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## *Articles*

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“I Am Opposed to this Procedure”:  
How Kafka’s *In the Penal Colony*  
Illuminates the Current Debate About  
Solitary Confinement and Oversight of  
American Prisons

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#### ABSTRACT

This is the 100th anniversary of Franz Kafka's *In the Penal Colony*. The story brilliantly imagines a gruesome killing machine at the epicenter of a mythical prison's operations. The torture caused by this apparatus comes to an end only after the "Traveler," an outsider invited to the penal colony by the new leader of the prison, condemns it. In the unfolding of the tale, Kafka vividly portrays how, even with the best of intentions, the mental and physical well-being of inmates will be jeopardized when total control is given to people who run the prisons with no independent oversight.

At the core of America's vast prison system is the pervasive practice of solitary confinement, a practice that in many ways is analogous to the penal colony machine. Like the machine, it inflicts great psychological and often physical pain on people subjected to it. It, like the machine, is used to punish people for trivial offenses without due process. Like the machine, it is seen as essential to the operation of this closed prison system. Many of the new leaders of

American prisons want to reform solitary confinement practices, but like the new Commandant in Kafka’s tale, without oversight, these leaders operate in the dark, unable to effectuate meaningful change by themselves.

Kafka knew what he was talking about. The historic record, reviewed in this Article, demonstrates that Kafka had a notable legal career as an attorney at the Workers’ Accident Insurance Institute for the Kingdom of Bohemia in Prague. In that job he worked on behalf of industrial workers to open closed worksites to oversight, thereby improving worker safety and preventing needless accidents. These experiences gave Kafka a realistic understanding of what can happen in closed, unregulated institutions such as prisons.

Despite the relevance of *In the Penal Colony*, Kafka’s voice has not yet been heard in this debate. This Article is intended to fill that void and to reveal how Kafka’s profound insights, so artfully crafted in the powerfully beautiful prose of *In the Penal Colony*, help us understand why we must open prison doors to outside scrutiny and put an end to the gruesome practice that is solitary confinement.

#### INTRODUCTION

I am opposed to this procedure.”<sup>1</sup> These words, which are spoken by a traveler to an imaginary prison on an unnamed island, come at a critical moment in Franz Kafka’s masterpiece, *In the Penal Colony*.<sup>2</sup> Written a century ago, in the heat of a writing frenzy during the

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<sup>1</sup> Franz Kafka, *In the Penal Colony*, in *THE METAMORPHOSIS AND OTHER STORIES* 125, 148 (Donna Freed trans., Barnes & Noble Books 1996).

<sup>2</sup> The story was composed over a two-week period in October 1914, just two months after the commencement of the First World War, while Kafka was on vacation. CLAYTON KOELB, *KAFKA: A GUIDE FOR THE PERPLEXED* 118–19 (2010). The story, one of the few works of Kafka published during his lifetime, was published five years later in May 1919. *Id.* at 56; see also ERNST PAWEL, *THE NIGHTMARE OF REASON: A LIFE OF FRANZ KAFKA* 386 (1984). This was a time in Kafka’s life of “astonishing” productivity. KOELB, *supra* note 2, at 45; see also REINER STACH, *KAFKA: THE DECISIVE YEARS 468–69* (Shelley Frisch trans., Harcourt, Inc. 2005) (2002) (This work claims that when Kafka wrote his work he “was standing at the threshold of the most productive period of his life . . . a burst of energy came to him. It was as though a curtain were opening.”). During this time, Kafka also began work on *The Trial*, though that work was not published during his lifetime. KOELB, *supra* note 2, at 45. There is some slight disagreement about the exact time he wrote *In the Penal Colony*. According to another biographer, it was “completed” in November 1914, not October 1914. RONALD HAYMAN, *K: A BIOGRAPHY OF KAFKA* 187 (1981). One scholar maintains that Kafka began writing *In the Penal Colony* on October 15, 1914, and finished it three days later. PAWEL, *supra* note 2, at 329. Kafka publicly read

opening days of World War I, the words are a denunciation by the outsider of a machine that is operated by prison officials to torture, maim, and kill hapless prisoners. Until that decisive moment, the current progressive leader of the penal colony—the “new Commandant”—lacked the power to end the abuse.

Written in another century by an author who had never set foot in the United States and, as far as research reveals, had never visited a prison,<sup>3</sup> *In the Penal Colony* is as relevant today as it was when it was written. The story forcefully recounts the abuse that can occur when there is unrestricted power over prisoners, no matter how well-intentioned prison administrators may be.<sup>4</sup> The story also highlights the importance of external oversight of prisons. In the story, the abuse that Kafka so vividly and gruesomely describes is only checked when the closed penal colony is opened to oversight.

America’s prisons need oversight. At the core of America’s vast prison system<sup>5</sup> is the pervasive practice of solitary confinement, a practice which inflicts great psychological and often physical pain on the people subjected to it.<sup>6</sup> On any given day, at least 80,000 people are held in these harsh conditions, sometimes for periods that stretch for years and even decades, where they suffer in cruel and lasting

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the work at a literary event at the “avant-garde” art gallery, Goltz, in Munich, Germany, over the weekend of November 10, 1916. *Id.* at 350–51. The work was not well received at that reading. *Id.* at 351 (noting that the reading of *In the Penal Colony* itself “from all accounts, was a calamitous failure”).

<sup>3</sup> I have uncovered no evidence that Kafka ever set foot in a prison. However, it is clear that Kafka was well aware of the abuses inflicted on imprisoned people of the Dreyfus affair and the penal colonies of French Guiana and Devil’s Island. *See* HAYMAN, *supra* note 2, at 187. At the time Kafka wrote *In the Penal Colony*, because of the Dreyfus affair, he “would have already known about the penal colonies of French Guiana and Devil’s Island.” *Id.* As one biographer has noted: “Kafka knew that in the civilized modern world violence was banished to concealed rooms in police stations and prisons, and to colonial settings far from Europe.” RITCHIE ROBERTSON, *KAFKA: A BRIEF INSIGHT* 106 (2010). Other biographies consulted in this research contain no reference to Kafka having visited a penal facility. *See, e.g.*, MAX BROD, *FRANZ KAFKA: A BIOGRAPHY* (G. Humphreys Roberts & Richard Winston trans., 1960); REINER STACH, *KAFKA: THE YEARS OF INSIGHT* (Shelley Frisch trans., 2013) (2008); STACH, *supra* note 2.

