The Betrayed(?) Wills of Kafka and Brod

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Abstract, The endeavor to trace the will of the deceased and respect it accordingly is the central concern of this essay. It deals with the wills of Franz Kafka and Max Brod, each of whom separately left written wishes about how to dispose of Kafka's manuscripts after they die.

In the months prior to his death Kafka explicitly expressed his wishes regarding the fate of his manuscripts in two letters addressed to Brod (which were never actually sent) in which he was instructed to set them on fire. Through his disregard of Kafka's instructions Brod clarified that he acted out of a twofold loyalty: to the public (the literary and cultural value of the manuscripts) and to Kafka himself (his true wish was otherwise). Brod himself expressed his wish regarding the fate of Kafka's manuscripts in gift letters addressed to Ilse Hoffe, as well as in his wills. The issue of the title to Kafka's manuscripts was discussed in Israeli court and ostensibly decided, in 1974 after Brod's death, in favor of Ilse Hoffe. However, the matter returned to court upon her death in 2008. This time the court ruled that Kafka's manuscripts did not belong to Ilse Hoffe or her heirs. An appeal against the court's decision is currently pending.

Kafka's wish is different than Brod's wish, nevertheless they are linked by a conceptual thread. Both wishes could potentially detract from the manuscripts' cultural value: Kafka by destroying them and Brod by privatizing them. In both cases a tension prevails between the private interest of autonomy and the public interest of preservation of cultural assets and their accessibility.

The question of how to interpret the wishes of Kafka and Brod is examined by reference to the issue of free will and "liberating bonds" in the story of Odysseus and the sirens (also following Kafka's version), by examining the idea of the author's "moral right," by focusing on the interrelations between text-author-interpreter, and by reference to the account of law as reflected in Kafka's writings.

Keywords, Kafka, Brod, wills, autonomy, Odysseus, sirens, Before The Law, The Trial, Kundera, Barthes, James Boyd White

THE LIVING OVER THE DEAD

What does the living wish? What does the dead desire? What does the dead expect from the living? What does the living ascribe to the dead? Western civilization with

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its liberal ethos has replaced divine will by autonomy as the primary justification for human activity, and no longer entrusts priests of religion but priests of law with the decipherment of the human will. It is questionable whether this has made the decipherment easier or more reliable. While it is sometimes difficult for us to apprehend our own will, it is still more challenging to understand another person's, and exceptionally ambitious to try to identify the will of the dead. This latter mission, namely the attempt to identify and respect the will of the dead, is the central concern of this essay. It deals with the wills of Franz Kafka and Max Brod, each of whom separately left written wishes about how to dispose of Kafka's manuscripts after they died.

Kafka is considered one of the greatest authors of the 20th century, possibly among the greatest in history. Few writers have had their name turned into an adjective – Kafkaesque, describing the nightmarish world of an empty, arbitrary and cruel bureaucracy, which rests on unfamiliar and inaccessible legal rules. Some of Kafka's writings appeared in his lifetime, although the great majority was published by Brod after his death. The tale of Kafka's manuscripts, their publication, ownership and custody, is a strikingly interesting story, extending over several continents for almost a full century now.

The story began in Prague in 1924, and continues in Israel to this day. In the months prior to his death that year Kafka expressed his wishes regarding the fate of his manuscripts in two letters addressed to Brod (which were never actually sent) in which he was instructed to burn them. Brod, who immigrated to Palestine in 1939 with Kafka's manuscripts in his possession, expressed his wish regarding their fate in gift letters addressed to his secretary and confidante Ilse Hoffe, and in his wills, the last of which was written in 1961 and disclosed after his death in 1968. The issue of the title to Kafka's manuscripts was discussed in court and ostensibly decided, in 1974 after Brod's death, in favor of Hoffe.[1] However, the matter returned to court upon her death in 2008. This time the court ruled that Kafka's manuscripts did not belong to Hoffe or her heirs.[2] An appeal against the court's decision is pending, and the story seems unlikely to conclude anytime soon.

The questions arising with regard to Kafka's wishes are entirely different from those relating to Brod's. Kafka, in asking Brod to have his manuscripts burned, expressed a wish concerning the writings' very existence. Years later, Brod, who did not fulfill his good friend's request, issued instructions concerning the ownership and custody of Kafka's manuscripts which had been entrusted to him. The two wishes are different, but are linked by a conceptual thread. Both men expressed wishes that could potentially detract from the manuscripts' cultural value: Kafka by destroying them and Brod by privatizing them. Brod, who abrogated Kafka's private will in favor of the public at large, privatized the manuscripts anew by placing them in private hands. The court prevented the privatization of the manuscripts, re-appropriating them in favor of the public at large. So the question remains the same: did those who deciphered the relevant wills faithfully implement the

testators' last wishes? Does the courts' involvement in the matter harmonize with Kafka's perception of the law?

FRANZ KAFKA'S LAST WISH

Kafka died in Prague in 1924 at nearly the age of 41. In the course of his life he handed his manuscripts to his close friend from the "Prague Circle," Max Brod, who recognized his genius and urged him to publish his works.[3] After Kafka's death, Brod found in his room two undated letters addressed to him but never sent. The first, a folded note found in a drawer of Kafka's writing desk, states:

> Dearest Max, my last request: Everything I leave behind me (in my bookcase, linen-cupboard, and my desk both at home and in the office, or anywhere else where anything may have got to and meets your eye), in the way of diaries, manuscripts, letters (my own and others'), sketches, and so on, to be burned unread; also all writings and sketches which you or others may possess; and ask those others for them in my name. Letters which they do not want to hand over to you, they should at least promise faithfully to burn themselves.
>
> Yours,
> Franz Kafka

In the second letter, in pencil on a yellowing sheet, which Brod thought preceded the first, Kafka writes, among other things,

> Dear Max, perhaps this time I shan't recover after all. Pneumonia after a whole month's pulmonary fever is all too likely; and not even writing this down can avert it, although there is a certain power in that.
>
> For this eventuality therefore, here is my last will concerning everything I have written:
>
> Of all my writings the only books that can stand are these: *The Judgment, The Stoker, Metamorphosis, Penal Colony, Country Doctor*, and the short story: *Hunger Artist* . . .
>
> But everything else of mine which is extant . . . all these things without exception are to be burned, and I beg you to do this as soon as possible.
>
> Franz[4]

As we know, Brod, who was a writer, thinker, musician and playwright, and literary adviser to the Habima theater company after migrating to Palestine, did not

fulfill his close friend's request. He kept all Kafka's manuscripts in his possession (with the full knowledge and endorsement of Kafka's family) and dedicated himself to their collection and publication. Kafka became Brod's life's mission. His commitment and perseverance let the entire world enjoy the unique cultural treasures left to us by Kafka, and marvel, like Brod himself, at the genius of Kafka's work. Ernst Pawel, one of Kafka's biographers, praised Brod:

> No life of Franz Kafka could have been written – or, for that matter, would have been written – had it not been for the vision and courage of Max Brod. It was he who twice rescued Kafka's work, first from physical destruction, later from indifference and oblivion.[5]

Kafka who studied law at Karl University in Prague devoted a considerable amount of his work to the law, but ultimately chose not to formulate his final will in a binding legal document. The letters bore neither the title "Will" nor a date, so it would appear that Kafka imposed upon his friend a moral, not a legal, obligation. Kafka's extremely ambivalent attitude towards law was chillingly expressed in his perhaps most renowned novel, *The Trial*. In this posthumously published work Kafka included the ghastly story *Before the Law*,[6] which had been published in his lifetime.[7] The story vividly expresses Kafka's belief that the law is unattainable, and will forever remain beyond our reach. Thus, the gates of law will always remain closed to those before whom they are supposed to open. Brod, who had also studied law at Prague's Karl University the year following Kafka, ignored Kafka's wish to incinerate his manuscripts and kept them alive.

