Kafka as a Populist: Re-reading "In the Penal Colony"

David Pan

Peculiarity

Franz Kafka's "In the Penal Colony " has almost always been read as the description of a barbaric machine of torture. Yet the first sentence of the story, "It's a peculiar kind of apparatus,"[1] uttered by the officer, does not direct attention to the apparatus itself but to its peculiarity. For the voyager who listens to the officer describing the apparatus, the latter is certainly peculiar as an instrument of torture and execution, but it is also peculiar for the officer in the sense that it belongs to a particular culture which has created it and supported its functioning. The peculiarity extends beyond the machine to the notion of justice of which the apparatus is an integral part. The story contraposes the two notions of peculiarity in order to stage a conflict between two cultures, one represented by the liberal, humanitarian voyager and the other embodied in the traditional justice of the officer. From the viewpoint of liberal humanitarianism, the apparatus is peculiar because of its barbarism and must be eradicated. But from the perspective of a community in which traditions are still alive, the apparatus' peculiarity lies in the fact that it is part of a cultural system "peculiar to" a specific community. The story thus presents two modes of justice opposed to each other in the struggle to determine the fate of the apparatus.

This fate is that of primitive culture when confronted by a universal one. "Primitive" here refers to a small, locally organized culture in which

1. Franz Kafka, "In the Penal Colony," in *The Transformation and Other Stories*, trans. and ed. by Malcolm Pasley (London and New York: Penguin, 1992), p. 127. All further page references to this text will be in parentheses after the quotation.

laws and authorities are not administratively separated from the people. Tribal cultures are excellent examples of primitive culture, but the latter must also be seen as a modern possibility. In Kafka's story, the issue is not simply a conflict between a Western and a non-Western culture. The penal colony is administered by a European power and both the officer and the new Commandant come from the same tradition. In the story, the primitive culture is part of Europe and the conflict in the colony is between a European primitive and a European civilized perspective on law and culture.

The officer seeks to demonstrate to the voyager the value of his system of justice by emphasizing its peculiarity and thus its ground in the communal will. In contrast to the voyager's understanding of justice in which legality and written laws are the crucial issues, the apparatus' execution process (in its fusion of sentencing and punishment in a collective spectacle) imbeds justice in a process of community legitimation. As a result, the conflict exemplifies the efforts of a primitive culture to maintain its peculiarity and legitimacy when threatened by a dominant universal culture. In order for a culture to remain both distinct to the outside world and legitimate to its members, it must be allowed to construct its own notions of truth and justice — even if these notions happen to conflict with liberal, Enlightenment values.

The officer's depiction of the apparatus and the voyager's evaluation enact this conflict between a local culture's unique identity and a liberal humanitarian legal code seeking to become universally binding. The voyager's universalist justice separates a set of abstract laws from their execution. From this viewpoint, the justice of the apparatus is bound to be condemned both for its lack of written laws and the painfulness of the execution. The officer's primitive justice is based on the idiosyncratic customs of a particular community in which abstract written laws are less important than the collectively-lived experience of justice. Within this system judgment and execution are combined. The perspective on law of the officer and that of the voyager compete in the story to define primitive culture as either a desired possibility or a savage barbarianism.

Before discussing the details of "In the Penal Colony" I would like to investigate the way in which the conflict between the civilized and the primitive perspective on culture occupied Kafka's thoughts before the writing of the story in October, 1914.[2] The cultural divide between Western European and Eastern European Judaism, which was the main focus

2. Hartmut Binder places the date of the writing of "In the Penal Colony" in the period from October 15 to October 18, 1914. The story was not published until 1919. Hartmut Binder, *Kafka Kommentar zu Sämtlichen Erzählungen* (Munich: Winkler, 1975), p. 174

of Kafka's attention beginning around 1910 and throughout his life, split European Judaism on the basis of precisely those issues which separate the civilized from the primitive. As Evelyn Torton Beck argues, while the voyager represents a Western-Jewish, liberal, cosmopolitan perspective, the culture connected with the apparatus correlates closely with the culture of Eastern European Judaism as seen by Kafka: "The quarrel of the old versus the new suggests the perpetual fight of Jewish Orthodoxy to maintain itself against voluntary assimilation or enforced conversion."[3] But while Beck argues that Kafka condemns the justice of the officer for its brutality and inhumanity,[4] I would like to argue that the apparatus, by embodying an Eastern European Jewish traditionalism, presents the type of organic and peculiar community Kafka attempts to save.

Kafka's Anarchism

Kafka's interest in the issue of community began with his friendship with the Czech anarchist, Michal Mareš, who invited Kafka to several anarchist meetings and demonstrations.[5] Mareš recounts Kafka's attendance at these gatherings and his interest in books by anarchists such as Peter Kropotkin and Michael Bakunin,[6] in which a critique of modern capitalism is presented as a rejection of institutionalized politics in favor of a society organized on a community level without any intervening administrative structures. As Michael Löwy points out, Kafka's anarchism

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3. Evelyn Torton Beck, *Kafka and the Yiddish Theater* (Madison, Wisconsin: University of Wisconsin Press, 1971), 149.

4. *Ibid.*, p. 152

5. These groups included Klub Mladych, Vilem Körber and the Czech Anarchist Movement. See Michal Mareš, "Wie ich Franz Kafka kennenlernte," published in Klaus Wagenbach, *Franz Kafka: eine Biographie seiner Jugend 1883-1912* (Bern: Franke Verlag, 1958), pp. 270-271. As Wagenbach notes, Kafka's relation with Mareš is documented not only by Mareš' manuscript, but also by Gustav Janouch and in a postcard written by Kafka to Mareš in December, 1910. (Wagenbach, *op. cit.*, p. 230.) For a further discussion of Kafka's interest in anarchism, see also Michael Löwy, "'Theologia Negativa' and 'Utopia negativa': Franz Kafka," chap. in *Redemption and Utopia: Jewish Libertarian Thought in Central Europe: A Study in Elective Affinity* (Stanford, Calif.: Stanford University Press, 1992), p. 72, and pp. 82-83.

6. Mareš, *op, cit.*, p. 275. Mareš' account is confirmed by diary entries in which Kafka mentions Kropotkin and Bakunin. In his entry for October 15, 1913, he writes "Don't forget Kropotkin!" Franz Kafka, *The Diaries 1910-1923*, ed. Max Brod (New York: Schocken Books, 1988), p. 233. Kafka mentions Bakunin in his diary entry of March 13, 1915. Kafka, *Diaries*, p. 333. In addition, Gustav Landauer's *Briefe aus der französischen Revolution* appears on two of the book lists put together by Kafka between 1922 and 1924. Jürgen Born, *Kafkas Bibliothek: Ein beschreibendes Verzeichnis*, (Frankfurt am Main: Fischer, 1990), 178, 183.

manifests itself as an anti-socialist critique of bureaucracy based on his own experiences with the Workers' Accident Insurance Institute where he worked as a lawyer.[7] This institute provided the first form of workers' compensation for accidents in the Austro-Hungarian Empire and was set up according to new social laws achieved by the workers movement. Yet, as Kafka notes in reference to a workers' demonstration: "The Revolution evaporates, and leaves behind only the slime of a new bureaucracy. The chains of tormented mankind are made out of red tape."[8]

This critique of bureaucracy links Kafka's intellectual perspective with that of anarchists such as Gustav Landauer, who developed a similar critique of socialism.[9] But in contrast to Landauer and other anarchists, Kafka did not pursue an intellectual or political development of anarchist ideas but rather an aesthetic embodiment. According to Mareš, though Kafka was familiar with the anarchist theoreticians already mentioned, he was especially fond of Malwida von Meysenbug's anarchist ideas manifest in a narration of her life story.[10] Kafka's preference for concrete descriptions led him to abandon his anarchist political activities (around 1912) in favor of a growing interest in the Yiddish theater, whose rootedness in a culture of Eastern European Judaism appealed to Kafka's sense for the peculiar.

Western vs. Eastern Judaism

Kafka's views on Eastern Judaism were influenced strongly by Nathan Birnbaum and the Zionist student organization, Bar Kochba.[11] In the face of the contemptuous attitude shared by "the overwhelming majority of Western Jews" toward the cultural backwardness and "physical decadence" of Eastern European Jews,[12] Birnbaum defended the Yiddish language and Eastern European Judaism for their cultural vitality as opposed to the lack of tradition of Western European Jews. The members of the Bar Kochba Society, including Kafka's friends Max Brod and

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7. Löwy, *op, cit.*, pp. 123-124.

8. Gustav Janouch, *Conversations with Kafka*, 2nd ed. and tr. Goronwy Rees (New York: New Directions Books, 1971), p. 120.

9. See Gustav Landauer, *For Socialism*, tr. David J. Parent (St. Louis: Telos Press, 1978).

10. Mareš, *op. cit.*, p. 275. Cf. Malwida von Meysenbug, *Memoiren einer Idealisten*, ed. by Renate Wiggershaus (Frankfurt a\M: Insel, 1985).

11. For an extended discussion of Kafka's relation to Birnbaum's ideas see Guiliano Baioni, "Zionism, Literature, and the Yiddish Theater" in *Reading Kafka: Prague, Politics, and the "Fin de Siècle,"* ed. Mark Anderson (New York: Schocken Books, 1989), pp. 97-102.

12. Baioni describes this attitude by summing up the views expressed by Max Nordau at the 5th Zionist Congress in Basel, 1901. See Baioni, *op. cit.*, p. 97.

Hugo Bergmann, integrated this positive evaluation of Eastern Judaism into a critique of Western Judaism and of modernity itself. Thus Hans Kohn, in the preface to *Vom Judentum*, a collection of essays published by the Bar Kochba Society in 1913 that found its way into Kafka's personal library,[13] writes: "Today there is a general tendency amongst a few people to go beyond the individual and integrate it into super-individual contexts. Several signs suggest that a shift is taking place in our time, not just for Judaism, but for humanity, which manifests itself externally in the West as a struggle against a mechanizing, de-spiritualizing functionalism and in the East as a reawakening of old cultural realms and the European attempt to appropriate Asian culture."[14] The opposition between Eastern and Western Judaism is at the same time one between an individual-oriented rationalizing modernity and a community-oriented cultural traditionalism. Though this favoring of Eastern over Western Judaism has been interpreted as a proto-fascist expression of Jewish self-hatred,[15] the essays of *Vom Judentum* can be better described as a presentation of an anti-rationalistic, anarchist perspective which is grounded in a Jewish tradition. As Kohn emphasizes: "Zionism is not a science nor a logical system of concepts, and it has nothing to do with racial theories and definitions of the folk. It is impossible to teach someone Zionism through arguments, and all the discoveries of racial and sociological research do not touch us. Zionism lies in another dimension of being. It is not knowledge, but life."[16]

Kafka shares this desire for a type of experience rooted in life and a cultural tradition rather than in science and race, but he carries this desire even further than the writers in *Vom Judentum* by concentrating less on explanations than on particular examples of the experience of such a culture. Thus, in spite of the affinity he feels for Birnbaum's ideas, Kafka criticizes him for his intellectualism, his estrangement from the immediacy and lack of self-consciousness within Eastern European culture. In his diary entry of January 24, 1912, Kafka describes a folksong evening at the Bar Kochba Society: "Folksong evening: Dr. Nathan Birnbaum is the lecturer. Jewish habit of inserting 'my dear ladies and gentlemen' or just 'my dear' at every pause in the talk. Was repeated at the beginning of Birn-

13. See Jürgen Born, *Kafkas Bibliothek: Ein beschreibendes Verzeichnis* (Frankfurt am Main: Fischer, 1990), p. 131.

14. Hans Kohn, "Geleitwort" in *Vom Judentum*, ed. Verein jüdischer Hochschüler Bar Kochba in Prag (Leipzig: Kurt Wolff, 1913), p. VI, my translation.