<sup>4</sup> Almost a century later, teaching a seminar on the rights of prisoners with the then-corrections commissioner of New York City as a guest speaker, it dawned on me that this story has meaning in the current debate in the United States about the pervasive use of solitary confinement in American prisons and jails and the current effort to establish meaningful oversight mechanisms for American penal institutions.

<sup>5</sup> The American prison system has expanded at an astonishing rate in the past three decades. Currently, America imprisons more people—and at a higher per capita rate of incarceration—than any other country in the world by significant margins. *See infra* notes 181–82.

<sup>6</sup> *See infra* notes 181–265 and accompanying text.

ways.<sup>7</sup> Despite this, solitary confinement continues to be used on a massive scale.<sup>8</sup> Like the punishment inflicted by the machine in Kafka’s tale, solitary confinement is inflicted on inmates with little in the way of due process and often for petty reasons;<sup>9</sup> like the machine, it is cruel and torturous;<sup>10</sup> like the old Commandant, its defenders justify the practice as necessary for control and enlightenment.<sup>11</sup>

Absence of oversight is a major reason for the continuation of these practices. America lacks a comprehensive, organized, and official prison oversight system, and there is little in the way of unofficial access by the press<sup>12</sup> or by interested citizen groups.<sup>13</sup> Although the leadership of American correctional systems has increasingly become more professional and reform minded than in the past,<sup>14</sup> and some of these new leaders like the new Commandant want to reform solitary confinement practices,<sup>15</sup> they operate largely in the dark without oversight and, thus, are unable to effectuate meaningful change.<sup>16</sup> In the shadows it is almost impossible for these professionals to make progress—even if they want change. With the prison doors securely shut, what happens behind prison walls remains behind prison walls. The voice of the public is generally absent. But, like *In the Penal Colony*, when the widely recognized public values of decency and fairness are brought to bear, either through official or unofficial oversight, change begins to take place.<sup>17</sup>

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<sup>7</sup> See *infra* notes 181–265 and accompanying text.

<sup>8</sup> See *infra* notes 181–265 and accompanying text.

<sup>9</sup> See *infra* notes 181–265 and accompanying text.

<sup>10</sup> See *infra* notes 181–265 and accompanying text.

<sup>11</sup> See *infra* notes 181–265 and accompanying text.

<sup>12</sup> See *Houchins v. KQED*, 438 U.S. 1, 3–7 (1978) (holding that the press has no greater right of access to prisons and jails than citizens, so if citizens are denied access—as they are routinely—the press may also be denied access).

<sup>13</sup> See *infra* notes 266–84 and accompanying text.

<sup>14</sup> See Michael B. Mushlin, *From White Plains to Austin: The Road from the Prison Reform Revisited Conference to the Opening Up a Closed World Conference*, 30 PACE L. REV. 1430, 1434 (2010).

<sup>15</sup> See generally Stan Stojkovic, *Prison Oversight and Prison Leadership*, 30 PACE L. REV. 1476 (2010).

<sup>16</sup> See Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 562 (2006) (“Prison and jail officials were frequently collaborators in the litigation. If they did not precisely invite it, they often did not contest it.”).

<sup>17</sup> See *infra* notes 266–84 and accompanying text.

The lessons Kafka provides in *In the Penal Colony* come from an author who knew what he was talking about. Contrary to the widely accepted view, Kafka was not a lowly, little-regarded backroom bureaucrat. To the contrary, he was a highly accomplished, well-respected attorney who dedicated his considerable legal talent as a high-ranking official in a pioneering social reform government agency to improving the safety of workers in industrial settings.<sup>18</sup> In his work, he saw firsthand that without oversight, workplaces could be unnecessarily dangerous. To protect vulnerable workers, Kafka strived to improve the oversight and inspection powers of his agency. In so doing he saved the lives and bettered the conditions of scores of workers and injured veterans.

Despite its relevance, however, the insights that Kafka provides in *In the Penal Colony* are missing from discussions about American prisons.<sup>19</sup> This Article is intended to redress that imbalance.

This Article proceeds in three parts. Part I briefly recounts the story that Franz Kafka tells in *In the Penal Colony*. It also describes the professional life of Kafka and how that life might have influenced the story. Part II is a short description of the American prison system with a focus on two of its most salient features: the massive use of solitary confinement and the lack of meaningful oversight. This Part also highlights the positive change that occurs when committed prison administrators function in an environment in which oversight is present. Part III brings these two strains together with a discussion of how Kafka's profound insights, so powerfully set out in *In the Penal Colony*, help us understand why we must open prison doors to outside scrutiny, and why we must end the rampant use of solitary confinement in the United States.

## I

### IN THE PENAL COLONY & FRANZ KAFKA

#### A. In the Penal Colony

The story takes place on a nameless penal colony. A visitor—Kafka calls him the “Traveler”<sup>20</sup>—has been invited to the colony by

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<sup>18</sup> See FRANZ KAFKA: THE OFFICE WRITINGS, at ix–x (Stanley Corngold, Jack Greenberg & Benno Wagner eds., Eric Patton with Ruth Hein trans., 2009) [hereinafter THE OFFICE WRITINGS].