Did Kafka choose to express his wish to burn his manuscripts in friendly letters, rather than a formal testament, because of his suspicious approach towards law? Was he apprehensive to face the fate of that villager who waited all his life at the footsteps of the gates of the law, only to witness them remained closed even after his death? Could he have imagined that a century after he wrote *Before the Law* his own writings would stand on trial? What did Kafka really wish be done with his manuscripts? Did he leave it to his good friend Brod to decide?

Evidently, from a legal viewpoint, one crucial issue concerns the title to Kafka's manuscripts which were physically in Brod's possession. It turns out that some of the manuscripts belonged to Kafka himself but he had given others to Brod as a gift.[8] Concerning the latter, Kafka's instruction to destroy them had no legal force, nor would it have even if he had written it in a valid will; of course, his instruction not to publish them did have legal force as it reflected an artist's moral right to determine the fate of his work, namely whether to publish it or not.[9] The manuscripts owned and possessed by Kafka (taken by Brod after Kafka's death, as stated, with the family's consent) were consequently owned by Kafka's heirs. As the executor of Kafka's 'spiritual will' Brod was authorized by the family not only to

physically hold them but also to publish them. Some other manuscripts were kept by other friends of Kafka.

A similar issue concerns Kafka's instruction to Brod to have the writings held by others burned ("also all writings and sketches which you or others may possess; and ask those others for them in my name. Letters which they do not want to hand over to you, they should at least promise faithfully to burn themselves."). If those others became the owners of Kafka's writings, the instruction would have no legal force at all. While a will may refer to the property owned by the testator, it cannot apply in any form to property owned by others, even if it once belonged to the testator.

MAX BROD'S LAST WILL

In 1968 Brod died in Tel Aviv at the age of 84. Documents he left reveal that he had given Kafka's manuscripts and letters which were in his possession (some of which were located in safety deposit boxes) to Ilse Hoffe, his secretary and confidante. Apart from these documents Brod left several wills, the last written in 1961, in which he stated (subject to certain reservations) that Hoffe was to be the heiress of all his property and all his literary estate. He further instructed that after her death his literary estate should be placed under the guardianship of the Hebrew University library, the Tel Aviv municipal library, or a public archive in Israel or abroad, if Hoffe made no other arrangement in her lifetime.

As opposed to Kafka who left no legal document regarding his manuscripts, Brod, a jurist in his own right, not only diligently wrote legally binding documents, but also over the years drew on the assistance and advice of lawyers, presumably to clarify his intentions precisely and leave no question open. Attempts to formulate intentions with legal precision are not always successful, and doubts and ambiguities surrounding legal phrasing provide a livelihood for lawyers and impose an increasingly heavy burden on the courts. The present case is a good example. Indeed, Kafka's fears of the problems legal involvement might create were realized with regard to his very own writings. Brod's diligence and precision, with none of Kafka's anxiety about the law, were unable to prevent the legal imbroglio.

Why is the question concerning Brod's will being aired again now, and for what purpose did it reach the courts? It turns out that as early as 1973 the State of Israel wished to get hold of Kafka's manuscripts, prevent Hoffe from selling them, and have them transferred after her death to an official archive in Israel or abroad. The state petitioned the court accordingly, but the petition was rejected in 1974 in a decision by Judge Yitzhak Shilo at the Tel Aviv District Court. The judge ruled that Hoffe was entitled to do with Kafka's manuscripts and with Brod's estate "during her lifetime as within her own," and only what was left after her death

should be handled as Brod had requested, namely sent to an archive in Israel or abroad.

As mentioned above, Brod presented Kafka's manuscripts in his possession to Hoffe as a gift during his lifetime. She in turn wrote in a 1970 letter to her daughters that she gave those same manuscripts to them. Yet throughout, the manuscripts remained in the archives where they had been deposited, and were under Brod's control during his lifetime, and under Hoffe's control during hers. Her death in 2008 reawakened the question of the rights to Kafka's manuscripts and the interpretive problems arising from Brod's will, which as noted stipulated that after Hoffe's death his literary estate should be placed under the guardianship of Hebrew University library, Tel Aviv municipal library, or a public archive in Israel or abroad. The key question was whether Brod's literary estate included Kafka's manuscripts, which ostensibly had been given to Hoffe as a gift.

It would seem that the matter had been settled through Judge Shilo's 1974 decision that Hoffe could do with Kafka's writings and the estate "as within her own." She had sold the manuscript of *The Trial* to a literary archive in Germany, and was thinking of doing the same with other manuscripts. But in 2012 Judge Talia Koppelman-Pardo of Tel Aviv Family Court concluded differently, namely that Brod's gift to Hoffe had not been consummated. She based her conclusion on the relevant Israeli law (not applicable now) that a gift is completed only upon its delivery to the recipient.[10] While Brod intended to grant the manuscripts to Hoffe as a gift, they were still solely under his control, hence remained in his estate. After Brod's death the manuscripts had been under Hoffe's full control, therefore the gift she meant to pass on to her daughters had not become part of their property. In sum, Kafka's manuscripts had never left Brod's estate, so after Hoffe's death, as she had made no other arrangement in her lifetime, it was time to place them in the custody of a public institution as stipulated in Brod's will. Which public institution? The judge ordered that Kafka's writings be moved to Hebrew University library (called now the National Library). Why there and not Tel Aviv municipal library or an archive abroad? The judge clarified that Brod had specified Hebrew University library as his first choice, and his intention was to transfer thither his entire estate, including Kafka's manuscripts.