15. See Christoph Stölzl, "Kafka: Jew, Anti-Semite, Zionist," in *Reading Kafka*, *op. cit.* pp. 70-71.

16. Kohn, "Geleitwort" in *Vom Judentum*, *op. cit.*, p. VIII, my translation.

baum's talk to the point of being ridiculous. But from what I know of Löwy I think that these recurrent expressions, which are frequently found in ordinary Yiddish conversations too, such as '*Weh ist mir*' or '*S'ist nischt*,' or '*S'ist viel zu reden*,' are not intended to cover up embarrassment but are rather intended, like ever-fresh springs, to stir up the sluggish stream of speech that is never fluent enough for the Jewish temperament."[17] In attempting to reproduce the linguistic gestures of Eastern Jewish culture, Birnbaum does not manage to "stir up" his speech, but only to demonstrate his embarrassment and, consequently, also his alienation from the Eastern Jewish spirit.

This incident illustrates the fundamental problem Kafka struggled with during this period in his writing. As much as he himself as a Western European Jew desired an integration with the traditional organic community of Eastern Judaism, all his attempts could only bring into relief an inner alienation from all community spirit. This alienation manifests itself in his diaries as well as in his literary works through a language of gestures. Kafka's diary entries of this period provide numerous descriptions of the two types of gestures depicted above: the alienated gesture of Birnbaum, attesting to a contradiction between intention and execution, and the expressive gesture of Eastern Jewish communities, unself-consciously manifesting a vital spirit, "like ever-fresh springs."

The Vital vs. the Empty Gesture

Kafka's dissatisfaction with the argumentative method of the Western Jewish Bar Kochba Society leads to his engagement with the Yiddish theater. Max Brod shared this feeling and provides a description of his and Kafka's passion for the performances of the Yiddish theater at the Café Savoy: "I, for example, was a frequent member of the audience at the Café Savoy, and learned a lot there towards appreciating Jewish folklore. But Franz, after the first time I took him there, entered into the atmosphere completely." Brod then continues to describe the opposition he and Kafka felt separated the academics at Bar Kochba from the actors of the Yiddish theater: "It was the time when I first came into contact with Zionists and the Zionist outlook, and I passed their influence on to my friend, influences which came from the Prague club 'Bar-Kochba,' and particularly from the wonderful Hugo Bergmann. At first Kafka's attitude was one of rejection. I, too, was not at first in agreement with everything that was preached to

17. Kafka, *Diaries*, *op. cit.*, p. 173.

me on this side — often in a form all too fine and polished — and in the beginning used to go to the tiny, not very inviting Café Savoy on Ziegen Square, where they gave the generally despised melodrama as a direct protest against Zionistic academics. I zealously championed the thesis that however near to unconscious humor and trash they might come, from the performances of these actors more could be learned about the essence of Judaism than from the philosophic deductions of Jews of the West who were, it is true, striving to get to the people, but who were at heart already estranged from them."[18] The anti-intellectual stance Brod describes is also evident in Kafka's own diary, which demonstrates his fascination with the Yiddish theater and his friendship with Yitzhak Löwy, one of the actors from the troupe performing in Prague. This fascination derived from his admiration for the gestural freedom animating this theater and his yearning for a community-oriented traditional culture from which he had been alienated by his upbringing as a Western Jew.[19]

In his first description of the Yiddish theater, Kafka focuses on two actors in caftans played by a woman and her husband. They present for Kafka an excellent example of beings who live entirely through expressive gestures. He describes them as "people who are Jews in an especially pure form because they live only in the religion, but live in it without effort, understanding, or distress. They seem to make a fool of everyone, laugh immediately after the murder of a noble Jew, sell themselves to an apostate, dance with their hands on their earlocks in delight when the unmasked murderer poisons himself and calls upon God, and yet all this only because they are as light as a feather, sink to the ground under the slightest pressure, are sensitive, cry easily with dry faces (they cry themselves out in grimaces), but as soon as the pressure is removed haven't the slightest specific gravity but must bounce right back up in the

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18. Max Brod, *Franz Kafka: A Biography*, tr. G. Humphreys Roberts and Richard Winston (New York: Schocken Books, 1960), pp. 110 and 112.

19. Kafka's relation to Löwy and the Yiddish theater is documented in his diary, beginning October 5, 1911 and continuing through most of 1912. See also the letters to Felice Bauer of 1912 and 1913. For two excellent accounts, see Beck *op. cit.*, pp. 12-30 and Baioni, *op. cit.*, pp. 102-110. Kafka describes his own Western-Jewish alienation from tradition in a November 1920 letter to Milena Jesenska. "After all, we both know numerous examples of the Western Jew; as far as I know I'm the most Western-Jewish of them all. In other words, to exaggerate, not one second of calm has been granted me; nothing has been granted me, everything must be earned, not only the present and future, but the past as well — something which is, perhaps, given every human being — this too must be earned, and this probably entails the hardest work of all." Kafka, *Letters to Milena*, tr. Philip Boehm (New York: Schocken Books, 1990), p. 217.

air."[20] Kafka's fascination with the Yiddish theater focuses on the gestural freedom of these actors, who on the one hand "performed in the same manner in which the Hasidim prayed in the synagogue, accompanying the movement of their arms and body with religious chants,"[21] and on the other hand provided the model for the gestural expressiveness of many figures in Kafka's stories.[22]

Yet, gestures do not play a unified role in Kafka's work. He praises the gestural freedom of the Yiddish theater and Eastern Judaism, but criticizes the gestures of his own Western culture, in which traditions have degenerated into empty and alienated gestures. He compares for instance the circumcision of his nephew with circumcisions in Russia. After describing the Western circumcision, he writes: "Today when I heard the moule's assistant say the grace after meals and those present, aside from the two grandfathers, spent the time in dreams or boredom with a complete lack of understanding of the prayer, I saw Western European Judaism before me in a transition whose end is clearly unpredictable and about which those most closely affected are not concerned, but like all people truly in transition, bear what is imposed upon them. It is so indisputable that these religious forms which have reached their final end have merely a historical character, even as they are practised today, that only a short time was needed this very morning to interest the people present in the obsolete custom of circumcision and its half-sung prayers by describing it to them as something out of history."[23] In contrast to the alienation from tradition on the part of the Western Jews, who in their gestures simply "bear what is imposed upon them," Kafka demonstrates the community consciousness of Russian Jews by describing in detail (probably from a conversation with Löwy) the

20. Kafka, *Diaries*, *op. cit.*, pp. 64-65.

21. Baioni, *op. cit.*, pp. 103-104.

22. Baioni writes: "Before most German Expressionists, Kafka had already made use of gestures in his early text "Description of a Struggle" to portray the explosive inner desires and neuroses of his protagonists. In the movements of these two figures in caftans (who, as Max Brod observed, are also the first incarnation of the land surveyor's assistants in *The Castle*), he no doubt found a parallel to the protagonists' wild gestures in his own first story." Baioni, *op. cit.*, p. 103. For a further discussion of the relation between Yiddish theater and gesture in Kafka's work, see Beck, *op. cit.*, pp. 4-5, 8, 27-28, 43. For other descriptions of the role of gesture in Kafka's work, see Deleuze and Guattari, *Kafka: Toward a Minor Literature*, tr. Dana Polan (Minneapolis: University of Minnesota Press, 1986), pp. 3-9 and Walter Benjamin, *Illuminations*, tr. Harry Zohn (New York: Schocken Books, 1968), p. 120.

23. Kafka, *Diaries*, *op. cit.*, pp. 147-148 (December 24, 1911). Cf. also *Tagebücher*, eds. Hans-Gerd Koch, Michael Müller, and Malcolm Pasley (New York: Schocken, 1990), pp. 311-312.

various customs surrounding birth and circumcision in Russia: the tablets covered with cabalistic symbols and the constant presence of children around the mother between the time of birth and the circumcision in order to protect against evil spirits, the all night vigil held with the mother before the day of the circumcision, and the presence of over 100 friends and relatives at the circumcision. After this description of Eastern European customs, Kafka locates the peculiarity of Judaism, and of Russian Jews in particular, in their community life: "so it is even more peculiar to the Jews that they come together at every possible opportunity, whether to pray or to study or to discuss divine matters or to eat holiday meals whose basis is usually a religious one and at which alcohol is drunk only very moderately. They flee to one another, so to speak."[24] On the side of the Western Jews, Kafka describes a loss of tradition which leads to a degeneration of gestures into empty formulas (both in the case of Birnbaum' speech and the Western circumcision), bereft of the vitality which guarantees their meaning and continuation. On the side of the Eastern Jews, Kafka describes active religious rituals and a community consciousness.

From the perspective of Eastern Judaism, the Western Jewish loss of tradition is regarded with contempt. This contempt is directed not only at completely assimilated Jews, but even at Jews who wish to regain their lost traditions. In his description of the second of a series of discussion meetings held by the "Jüdischer Volksverein" in order to increase understanding between Eastern and Western Jews, Kafka notes: "The Eastern Jews' contempt for the Jews here. Justification for this contempt. The way the Eastern Jews know the reason for their contempt, but the Western Jews do not. For example, the appalling notions, beyond all ridicule, by which Mother tries to comprehend them. Even Max, the inadequacy and feebleness of his speech, unbuttoning and buttoning his jacket. And after all, he is full of the best good will. In contrast a certain Wiesenfeld, buttoned into a shabby little jacket, a collar that it would have been impossible to make filthier worn as his holiday best, braying yes and no, yes and no. A diabolically unpleasant smile around his mouth, wrinkles in his young face, wild and embarrassed movements of his arms. But the best one is a little fellow, a walking argument, with a sharp voice impossible to modulate, one hand in his pocket, boring towards the listeners with the other, constantly asking questions and immediately proving what he sets out to prove. Canary voice. Tosses his head. I, as if made of wood, a clothes-rack pushed into the middle of the room. And yet

24. Kafka, *Diaries*, *op. cit.*, p. 152 (December 25, 1911), translation modified.

hope."[25] This passage depicts the composite range of gestures in "In the Penal Colony." First, there is the vitality of the Eastern Jews, which Kafka depicts not as a perspective or argument but only as a feeling. In the story, such an active community is only present as an image of a lost past in the officer's descriptions and the antics of the soldier and the condemned man, resembling the actors in caftans of the Yiddish theater. Afterwards, Kafka describes the two basic types of gestures which express the Western Jewish attitude toward the Eastern Jewish community spirit: on the one hand, the "little fellow, a walking argument" who presents an uncomprehending argumentative rejection of Eastern Judaism; on the other, Brod's impotent and embarrassed attempt to understand Eastern Judaism, embodied in the helpless gesture of buttoning and unbuttoning his jacket. The liberal, Western position based on argument is the position of the voyager who cannot comprehend the perspective of the officer. The officer's attempt to describe the apparatus and thus enter into a theoretical debate, like Brod demonstrating "the best good will," is also unable to prevent the demise of the apparatus.