<sup>19</sup> Unlike Kafka, the writings of Charles Dickens have been used in contemporary discussions of prisons. See, e.g., DICKENS, *infra* note 203.

the “new Commandant,” who has recently assumed leadership of the colony.<sup>21</sup> The apparent reason for the invitation is that the new Commandant wants the Traveler to express his opinion about the wisdom of a ghastly machine used to torture and kill inhabitants of the penal colony who violate prison rules.<sup>22</sup>

As the story begins, the Traveler is at a “small, deep, sandy valley, closed in on all sides by barren slopes,”<sup>23</sup> accompanied by a person called the “Officer,” a longtime member of the prison staff. The Officer, who is captivated with the machine, is in the process of preparing it to torture and kill an anonymous condemned man whom we learn has been sentenced to die for the trivial offense of failing to salute a superior at specified times.<sup>24</sup> Although the condemned man has been taken to the execution machine, he does not know the punishment that awaits him.<sup>25</sup>

The Officer is a firm believer in the torture and death machine and is eager to begin the process of executing the condemned man.<sup>26</sup> The Officer tells the Traveler that the machine was the invention of the old Commandant of the penal colony, whom the Officer worships.<sup>27</sup> The machine, in the Officer’s words, is “an exceptional apparatus.”<sup>28</sup> It has three parts: the “bed” upon which the condemned is laid out naked on his stomach, tied down securely by straps on his hands, feet, and throat to prevent him from screaming and biting his tongue when the machine is in use; the “inscriber,” which is programmed to record “the commandment the condemned man has transgressed”; and “the harrow,” which slowly carries out the sentence by engraving the law violated on the prisoner’s back.<sup>29</sup>

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<sup>20</sup> In some translations, the invited guest of the new Commandant is called an “Explorer.” The German word that Kafka used is “Reisende,” which translates as “Explorer” or “Traveler.” SHARON SCHUMAN, FREEDOM AND DIALOGUE IN A POLARIZED WORLD 165 n.5 (2014).

<sup>21</sup> Kafka, *supra* note 1, at 130.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 125.

<sup>24</sup> The Officer explains to the Traveler that the condemned man’s offense is that he failed as ordered to stay awake during the night and to salute the door of the prison Officer every hour. *Id.* at 132.

<sup>25</sup> *Id.* at 131.

<sup>26</sup> *Id.* at 130–31.

<sup>27</sup> *Id.* at 127, 130.

<sup>28</sup> *Id.* at 125.

<sup>29</sup> *Id.* at 129–30.

Kafka gives us details about the machine.<sup>30</sup> The inscriber is about two meters (six feet) above the bed.<sup>31</sup> The parts are joined together at the corners by four brass rods, and they are powered by their own electric batteries.<sup>32</sup> When the prisoner is strapped in securely the intricate machine is set in motion. Working in unison, the gyrating parts of the machine are “calibrated precisely” to slowly engrave on the condemned’s back the rule he is being tortured and killed for violating.<sup>33</sup> Kafka has the Officer relate to the Traveler the horrid process that unfolds when the machine is set in motion:

When the man is laid down on the bed and it has started vibrating, the harrow is lowered onto his body. . . . The harrow appears to do its work in a uniform manner. As it quivers, its points pierce the body, which is itself quivering from the vibrations of the bed. . . . And now anyone can observe the sentence being inscribed on the body.<sup>34</sup>

The machine is designed to inflict its punishment slowly. It takes twelve hours to kill. At first “the condemned man is alive almost as before, he only suffers pain.”<sup>35</sup> After two hours the strap over the condemned’s mouth is removed, for at that point “he no longer has the strength to scream.”<sup>36</sup> The turning point comes at the sixth hour. At around that time it becomes clear to the condemned what is happening.<sup>37</sup> Here is how Kafka has the Officer describe what happens next:

[H]ow still the man becomes in the sixth hour! Enlightenment comes to even the dimmest. It begins around the eyes, and it spreads outward from there—a sight that might tempt one to lie down under the harrow oneself. . . . [T]he man starts to interpret the writing . . . .

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<sup>30</sup> In his professional life as an attorney at an office devoted to improving safety in workplaces, Kafka confronted a machine, which he describes in a memorandum he wrote in 1910, four years before he wrote *In the Penal Colony*. That machine bears some resemblance to the wood-planing machine described in the story. See Franz Kafka, *Measures for Preventing Accidents from Wood-Planing Machines (1910)*, reprinted in THE OFFICE WRITINGS, *supra* note 18, at 109–15 [hereinafter Kafka, *Wood-Planing Machines*, referring to the article by Kafka]; see also Richard A. Posner, *Kafka: The Writer as Lawyer*, 110 COLUM. L. REV. 207, 213 (2010) [hereinafter Posner, *The Writer as Lawyer*] (“The torture-killing machine in ‘In the Penal Colony’ seems a natural extension of his interest in technology, as manifested in the paper on the wood-planing machines.”).

<sup>31</sup> Kafka, *supra* note 1, at 129.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 133–34.

<sup>35</sup> *Id.* at 135–36.

<sup>36</sup> *Id.* at 136.

<sup>37</sup> *Id.* at 137.

You’ve seen how difficult the writing is to decipher with your eyes,  
but our man deciphers it with his wounds.<sup>38</sup>

The prisoner dies six hours after the moment of enlightenment, around the twelfth hour, and the “harrow pierces him clean through and throws him into the pit, where he’s flung down onto the cotton wool and bloody water. This concludes the sentence and we, the soldier and I, bury him.”<sup>39</sup>

The Officer explains to the Traveler that during the time of the old Commandant executions using the machine were popular events.<sup>40</sup> The Officer describes the killings that took place using the machine in an almost festive manner.<sup>41</sup> Kafka lets us know through the Officer’s comments that the old Commandant has died.<sup>42</sup> He has been buried on penal colony grounds.<sup>43</sup> The Officer deeply mourns his passing.<sup>44</sup> We also learn that to the Officer’s regret, the new Commandant has a totally different philosophy of penology.<sup>45</sup> He abhors this horrible machine of death.<sup>46</sup> If the new Commandant had his way, the Officer tells the Traveler, he would not use the machine any longer.<sup>47</sup>

However, despite the new Commandant’s views, and his “very extensive powers in this penal colony,” he has been unable to rid the colony of the machine.<sup>48</sup> Instead, we learn through the Officer’s bitter complaints that the new Commandant has made it more difficult to use the machine efficiently. For example, the new Commandant does not replace parts when they break, nor does he properly attend to maintenance.<sup>49</sup> These measures only make it more difficult to use the machine; they do not render the machine inoperable.<sup>50</sup>

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<sup>38</sup> *Id.* at 138.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 141.

<sup>41</sup> *Id.* (“As much as a whole day before the event the valley would be packed with people: They lived just to see it.”).

<sup>42</sup> *Id.* at 127.

