



Kafka's Law: "The Trial" and American Criminal Justice

Robert P. Burns

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The Trial is actually closer to reality than fantasy as far as the client's perception of the system. It's supposed to be a fantastic allegory, but it's reality. It's very important that lawyers read it and understand this." Justice Anthony Kennedy famously offered this assessment of the Kafkaesque character of the American criminal justice system in 1993. While Kafka's vision of the "Law" in *The Trial* appears at first glance to be the antithesis of modern American legal practice, might the characteristics of this strange and arbitrary system allow us to identify features of our own system that show signs of becoming similarly nightmarish?

With *Kafka's Law*, Robert P. Burns shows how *The Trial* provides an uncanny lens through which to consider flaws in the American criminal justice system today. Burns begins with the story, at once funny and grim, of Josef K., caught in the Law's grip and then crushed by it. Laying out the features of the Law that eventually destroy K., Burns argues that the American criminal justice system has taken on many of these same features. In the overwhelming majority of contemporary cases, police interrogation is followed by a plea bargain, in which the court's only function is to set a largely predetermined sentence for an individual already presumed guilty. Like Kafka's nightmarish vision, much of American criminal law and procedure has become unknowable, ubiquitous, and bureaucratic. It, too, has come to rely on deception in dealing with suspects and jurors, to limit the role of defense, and to increasingly dispense justice without the protection of formal procedures. But, while Kennedy may be correct in his grim assessment, a remedy is available in the tradition of trial by jury, and Burns concludes by convincingly arguing for its return to a more central place in American criminal justice.

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