Kafka's description of himself as "made of wood, a clothes-rack pushed into the middle of the room" locates his own position within this tableau as one who is as unable to participate in Eastern Jewish culture as he is critical of Western Jewish culture. Even his own plan for a "minor literature" rooted in community involvement, which he sketches in the same set of diary entries as the description of the circumcisions,[26] becomes an intellectual exercise alienated from any true community life. After writing an outline of the characteristics of a minor literature, he notes: "How weak this picture is. An incoherent assumption is thrust like a board between the actual feeling and the comparative description."[27] Like Kafka's body, thrust into the middle of the room and paralyzed by the estrangement of Eastern form Western Jewish culture, the board which separates the "genuine feeling" from the "comparative description" is a manifestation of a fundamental contradiction between the two perspectives.

Kafka's work is marked by a conflict between his hope, resulting in a search for ways to break down this barrier, and his despair over the

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25. Kafka, *Diaries*, *op. cit.*, p. 332 (March 11, 1915).

26. For an extended discussion of Kafka's plan for a minor literature, see Gilles Deleuze and Felix Guattari, *op cit.*, pp. 16-27.

27. Kafka, *Diaries*, *op. cit.*, p. 155, translation modified. This passage is located in the wrong position in this edition. In Kafka's original notebooks, this passage appeared directly underneath the "character sketch of the literature of small peoples." See Kafka, *Tagebücher*, *op. cit.*, p. 325.

immutability of the barrier. He first attempts to dissolve the barrier in his engagement with Yiddish theater and language. As part of this project, he organized an evening of dramatic readings by Löwy for the Bar Kochba Society, taking care of everything from conferring with the members to drafting the program, setting up the stage, numbering the seats, selling the tickets, and, finally, writing and presenting the "Introductory Talk on the Yiddish Language" which preceded Löwy's performance.[28] He sought to convince his Western audience that even though "no explanation on the spur of the moment can be of any help to you" there are nevertheless "active in yourselves forces and associations with forces that enable you to understand Yiddish intuitively."[29] The entrance into the Yiddish language is also an intuitive communion with an Eastern European Jewish culture. The primary obstacle to this intuition is fear. For, as Kafka notes in his opening remarks, "many of you are so frightened of Yiddish that one can almost see it in your faces."[30] But just as Kafka differentiates between two types of gestures, he also describes two types of fear. While fear of the Yiddish language prevents an intuition of it, "once Yiddish has taken hold of you and moved you . . . you will come to feel the true unity of Yiddish, and so strongly that it will frighten you, yet it will no longer be fear of Yiddish but of yourselves. You would not be capable of bearing this fear on its own, but Yiddish instantly gives you, besides, a self-confidence that can stand up to this fear and is even stronger than it is."[31] The counterpart to the Western fear of the Yiddish language is the Eastern fear of oneself, stemming from the experience of the power of inner "forces" which also create self-confidence. Thus even the Eastern European unity with the gesture is not without contradiction, but is predicated upon an intuition of the frightening power of forces already in oneself. Though this fear is based on a certain self-alienation, i.e., a sensation of forces over which one has no control, the direct intuition, rather than the abstract knowledge, of such forces, is the prerequisite for a communion with them.

Kafka realizes that even a possible participation in this power can only be short-lived and is limited by the fundamental estrangement of Western Judaism from an active cultural tradition. "Enjoy this self-confidence as much as you can! but then, when it fades out, tomorrow and later — for how could it last, fed only on the memory of a single evening's recitations!

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28. Kafka, *Diaries*, *op. cit.*, pp. 180-181.
29. *Reading Kafka*, *op. cit.*, pp. 265-266.
30. Kafka, "Talk on the Yiddish Language," *op. cit.*, p. 263.
31. *Ibid.*, p. 266

— then my wish for you is that you may also have forgotten the fear. For we did not set out to punish you."[32] The participation in the forces which underlie the self depends on the communal repetition of an aesthetic experience which defines the individual's relation to his own body. This aesthetic experience must be regularly repeated in order to prevent the memory from fading. The issue for Kafka here as well as in "In the Penal Colony," is consequently not so much punishment as aesthetic ritual.

Irreconcilable Differences

"In the Penal Colony" depicts the impossibility of ever transcending the barrier between the "genuine feeling" of the officer's organic community and the distanced perspective which presupposes any "comparative description," such as that of the voyager. Kafka constructs the characteristics of the apparatus in such a way as to make it completely unacceptable to a liberal, Enlightenment perspective. As a result, the story reenacts the unbridgeable gap Kafka perceives between his own Western Jewish perspective and the peculiarity of Eastern Judaism. If the "Introductory Talk on the Yiddish Language" was not a form of punishment but an attempt to mediate, if only for a brief moment, the peculiarity of Yiddish to a Western Jewish audience, "In the Penal Colony" depicts the impossibility of such a mediation by counterposing two incompatible modes of punishment, corresponding to the two modes of gesture Kafka describes in his diaries. In contrast to his earlier engagement for the Yiddish theater in 1912 and the beginning of a sense of "hope" in spite of differences at the Western and Eastern evening in 1915 mentioned above, "In der Strafkolonie" presents in the fate of the apparatus an intractable conflict between the primitive Eastern Jewish culture of the officer and the civilized Western Jewish culture of the voyager.[33]

The total lack of communication between the two perspectives determines Kafka's construction of the apparatus as something which would be completely unacceptable to a Western, liberal perspective.

The voyager sees primitive culture as barbaric, and most readers

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32. *Ibid.*

33. Brod dates Kafka's view that the Western and the Eastern aspects of Judaism were incompatible to the period preceding the writing of "In the Penal Colony." Kafka's insistence on his own Western Jewish separation from the community spirit of Eastern Judaism even leads in 1913 to the only serious quarrel between the two during their long friendship. Brod saw this as a result of their differing ideas as to whether Western Jewish individualistic attitudes might be reconciled with an Eastern Jewish community spirit. Brod, *Kafka*, *op. cit.*, pp. 112-113.

share this judgment because a prejudice toward the position of the voyager is built into the structure of the text. Though the story consists of a clash between two different understandings of justice, the narrative encourages an identification of the reader with the voyager and creates a bias against the justice of the officer — this bias itself being an enactment of the difficulties of a primitive culture attempting to defend itself against the universalizing tendencies of a liberal perspective. Yet, rather than uncritically articulating this latter perspective, the narrative eventually turns against the voyager by demonstrating that his position of objectivity and neutrality is in fact an impossibility. The voyager's claim to neutrality functions as a cover for the spread of a liberal ideology based on justice as written law and a defense of individual rights over community identity.

The story articulates this critique of liberal ideology by encouraging the reader's initial identification with the voyager's perspective in order to focus on this identification later on. This identification is established when the officer explains the apparatus while the voyager, essentially in the same position as the reader, is simply a passive observer. The narrator reinforces this passivity by noting that "[i]t seemed to have been no more than politeness that had prompted the voyager to accept the invitation of the Commandant, who had suggested that he witness the execution of a soldier. . ." (127). The narrator makes repeated references to the voyager's lack of interest, but the voyager's passive attitude is soon dispelled when the officer explains the mechanical functioning of the apparatus. The voyager's growing interest in the apparatus is connected to the description of it and its functioning, and the reader's interest is also focused on these technical aspects. But as much as this initial interest seems to be an objective reaction, this understanding of the apparatus already prefigures a particular interpretation of the execution which reduces it to a physical process separate from any judgment.

The distinction between this interpretation and the officer's perspective only becomes clear through a series of misunderstandings on the part of the voyager and explanations on the part of the officer. Throughout this process, the reader's attention is focused on the explanations of the officer. But the voyager's questions reinforce the identification of the reader with the voyager and his perspective. As a consequence, the reader is apt to follow the voyager who, "conditioned by European ways of thought," (142) only sees the divergences of the apparatus from his own idea of justice and is unable to appreciate its peculiar logic.

The first point of misunderstanding demonstrates both the difference between the two perspectives on justice and the inability of the voyager to

appreciate the officer's perspective. When the officer explains that "it is to the harrow that the actual carrying out of the sentence belongs," (131) the voyager, not understanding that the process of judgment and execution are inseparable, asks about the pronouncement of the judgment which for him must occur before the execution: "And what in fact is the sentence?" (131). The officer, in his turn, because he does not recognize the validity of a judgment separate from its execution — a content separate from a form — misinterprets the voyager's question as about "the form that our sentencing takes. . . " (131). Accordingly, the officer responds "Our sentence does not sound severe. The condemned man has the commandment that he has transgressed inscribed on his body with the harrow" (131). It is only as an afterthought that the officer unwittingly answers the voyager's question by telling him the law the prisoner had broken: "'This condemned man, for instance' — the officer indicated the man — 'will have inscribed on his body; Honour thy superiors!'" (131). The misunderstanding continues, however, as the voyager, interested in the fate of the prisoner, questions further: "Does he know his sentence?"(131). The voyager understands justice conceptually; and his expectation is that the prisoner has had the opportunity to know and understand the judgment against him. When the officer answers "No," the voyager reacts with surprise, repeating his question again. "He doesn't know his own sentence?" (131).

The voyager also expects that the prisoner has had the opportunity to present a spoken defense and asks: "Do you mean that the man still doesn't know how his defence was received?" (132). When the officer responds that the prisoner was not given the opportunity to present a spoken defense, the voyager does not attempt to understand the perspective but is immediately outraged by the officer's responses because they do not conform to his understanding of justice: "'But he must have had the opportunity to defend himself,' said the voyager, and rose from his seat" (132). For his part, the officer is equally mystified by the voyager's questions. On hearing the first question, "he paused for a moment as if expecting the voyager to give some reason for his question. . . " (132). He answers the next question, "smiling at the voyager as if expecting to hear further strange communications from him" (132). Finally, the officer answers the voyager's last question, "looking in another direction, as if he were talking to himself and wished to spare the voyager the embarrassment of being told such self-evident things" (132).

Unlike the voyager, who insists on the prisoner's intellectual knowledge of the judgment, the officer is concerned with its form, the execution,

which mediates a direct experience of the law. When the voyager is surprised to hear that the prisoner has not heard the judgment against him, the officer responds that such a pronouncement would be senseless. "There would be no point in announcing it to him. You see, he gets to know it in the flesh" (132). While the voyager insists on the importance of discourse and debate, the officer emphasizes the primacy of bodily experience.

Though the officer is as convinced as the voyager of the obviousness of his own position, the earlier identification of the perspective of the voyager with that of the reader, coupled with the narrative's casting of the voyager in the role of inquisitor and the officer in that of an accused respondent, biases the reader in favor of the obviousness of the voyager's position. The narrator's alignment of the voyager's perspective with the reader's insures that both will regard the matter-of-factness of the officer's answers not as a sign of the coherence of his ideas but of "this officer's limited understanding" (133).