<sup>43</sup> *Id.* at 156.

<sup>44</sup> *Id.* at 127.

<sup>45</sup> *Id.* at 138–41.

<sup>46</sup> *Id.* at 127.

<sup>47</sup> *Id.* at 130.

<sup>48</sup> *Id.* at 144; see also Reza Banakar, *In Search of Heimat: A Note on Franz Kafka’s Concept of Law*, 22 L. & LITERATURE 463, 470 (2010) (“Although the New Commandant has the power to stop this barbarous practice, he does not dare to.”).

<sup>49</sup> Kafka, *supra* note 1, at 138.

<sup>50</sup> *Id.*

The Traveler is appalled by “the injustice of the process and the inhumanity of the execution,”<sup>51</sup> but initially he does not object.<sup>52</sup> He hesitates because “[i]f I were to express an opinion it would be the opinion of a private individual.”<sup>53</sup> The Traveler also worries that because the penal colony is a special place, he should defer to people with more knowledge.<sup>54</sup> Finally, even though he is appalled by the device, he demurs and says that since he is not a resident of the colony, he has no place ordering anyone to do anything.<sup>55</sup>

As the inevitable approaches, Kafka treats us to a gruesome description of the preparations of the torture machine.<sup>56</sup> He tells us with awful precision just how the machine will do its work to bring about the excruciatingly slow death of the condemned man.<sup>57</sup> We are convinced that a terrible act of prison brutality is about to occur. We brace ourselves for it.

But there will not be an execution of the prisoner after all because despite his misgivings, when the Officer continues to press him to give his approval for the use of the machine, the Traveler decides he must take a stand. “I am opposed to this procedure,” he tells the Officer.<sup>58</sup> The power of those words causes the Officer to halt the process and release the condemned.<sup>59</sup> Because the Traveler speaks his mind even though he lacks the formal authority, the condemned man is spared a horrific death.<sup>60</sup>

The Officer next places himself in the machine, which he recalibrates the inscription to read, “be just,” but it malfunctions, killing the Officer.<sup>61</sup> The Traveler then leaves the penal colony. The machine has fallen apart and will no longer be used.<sup>62</sup> The penal colony has been reformed.

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<sup>51</sup> *Id.* at 139.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 144.

<sup>54</sup> *Id.* at 133.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 128–30.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 148.

<sup>59</sup> *Id.* at 149.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 150–55.

<sup>62</sup> *See id.* at 155–57.

### B. Kafka

Kafka, the author of *In the Penal Colony*, needs little introduction.<sup>63</sup> His piercingly powerful writings, most of which were published after his death,<sup>64</sup> have long captured our attention.<sup>65</sup> Indeed, Kafka is universally ranked as one of the top authors of the modern era.<sup>66</sup> As of 1984, more than 15,000 books and articles written in most of the world's great languages had been published about him and his writings.<sup>67</sup> In legal opinions, he has been cited perhaps more than any author.<sup>68</sup> As one scholar put it, "[t]here is no

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<sup>63</sup> See George Dargo, *Reclaiming Franz Kafka, Doctor of Jurisprudence*, 45 BRANDEIS L.J. 495, 497 (2007) (stating that "[n]o author has had more written about him than Kafka" (quoting W.G. Sebald, *Kafka Goes to the Movies*)), reprinted in W.G. SEBALD, CAMPO SANTO 153 (Anthea Bell trans., 2005) (2003).

For a sampling of the law review writings about Kafka, see, e.g., Martha J. Dragich, *Justice Blackmun, Franz Kafka, and Capital Punishment*, 63 MO. L. REV. 853 (1998); Jefferson M. Gray, *Franz Kafka: The Office Writings*, 56 FED. L. 52 (2009) (book review); Douglas E. Litowitz, *Franz Kafka's Outsider Jurisprudence*, 27 L. & SOC. INQUIRY 103 (2002); Ed Morgan, *In the Penal Colony: Internationalism and the Canadian Constitution*, 49 U. TORONTO L.J. 447 (1999); Brian Pinaire, *The Essential Kafka: Definition, Distention, and Dilution in Legal Rhetoric*, 46 U. LOUISVILLE L. REV. 113 (2007); Parker B. Potter, Jr., *Ordeal by Trial: Judicial References to the Nightmare World of Franz Kafka*, 3 PIERCE L. REV. 195 (2005); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); Samuel Wolff & Kenneth Rivkin, *Essay: The Legal Education of Franz Kafka*, 22 COLUM.-VLA J.L. & ARTS 407 (1998); Banakar, *supra* note 48; Posner, *The Writer as Lawyer*, *supra* note 30.

<sup>64</sup> "Kafka wrote a great deal but published very little." KOELB, *supra* note 2, at 72 (citation omitted). Indeed, in his entire lifetime he only published 112,000 words. *Id.* at 166 n.1. In his life, Kafka "authorized the publication of . . . approximately 40 pieces in total, many of which are shorter than a single page." Litowitz, *supra* note 63, at 115; see also Elif Batuman, *Kafka's Last Trial*, N.Y. TIMES (Sept. 22, 2010), [http://www.nytimes.com/2010/09/26/magazine/26kafka-t.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2010/09/26/magazine/26kafka-t.html?pagewanted=all&_r=1&); Franz Kafka—Biography, EUR. GRADUATE SCH., <http://www.egs.edu/library/franz-kafka/biography/> (last visited Jan. 2, 2015).

<sup>65</sup> Litowitz, *supra* note 63, at 104 (Kafka is "highly relevant for cutting-edge movements in legal studies.").

<sup>66</sup> Dargo, *supra* note 63, at 495. ("There is no end of interest in the work of Franz Kafka, surely one of the great modernists of our time."); Litowitz, *supra* note 63, at 103–04 ("Kafka is more popular than ever. . . . Although Kafka has been dead for more than 75 years, he is widely recognized throughout Western culture as a 'representative man' who captured the anxieties of the modern age . . . and heralded the emergence of postmodernism." (citations omitted)).

<sup>67</sup> See PAWEL, *supra* note 2, at 449.