The decision raises weighty legal issues. On the face of it the conclusion that the gift to Hoffe's daughters had not been completed directly contradicts Brod's intention: he wrote explicitly in his letters to Hoffe that Kafka's manuscripts were hers as a gift, therefore he did not mention them at all in his will as part of his estate; why were those letters not sufficient to transfer ownership of the manuscripts to Hoffe? This question elicits the sometimes notorious tension between form and substance, usually portrayed as a gap between the donor's intention and the mandatory legal requirements. For a gift to become effective, or for a will to be recognized as such, certain formal requirements must be met, otherwise the gift or will is considered invalid despite the donor's or testator's intention. One tragic case, litigated

about 30 years ago, illustrates the problem in all its severity.[11] A woman had committed suicide, leaving a bundle of unsigned and undated notes. In one of them she wrote that her husband, who had constantly abused her, should not inherit her assets. The court was divided as to whether this note could be deemed a will. The majority held that even though the note was to be considered authentic reflecting the writer's true will, it could nevertheless not be regarded a will: not bearing a signature and a date, it did not comply with the formal requirements of the law.[12] So contrary to the woman's explicit wish, the husband was able to inherit her estate. This formal position, which gives precedence to the formal legal requirements and to the principles of certainty and stability,[13] could certainly serve as grounds for Kafka's ambivalence regarding the law. Rather ironically, a situation where a testator's intention is not fulfilled because of a failure to meet a formal requirement may sometimes be called *Kafkaesque*: this stark gap between the individual's autonomy and the state's dictates highlights the law's inaccessibility to its addressees – one of its most problematic aspects; its gates are arbitrarily locked to those who sincerely wish to enter and find within it shelter and refuge.

But apart from the conflict between form and substance, Judge Koppelman-Pardo's decision also ran counter to Judge Shilo's 1974 ruling rejecting the state's petition to prohibit Hoffe from dealing in Kafka's manuscripts, holding that she was free to do with them "as within her own." Accordingly, Hoffe as noted had sold some of Kafka's manuscripts, and given others to her daughters as a gift. What are we to make of a situation where the gates of law first opened wide, then years later slammed shut, in flagrant disregard of what supposedly had been lawfully obtained before? I will not elaborate this point, nor will I discuss whether the Family Court did in fact reach the right conclusion in 2012. As mentioned above, that decision is pending appeal which will be heard in Tel Aviv District Court.

WHY DID BROD NOT FULFILL KAFKA'S LAST WISH?

In some sense, Brod's will to place Kafka's manuscripts in private hands is equivalent to Kafka's wish to destroy his own manuscripts. In both cases a private interest stands in conflict with the public interest in preserving cultural assets and making them accessible. Was Brod justified in disregarding Kafka's wish? Did he thereby betray Kafka, or was he his faithful interpreter? In the epilogue to *The Trial* Brod explains at length why he refused to follow Kafka's instruction:[14] "If, in spite of these categorical instructions, I nevertheless refuse to perform the holocaust demanded of me by my friend, I have good and sufficient reasons for that." He cites as the main reason Kafka's telling him in a conversation that in his will he asks him to burn his works, and Brod's replying that he will not. He adds that if Kafka truly meant what he said he should have appointed another executor of his will.

A second reason was that Kafka himself contradicted his own instruction: in his first letter he forbade republication of certain writings, but allowed it in his second letter. He also released new stories for publication. Brod explains:

> [B]oth sets of instructions to me were the product of a period when Kafka's self-critical tendency was at its height. But during the last year of his life his whole existence took an unforeseen turn for the better, a new, happy, and positive turn, which did away with his self-hatred and nihilism.[15]

Thirdly,

> [M]y decision to publish his posthumous work is made easier by the memory of all embittered struggles preceding every single publication of Kafka's which I extorted from him by force and often by begging. And yet afterwards he was reconciled with these publications and relatively satisfied with them. Finally in a posthumous publication a whole series of objections no longer applies; as, for instance, that present publication might hinder future work and recall the dark shadows of personal grief and pain.[16]

Finally Brod states:

> My decision does not rest on any of the reasons given above but simply and solely on the fact that Kafka's unpublished work contains the most wonderful treasures, and, measured against his own work, the best things he has written. In all honesty I must confess that this one fact of literary and ethical value of what I am publishing would have been enough to decide me to do so, definitely, finally and irresistibly, even if I had had no single objection to raise against the validity of Kafka's last wishes.[17]

Kafka did not formally title his letters a "Will," although in the first letter he did term its content his "last wish," and in the second he explicitly states: "here is my will concerning all that I've written." Brod regards these letters as a "will." This approach imparts a sense of formality and legality to Kafka's informal letters, and it also requires an explanation.

Brod gives two primary reasons for his disregard of the "will": the first is the esteemed literary value of the works; the second, the fact that Kafka was well aware that Brod had no intention of executing his instructions, from which Kafka himself had deviated. The first is external to Kafka's wish and reflects considerations of the

public good; the second involves Kafka's wish, supposedly exposing his true desire – that Brod would in practice disregard his instructions.

Such considerations of public good and the testator's intention play a pivotal role in the formal interpretation of a will under the law. Israeli Inheritance Law determines that a will whose execution would be immoral is void.[18] This raises the following question: Does an artist's instruction to destroy his or her works constitute an "immoral will"? Interestingly, French copyright law allows an artist who has relinquished ownership of a work to demand, in the framework of the moral right, that its new owner destroy it (subject to appropriate compensation). Furthermore, this right cannot be exercised after the artist's death except in order to fulfill a wish expressed in his or her will.[19]

As for consideration of the testator's intention, the notion of course stems from, and is supposed to reflect, the testator's free will. Therefore a defective will is void.[20] For the same reason, under Israeli law (unlike American law)[21] a testator is free to revoke a previous will, and any prior undertaking not to do so is invalid.[22] Brod's contention is that Kafka did not mean his instructions to be taken seriously, and in any event in speech and deed he subsequently revoked his instructions. These assertions obviously have no formal legal support, but we may assume that Brod, Kafka's closest friend, felt that he perhaps more than anyone was authorized to interpret Kafka's wish.

In his disregard of Kafka's instructions Brod clarifies that he acted out of a twofold loyalty: to the public (the literary value of the manuscripts) and to Kafka himself (his true wish was otherwise). Indeed it could be said that Kafka was double-signaling to Brod through the letters: he left him an instruction that would enable him, Kafka, to write freely and without inhibition (everything was to be destroyed anyway). Yet in not sending the letters and placing them in his friend's hands after his death, Kafka knew that Brod would understand the implied message, and just as he had smoothly extracted and published Kafka's manuscripts in his lifetime,[23] he would easily disregard the instruction, select the worthy writings and publish them after his death. Thus Brod would fulfill Kafka's genuine will:

> I wrested from Kafka nearly everything he published either by persuasion or by guile. This is not inconsistent with the fact that he frequently during long periods of his life experienced great happiness in writing, although he never dignified it by other name than "scribbling." Anyone who was ever privileged to hear him read his own prose out loud to a small circle of intimates with an intoxicating fervor and a rhythmic verve beyond any actor's power was made directly aware of the genuine irrepressible joy in creation and of the passion behind his work. [. . .]