The two perspectives are incommensurable. Yet this predicament is understood by the voyager and the reader as a sign of the barbarity of the officer's system of justice. From a position of neutrality, the voyager now moves to a position of interest and even intervention. He struggles to maintain his former position. He realizes that any action against the officer's legal system would be on the part of a foreign power with no right to intervene in the colony's affairs. But despite his resolve to remain neutral, he cannot help condemn the apparatus' injustice and inhumanity (138). The mere fact of his observation of the apparatus has led him to the position of a judge who condemns the officer's understanding of law.

Until the very last description of the officer in the story, the narrator has forced the reader to adopt the perspective of the voyager in order to judge the officer. Thus this last description is still framed by the thoughts of the voyager: "In doing so he caught sight, almost against his will, of the face of the corpse. It was as it had been in life; no sign of the promised deliverance could be detected; what all the others had found in the machine, the officer had not found; his lips were pressed firmly together, his eyes were open and had the expression of life, their look was calm and convinced, through his forehead went the point of the great iron spike" (152). After this description introduced by voyager, the narrator makes a radical shift. Instead of ending the story here, Kafka inserted a blank space with three asterisks indicating a break in the narration. After the break, the narrator continues the story without the officer: "As the voyager, with the soldier and the condemned man behind him, reached the

first houses of the colony the soldier pointed to one of them and said: 'Here is the tea-house'" (152).

The continuation of the story after the officer's death and his consequent disappearance as an object of judgment forces the reader to focus on the voyager. This redirection of the narrative undermines the possibility of a neutral perspective. Yet, because the reader has been carefully manipulated into adopting the voyager's perspective as if it were neutral, the reader is now at a loss concerning the new perspective. With the focus on the voyager, the reader is suddenly faced with the prospect that the voyager was not in fact a passive observer but also a protagonist. At this point, the reader must consider the voyager's perspective and begin to judge it rather than assume it, while reconsidering the perspective of the officer in order to determine to what extent it has been obscured by the voyager's prejudices.

The focus on the voyager at the end of the story, in pointing out that his system of justice has now been generalized and is the only remaining one in the colony, reveals that the story was about a conflict between two systems of justice rather than an objective depiction of the apparatus. What the reader had previously taken to be the objective perspective from which to observe the apparatus now turns out to be one of the biased opponents. Each of the two competing systems of justice has its own interpretation of the apparatus and its own form of execution.

Modernism and Myth

Though the text ends with a critical attitude toward the voyager, interpretations of the story have generally joined the voyager in condemning the apparatus, not only because of the narrator's careful orchestration of the reader's responses to the officer, but also because the readers have all shared a liberal perspective from which the officer's justice must be condemned for its violence and arbitrariness.[34]

Before uncritically condemning the officer, however, it is necessary to understand the logic of his position. Walter Sokel describes this logic by presenting the officer's justice as an example of modern irrationalism. He lists the ideas presupposed by the officer's system of justice — sacrifice, the importance of the mythic over the material, the centrality of

34. Though Heinz Politzer recognizes the critique of the voyager in the ending, his only comment is that the voyager may not be sufficiently committed to his Enlightenment principles and does not condemn the apparatus emphatically enough. See Heinz Politzer, *Franz Kafka: Parable and Paradox* (Ithaca: Cornell University Press, 1962), pp. 110-111.

death and pain, the connection between truth and experience — and places them under the rubric of fascism.[35] While he provides a relatively accurate list, his equation of these ideas with fascism obscures what is at stake. Although fascists used them, these ideas were also current in anarchist groups such as the Bar Kochba Society, and Kafka takes up the basic tenets of this anarchist primitivism in order to criticize the justice based on the voyager's written law. The officer's justice presents a *desideratum* within turn-of-the-century German legal theory in which the source of justice lies not in laws or decrees imposed by the state but in the community's beliefs and traditions.[36] Like the officer's justice which emphasizes the mythic over the material and the connection between truth and experience, Kafka's prose attempts to create a link between law and myth, truth and experience. He does so by dissolving the distinction between the real and the fantastic.

As Tzvetan Todorov notes, the strict separation of the real and the fantastic is not typical of 20th century modernist texts but of a 19th century structure of thought resulting from a positivist worldview in which the fantastic and the metaphysical are sharply differentiated from the real.[37] Todorov distinguishes between the 19th century literature of the fantastic, which presupposes the matter/mind opposition, and myth, in which this opposition is unknown.[38] He then points to Kafka as an example of a 20th century prose in which "[w]ords have gained an autonomy which things have lost,"[39] resulting in a similar collapsing of

35. Walter H. Sokel, *Franz Kafka: Tragik und Ironie: Zur Struktur seiner Kunst*, (Frankfurt am Main: Fischer, 1976), p. 128, "Most of the elements which characterize the penal colony can be counted among the implements of modern irrationalism: the glorification of sacrificial death as the fulfillment of life; the nostalgic enthusiasm for a social structure in which not the useful (harbor works), but ritual and cult are at the center of community life; the idea of limit situations, the discovery of true existence at the edge of the abyss and of death; the veneration of physical pain on the basis of its presentation of the purest truth, i.e. pure experience, and the equation of truth with experience expressed in this view of pain. The system of punishment anticipates precisely the singular combination of sophistication, brutality and solemn idealism with which National Socialism and Fascism were able to fascinate a portion of the European intelligentsia."

36. One of the most important legal theorists defending this position was Karl Binding. He writes for example: "All objective law is a declaration of the communal will that a specific conception of directed life conduct should become a binding rule," Karl Binding, *Grundriß des deutschen Strafrechts, Allgemeiner Teil*, 8th edition (Leipzig, 1913; reprint Aalen: Scientia, 1975), p. 67.

37. Tzvetan Todorov, *The Fantastic: A Structural Approach to a Literary Genre*, trans. by Richard Howard (Cleveland and London: Case Western Reserve University Press, 1973), pp. 73-74.

38. *Ibid.*, p. 116.

39. *Ibid.*, p. 168.

the boundary between the fantastic and the real.[40] "The 'normal' man is precisely the fantastic being; the fantastic becomes the rule, not the exception. . . . Here in a word is the difference between the fantastic tale in its classic version and Kafka's narratives: *what in the first world was an exception here becomes the rule.*"[41] Though Todorov does not explicitly make this connection, one can infer from his discussion that the structure of Kafka's prose is similar to the structure of myth. When the fantastic has become the rule, as in Kafka, the same ignorance of the differentiation between matter and mind, literal and symbolic, dominates.[42] In both cases, the real and the fantastic exist on the same plane and are treated similarly.

The two elements which define Kafka's prose are 1) the dissolution of the distinction between the real and the fantastic (or metaphysical) and 2) the connection between truth and experience. Kafka's prose thus shares the formal characteristics of the apparatus' system of justice in which the pronouncement of the law and the execution of the prisoner are combined in the single aesthetic event staged by the apparatus. In both cases a metaphysical idea cannot be separated from its material expression. While the elements of Kafka's narrative cannot be distinguished from the truth of the narrative, in the case of the apparatus there is no distinction between the everyday world of experience and the truth of law. Both the apparatus and the narrative create the metaphysical as an enactment and a performance in which experience and truth coincide.[43]

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40. *Ibid.*, p. 171.

41. *Ibid,*. pp. 173-174.

42. Though this reading of Kafka's story as a form of myth recalls arguments made in earlier religious readings by Erwin R. Steinberg, for example, the present reading is different in that it is based on an understanding of myth which sees it as a story in which the real and the fantastic are not distinguished. Consequently, here myth is a performance with an inherent exemplary meaning. By contrast, in the religious reading the elements of the story symbolize different religious figures, and the text as a whole functions as a religious allegory. Thus in Steinberg's interpretation of the two Commandants, the old Commandant is the God of the Old Testament while the new Commandant is the God of the New Testament. See Erwin R. Steinberg, "Die zwei Kommandanten in Kafkas 'In der Strafkolonie'," in Maria Luise Caputo-Mayr, ed., *Franz Kafka: Eine Aufsatzsammlung nach einem Symposium in Philadelphia* (Berlin: Agora, 1978). See also Austin Warren, "The Penal Colony," in Angel Flores, ed., *The Kafka Problem* (New York: New Directions, 1946), pp. 140-2.

43. Adorno describes this mythic aspect of Kafka's prose as a union of the literalness of the text (whereby every word can only be taken for what it is and nothing more) with a *déjà vu* effect, by means of which the text refers to experiences outside the text. See Theodor W. Adorno, "Notes on Kafka," in *Prisms* (Cambridge, Mass.: The MIT Press, 1981), pp. 246-248.

Law as Writing vs. Law as Art

As opposed to this mythic approach, in which the material and the spiritual co-exist within a single dimension of experience, the voyager's understanding of law separates the ideal law from its mundane execution. He separates the horrifying mechanical functioning of the apparatus from the creation of justice, execution from the law, the physical from the metaphysical aspect. This separation allows the voyager to reject the physical aspect (the apparatus itself) and to keep the metaphysical aspect (justice) as an "objective" entity based on rational, humanitarian justifications rather than on the functioning of the apparatus.[44]

Critiques of the apparatus which condemn it for its collapsing of signifier and signified begin with this understanding of law and consequently overlook the specifically mythic understanding of law underlying the apparatus' justice. Thus for Clayton Koelb, the function of the apparatus is to inscribe the text of the law onto the prisoner's body. Because the connection between signifier and signified is considered arbitrary, the functioning of the apparatus is interpreted as a depiction of the catastrophic consequences of an attempt to force a particular textual meaning onto the psyche of a reader.[45] Koelb's equation of law with writing ends by destroying the concept of law altogether. Posing as a mediator of justice, the apparatus is actually the instrument of a violent and arbitrary paternal

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44. Just as the voyager in the story distinguishes the actual process of execution from the ideal of justice, in Politizer's model parable is characterized by an allegorical structure in which the natural and the supernatural are distinct. Like the voyager, Politzer presupposes a clear differentiation between natural and supernatural reality, characterizing Kafka's texts as a set of parables in which the link between the natural and the supernatural has been cut and the allegory has no obvious meaning. (Politzer, *op. cit.*, p. 98) For Politzer, Kafka's stories are parables without a commonly accepted belief system to which they might refer. Thus the meaning of these parables becomes ambiguous. (21-22) Rather than relating a literal to a symbolic meaning, only the former is present. In the end, however, Politzer reads "In the Penal Colony" as a parable about the unattainability of metaphysical truth.Yet in the story the officer explicitly outlines the specific parameters within which a metaphysical meaning can be articulated within the execution process. Politzer fails to see this model for metaphysical truth because of his own bias against the apparatus, "a relic from the times of primordial savagery," (p. 107) and against the metaphysical, considering it also a relic of an earlier stage of civilization where religion played a larger role.