<sup>68</sup> See Pinaire, *supra* note 63, at 117–18 (examining "1,069 court rulings, orders, and judgments (450 at the federal level and 619 at the state level), seventy-three Supreme

end of interest in the work of Franz Kafka.”<sup>69</sup> In all of these writings, there are many lenses critics and scholars have used to view Kafka and his writings.<sup>70</sup>

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Court briefs, and 468 articles from legal periodicals, for a total of 1,610 documents” in which Kafka has been cited in legal proceedings); Potter, Jr., *supra* note 63, at 195 (“To date, more than 400 judicial opinions contain references to [Kafka.]”); Dargo, *supra* note 63, at 497 (“The piling up of published writings on this most paradigmatic of twentieth century authors is surpassed only by the continuing energy emanating from the fountainhead of modernity itself, William Shakespeare.”); *see also* Jack Greenberg, *From Kafka to Kafkaesque*, in *THE OFFICE WRITINGS*, *supra* note 18, at 355 (“A Lexis search of state and federal courts turns up 245 opinions in state and federal courts that employ ‘Kafkaesque,’ including five in the Supreme Court of the United States.”).

<sup>69</sup> Dargo, *supra* note 63, at 495.

<sup>70</sup> Generally, there are three ways that scholars and literary commentators have sought to interpret Kafka. First, they have interpreted him through the lens of “social allegory,” using his writings as case studies of modern bureaucracy and its effects on people who are subjected to its power. *Id.* at 498 (citing SUSAN SONTAG, *AGAINST INTERPRETATION AND OTHER ESSAYS* 8 (1966)). Second, they have interpreted him through “psychoanalytic allegory,” using his writings as a way of understanding deeply personal relations. *Id.* (citing SONTAG, *supra* note 70). Third, they have interpreted him through “religious allegory,” seen in his writings’ deeply religious themes. *Id.* No one has yet or will ever come up with the “Rosetta Stone” that will unravel the mystery. Indeed, some claim that Kafka himself “did everything possible to evade interpretation.” HAROLD BLOOM, *RUIN THE SACRED TRUTHS: POETRY AND BELIEF FROM THE BIBLE TO THE PRESENT* 171 (Harvard Univ. Press ed. 1989). In the end, given the many ways in which Kafka can be viewed validly, “any reasonable interpretation” of Kafka may be legitimate. *See* Theodor W. Adorno, *Notes on Kafka*, in HAROLD BLOOM, *MODERN CRITICAL VIEWS: FRANZ KAFKA* 95, 95–97 (1986).

The literary criticism of *In the Penal Colony* is enormous. For scholars who have a theological perspective on the work, *see e.g.*, Warren Austin, *An Exegetical Note on “The Penal Colony,”* 7 S. REV. 363 (1941) (analogizing the storyline of *In the Penal Colony* to the turmoil between devout religionists and modern day scientists and humanitarians); Susanna Klingenstein, *In the Penal Colony*, in *REFERENCE GUIDE TO SHORT FICTION* 752, 752–53 (Noelle Watson ed., 1994) (book review) (providing a brief overview of Kafka’s *In the Penal Colony*, characterizing the work as the thematic counterpart to Kafka’s *The Trial*, with an exclusive focus on judgment and punishment); Erwin R. Steinberg, *The Judgment in Kafka’s “In the Penal Colony,”* 5 J. MOD. LITERATURE 492 (1976) (noting and discussing the various interpretations of *In the Penal Colony* from a religious perspective); Russell Samolsky, *Metaleptic Machines: Kafka, Kabbalah, Shoah*, 19 MOD. JUDAISM 173 (1999) (exploring Kafka’s literature in the context of the Holocaust, suggesting that his writings were prophetic of this tragic event); J.D. Thomas, *On the Penal Apparatus of Kafka*, 9 C. LITERATURE 64 (1982) (urging that *In the Penal Colony* should be interpreted through a theological lens, specifically in the context of the Jewish religion).

For scholars who have a legal perspective on the work, *see e.g.*, Banakar, *supra* note 48 (exploring law’s role in Kafka’s fiction, arguing that his writing allows readers to grasp law as a form of experience, the concept of which is an integral part of the human condition); James Conant, *In the Electoral Colony: Kafka in Florida*, 27 CRITICAL INQUIRY 662 (2001) (equating the electoral process in Florida with a machine, once prized and flawless, efficiently carrying out justice); Lida Kirchberger, *In the Penal Colony or The Machinery of the Law*, in *FRANZ KAFKA’S USE OF LAW IN FICTION: A NEW*

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INTERPRETATION OF *IN DER STRAFKOLONIE*, *DER PROZESS*, AND *DAS SCHLOSS* 13 (1986) (analyzing the machine's use in *In the Penal Colony* as a metaphor for the law in light of Rudolf von Jhering's concept of justice); Scott McClintock, *The Penal Colony: Inscription of the Subject in Literature and Law, and Detainees as Legal Non-Persons at Camp X-Ray*, 41 COMP. LITERATURE STUD. 153 (2004) (discussing the relevance of *In the Penal Colony* to the legal and sociological predicaments of suspected terrorists imprisoned at Guantanamo Bay); Morgan, *supra* note 63 (discussing the relationship between internationalism and the Canadian Constitution through the lens of *In the Penal Colony*).

For scholars who have a psychological perspective on the work, see e.g., Marjorie E. Rhine, *Franz Kafka: The Necessity of Form*, 83 MONATSHEFTE 86 (1991) (book review) (critiquing Corngold's study of Kafka's literature, presented in a collection of essays that attempt to uncover the meaning and motivation behind Kafka's literature, arguing that *In the Penal Colony* "served to repudiate the link between guilt and personal fate"); William J. Dodd, *Kafka and Freud: A Note on In der Strafkolonie*, 70 MONATSHEFTE 129 (1978) (analogizing the overall mechanism of the apparatus in *In the Penal Colony*, specifically its clearly distinct parts, to Freud's scheme of consciousness, the id, ego, and superego); Peter Dow Webster, "Dies Irae" in the Unconscious, or the Significance of Franz Kafka, 12 C. ENG. 9 (1950) (taking a psychoanalytical approach to interpreting Kafka's literature, arguing that much of his writing was fueled by his own neurosis and its "bewildering consequences"); Kevin S. Yee, *In der Freszkolonie: Kafka's Mouth of Justice*, 34 GERMANIC NOTES & REVS. 128 (2003) (In this essay, the author analogizes the three-part execution of the machine in *In the Penal Colony* to eating, with its functions serving as a metaphoric mouth. The author also argues that eating serves as a common theme for the story, referencing the rice pudding fed to the machine's victims, and characterizing it as an eating contest of sorts, the victor decided by both stamina and duration.).