> He often spoke of "false hands" beckoning to him while he was writing; and he also maintained that what he had already written, let alone published, interfered with his further work. [. . .] All the same, the sight of the books in print gave him real pleasure [. . .].[24]

Brod ignored the annihilating instructions of his friend who had a zealous instinct of self-annihilation. But Kafka himself entrusted Brod with this power. In every will, as in every relation of trust, there apparently is an inherent conflict of interest. The executor may betray his duty of loyalty to the testator and depart from the will, for personal or ulterior motives. Ostensibly, the only way one can ensure one's wish is carried out in full is by carrying it out personally in the course of one's lifetime.[25] Kafka, it seems, knowingly and deliberately chose a trustee who was likely to disregard his supposed outward wish and fulfill his true inner one. Brod, as a trustee for the execution of the will, faithfully filled that role: not as trustee of the written document but as trustee of Kafka's complex mentality. I noted at the outset that deciphering our own will, let alone that of others, is one of the most difficult tasks that we and decision-makers may face. The case before us is a distinctive illustration.

THE LIBERATING BONDS OF ODYSSEUS AND KAFKA

Brod shouldered the task of deciphering Kafka's wish in light of what he had written and said. However, the wish attributed to Kafka contradicts what he left in writing, either because that never was Kafka's desire or because he later changed his mind. A parallel example relating to a declaration of a certain wish and its subsequent change takes us back several millennia to ancient Greece and the story of Odysseus and the Sirens.[26] Sailing on his ship with his sailors, Odysseus knew that they would soon encounter the Sirens, who lived at sea and used their bewitching voices to lure seamen to their watery grave. Odysseus instructed his sailors to plug their ears with wax and to chain Odysseus himself to the mast. He also warned them that even if he later commanded them to remove his bonds they must disobey. And indeed, hearing the Sirens Odysseus ordered his sailors to release him, but they, following his earlier injunction, bound him tightly with even more chains, and thus avoided the fatal danger.

This story highlights a conflict between an earlier and a later wish, in which the earlier triumphs for two reasons: first, the later wish is not genuine – it stems from the Sirens' seduction; second, it would lead to a fatal result, namely the death of Odysseus and his seamen. So Odysseus requests that his later defective desire be disregarded – to protect himself, but also out of his fatherly concern for his sailors.

Odysseus' encounter with the Sirens has given rise to countless interpretations. It has also enchanted many artists and writers.[27] Here I refer to a short story by

Kafka himself,[28] and to Adorno and Horkheimer's essay "Odysseus or Myth and Enlightenment."[29]

In his story, Kafka revises the narrative: the Sirens' allure and fatal effect stem not from their singing but from their silence. According to Kafka, Odysseus, bound to the mast, does not hear their silence because on seeing their movements he believes they are singing, and in this way escapes their deathly quiet. And being the wily old fox he is, Odysseus might only have pretended not to hear the Sirens' silence, and therefore was saved. So his cunning is twofold: he had himself bound, but he also responded to their silence as if they were singing or pretended to do so.

Adorno and Horkheimer, who refer to Homer's original story, consider Odysseus a modern hero, seeking to reconcile the mythological power of nature with his own selfhood through his cunning. Odysseus does not even try to listen to the Sirens, assuming that his rationality will triumph and that he will control his desire. He diminishes himself by being bound to the mast and by releasing his sailors from the duty to obey him, their commander. He is unable to unleash his passion because his sailors' ears are sealed both to the Sirens and to their commander's orders. In Adorno and Horkheimer's view, Odysseus acknowledges the existence of a binding contract between himself and the seductive forces of nature manifested by the Sirens. However, something is missing from that contract: nowhere does it state that Odysseus is not to be bound or that the sailors have to hear the Sirens' voices. The temptation is directed at the ship's captain, Odysseus, and it may impact only him, for he can hear it. But he is able to withstand it because of his bonds. Odysseus does not ignore nature's seductions, but by filling in the contractual lacuna he meets them with cunning, and is able to resist the temptation. He fulfills the contract literally and ignores its deadly intention in order to preserve his selfhood. Rationality triumphs over myth. It places new bonds upon the hero. But these are bonds that allow life.[30]

Kafka, like Adorno and Horkheimer, highlights Odysseus' cunning, which enabled him to escape extinction. All three are captivated by his cunning. The chains that Odysseus ordered himself fettered by are actually liberating bonds. They liberated him from the annihilation entailed by the Sirens' lethality through their singing or their silence.

Kafka placed similar liberating bonds upon himself. He was torn between the frustrated aspiration for perfection and the outpouring of creativity. This common mentality of conflicting desires was in fact Kafka's existential condition. He was tempted, actually forced, to continue writing, despite his belief that he would never be able to achieve the artistic perfection he aspired to. The instruction to burn his writings enabled him to persevere in his artistic endeavor with a clear conscience. He destroyed some of his work still in his lifetime, and having placed a similar burden on his friend Brod for after his death, he felt entirely liberated. Yet this freedom was illusory. Like the contract between Odysseus and the Sirens, this contract too was cunningly executed: Kafka did not wish his work to be lost but preserved. He

wrote a letter to Brod which he left in his drawer and never sent. May we conclude then that someone who wrote a letter but never sent it would want the addressee to abide by the instruction it contained? Did Kafka simply not send the letter because he understood that Brod would not follow his instruction?

Judith Butler also points to the paradox of the existence of such a letter, itself being a manuscript of Kafka, which also should be burnt. But if this letter nevertheless continued to exist, as it were, only by chance, and – so Butler's argument goes – if Kafka's intention had been realized, its content too would not have been known, and therefore should not be considered binding.[31] This explanation seems problematic: the letter would have to be burned not at once but after Brod read it. Hence Kafka's letter should be interpreted in keeping with the contrast between its content, its existence in the drawer and its disregard by Brod. Indeed, in the spirit of Odysseus' cunning, could Kafka, who knew that Brod had beguiled him into allowing publication of his works in his lifetime, and thus brought him joy, rely on his faithful friend to act likewise after his death?

"DOING AS WITHIN YOUR OWN" IN KAFKA

In his book *Testaments Betrayed*, Milan Kundera extensively explores the extent an author is free to control his work, and how proper it is to place a work in the hands of "trustees" who will guarantee its existence at the price of harming the author's genuine spirit.[32] Kundera depicts the tremendous effort by Igor Stravinsky to preserve all his works in his personal rendition "as an unimpeachable standard." Samuel Beckett did the same regarding his plays.[33] Kundera describes the correspondence between Stravinsky and the Swiss conductor Ernest Ansermet. Ansermet had suggested that Stravinsky delete a section from his composition *Card Game*. Stravinsky bitingly replied that Ansermet's not liking part of his work was not sufficient reason to remove it, adding: "But you're not in your own house, my dear fellow"[34] – in other words, he could not do with it "as within your own." Kundera talks about the author's moral right (*droit moral*) to control the full realization of his work.[35] He laments its erosion, the struggle required in order to preserve it, and the lenient approach by the public and the law to violation of the author's rights.[36]