45. Clayton Koelb, "'In der Strafkolonie': Kafka and the Scene of Reading," in *German Quarterly* Vol. 55, No. 4 (November 1982), pp. 513-514. For a similar reading of the apparatus as a writing machine, see Arnold Weinstein, "Kafka's Writing Machine: Metamorphosis in the Penal Colony," in Ruth V. Gross, ed., *Critical Essays on Franz Kafka* (Boston: G.K. Hall & Co., 1990), p. 124. This essay was originally published in *Studies in Twentieth Century Literature,* Vol. 7, No. 1 (Fall 1982).

authority, and all justice is an alibi for power and the use of brute force.[46]

Likewise, Deleuze and Guattari argue that "where one believed there was the law, there is in fact desire and desire alone. Justice is desire and not law."[47] Arguing against the separation of a transcendent law from an immanent reality, they excise law from justice, leaving only "the real, immanent problems of desire and of power — the real problem of justice."[48] In their critique of the separation of meaning into a transcendent law and immanent reality, they do not try to reintegrate the two but rather make the separation permanent by discarding transcendence in order to end up with the immanence of desire which replaces both law and justice. Basing their interpretation of "In the Penal Colony" on their reading of *The Trial*, they do not differentiate between the justice presented in these two works and understand justice in both texts as another word for the power of bureaucratic systems which permeate reality through a continuous machinery of desire.[49]

Because they understand the forces of bureaucratization as unstoppable and all-encompassing, Deleuze and Guattari are forced into the extreme position of denying the very possibility either of law or any social alternative to these forces. Their only alternative is a "schizo-desire" which flees all formulations and all forms in order "to find a world of pure intensities where all forms come undone, as do all the significations, signifiers, signifieds, to the benefit of an unformed matter of deterritorialized flux, of non-signifying signs."[50] By reducing the experience of desire and, by extension, pain into pure intensity rather than the expression of a certain constellation of forces, this interpretation presents psychological regression as a solution to bureaucratization. As a result, their description of Kafka's writing distorts it into something which more closely resembles the aesthetics of pure intensity and the machine-man of Ernst Jünger than the dynamics of law and desire developed in Kafka's texts.[51] The equation of justice with desire

46. *Ibid.*, pp. 517-519. For another interpretation of the apparatus as an instrument of power without justification, see Richard Jayne, "Kafka's *In der Strafkolonie* and the Aporias of Textual Interpretation," in *Deutsche Vierteljahrsschrift für Literaturwissenschaft und Geistesgeschichte* Vol. 66, No. 1 (March 1992), p. 110.

47. Gilles Deleuze and Felix Guattari, *Kafka: Toward a Minor Literature*, trans. by Dana Polan (Minneapolis: University of Minnesota Press, 1986), p. 49.

48. *Ibid.*, p. 50.

49. *Ibid.*, pp. 11-12.

50. *Ibid.*, pp. 12-13.

51. For an excellent description of the machine-man in Jünger's prose and a comparison with Kafka, see Andreas Huyssen, "Fortifying the Heart — Totally: Ernst Jünger's Armored Texts" in *New German Critique* 59 (Spring/Summer 1993), pp. 3-24.

is a rejection of the idea of law as connected with pain and, as such, a narcissistic denial of the existence of the necessities which limit desire. Against this reading of justice as a continuum of desire, "In the Penal Colony" presents an alternative to the bureaucratic machinery which justice has become in *The Trial*. In this alternative, the law is not unreachable and unknowable but rather conforms to the limits on desire imposed by external necessities and mediated through the community.[52] The function of the apparatus is to mediate law with experience.[53]

The Spirit of the Law

As gestures the two executions are opposed to each other in the same way that the anarchistic gesture of Eastern Judaism is opposed to the alienated gesture of Western Judaism. The first execution, described from the officer's local perspective, does not take place in actuality but only as a desired possibility. The second execution, conducted from the perspective of the voyager's universalist liberal culture, is carried out on the officer as

52. Deleuze and Guattari insist on the parallel between the apparatus in "In the Penal Colony" and the court system of *The Trial* in which both are seen as machines. The apparatus' obvious modern technical complexity leads them to call it a "too transcendental, too isolated and reified, and too abstract machine." Deleuze and Guattari, *op. cit.*, pp. 39-40. See also Norris *op. cit.*, pp. 175-176. Yet the origins of the apparatus in a technological age say nothing about its practical relation to the system of morals of which it is a part. As Nietzsche notes: "The origin of the existence of a thing and its final utility, its practical application and incorporation in a system of ends, are *toto coelo* opposed to each other — everything, anything, which exists and which prevails anywhere, will always be put to new purposes by a force superior to itself, will be commandeered afresh, will be turned and transformed to new uses." Friedrich Nietzsche, *The Genealogy of Morals: A Polemic*, tr. Horace B. Samuel (New York: Russell & Russell, Inc., 1964), p. 89. The origin of the procedure of punishment is separate from the purpose to which this procedure is later put. Thus the apparatus' origin in a technical age says nothing about the mythic use it serves. For a discussion of the importance of *The Genealogy of Morals* for Kafka, see Patrick Brigadier, *Kafka and Nietzsche* (Bonn: Bouvier, 1974), pp. 41-46; and Norris, *op. cit.*, pp. 171-174.

53. In addition to denying the validity of the supernatural and of law, linguistic readings of the apparatus criticize the relation between writing and experience, mistakenly attributing to the apparatus an understanding of law based on writing. For Corngold, the function of "In the Penal Colony" is to discredit the connection between writing and experience, and he condemns the apparatus because it writes the judgment using the experience of pain. Stanley Corngold, *Franz Kafka: The Necessity of Form* (Ithaca: Cornell University Press, 1988), pp. 245-247. Corngold's conclusions about the incompatibility of writing and experience are in fact an apt criticism of the voyager's discursive justice, but not of justice based on the aesthetic experience of the apparatus. But because Corngold equates law with writing, he overlooks the difference between the justice of the voyager and the justice of the apparatus. He extends the idea of an alienation of writing from experience to the conclusion that law itself must also always be alienated from experience as well.

a result of the voyager's judgment. The voyager's condemnation of the apparatus leads to the execution of the officer, but since this execution is not ordered by the officer but by the voyager, it does not proceed according to the justice of the former but of the latter.[54] While the officer considers law a result of an aesthetic event which links it to individual experience, the voyager considers law a written code imposed by a legislative apparatus.

Though Koelb, Deleuze and Guattari present an effective critique of the voyager's understanding of law, which reduces it to the written word, their failure to distinguish the two systems of justice leads them to direct their critique against the apparatus rather than the voyager. Unable to appreciate the apparatus' peculiar creation of law through aesthetic experience, they condemn the apparatus' system of justice on the basis of a critique of the sign which actually applies to the voyager's law. To avoid this error, it is necessary to distinguish carefully a discursive law from an aesthetically based law in order to recognize that the connection between law and individual experience is the crucial issue for all systems of justice.

An analysis of the text of the law provides an initial understanding of the inability of the text alone to transmit the law to the community. The old Commandant's first commandment, "Honour thy superiors" (131), emphasizes the sacred status of authority and refers to law as a necessity. Yet, although subordinates are not to question the authority of a superior, this authority is also subject to law. The old Commandant's second commandment, "Be just" (148), governs the actions of superiors and also subjects them to the law. Though these two commandments construct a complete system of law based on individual responsibility in which there is one law for subordinates and another for superiors, the laws are also so general that their realization depends on the ability of each member to interpret the two constraints of honor and justice. As a result, the individual's interpretation of the spirit of the law is much more important than a faithful reconstruction of the actual text. Moreover, this individual understanding through actions of the spirit of the law is the source from which a written law ultimately gains its validity and legitimacy.[55]

The relative lack of importance of the text is reflected in the officer's

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54. In one of the alternate versions of the end of the story, the officer, speaking in the imagination of the voyager, explicitly states that the voyager ordered his execution: "'No,' said the officer, 'an error on your part, I have been executed, as you have commanded'." See Franz Kafka, *Tagebücher 1910-1923* (Frankfurt am Main: Fischer, 1973), p. 327 (August 6, 1917).

55. Binding also notes this primacy of just actions over written laws for the development of justice. Binding, *op. cit.*, p. 69.

description of the functioning of the apparatus. The transfiguration of the condemned is the climax. Yet this transfiguration does not result from the condemned man's successful decipherment of the judgment at the twelfth hour, the meeting of text and reader. The texts the apparatus inscribes are in fact indecipherable, and when the voyager looks at the text, "all he could see was a labyrinth of lines crossing and recrossing each other."(135). The indecipherability of the text leads to the conclusion that the intellectual cognition of the law is subordinate to the spiritual experience. The "arabesques" which make up the text of the law recall Kafka's description of Eastern Jewish prayers: "The words are not really, or chiefly, sung, but behind them arabesque-like melodies are heard that spin out of the words as fine as hairs."[56] Rather than the intellectual decipherment of the text, the goal of the process is the spiritual experience of transfiguration occurring in the sixth hour, when the condemned man realizes that his pain is structured as a text.[57]

The two forces determining the experience of transfiguration are desire and necessity. Desire is perceived as bodily desires such as hunger, necessity is felt as pain. The execution of justice corresponds to the consciousness of the meeting of these two forces. Thus, at the moment of transfiguration, the condemned man loses interest in his bodily desires, no longer finding pleasure in food, and realizes that material concerns such as pleasure and pain are less important than the spiritual issue of the pattern of his pain. "Not until the sixth hour does the man lose his pleasure in eating. At that point I usually kneel down here and observe this phenomenon.

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56. Kafka, *Diaries*, *op. cit.*, p. 59 (October 1, 1911).

57. Anderson also interprets the apparatus as the mediator of an aesthetic experience by focussing on "the embellishments," but without noting the relation to Eastern Jewish prayer. Anderson, "The Ornaments of Writing: 'In the Penal Colony'" in *Kafka's Clothes: Ornament and Aestheticism in the Habsburg "Fin de Siècle"* (Oxford: Clarendon, 1992), pp. 173-193. See also Koelb, *op. cit.*, p. 511 and Weinstein, *op. cit.*, p. 121. Instead, he reduces the "aesthetic context of the judgment" to "the embellishments" (Anderson, *op. cit.*, p. 175) covering the body of the condemned at the end of the execution process and at no point takes the officer's descriptions of the actual execution process at face value. Instead of focussing on the execution as an aesthetic event at the foundation of law, Anderson discusses how criminologists such as Cesare Lombroso and Hanns Gross made an "equation between tatoos and criminal types." (*Op. cit.*, p. 179) Though he points out that Hanns Cross was one of Kafka's teachers during law school, he argues that Kafka was opposed to Gross' views. (*Op. cit.*, p. 152). Yet he uses this argument not to arrive at Kafka's vision of law but to move the discussion of "In the Penal Colony" away from legal questions and toward aesthetic ones. Going on to read the apparatus' execution process as an allegorical depiction of "Kafka's own writing 'machine'" (*op. cit.*, p. 188), he does not pursue the issue of how law and aesthetic experience are intimately connected in the executions the officer describes.

The man rarely swallows the last morsel; he simply rolls it round in his mouth and spits it into the pit. I have to duck then, or he would spit it in my face. But how still the man grows at the sixth hour! Enlightenment dawns on the dullest. It begins around the eyes. From there it spreads out. A spectacle that might tempt one to lay oneself down under the harrow beside him. Nothing further happens, the man simply begins to decipher the script, he purses his lips as if he were listening"(136-7). In order to be able to read his experience, the condemned man must forget his pain as pure intensity in order to concentrate on it as a pattern. After this crucial moment, pain is no longer simply a bodily experience like desire; it becomes a spiritual experience in which the pattern of the pain can be read in order to reveal the law which has been broken. The structure of this pain, not the pure intensity, yields the verdict. The condemned man feels intensely the physical, yet goes beyond the physical as an isolated and arbitrary event in order to understand it as part of a structure of experience which is the basis for law. This moment in which the condemned man transcends the physical is the moment of transfiguration and already contains the essence of law.