For scholars who have a literary perspective on the work, see e.g., Kurt J. Fickert, *The Failed Epiphany in Kafka's In der Strafkolonie*, 32 GERMANIC NOTES & REVS. 153 (2001) (discussing the evolution of Kafka's use of the literary device of "epiphany," or moment of inner revelation, in his literature, which the author argues reached a "high point" in *In the Penal Colony*); Christine C. Mather, Performance Review, 53 THEATRE J. 491 (2001) (reviewing Philip Glass, *In the Penal Colony* (2000)) (This review critiques a chamber opera created by Philip Glass of *In the Penal Colony*, adding Kafka as a character to the production as both an observer and a participant. Mather describes Kafka's message in *In the Penal Colony* as questioning the "horrors" perpetuated out of sentiment and tradition.); Margot Norris, *Sadism and Masochism in Two Kafka Stories: "In der Strafkolonie" and "Ein Hungerkünstler,"* 93 MOD. LANGUAGE NOTES 430 (1978) (This article argues that there are pornographic elements in Kafka's *In the Penal Colony* and *The Hunger Artist*. Taken as companion pieces, the author explores the common themes of pain and embarrassment in each, contending that they suggest sadism and masochism, where suffering is seen as a means whose end is ultimately pleasure.); ROY PASCAL, KAFKA'S NARRATORS: A STUDY OF HIS STORIES AND SKETCHES 64 (Leonard Forster et al. eds., 1982) (In this book, Pascal explores Kafka's fiction, its numerous interpretations, and its relationships. Pascal discusses at length the relationship between the Traveler and the Officer in *In the Penal Colony*, noting the difficulty in deciphering who serves as the protagonist, and categorizing their relationship as one of two contrasting ideologies. However, Pascal points out that the outcome of their "contest" is unclear at the end of the story.); Malynne Sternstein, *Laughter, Gesture, and Flesh: Kafka's "In the Penal Colony,"* 8 MODERNISM/MODERNITY 315 (2001) (exploring Kafka's prevalent use of irony in his literature, and specifically in *In the Penal Colony*, often in seemingly inappropriate contexts).

Kafka was born in Prague in 1883, in what was then the Austria-Hungarian Empire, into a middle-class, German-speaking, Jewish family.<sup>71</sup> Except for the last few months of his life, he lived almost entirely in Prague with his family. He never married, and he died in 1924 at age forty-one, after a long illness caused by tuberculosis and severe influenza.<sup>72</sup> He was largely unknown at the time of his death.<sup>73</sup>

Kafka attended a private elementary and secondary school in Prague; at college, after dabbling in chemistry, he decided to study law.<sup>74</sup> He earned his law degree at age twenty-three in 1906 from Charles University of Prague.<sup>75</sup> Following graduation, he served for a year as a law clerk in the civil and criminal courts and then, after a year working for an Italian insurance company,<sup>76</sup> took a position at

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For scholars who have a colonial perspective on the work, see e.g., Rolf J. Goebel, *Kafka and Postcolonial Critique: Der Verschollene, "In der Strafkolonie," "Beim Bau der chinesischen Mauer,"* in A COMPANION TO THE WORKS OF FRANZ KAFKA 187 (James Rolleston ed., 2002) (discussing Kafka's use of the relationship between metropolitan centers and their colonial peripherals as a backdrop for three of his works, including *In the Penal Colony*); Paul Peters, *Witness to the Execution: Kafka and Colonialism*, 93 MONATSHEFTE 401 (2001) (exploring the metaphoric references to colonialism in *In the Penal Colony*, with a focus on role of the machine in Kafka's portrayal of colonialism).

<sup>71</sup> KOELB, *supra* note 2, at 12. Prague is now the capital of the Czech Republic. *Czech Republic Profile*, BBC NEWS: EUR., <http://www.bbc.com/news/world-europe-17220219> (last updated May 23, 2013, 6:11 AM).

<sup>72</sup> JANA ČERNA, *KAFKA'S MILENA* 88 (A.G. Brain & George Gibian trans., 1993).

<sup>73</sup> BROD, *supra* note 3, at 214.

<sup>74</sup> Wolff & Rivkin, *supra* note 63, at 407 (citing PAWEL, *supra* note 2, at 104 (“[U]pon matriculating at the Imperial and Royal German Karl-Ferdinand University in Prague . . . when he was 18 years of age, Kafka embarked . . . upon the study of chemistry, ‘of all things.’”). There is no indication that he enjoyed the rigid style of the legal education of those days and in that place. In fact, there is strong evidence that he found the study of law distasteful. His first biographer and good friend, Max Brod, reported that in law school Kafka “felt himself once again drowning in academic miasma; boredom closed in on him like a cloud of poison gas.” PAWEL, *supra* note 2, at 109.

<sup>75</sup> PAWEL, *supra* note 2, at 164–65; *see also* Dargo, *supra* note 63, at 503–04. Charles University was located in the Old City of Prague. Kafka attended the law school located in the “hallowed halls of the Carolinum, the oldest edifice of Central Europe’s first university.” *Id.*

<sup>76</sup> The company, called the Assicurazioni Generali, was an Italian insurance company that specialized in transport, marine, and fire insurance. PAWEL, *supra* note 2, at 175. Although Kafka was at first “upbeat” about the job, he soon found that “there could be no hope of accomplishing any creative work of his own” at the position. *Id.* at 177. Work was also regimented, and there was little time in it for his writing, so “[a]fter a mere few weeks he therefore began to look for a more congenial job.” *Id.* at 178.

the Workers’ Accident Insurance Institute of the Kingdom of Bohemia where he remained for the rest of his legal career.<sup>77</sup>