In keeping with this view, Kundera adopts a critical stance to Brod, who ignored Kafka's will: by publishing his unfinished works he violated Kafka's moral right to his works, and by publishing his diaries he violated Kafka's privacy, which Kafka had zealously protected.[37] Kundera notes that in this way Brod created "the model for disobedience to dead friends; a judicial precedent for those who would circumvent an author's last wish [. . .]."[38]

Kundera is aware of Brod's monumental role in creating the myth of Kafka and making him one of the great artists in world culture. He also readily confesses that regarding the unfinished novellas and novels he would have faced the same

dilemma as Brod, for among those manuscripts were the three novels (*The Trial*, *The Castle* and *Amerika*), and Kafka "wrote nothing greater than these."[39] How would Kundera have dealt with the dilemma? His answer is that he would indeed have acted like Brod and published the works, but he would have clarified that in doing so he was explicitly breaking the (moral) law, which required him to remain loyal and faithful to his friend's wish. In other words, according to Kundera, whereas Brod held that he might ignore Kafka's wish due to the existence of a higher value (the sublime cultural value of his works), he himself would have been willing to act like Brod on condition that he also admitted that he was breaking the law, which demanded compliance with the wish of the dead, and he was willing to face the risk involved.[40]

Kundera seems to treat Brod with undue harshness, and his response regarding the dilemma is questionable. He relies on Kafka's letter authorizing publication of several works[41] without mentioning that this one might have been written before Kafka's letter instructing that all his writings should be burned.[42] If this last will (ordering the whole opus to be burnt) is the binding one, Brod could not have relied on Kafka's own selection, and should have ignored his wish altogether. But most importantly, Kundera acknowledges that cases exist where the wish of the dead should be ignored, though it may involve admitting guilt and facing the risk that it entails. One may wonder what that risk exactly is. Beyond that, Kundera condemns Brod for his seemingly religious adoration of Kafka's work and personality.[43] He himself, however, seems ready to do what Brod did. Could Kundera perhaps be compared to the felon who exculpates himself by buying an indulgence, having atoned for his sin by admitting his guilt?

But perhaps Kundera's stance can be interpreted as follows: anyone acting as Brod did must declare that he is committing a breach, and is willing to bear the consequences. True, he was forbidden to act as he did, but he was under a duty to commit the act. In analogy to the conflict between law and morality, insofar as responsibility is assumed morality may be given preference, as in the case of a revenge that is believed to be morally justified, and then responsibility is assumed with a willing to pay the price.

Kundera addresses several interesting dilemmas regarding a testator's instructions: does protecting a cultural asset demand absolute obedience to the author's wish? Kundera himself answers in the negative, admitting that he too would have defied Kafka's will with regard to his unfinished books. However, this also relates to the question whether restrictions may be imposed on a person's control of his own (or another's) cultural assets.

What is the definition of a "cultural asset" anyway, and what values is it intended to serve?[44] Is the owner of a Rembrandt painting entitled to burn it because it is his own? In fact, is there any real difference between Rembrandt's intent to destroy his own work and someone else simply purchasing his painting?[45]

The burning of art is repugnant to us, as we are haunted by the echoes of Heine's prophetic remark that "where books are burned human beings will be burned too."[46] Heine was talking about a violent burning forced upon us as part of terror of the mind, rather than a voluntary burning, certainly not by the author himself. This resonates back to Plato, who suggested setting fire to scripted texts in order to be liberated from anachronistic and outdated perceptions.[47] The act of writing perpetuates memory, yet at the same time it holds back the living by preserving undesired memories. But is there any effective alternative to writing when our aim is to triumph over time, over forgetfulness, over error, over lies?[48]

Kafka burned some of his manuscripts. He was fully entitled to do so. It is doubtful whether in his lifetime his writings met the definition of a "cultural asset." But if Kafka had won the same renown in his lifetime as he did posthumously, would he have been entitled to burn his writings? And by the same token, does Brod's obligation to Kafka, who asked him to burn his manuscripts, override his obligation to protect the existence of a "cultural asset"? And what is the relevant moment for defining a work as a "cultural asset"? Brod was convinced that he had a "cultural asset" in his hands from his first acquaintance with Kafka and his writing, long before this actually became one, largely due to Brod himself. Could Kafka's heirs (assuming a proper will) have required Brod to burn Kafka's works immediately after his death, or would Brod's unequivocal opinion have sufficed to convince the court that these indeed were an asset whose destruction would be immoral because of their cultural value (which would be revealed to the entire world only afterwards)?[49]

Brod exposed Kafka's work, some of it unfinished, to the entire world, and in a certain sense he did with it "as within his own."[50] Not many may know who Brod was. But the entire world, it seems, knows who Kafka is by virtue of Brod's spiritual and physical control over the manuscripts. That control seems nowadays not only understandable, but even gratified. Spiritually Brod was the driving force behind Kafka all his life; indeed, Kafka wholeheartedly trusted him and chose to appoint him executor of his will. But also maintaining the physical control, which allowed the editing and dissemination of Kafka's work, seems self-evident. Brod received authorization for this from Kafka's relatives in their lifetime, and he earned the right of possession of the manuscripts (those that Kafka had not given him as a gift) through the family's approval as well as the enormous work he put into constructing the Kafka myth. There is no argument as to the immense importance of Kafka's work. However, would the manuscripts themselves (in the material sense) have had any significant value if not for Brod's relentless efforts?

Brod, who crafted Kafka's spiritual legacy by doing with it "as within his own," turned Kafka's manuscripts into a tangible treasure, which he then passed on to Hoffe, to do with "as within her own." After the 1974 court ruling that Hoffe was entitled "in her lifetime" to do with Kafka's manuscripts and Brod's estate "as within her own"[51] she decided to transfer the manuscripts as a gift to her daughters. In 2012 the court ruled that the latter intention of transfer was not effective, and that the

manuscripts were not part of Hoffe's or her heirs' property. Did the court, on the face of it, thereby fulfill Brod's wish with regard to Kafka's manuscripts?

The spiritual treasure realized by Brod, perhaps contrary to Kafka's last will, became a cultural asset of the entire world. Ironically, the manuscripts became a physically endorsed treasure, held in private hands, a form of convertible currency.[52] It is no small paradox that Brod himself, who vigorously claimed society's right to gain access to Kafka's work, eventually privatized the cultural treasure by passing it on to Hoffe. The question whether the material trove comprised of Kafka's manuscripts will be disposed of as Brod requested, in his lifetime and in his last will, now awaits further judicial proceedings.

DEATH OF THE MESSAGE AND RESURRECTION OF THE AUTHOR

This essay deals with interpretation, albeit not directly of Kafka's work but of the documents relating the fate of Kafka's manuscripts – from the letters that Kafka wrote to Brod, to the gift documents and wills written by Brod and Hoffe. Who is to interpret these documents? The interpreter who executed Kafka's last will was Brod. He interpreted Kafka's letters not in accordance with their explicit language but with his personal–intimate acquaintance with Kafka's anima and his appreciation of the work. The interpreter of Brod's last will and gift letters was the court, which in 1974 allowed Hoffe to do with Kafka's manuscripts "in her lifetime as within her own." Thirty-six years later the court was called upon yet again to interpret Hoffe's last will and gift letters, ultimately determining that Kafka's manuscripts were not the property of Hoffe or her heirs, and should reside in the National Library. This interpretation is by no means self-evident, and it is now under appeal.