This mythic construction of law and community must be strictly differentiated from "the perspective of today's Western culture" in which, as Hugo Bergmann continues, "God and the world are given once and for all and the world and the people in it are separate from God."[58] This Western concept of religion presents it as a gesture which has been alienated from its source. As opposed to the alienated gesture, Bergmann attempts to recover in Judaism a primitivist notion of myth which can reinvigorate the gesture and make it into an expression of human forces: "The Jewish understanding also separates God and the world, but it connects the fate of the world and the fate of God with each other in such a way that the world is not simply dependent upon God, but — and this is of central importance for our considerations — the fate of God depends upon the world. We will be able to best characterize the opposition between the contemporary view and the Jewish one by noting that the relation between God and world in the European view is static while in the Jewish view it is dynamic. According to the former view, God *is* and *is* the only God and *is* holy etc. The Jewish view considers God from the standpoint of the human, as the goal and task of

58. Bergmann, "Die Heiligung des Namens" in *Vom Judentum*, *op. cit.*, p. 33, my translation.

human life."[59] Like Kafka's differentiation between an alienated gesture based on fear of the Yiddish word and a dynamic gesture which puts the individual in touch with forces inside himself leading to both fear and self-confidence, Bergmann presents, in opposition to a civilized hypostasis of myth, a primitivist notion of myth as a dynamic construction grounded within the human. This differentiation lies at the basis of the conflict between the officer's and the voyager's conception of the apparatus.[60]

The correlation between the officer's description of transfiguration and Bergmann's view of a dynamic myth becomes clear when one considers Bergmann's own description of the moment of transcendence of the physical as the human act which creates the sacred: "God is the entity which receives a determination to action from out of itself. The life which confirms God is therefore one which pulls itself out of the tangle of conditions, cares and compromises, the unconditioned life. The consecration of the name of God thus becomes the imperative of a heroic life. For the Jew, the deepest proof of the reality of the transcendent (*des Übersinnlichen*) was the sacrifice of sensual being, the death of the witness, the martyr."[61] Like the experience of the condemned man in the apparatus, the

59. Bergmann, "Die Heiligung des Namens" in *Vom Judentum*, *op. cit.*, p. 33, my translation. Kafka's close relation to Bergmann's ideas is demonstrated by the following passage from Kafka's diaries in which Kafka convinces Bergmann that God does not precede the world: "So I remember that when I was at the Gymnasium I often — even if not very thoroughly, I probably tired easily even then — argued the existence of God with Bergmann in a talmudic style either my own or imitated from him. At the time I liked to begin with a theme I had found in a Christian magazine (I believe it was *Die Christliche Welt*) in which a watch and the world and the watchmaker and God were compared to one another, and the existence of the watchmaker was supposed to prove that of God. In my opinion I was able to refute this very well as far as Bergmann was concerned, even though this refutation was not firmly grounded in me and I had to piece it together for myself like a jigsaw puzzle before using it. Such a refutation once took place while we were walking around the Rathaus tower. I remember this clearly because once, years ago, we reminded each other of it." Kafka, *Diaries*, *op. cit.*, p. 159 (December 31, 1911). Kafka's argument that God does not make the world like the watchmaker makes the watch is the preparatory argument for Bergmann's view that God is as dependent on the world as the world is dependent on God. Kafka's continued engagement with and sympathy for Bergmann's ideas is demonstrated two years later: "Lecture by Bergmann 'Moses and the Present.' Pure impression. How this person has raised himself up, he has really a firm grip somewhere up above. And as a boy one could just blow him away, in everything, but perhaps not in everything and it was only my lack of understanding which thought so." Kafka, *Tagebücher*, *op. cit.*, p. 616 (December 17, 1913).

60. In proposing an opposition between two different conceptions of myth, I diverge from Margot Norris' reading in which she argues, following Deleuze and Guattari, that "Kafka restores physical, 'animal' pain to its real and incontestable 'truth' by de-moralizing, demythifying, and de-signifying it." Margot Norris, "Sadism and Masochism in 'In the Penal Colony' and 'A Hunger Artist'" in *Reading Kafka*, *op. cit.*, p. 181. Instead of demythification, Kafka presents a primitivist as opposed to a civilized interpretation of myth.

rejection of the sensual world and the sacrifice of the physical self is the precondition for the construction of transcendence. Kafka's own interest in martyrdom is documented, on the one hand, by his fascination, communicated in two letters to Felice Bauer, with the news of the beatification of 22 Ugandan martyrs,[62] and on the other, by the enthusiasm for sacrifice he communicates in another letter to Felice: "The *Memoirs* are meant neither to improve nor influence your way of thinking; that was not my intention. But this life really is worth sharing. How it longs to sacrifice itself, and does! A veritable suicide and a resurrection while still alive. And what is the sacrifice for? How many readers would be able to recognize a success that, taken out of the context of the book, could stand on its own legs? I am glad you are reading it."[63] Though according to Brod's notes the mention of the Memoirs probably refers to Lily Braunn's *Memoiren einer Sozialistin*, the element of sacrifice is also prominent in Malwida von Meysenbug's *Memoiren einer Idealistin*, in which Meysenbug presents an anarchist conception of religion similar to Bergmann's. Thus her description of her visits to comfort a young boy dying of gangrene provides a model for the transfiguration of the prisoner in the

61. Bergmann, in *Vom Judentum*, *op. cit.*, p. 42, my translation.

62. "For a long time now I have planned, and only my indolence has prevented me repeatedly from carrying it through, to cut out and collect from various papers news items that astonisched me for some reason, that affected me, that seemed important to me personally for a long time to come; at a glance, they were usually quite insignificant, for instance just recently 'The beatification of 22 Christian Negro youths in Uganda' — (which I have just come across and am enclosing). I find something of the kind in the papers nearly every other day. News which seems to be meant only for me, but I haven't got the patience to start the collection for myself, let alone keep it up." Kafka, *Letter to Felice Bauer*, November 24, 1912, in *Letters to Felice*, ed. Erich Heller and Jürgen Born, tr. James Stern and Elisabeth Duckworth (Schocken Books: New York, 1973), pp. 61, 171. The importance of this clipping for Kafka is underlined by the fact that he refers to it in another letter to Felice two months later on January 24/25, 1913: "Surely you couldn't have lost the clipping about the beatification of the 22 Negro youths from Uganda?" Kafka, *Letters to Felice*, *op. cit.*, p. 171. The text of the article from the *Prager Tagblatt* of September 25, 1912, reads as follows: "A decree issued on August 13 by the Congregation of Rites announces the opening of proceedings for the beatification of the so-called 'Ugandan Martyrs' — 22 Christian Negro youths who, 26 years ago, were the first to be martyred for the faith and suffered death at the stake. It was reported from the central office of the St. Peter Claver Sodality in Rome that the cardinals who had this matter under consideration had been moved to tears by the heroism of these young martyrs. The news of the opening of proceedings for the beatification was received by all Negroes, and in particular by those from North Victoria Nyanza, the home of the martyrs, with great rejoicing which they expressed by dancing and much leaping about." Reprinted in Kafka, *Letters to Felice*, *op. cit.*, p. 579.

63. Kafka, *Letters to Felice (*Berlin, May 6, 1915*)*, *op. cit.*, p. 454.

apparatus: "I went regularly to read to him from the Bible and connected this reading with considerations which were appropriate for his age and his understanding but which were anything but orthodox. I did not describe his suffering as something sent for his salvation; did not say to him that the crucifixion of a mediator had freed him from sins which his innocent heart did not know. Rather, I attempted to make clear to him the power and majesty of the spirit which, with the vision of eternal truth, can make one forget the most horrible suffering. Myself carried away by my task, I attempted to raise him to a state of ecstasy which could make his horrible death easier for him. I can still see in my memory the face of the poor child, a transfigured smile animating his pale lips and his large dark eyes glowing with an otherworldly light."[64] The similarity between the "transfigured smile" of the boy and "the transfigured look on the tortured face" (141) of the condemned man in the apparatus is unmistakable, not only in that both the boy and the prisoner experience an ecstasy in their pain and death but also in that the significance of their experience goes beyond their individual fates and profoundly affects their spectators as well, who are themselves "carried away."

These examples from Kafka's readings demonstrate the connection between the experience of the condemned man in the apparatus with the idea that sacrifice provides the foundation for an anarchist/primitivist conception of the world and culture. But Kafka also links the idea of sacrifice to law and punishment, in this case relying on Nietzsche's *The Genealogy of Morals*. For both Kafka and Nietzsche, the transcendence of the physical is not an abandonment of the realm of experience but rather an intense concentration on the hidden structures of this realm. To realize that there is a decipherable pattern in pain is to realize that experience follows certain structures which are not arbitrary. Certain actions lead to a specific and limited range of consequences; the relation between action and consequence can be seen as the basis of law. Because law is defined through the experience of pain, it must be reconstructed constantly, only becoming evident in the punishment which results from a transgression. Every instance of punishment of an individual is simultaneously a definition of the law, of the necessities which constrain the desires and freedom of the community.The connection between law and the necessities which affect the entire community is expressed in the idea of the doubtlessness of guilt: "Guilt is always beyond question. Other courts cannot follow this principle since they are composed of more than

64. Meysenbug, *Memoiren einer Idealistin*, *op. cit.*, p. 100, my translation.

one member, and furthermore they have higher courts above them" (132). The doubtlessness of guilt can only be applied within a small community in which external necessities are directly felt by all and there are no mediating agencies which take over the decision-making process. No one can escape guilt. All are subject to the necessity of pain.[65]

The first commandment of the old Commandant, "Honour thy superiors," refers to the necessity of pain. In honoring authority and superiors, the community collectively recognizes that pain is a result of external exigencies. The failure to honor superiors is a failure to recognize these external limitations on the desires of the community and would lead to actions threatening the community's survival. Seen in this way, the punishment of the condemned is a collective reenactment, a mimesis, of the punishment which threatens the entire group. If the transgression of an individual is not punished by the community and the law transgressed is based on external necessities which affect the group, then the community as a whole will eventually experience the punishment which the outside world will inflict. The punishment of the transgressor is not a simple execution but a sacrifice which the community must make in order to preserve itself.[66]

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65. There is a close correlation between this image of punishment and Niezsche's concept. Nietzsche writes that the effect of punishment was not to make people "better," nor to create a feeling of guilt or a bad conscience in its victims. (Nietzsche, *The Genealogy of Morals*, *op. cit.*, pp. 95-99) Rather than as an atonement for guilt, Nietzsche describes punishment as "an irresponsible piece of fate" which strikes the criminal just as a natural catastrophe strikes without warning or reason. (Nietzsche, *op. cit.*, p. 97) The reaction of the criminal to punishment is: "'here is something which went wrong contrary to my anticipation' not: 'I ought not to have done this.'" (Nietzsche, *op. cit.*, p. 98) Consequently, the practical effect of punishment on the community is its primary justification. Punishment is not imposed in order to create goodness or cure the criminal, but to effect a training of memory and the will whose goal is "the increase of fear, the sharpening of the sense of cunning, the mastery of the desires." (Nietzsche, *op. cit.*, p. 99) For Nietzsche, punishment serves to connect individual experience to external necessities.

