford University Press New York
- Fitzpatrick P 2017 'Necessary Deceptions: Kafka and the mystery of law' in Aristodemou et al 2017:87-104
- Kafka F 2009 *The Castle* Oxford University Press New York
- 1998 *The Trial* Schocken Books New York
- Minkinen P 1994 'The Radiance of Justice: On the Minor Jurisprudence of Franz Kafka' *Social & Legal Studies* 3: 349-63
- Plitmann Y 2019 'Performing Law into Being: Resistance and Mimicry in one Religious Community' unpublished article
- Teubner G 2013 'The Law Before its Law: Franz Kafka on the (Im)Possibility of Law's Self-Reflection' *German Law Journal* 14: 405-422
- Van Houtum H 2010 'Waiting Before the Law: Kafka on the Border' *Social and Legal Studies* 19/3: 285-97

Cases:

62 Cases of Jam v. United States, 340 U.S. 593 (1951)

Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218 (1943)