Interpretation ties together legal discourse and artistic–literary discourse, and actually applies to any type of message conveying. The task of the interpreter, as a messenger mediating between the message and its addressees, is to settle the intrinsically complex relations between the author of the message (in our case Kafka, Brod and Hoffe), the message (Kafka's letters, Brod's gift letters, Brod's last will, Hoffe's gift letter, and Hoffe's last will) and the interpreter (Brod, the court in 1974, and the court currently). Does the interpreter owe a duty of loyalty to the author or the message or perhaps both? Is she entitled to deviate from her duty of loyalty for the sake of accomplishing a social or cultural task?

These questions arise in every artistic–literary context, and have been thoroughly developed.[53] Without expanding on this vast topic, I shall briefly address Roland Barthes, who provocatively asserted the superiority of the reader–interpreter, proclaiming "the death of the author."[54] According to Barthes, the reader–interpreter disconnects from the author and becomes the creator of a new work by the act of interpretation, which also begs interpretation, and so on, endlessly.

Some, such as Umberto Eco, have challenged this approach.[55] The weakness of Barthes' position seems particularly evident in the legal context, concerning the

interpretation of a constitution, statutory law, by-law, will or contract, as reflected by James Boyd White:

> The process of reading the old text into the present context, just like the process of reading literary texts and works of art, demands changes: it is not possible to simply recreate the "original text," for the context in which it operates and from which it draws its meaning has changed. Translating, interpreting always means the loss of meaning. [. . .] Nonetheless, the lawyer and judge work in the framework of the authority of the original text and owe it loyalty. They are thus like the translator or interpreter of works of art, who owe loyalty at the same time both to the original and to the world and language into which they are translating.[56]

White distinguishes a literary from a legal text. The cultural interpreter, despite her obligation of loyalty to the original, is not bound by what the text may require, and she can instill in it a new spirit, surpassing any binding conceptual meaning. But there is no such freedom in legal interpretation. Therefore, whereas Kafka could interpret the story of the Sirens as he saw fit, and deviate from Homer's story, the horizon of legal interpreters is necessarily more restricted. The legal interpreter is not considered the creator of the text, but the trustee of the text and its creators. Her principal task then should be restoration and revival. Obviously this is not easy. The interpreter's consciousness, understanding, views – all limit her interpretative horizon. Being aware of this, her duty is to place her own position aside, and see the viewpoint of the text's creators, who in our context are the writers of the wills and the gift-endowers.

Let us return, then, to our texts and authors to examine their interpreters' loyalty. Although Brod bypassed Kafka's text in the "testamentary" letters, he virtually did display loyalty to Kafka given his view that the text did not reflect Kafka's genuine intention. Furthermore, a noble social purpose, namely safeguarding the cultural treasures contained in the manuscripts, justified his disregard of their textual meaning. The death of the text in Kafka's "wills" is what resurrected and preserved all the glorious texts in his writings, and gave their author, Kafka, eternal life.

The fate of Brod's texts has fluctuated: Brod wanted to give Kafka's writings to Hoffe. In his gift letters and in his last will, Brod executed a move opposite to what he himself had done with Kafka's writings. Like Kafka, he too wanted to control their fate and keep them in private hands, far from the public eye. The legal interpreter in 1974 remained loyal to Brod's written intention, and allowed Hoffe to do with Kafka's manuscripts "in her lifetime as within her own." In 2012, however, the legal interpreter of all the documents, now including also Hoffe's gifts to her daughters and her own last will, decided that Kafka's manuscripts were not part of Hoffe's estate, and should be transferred to Israel's National Library in Jerusalem in

accordance with Brod's will. Could it be said, then, that the Tel Aviv Family Court thus acted to fulfill Brod's original wish, the language of his last will notwithstanding? Should we, as in the case of Odysseus and the Sirens, disregard Brod's later wish (in his will), which may imperil the project of his life, namely the exposure and dissemination of Kafka's work to the public? In any event, these divergent interpretative rulings can hardly be reconciled, and we wonder which of them faithfully reflects the content of the will and the intention of its author, Brod. Could this tale also be regarded as the story of Israeli law, with its transition from formalism to unbridled activism? Or could it be just a common expression of an overprotective approach of courts toward the state?[57]

The greatness of the work naturally projects onto the manuscript. Once the work has been copied and published, the value of the manuscript as preserver of the work bears less importance. Nevertheless, the material itself retains its cultural and political significance, which evidently has an effect on its economic worth. The physical manuscripts are a cultural asset. They are a source of opinion and knowledge. Kafka scholars may need the manuscripts for their researches (they may want to see earlier drafts or revisions of published texts), and the public at large may have an interest in documents that Kafka held in his hands and on which he left a physical and spiritual imprint. It is therefore important to guarantee access to the manuscripts, whose cultural value today is universal. But how does that value coexist with the value of private property, by dint of which the manuscripts' owners are supposed to be entitled to sell them? The question also remains whether they should be kept in Israel or in Germany. Having them concentrated in one place is important of course, but in any event Kafka's manuscripts are already scattered among several libraries (in Israel, England, Germany, and Switzerland). The dispute regarding the preservation and the eventual location of the manuscripts either in Israel or Germany does indeed reflect their sublime cultural value; yet it also involves national pride; Kafka's cultural identity as Jewish or German–Czech in contrast to his private identity as Brod's friend; and perhaps also – who can tell – it involves a certain spark that the work projects onto the manuscript, a spark that irradiates its location.

THE SIRENS' CURSE OF SILENCE AND THE LAW

The Sirens' deadly power, so Kafka tells us, lies in their silence. Silence is mist and uncertainty. An audience's silence in response to a work of art is more lethal than any criticism. Instead of the silence that Kafka believed probably awaited his writings in some gloomy subterranean archive, he preferred voluntarily to eliminate them, to silence them on his own accord. Supposedly, by sentencing the writings to incineration, they escape the miserable destiny of encountering the deathly silence of the audience.