66. This principle of community survival lies at the basis of his theory of norms. Summing up Binding's theory, Bar writes that the state, in deciding punishment, must determine "whether the evil resulting from no punishment is greater for the state than the evil of punishment; for punishment is also an evil, and not just for those directly affected." Carl Ludwig von Bar, *Geschichte des deutschen Strafrechts und der Strafrechtstheorien*, 1. (einziger) Band des Handbuchs des deutschen Strafrechts, Neudruck der Ausgabe Berlin 1882 mit Vorbemerkungen von Ludwig Schnorr von Carolsfeld (Aalen: Scientia Verlag, 1974), p. 308. According to Binding: "both the threat of punishment and the execution exist primarily to influence the entire community bound by the law and they can only maintain this influence to the extent that they create an impression on both the criminal and the collective, if possible, or only on the collective, if this double effect is not possible. For this latter effect is infinitely more significant and beneficial!" Binding, *op. cit.*, p. 15.

The commandment, "Be just," defines the responsibilities of authority. The justice of a particular law depends on the extent to which the punishment inflicted on the individual transgressor corresponds to the punishment which would be inflicted by external necessities on the group as a whole if the community were to allow the individual transgressor to go free. The execution process remains legitimate to the extent that the punishment it exacts corresponds directly to the pain which threatens the community as a whole. The task of making this determination in the colony rests not only with the officer but with all those in positions of authority. Like the officer, they must take responsibility for their decisions. If these decisions turn out to be unjust, then the superiors are subject to condemnation as well, as demonstrated by the fate of the officer.

The legitimation of authority occurs collectively in the execution, which must repeat the experience of each individual in order to retain its legitimacy. Consequently, "[s]o as to enable anyone to scrutinize the carrying out of the sentence, the harrow is made of glass. Getting the needles mounted in the glass presented certain technical problems, but after numerous experiments we managed it. No effort was spared, you understand. And now anyone can observe through the glass how the inscription on the body takes place" (134). Because the justice of an authority is carried out as a comparison of the judgment with the experience of the community, the inscription of the judgment must be accessible to everyone.[67] To the extent that the aesthetic experience is a repetition of the individual experience of each member of the community, the law is affirmed. The sentencing of the condemned does not occur at the whim of a supreme and arbitrary authority; it is legitimated by the entire valley of spectators. The community experiences justice through an act of collective sacrifice, and the guilt of the executioner, thanks to the apparatus, is shared by all.

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67. Thus Bar describes the communal judgment of actions as essential for the maintenance of morals within the community. Bar, *op. cit.*, p. 313. Similarly, Bergmann argues that the sacrifice of the material is the basis for moral actions: the sacred acts which create the divine. "For God is the goal of human striving. In every action in which we transform ourselves from a thing to an ego, from a conditioned creation to a free entity, in every moral action, we act like God, we realize the divine." Bergmann, *op. cit.*, p. 41, my translation.

Law as Collective Experience

Though they were initially created by the old Commandant, the commandments of the law must be reenacted continually as a collective aesthetic experience for them to be able to lead to the constitution of the colony as a distinct entity. The survival of the community as an integral totality is linked inextricably to its construction of justice through this experience. Thus the authority of the old Commandant is mediated through the community's participation in the execution.[68]

The officer describes this participation as a collective experience in which the inhabitants of the colony gather to witness the executions. "The day before the performance the entire valley was already crammed with people; everyone came along just to watch it. . . " (140). The purpose of the gatherings is to experience justice as something irreducible to a set of written laws. The execution of the law corresponds to an intangible spiritual experience. As the condemned died, "many even ceased to watch and lay with their eyes closed in the sand; all of them knew: Now justice is taking its course" (140). Rather than being defined once and for all according to universal principles, justice appears as a collective experience. It is something which "takes its course" and is connected intimately with the moment of transfiguration experienced by the tortured prisoner in the sixth hour: "Yes, and then came the sixth hour! It was impossible to grant every request to watch from close up. The Commandant in his wisdom decreed that the children should be given priority; of course I myself, by virtue of my office, could always be close at hand; often I would be squatting there with a small child in either arm. How we all drank in the transfigured look on the tortured face, how we bathed our cheeks in the glow of this justice, finally achieved and soon fading! O comrade, what times those were!" (140-1). The importance of this aesthetic experience for the constitution and maintenance of the community is underlined by the need to educate children into the experience of transfiguration. The grounding of justice in a shared aesthetic-religious experience constitutes the "peculiarity" not only of the apparatus but also of the community which has chosen the apparatus as a

68. Foucault shows that the success of executions in the 17th and 18th centuries in France depended upon the support of the crowd. "In the ceremonies of the public execution, the main character was the people, whose real and immediate presence was required for the performance." Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. by Alan Sheridan (New York: Vintage Books, Random House, 1979), p. 57.

basis for justice. Bar describes the religious element of punishment as grounded both in sacrifice and in the community's survival. On the one hand, the death penalty originates out of a religious sacrifice;[69] on the other, the original function of the religious sacrifice was to preserve the community.[70]

Similarly, the sacred texts of the apparatus — the old Commandant's designs for the laws to be inscribed on the condemned — are not the final works of art. Rather, the apparatus itself and the entire penal colony constructed by the execution are the works of art created by the aesthetic transfiguration. The inventor of the apparatus and the colony is the former Commandant: "'This apparatus,' he [the officer] said, taking hold of a connecting-rod and leaning on it, 'is an invention of our former Commandant . . . Well, I'm not exaggerating when I say that the organization of the whole penal colony is his work" (128). The status of the apparatus as an invention reflects its entwinement with the status of the entire colony as a work of art.

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69. "The religious element expresses itself very emphatically. Even the word *supplicium* — signifying punishment and especially the death penalty — is of sacred origin. It originally signified the sacrifice of atonement, a sacrifice combined with a plea for mercy, and derives from *sub* and *placare*, to placate, and, when a crime has been committed, special sacrifices of atonement are not seldom made in order to calm the anger of the gods. *Sacer* signifies the criminal who has been banished out of the association of gods and men and declared 'free as a a bird,' so that anyone who kills him/her accomplishes a deed which is pleasing to the gods." (Bar, *op. cit.*, pp. 5-6)

70. "The actions upon which the condition of *sacer* for the guilty is based are much more essentially connected with the interest of the family and the community." Bar, *op. cit.*, pp. 6-7. On this, Foucault writes: "An offence, according to the law of the classical age, quite apart from the damage it may produce, apart even from the rule that it breaks, offends the rectitude of those who abide by the law. . . Besides its immediate victim, the crime attacks the sovereign: it attacks him personally, since the law represents the will of the sovereign; it attacks him physically, since the force of the law is the force of the prince." Foucault, *op. cit.*, p. 47. As opposed to Bar and Binding, Foucault sees the crime as an offence against the prince rather than against the community. This replacement of the prince for the community may have to do with the specific history of state centralization in France creating a distance between the community and the law. Yet, Foucault's replacement turns law into an issue, not of justice, but of power and terror: "Yet, in fact, what had hitherto maintained this practice of torture was not an economy of example. . . , but a policy of terror: to make everyone aware, through the body of the criminal, of the unrestrained presence of the sovereign. The public execution did not re-establish justice; it reactivated power." Foucault, *op. cit.*, p. 49. Like Deleuze and Guattari, Foucault equates justice with arbitrary power and does not consider the possibility that the laws of the sovereign might be a result of external necessities which impose unavoidable restrictions on the entire community. In contrast, Kafka attempts to distinguish between these two manifestations of law.

The Dead Letter

Because the executions are carried out collectively, the functioning of the apparatus depends on the assent of the community supporting it. But by the same token, without the legitimacy lent to the justice of the apparatus by the collectivity, the officer loses the mandate for his authority and the execution becomes an arbitrary act.[71] It is, however, at this point — when the apparatus has lost its followers — that the story begins. The collective which supported the justice of the apparatus no longer exists and, as a result, the apparatus no longer functions smoothly but rather with the grinding noise of a defective gear (136).

In the face of this lack of community support, the officer submits to the voyager's condemnation. He frees the condemned man and places himself in the apparatus. "Be just" is to be inscribed on his body (148). But because the officer is being condemned by the voyager's new justice, the apparatus will no longer function according to the officer's expectations. Whereas the law of the old Commandant was accessible to and even dependent on individual experience, the new law brings with it an alienation of the individual from the authority which pronounces the judgments and a separation of judgment from execution. The process by which the officer is condemned resembles the experience of Joseph K. in *The Trial.* Instead of a direct condemnation by the entire community, the officer's condemnation by the new Commandant occurs by proxy, through the voyager and after a prolonged set of defenses which in the end are useless and are not even recognized by the voyager as having any relation to the final execution.

According to the voyager, justice is divided into two processes: the judgment and the execution. The judgment is not based on the individual experience of the condemned but on a process of debate during which the accused has an opportunity to mount a defense. Yet the terms of this defense block the connection between law and experience. The officer's defense is never considered by the voyager on its own terms because the translation of aesthetic experience into discursive formulations fails here just as Nathan Birnbaum's discursive defense of Eastern Judaism and

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71. Foucault notes the dependence of the execution on community support by describing both "successful" executions (Foucault, *op. cit.*, p. 58-9) and cases where the spectators prevented executions (Foucault, *op. cit.*, pp. 60-62). Whereas in Kafka's account the spectators provide a guarantee of the legitimacy of the judgment process, Foucault interprets the reaction of the spectators as either a submission to state authority or a rebellion against it.

Kafka's own explanation of the Yiddish language fail on a gestural level to create the spiritual community they can only describe.