It is common to refer to Kafka’s professional life as inconsequential. He is often portrayed as a petty bureaucrat who worked in a backward bureau by day so that he could devote all his energy to writing at night.<sup>78</sup> The reality, however, is far different.<sup>79</sup> Kafka decidedly was not a faceless, petty civil servant. To the contrary, he was an accomplished lawyer who, over the course of a short but distinguished career, dedicated his considerable talent to the mission of reducing accidents by addressing dangerous working conditions in industrial settings in his native Bohemia.<sup>80</sup> In his professional work, Kafka demonstrated, through his actions and through his office writings and advocacy, a strong belief that oversight is necessary to prevent harmful things from happening in the organizations with which he dealt.<sup>81</sup>

### *1. The Workers’ Accident Insurance Institute for the Kingdom of Bohemia in Prague*

The Workers’ Accident Insurance Institute for the Kingdom of Bohemia was established in 1887, twenty-one years before Kafka began his career there.<sup>82</sup> The office was one of the first workers’ compensation offices in the world.<sup>83</sup> It was responsible for the area in

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<sup>77</sup> THE OFFICE WRITINGS, *supra* note 18, at ix, xi (When he retired on July 1, 1922, he had achieved the rank of Obersekretär, or “Senior Secretary,” of the Institute.); PAWEL, *supra* note 2, at 423.

<sup>78</sup> See, e.g., Wolff & Rivkin, *supra* note 63, at 411 (asserting that Kafka’s legal work was “non-taxing,” that he was “unmoved” by it, and that he worked because it allowed him to write and because it gave him funds on which to live).

<sup>79</sup> KOELB, *supra* note 2, at 55 (“Although it is tempting to imagine Kafka as merely a minor functionary in the great insurance bureaucracy, the truth is quite different.” (citation omitted)).

<sup>80</sup> See generally Kafka, *Wood-Planing Machines*, *supra* note 30, at 109 (recounting the legal career of Kafka and his extensive efforts to improve safety conditions at work sites).

<sup>81</sup> Dargo, *supra* note 63, at 507–08 (describing Kafka as favoring outside judicial oversight of unsafe work places).

<sup>82</sup> See *id.* at 504, 506–07.

<sup>83</sup> Workers’ compensation, which the office administered, was a major social welfare program adopted by the Austro-Hungarian Empire. The program was in part “to ward off growing social discontent” that was developing in the wake of the industrial revolution and in part out of an altruistic desire to improve the lot of working people who, when injured while working at dangerous factory jobs, were not compensated for their injuries. *Id.* at 507. The Austrian program in which Kafka worked was the number three program, ranked

the Austria-Hungarian Empire that had experienced the greatest amount of industrialization, making it “the largest and most influential” of six workers’ compensation offices established in the Empire.<sup>84</sup> When Kafka arrived, the office had 250 employees who were accountable for overseeing “35,000 industrial enterprises—close to fifty percent of all the companies required to carry workers’ insurance in all of the Austrian lands.”<sup>85</sup>

The office functioned as an insurance program and administrative agency. Employers of covered industries,<sup>86</sup> those with twenty or more workers, were required to pay a premium to the office calibrated based on the risk of accidents to their employees.<sup>87</sup> The funds generated by those premiums were used to pay injured workers on a no-fault basis.<sup>88</sup> The agency’s power to set premiums gave incentives for employers to make their workplaces safer. Workplace improvements that caused lower rates of accidents would result in lower premiums because premiums were based on statistical data about the number of accidents in the particular industry.<sup>89</sup> The Workers’ Accident Insurance Institute also determined the validity of claims filed by injured workers and gave compensation awards to those workers that had valid claims.<sup>90</sup> Perhaps most importantly, to reduce industrial injuries, the Institute actively promoted accident

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behind Germany and Switzerland, in its “commitment to the new reformist legislation.” *Id.* (citing PAWEL, *supra* note 2, at 183).

<sup>84</sup> Dargo, *supra* note 63, at 508 (citing JEREMY ADLER, FRANZ KAFKA 48 (2001)).

<sup>85</sup> Dargo, *supra* note 63, at 508 (citing PAWEL, *supra* note 2, at 184). Thus, the agency handled one-third of the empire’s industrial capacity. Dargo, *supra* note 63, at 508 (citing ADLER, *supra* note 84).

<sup>86</sup> There were real issues about which workplaces were covered. *See, e.g.*, Franz Kafka, *Accident Prevention in Quarries (1914)*, reprinted in THE OFFICE WRITINGS, *supra* note 18, at 273 [hereinafter Kafka, *Accident Prevention*] (discussing the imprecise distinction between agricultural quarries, which were not regulated by the Institute, and commercial quarries, which were).

<sup>87</sup> *See* Dargo, *supra* note 63, at 507.

<sup>88</sup> Benno Wagner, *Kafka’s Office Writings: Historical Background and Institutional Setting*, in THE OFFICE WRITINGS, *supra* note 18, at 20 (indicating that workmen’s compensation is “not connected to human fault”).

<sup>89</sup> *See id.* at 24, 31. Kafka worked in what we today would call “risk management.” Dargo, *supra* note 63, at 506. Kafka introduced the classification system, whereby industries with the greatest accident records would have to pay higher insurance premiums. *Id.* at 519. The system called for “[m]andatory coverage for industrial accidents, paid for entirely by employer contributions.” PAWEL, *supra* note 2, at 183.

<sup>90</sup> THE OFFICE WRITINGS, *supra* note 18, at 27–28.

prevention improvements.<sup>91</sup> The office performed various functions to carry out its mission, including actuarial work using injury statistics in particular industries to set premiums, adjudication work processing the appeals of workers denied compensation and of employers who contended that their premiums were set too high, and accident prevention work.<sup>92</sup> In the course of his career, Kafka performed all of these tasks.<sup>93</sup>

## 2. Kafka’s Work at the Institute

### a. Overview

Kafka initially was hired in 1908 as a temporary employee, but he quickly was given a permanent position.<sup>94</sup> He worked at the office for fourteen years, resigning in 1922 when he was too ill to continue, a short time before his death.<sup>95</sup> During that time, he rose to prominence serving as *Obersekretär*, or senior secretary, of the Prague office during the war years.<sup>96</sup> At the end of his career, he was the equivalent of the general legal counsel for the entire agency.<sup>97</sup>

When Kafka arrived at the Institute, it was in a state of near crisis. The office had a large deficit, employers were attacking the methods of setting premiums, the statistical data collection and analysis methods essential for the office to function properly were poor, and there was concern that workers were filing fraudulent claims.<sup>98</sup> A new

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<sup>91</sup> PAWEL, *supra* note 2, at 185 (noting that the office placed “a heavy stress” on “active and systematic involvement in occupational safety measures and in the prevention of industrial accidents”).