Silence is death. It then becomes clearer and more lucid. In *The Trial* no one troubles to tell Josef K. what he is charged for or guilty of. He is led to his death in the shadow of silence. In *Before the Law* the doorkeeper does not explain to the villager why the gates of law, which are specifically meant to open for him, close shut upon his death. The law, like the Sirens, wants to play a fatal trick on the traveler who has arrived at its door. But whereas the Sirens' trickery failed because their lethal temptation was known, the law, elusive and unknown, scored a success. Being unknown it remains a kind of alluring temptation, at once both an aspiration and a failed quest. Kafka says:

> Our laws are not generally known; they are kept secret by the small group of nobles who rule us. We are convinced that these ancient laws are scrupulously administrated; nevertheless it is an extremely painful thing to be ruled by laws that one does not know [. . .]
>
> The very existence of these laws, however, is at most a matter of presumption. There is a tradition that they exist and that they are a mystery confided to the nobility, but it is not and cannot be more than a mere tradition sanctioned by age, for the essence of a secret code is that it should remain a mystery. Some of us among the people have attentively scrutinized the doings of the nobility since the earliest times and possess records made by our forefathers – records which we have conscientiously continued – and claim to recognize amid the countless number of facts certain main tendencies which permit of this or that historical formulation; but when in accordance with these scrupulously tested and logically ordered conclusions we seek to adjust ourselves somewhat for the present or the future, everything becomes uncertain, and our work seems only an intellectual game, for perhaps these laws that we are trying to unravel do not exist at all. There is a small party who are actually of this opinion and who try to show that, if any law exists, it can only be this: The Law is whatever the nobles do.
>
> A writer once summed the matter up in this way: The sole visible and indubitable law that is imposed upon us is the nobility, and must we ourselves deprive ourselves of that one law?[58]

The law ostensibly speaks, but its speech is muted. It is secret, inaudible to the public ear. Even though the law is meant for us, we are unable to participate in it. We will never be able to know in advance what the law is, says Kafka, but only after we have seen what a small and exalted group does with it. By then, however, it will

be too late. The silent and unfamiliar law may torture us; it may be surprising in its lethality. If so, it is clear why Kafka avoided entrusting the law with the interpretation of his wills–letters, and preferred to rely on the interpretation of his close friend Brod. Brod may have been surprised by the court's rulings regarding the gift letters and last will he had written; not Kafka.

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1. The decision in its entirety is cited (in Hebrew) in CC (Fam. Ct. TA) 105050/08 Hoffe v. General Custodian — Tel Aviv, 48 (published in Nevo, 12 October 2012) (Isr.) (hereinafter the Hoffe case).
2. Ibid.
3. Max Brod, *The Biography of Franz Kafka*, trans. G. Humphreys Roberts (London: Secker & Warburg, 1948), 51: "I got the impression immediately that here was no ordinary talent speaking, but a genius. My efforts to bring Kafka's works before the public began from that moment [. . .]."
4. The letters are quoted from Brod's postscript to the first edition of Kafka's book "The Trial"; Franz Kafka, *The Trial*, trans. Willa Muir and Edwin Muir (Schocken, 1995), 265—7 (hereinafter *The Trial*).
5. Ernst Pawel, *The Nightmare of Reason: A Life of Franz Kafka* (New York: Farrar, Straus and Giroux, 1984), xi; see also Nicholas Murray, *Kafka* (New Haven: Yale University Press, 2004), 40—1.
6. *The Trial*, 213—15; and further on Kafka includes an interpretation of the story from the priest's mouth, 219.
7. It was first published in the 1915 New Year's edition of the independent Jewish weekly *Selbstwehr*, then in 1919 as part of the collection *Ein Landarzt* (*A Country Doctor*). For the translation of the whole collection, see Franz Kafka, *Collected Stories* (New York: Everyman's Library, 1993), 161. For a new translation of this collection, see Franz Kafka, *Metamorphosis and Other Stories*, trans. Michael Hofmann (London: Penguin, 2007), 181.
8. Hoffe case, 20 (Brod noted that certain manuscripts belonged to him and had been deposited by him in a safe in Jerusalem; all the rest belonged to Kafka's heirs); 27 (Brod noted that he gave Kafka's manuscripts and letters that belonged to him to Ilse Hoffe as a gift, and he specified them, including the manuscript of *The Trial*).
9. On the moral right, see the text accompanying notes 35—9.
10. The matter was discussed under the law preceding the Israeli Gift Law, 1968-5728. Under the Gift Law, an undertaking to make a gift becomes irrevocable upon the death of the donor and becomes part of the estate of the recipient, even though the subject matter of the gift had not been delivered to the recipient; CA 11/75 Vaad Hayeshivot v. Michaeli 30 (1) PD 639 [1975] (Isr.).
11. CA 86/79 Kenig v. Cohen 35(1) PD 176 [1980] (Isr.); FH 40/80 Kenig v. Cohen 36(3) PD 701 [1982] (Isr.) (hereinafter Kenig further hearing).
12. As determined at the time by sec. 25 of the Succession Law, 1965-5725 (hereinafter Succession Law), which was amended later by the Succession Law (amendment no. 11), 2004-5764; see note 13.
13. Justice Barak's convincing minority opinion, which regarded the note as a will, loosened the formal requirements set by the law, granting precedence to the testator's intention and the sense of morality. For a critical discussion showing preference for the minority opinion, see Celia Wasserstein Fassberg, "Form and Formalism: A Case Study," *American Journal of Comp. Law* 31 (1983): 627; John H. Langbein, "Excusing Harmless Errors in the Execution of Wills," *Columbia Law Review*, 87 (1987): 1, 49—50. Justice Elon, also in the minority, validated the document but referred to it as a deathbed will: Kenig

further hearing, 729—43. For an analysis of the case in the context of "the slayer rule," see Nili Cohen, "The Slayer Rule," *Boston University Law Review*, 92 (2012): 793, 802—3. In the wake of the decision, sec. 25 of the Succession Law was amended to allow the court to refer to a deficient document as a will if it has no doubt regarding the testator's free and genuine will, on condition that the document exhibits the "fundamental components of a will."