The first part of the story consists primarily of the officer's explanations of the apparatus to the voyager. The officer's decision to explain first the apparatus and then demonstrate it is already a concession to the rational decision-making the voyager prefers. Yet this concession has been forced upon the officer by the new Commandant and by the loss of followers for the apparatus. It is the new Commandant who invited the voyager to witness the execution and subject it to his perspective. The new Commandant has also introduced public meetings of the administrators of the colony: "Tomorrow there's to be a great meeting of all the high administrative officials at the Commandant's headquarters, with the Commandant himself presiding" (144). These meetings now draw the spectators which earlier had thronged to the executions. Just as everyone present at the executions could "observe through the glass how the inscription on the body takes place" (134), the spectators at the meetings are allowed to observe discussions of the administrators of the colony: "Of course the Commandant has succeeded in turning all such meetings into public spectacles. He has had a gallery built that is always packed with spectators" (144). The old Commandant's execution and the new Commandant's public meetings are parallel events, suggesting that the new Commandant has attempted to reproduce on the rational level what was previously experienced as a spiritual transfiguration. But whereas the apparatus' execution was a collective experience which legitimized the law, the public meetings have the character of spectacles in which the community is alienated from the proceedings.[72]

This alienation is demonstrated by the separation of languages in the penal colony. Accompanying the voyager's attempts to overcome his lack of interest in the apparatus, the condemned man attempts to follow the officer's explanations, even though they are in French, a language which

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72. Foucault describes the increasing distance of the spectators from the executions in the 18th century as an increasing alienation which, though justified by "feelings of humanity for the condemned," separated justice from community legitimation. Foucault, *op. cit.*, p. 65. Carl Schmitt describes this transformation in law as a diminishment of the role of jurisprudence in the face of a 19th and 20th century rise of codes of law passed by legislators. See Carl Schmitt, "The Plight of European Jurisprudence," trans. by G. L. Ulmen, *Telos* 83 (Spring 1990), pp. 35-70. For a discussion of sources of law, see Friedrich Carl von Savigny, *System des heutigen Römischen Rechts* (Berlin: Veit & Comp., 1840), Vol. I, Chapters 2 and 3, pp. 13ff. Cited by Schmitt, p. 57. See also Friedrich Carl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg, 1840; reprint Hildesheim: Georg Olms Verlagsbuchhandlung, 1967), pp. 8-15.

the condemned soldier does not understand. The division between the voyager who understands but is initially uninterested and attempts to remain disinterested later on, and the condemned man who does not understand French, a bureaucratic and international language, but who has a deep interest in comprehension exemplifies the division on the level of language which seems to have taken place on the island between the administrators and the harbor workers and soldiers. Whereas the earlier functioning of the apparatus united all groups in a collective experience and the condemned man's attempts at reading his pain were a reading of his own experience, the introduction of public meetings (certainly in French) along with the increased commerce with the rest of the world brought on by the new harbor works (144) and the welcoming of the voyager have created a division between those who have mastered the French language of commerce and exchange and those who only speak the language of the indigenous people. This division insures that the public meetings, though modeled on the ecstatic communal experience enabled by the apparatus, will remain a spectacle which maintains a distinction between active and passive participants in the colony's new system of law.[73]

The inability of rational discourse to integrate collective experience is demonstrated by how the officer is condemned by the voyager. If the condemned soldier has difficulty understanding the officer's explanations, the officer has similar problems reading the voyager's judgment. "The officer was constantly looking sideways at the voyager, as if trying to read from his face how the execution, which he had by now at least superficially explained, was impressing him" (137). Here already slipping into the same position as the uncomprehending condemned man, the officer awaits the judgment of the voyager without any understanding that he is condemned from the beginning. Echoing the officer's words, "guilt is always beyond question from the beginning," the narrator repeats at a later point: "The answer that he must give had been clear to the voyager from the very beginning" (146). As the condemnation of the officer demonstrates, the rational rendering of the officer's justice obscures rather than reveals the specific logic of his system. The voyager's condemnation ignores the validity of the collective experience of justice which is the center of the execution process, and the voyager's judgment ends

73. As Schmitt points out, the separation of legality from legitimacy in Germany was a consequence of the move to a justice based on a code of laws passed by the state. The primacy of written laws led to the reduction of the power of jurists to interpret laws and to the creation of "motorized legislation," with which bureaucrats and presidents in the Weimar Republic gained dictatorial powers. Schmitt, *op. cit.*, pp. 50-53.

up being as arbitrary as the justice of the machine appears to the voyager.

The voyager's liberal achievement, however, is to project successfully the arbitrariness of his own judgment onto the justice of the apparatus. This projection takes place not only in the voyager's unintended manipulation of the reader but in the voyager's appropriation of the apparatus. The voyager's justice makes use of the machine as did the officer's justice. The fact of the voyager's admiration for the technical complexity of the machine attests to his affinity with the machine, but solely as a technical instrument of execution, not as a mediator between law and experience. The execution which the apparatus carries out does not follow the officer's, but the voyager's justice. Since this justice does not recognize the validity of the now delegitimized transfiguration, the apparatus operates smoothly according to the condemnation expressed by the voyager, for whom the pattern of the inscription is no longer important and is in fact senseless. The gears that controlled the patterning of the inscription are spit out of the "designer" one after another, and the apparatus proceeds to execute the officer directly and immediately: "The harrow was not writing, it was just stabbing, and the bed was not rolling the body over but just heaving it up quivering into the needles. The voyager wanted to intervene, if possible to bring the whole thing to a standstill, for this was no torture such as the officer had wished to achieve, this was just plain murder" (151). When he is executed, the officer does not experience transfiguration. He is simply impaled. The separation of the judgment from the execution has turned the apparatus into a machinery of death, only to be judged, as the voyager had done at the beginning of the story, in terms of technical efficiency.

At this point the voyager's reduction of law to an empty letter and of sacrifice to a machinery of death resembles the methods of fascism much more than the officer's justice. Whereas justice under the officer depends upon the morals within the community which lead to just actions,[74] the justice of both the voyager and of fascism depend upon a separation of the sentence from the punishment and the law from action. In this situation where justice and the letter of the law are equated, there is no place for individual interpretation of the law and thus no process whereby laws may be legitimized by the moral actions of the community. In such a situation, where punishment is

74. Bar writes: "The law can grant someone the permission to kill another. For example, it may grant the lord the permission to kill the slave. but that which dictates the execution of what is permitted is not the law, but a properly or improperly understood morality according to which we measure, whether we want to or not, all of our actions, insofar as these actions enter distinctly into our consciousness at all." Bar, *op. cit.*, p. 312.

separated from the community, execution becomes a purely technical process which lacks legitimation and occurs secretly rather than publicly.

The voyager's idea of justice exists without any process of collective legitimation and he does not seem to think such a foundation is necessary to maintain the set of morals connected with his concept of justice. While the officer's justice is concerned primarily with justice as a community event and as an issue which goes beyond the individual, the voyager is primarily concerned with the individual victim and does not recognize until after the fact the consequences for the community of a justice which only considers individual rights. Thus, as the voyager listens to the officer's explanations at the beginning of the story, he is distracted constantly by the presence of the prisoner. "The voyager would have said no more, but he became aware of the condemned man's gaze turned upon him; it seemed to be asking if he could approve the procedure described" (132). Though the prisoner does not know what is happening, the voyager interprets the prisoner's gestures as mute cries for help. "When the needle-points touched him a shudder ran over his skin; while the soldier was busy with his right hand, he stretched out his left hand in some unknown direction; but it was towards the spot where the voyager was standing" (137). In acting against the apparatus, the voyager takes the side of the individual prisoner against the community's system of justice.

But with the emancipation of the prisoner, the law broken by the prisoner, "Honour thy superiors," is annulled implicitly. In condemning the apparatus, the voyager also condemns the whole system of authority on which the community in the penal colony is based. As a result, after he is freed the prisoner does not listen to any of the orders the voyager gives. When he orders the soldier and the prisoner to leave the scene, "[t]he voyager saw that giving orders was useless" (150). Again, when the voyager orders the soldier and the prisoner to help him remove the corpse of the officer from the needles of the apparatus, "the other two could not make up their minds; the condemned man actually turned away; the voyager had to go over to them and compel them to take up their place at the officer's head" (152). The sparing of an individual in this case condemns the community to disintegration, as the voyager only belatedly recognizes.[75] After

75. For Bar, the subordination of the individual to the community's demands is one of the fundamental sources of penal law: "The origin of penal law refers to a double root: to the principle of revenge for an injury of justice and to the principle of the subordination of the individual to a higher authority, whether it be the family or the head of the clan or the community or the state itself, an authority which attempts to maintain a particular order for the purpose of pursuing more or less determinate and conscious goals." Bar, *op. cit.*, p. 4.

condemning the officer for his use of the apparatus to compel the condemned soldier to "obey his superiors" in the colony, the voyager finds himself using direct violence against the condemned soldier for the purpose of enforcing his own orders. The voyager has replaced law with brute force.

In the final section of the story, the voyager is faced with the further consequences of his actions. He is drawn to the teahouse where, recognizing the spiritual significance of the tradition he has helped to overthrow, "he felt the power of earlier times" (152). Though his judgment against the officer has allied him with the soldier and the prisoner, he is taken aback by this relation. Unlike the workers in the teahouse, he will not laugh at the grave of the old Commandant. In the end, in contrast to the officer's willingness to answer for his beliefs and be executed according to the voyager's condemnation, the voyager refuses to take responsibility for his support of the prisoner against the officer, fleeing the island and warding off the soldier's and the prisoner's attempts to join him (123).

The colony's prospects are bleak. The former Commandant no longer has the followers to support and justify his form of justice, and the officer betrays the ideal of justice as a collective experience by saying: "In any case, the machine still operates and it is effective on its own. It is effective even if it stands all alone in this valley. And the corpse still falls at the last with the same unfathomable smoothness into the pit, even if there are not, as there used to be, hundreds gathered like flies around it" (141). The voyager is part of the universal culture which, having no right to impose its values (as the voyager himself is the first to admit), takes control of the colony through the new harbor and destroys the indigenous culture, leaving only the harbor workers, "poor, humiliated folk" (153). The intact, vibrant community has disintegrated. The nominally humanitarian but administratively based state that has replaced it creates a stratification between administrators and masses which destroys community structures able to legitimate laws. The only hope for a future community is the prophecy of the resurrection and the return of the old Commandant.[76]

76. Binding makes a similar prophecy in his attack on new forms of punishment based on "pity": "As for the so-called 'restorative punishment' (*Sicherungsstrafe*), according to the latest methods this punishment, which is not one and only mistakenly carries its name, is no longer supported by a deep feeling of disapproval for injustice, by a consciousness of its necessity and justice, but is only supposed to be a measure taken out of pity for the guiltless criminal. Consequently, it is deprived of all seriousness. I would hazard my own prophecy against prophecy: this 'punishment' will declare the bankruptcy which has been falsely attributed to the form of punishment historically passed down to us." Binding, *op. cit.*, p. 15.

Yet, this prophecy rings hollow at the end of the story. The forces of commerce, rationality and bureaucratization present an overwhelming power which eradicates all forms of peculiarity.

The Future of the Primitive

"In the Penal Colony" presents the tragedy of primitive culture.The officer is the hero. His death is a sacrifice which results from the hopelessness of his situation. Yet this lack of alternatives was dictated by Kafka's historical situation in which the Western liberal attack on tradition had already eroded the community structures which could support an organic culture.

The structure of the apparatus' system of justice does offer a way out to the extent that the experience of transfiguration is aesthetic; it must constantly be reinvented in order to survive. If the fragility of this process of invention makes communities vulnerable to the predations of a universalist rationalization, the continuation of this process, even within healthy communities, points toward the potential for regeneration of communities given the opportunity to develop on their own.

The formal gestural connection between experience and law outlined in the penal colony demonstrates not just the vulnerability but also the renewability of a community's peculiarity. The condition for this renewal is an aesthetic-religious experience in which a community constitutes its specific identity as a group. The social distinctions which would otherwise separate individuals from each other become irrelevant in the face of the collective experience. This experience must be *apolitical* — power relations between individuals or factions should play no role — and *constitutive* for all other experiences, the sacred providing the parabolical template for everyday experience. This creation of patterns for experience is the essence of law, which in the end is not a text but a pattern of conduct. The law, like the apparatus in the penal colony, "grows with a people, develops with it, and finally dies away when the peculiarity of a people is lost."[77]

77. Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, op. cit.*, p. 11.