14. *The Trial*, 267.
15. Ibid., 268.
16. Ibid.
17. Ibid., 269.
18. Sec. 34 of the Israeli Succession Law: "A testamentary provision the execution of which is illegal, immoral or impossible is void." Also see sec. 38 of the Succession Law: "(a) Where a will stipulates anything illegal, immoral or impossible as a condition of an entitlement or as an obligation [. . .], the condition or obligation is void, but without thereby rendering void the entitlement to which the condition or obligation was attached."
19. Raymond Sarraute, "Current Theory on the Moral Rights of Authors and Artists under French Law," *American Journal of Comp. Law* 16 (1968): 465, 476—7; Edward J. Damich, "The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors," *Geo. Law Review* 23 (1988): 1, 24—5, 40. On moral rights in Israeli and American law, see notes 35—40 and the accompanying text.
20. Sec. 30 of the Succession Law states: "(a) A testamentary provision made under duress, threats or undue influence or as a result of trickery or fraud is void. (b) Where a testamentary provision is made by reason of error and it is possible to determine clearly what the testator would have directed in his will but for the error, the Court shall amend the terms of the will accordingly; where this is impossible, the testamentary provision is void."
21. Sec. 2-514 of the Uniform Probate Code, entitled "Contracts Concerning Succession" allows on certain conditions for the validity of a contract to make a will or not to revoke a will.
22. Sec. 27 of the Succession Law, entitled "Freedom to Testation," states: "(a) An undertaking to make, alter or revoke a will or not to do any of these things, is of no effect. (b) A testamentary provision which negatives or restricts the right of the testator to alter or revoke the will is void."
23. *The Trial*, 264—5.
24. Ibid., 265.
25. Brod remarks that unfortunately Kafka became the executor of part of his estate: he found in Kafka's apartment covers of a notebook whose contents were entirely destroyed. Also, to the best of Brod's knowledge, Kafka burnt some other writings; ibid., 269.
26. Homer, *The Odyssey*, bk 12, ll. 165—200. The story of Odysseus and the Sirens served as the basis for a discussion of rationality and inter-temporal contradictory preferences; Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge: Cambridge University Press, 1979), esp. 36—111.
27. Jeffrey Miller, "What the Sirens Sang: A Law and Literature Answer," *Law and Literature* 24 (2012): 380.
28. Kafka, *Collected Stories*, 398. For an interpretation, see Ruth Martin, "Love at a Distance: Kafka and the Sirens," in *Sexual Politics of Desire and Belonging*, eds Nick Rumens and Alejandro Cervantes-Carson (Amsterdam: Rodopi Press, 2007), 81.
29. Theodore W. Adorno and Max Horkheimer, "Odysseus or Myth and Enlightenment" [trans. Robert Hullot-Kentor], *New German Critique* 56 (1992): 109—41; taken from Theodore W. Adorno and Max Horkheimer, *Dialectic of Enlightenment*, trans. E. Jephcott (Stanford: Stanford University Press, 2002), 35—62.
30. Adorno and Horkheimer, "Odysseus or Myth and Enlightenment," 123—4.
31. Judith Butler, "Who Owns Kafka?," *London Review of Books* 33, no. 5 (2011): 3.
32. Milan Kundera, *Testaments Betrayed: An Essay in Nine Parts*, trans. Linda Asher (London: Faber, 1995).
33. Ibid., 273—4.
34. Ibid., 245.
35. This right was first developed in French law; Susan Liemer, "On the Origins of Le Droit Moral: How Non-Economic Rights Came to Be Protected in French IP Law," *Journal of Intellectual Property Law* 19 (2011): 65. For the protection of this right in Israeli Law, see Copyright Law, 2007-5768: sec. 45 stipulates the right; sec. 46 defines what it implies, including the author's right of attribution and that no injury be caused to his work, nor any distortion or other change of form and that nothing injurious be done in connection with that work, all if any of these are liable to injure the honor or good name of the creator of the work; sec. 50 determines what constitutes an infringement of the right, but also provides for a defense against infringement, if the act was reasonable under the circumstances. Obviously, to enforce a law protecting the moral right it is necessary to have a

plaintiff claim on behalf of the author. None of Kafka's heirs felt themselves damaged by the non-destruction and publication of the works. In this matter sec. 55 of the Copyright Law currently stipulates that if the infringement took place after the author's death his close family members, including spouse, children, parents or siblings, are entitled to submit a claim. In American law moral right is narrowly protected. Sec. 106(a) of the Copyright Law applies to visual art, but the protection of moral right has been developed by courts and by legislation in some states. For a comparison between American and French Law, see Jean-Luc Piotraut, "An Author's Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared," *Cardozo Arts and Entertainment Law Journal* 24 (2006): 549, 595—614.

36. Kundera, *Testaments Betrayed*, 271—4.
37. Kundera is indeed willing to accept that Kafka had contradictory-mixed motives with regard to his literary work, but he criticizes Brod for rushing to publish the letters as part of constituting Kafka's myth; ibid., 274—5.
38. Ibid., 276.
39. Ibid.
40. Ibid., 277—8.
41. Ibid., 256—9.
42. A possibility noted by Brod himself; see the text accompanying note 4. However, Pawel, *Nightmare of Reason*, 426, follows Kundera's version: the first note ordered the burning of everything; the second granted a reprieve to some of the writings.
43. Kundera, *Testaments Betrayed*, 274—6.
44. For a general discussion on this topic, see John Henry Merryman, "The Public Interest in Cultural Property," *California Law Review* 77 (1989): 339. Merryman clarifies that defining an asset as cultural mainly fulfills the values of freedom of thought and national pride.
45. On the question whether the owner of a Rembrandt painting is entitled to destroy it, see Joseph L. Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasure* (Ann Arbor: University of Michigan Press, 1999), 60—72.
46. Heinrich Heine, "Almansor" *Saekularausgabe*: *Heines Werke*, band 4, Tragoedien, Fruehe Prosa 1820—1823 (Berlin: Akademie-Verlag and Paris: Editions du CNRS,1981), 7 at 15, lines 243—244.
47. Plato, *The Collected Dialogues: Including the Letters 1563, 1567*, eds Edith Hamilton and Huntington Cairns, trans. Lane Cooper (Princeton: Princeton University Press, 2005), lett. 2.
48. Roland Barthes, "Variations Sur l'Écriture," in *Oeuvres Complètes*, ed. Eric Marty (1993—95), II, 1535, 1556.
49. An issue that arises in the present context is the application of the Israeli Archives Law, 1955-5715, which covers "archival material," defined in sec. 1 as "any writing on paper or on other material and any sketch, diagram, map, drawing, label, file, photograph, film, gramophone record and the like [. . .] situated anywhere and which are relevant to the study of the past, the people, the State or society, or associated with the memory or activities of persons of note." Secs 8, 14 and 16 grant authority to the State Archivist over archival material in private hands, and also impose restrictions on its removal abroad. The State Archivist was involved in the actions concerning Kafka's manuscripts.
50. In the epilogue to *The Trial*, Brod explains his decision to publish Kafka's writings, and also his involvement in the editorial work. He clarifies that some passages written by Kafka, which he omitted, were published at the end of the novel. Regarding the opening of *The Castle*, Brod preferred one option and inserted the other at the end. He emphasizes that he made only minor changes in the contents and the chapter division.
51. Hoffe case.
52. Butler, "Who Owns Kafka?," notes somewhat ironically that the intention was to sell the manuscripts by weight.
53. See generally Stanley E. Porter and Jason C. Robinson, *Hermeneutics: An Introduction to Interpretive Theory* (Grand Rapids: Wm. B. Eerdmans Publishing co., 2011).
54. Roland Barthes, "The Death of the Author," in *Image—Music—Text*, trans. Stephen Heath (1977), 148: "the birth of the reader must be at the cost of the death of the Author."
55. Umberto Eco, *Interpretation and Overinterpretation* (1992). For a response, see Richard Rorty, "The Pragmatist's Progress," ibid., 89.
56. James Boyd White, *From Expectation to Experience: Essays on Law and Legal Education* (Ann Arbor: University of Michigan Press, 1999), 107.
57. Theodore Eisenberg, Talia Fisher and Issi Rosen-Zvi, "Israel's Supreme Court Appellate Jurisdiction: An Empirical Study," *Cornell Law Review* 96 (2011): 693.
58. Franz Kafka, "The Problem of Our Laws," in Kafka, *Collected Stories*, 404—6.