<sup>92</sup> See Gray, *supra* note 63, at 53.

<sup>93</sup> *Id.*; see also THE OFFICE WRITINGS, *supra* note 18, at 38–41.

<sup>94</sup> KOELB, *supra* note 2, at 25–26.

<sup>95</sup> See *id.* at 60.

<sup>96</sup> THE OFFICE WRITINGS, *supra* note 18, at ix; see also *supra* note 77 and accompanying text.

<sup>97</sup> Gray, *supra* note 63, at 53 (noting that Kafka was the equivalent of the modern general counsel); see also KOELB, *supra* note 2, at 25–26 (Kafka went from temporary assistant to a position of “high responsibility” in which he produced an “impressive quantity of technical writing.”).

<sup>98</sup> THE OFFICE WRITINGS, *supra* note 18, at 28–32; PAWEL, *supra* note 2, at 184 (“[T]he institute’s original management team seems to have been strikingly innocent of actuarial experience or even ordinary business sense.”).

administrator had just been hired to run the agency.<sup>99</sup> Kafka was assigned tasks that went “well beyond the routine itinerary of a new clerk.”<sup>100</sup> Within two years of starting work, Kafka was named head of the appeals unit at a time when the agency was flooded with appeals from employers challenging the premiums set by the Institute.<sup>101</sup> Thereafter, Kafka was involved in the full range of the Institute’s operations, including going to court and actively litigating cases<sup>102</sup> and serving as the administrative assistant and ghostwriter for the chief administrators of the office.<sup>103</sup> Of the many tasks and responsibilities that Kafka undertook, none interested him as much as accident prevention.<sup>104</sup>

*b. Kafka’s Accident Prevention Work*

Early in Kafka’s career, the director of the Institute was sufficiently impressed with Kafka that he put him in charge of “the institute’s pioneer venture into aggressive accident prevention.”<sup>105</sup> Doing accident prevention meant that Kafka would visit work sites.<sup>106</sup> In

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<sup>99</sup> The new administrator was Dr. Robert Marschner, “an energetic young professor of insurance at the Prague Institute of Technology, with whom Kafka had already taken several specialized courses.” PAWEL, *supra* note 2, at 184.

<sup>100</sup> THE OFFICE WRITINGS, *supra* note 18, at 36. In addition to writing a speech for the inaugural ceremony of the new head of the Institute just months after starting work, Kafka also dealt with a number of “strategic issues” that were an integral part of the new director’s reforms. Barely four months after he started work, he had written a “long and intricate essay on workshop insurance in the construction trade.” *Id.* at 36–37. That he was chosen for the important task of writing the inaugural speech, in the view of one scholar, “demonstrates once again [Kafka’s] rapidly achieved status as the public voice of the comprehensive reforms that Robert Marschner was to initiate as the Institute’s new director.” *Id.* at 53.

<sup>101</sup> *Id.* at 38. In that capacity, Kafka was entrusted with a large number of “exemplary legal cases,” including the criminal prosecution of an orchard and quarry owner. *Id.* From all accounts, he discharged his responsibilities in that capacity with skill and dedication. *Id.* at ix (describing Kafka as a “brilliant” lawyer).

<sup>102</sup> Gray, *supra* note 63, at 53. For example, Kafka was involved in litigation, “preparing the agency’s response to a weaving mill’s appeal of its risk classification.” *Id.* He also served as “agency counsel in the criminal prosecution of a quarry owner who was particularly recalcitrant about paying the necessary premiums to insure his workers.” *Id.*

<sup>103</sup> THE OFFICE WRITINGS, *supra* note 18, at 40; *see also* Gray, *supra* note 63, at 53 (“He also effectively functioned as a special assistant to the institute’s director, Dr. Robert Marschner, and to Eugen Pfohl, the head of the actuarial department, drafting speeches for both men and lengthy analytical pieces for the institute’s annual report.”).

<sup>104</sup> *See* THE OFFICE WRITINGS, *supra* note 18, at 40 (The accident prevention work he did has been called “pioneer[ing] work.”); *see also* Posner, *The Writer as Lawyer*, *supra* note 30, at 211.

<sup>105</sup> PAWEL, *supra* note 2, at 187.

<sup>106</sup> *Id.* (describing Kafka’s “numerous trips he undertook on behalf of the institute”).

these trips, he went into the backwaters of Bohemia.<sup>107</sup> As a result, Kafka, not unlike the Traveler who saw prison abuse, witnessed firsthand the horrible injuries that could be inflicted on laborers forced by circumstances to work at unsafe worksites.<sup>108</sup> He also saw the benefits to worker safety that resulted from the oversight efforts of his office, which he aggressively promoted.<sup>109</sup>

Three examples illustrate Kafka’s accident prevention work. The first involves Kafka’s efforts to improve safety in wood processing plants.<sup>110</sup> Many of these plants used a machine that had no safety guards, resulting in horrifying injuries to the workers who operated the machine—such as lost fingers and severed portions of their hands.<sup>111</sup> In an effort to prevent this carnage, Kafka conducted a careful analysis of possible design modifications to make the machine safer.<sup>112</sup> Following that analysis he wrote a report, illustrated in words and drawings,<sup>113</sup> describing how a worker’s exposure to injury would be drastically reduced with simple modifications to the machine.<sup>114</sup>

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<sup>107</sup> See Dargo, *supra* note 63, at 524. The Institute had a large number of factories and work sites within its purview and lacked resources to visit each factory. *Id.* at 519. Moreover, in some instances employers sought to bar employees of the Institute from inspecting their work site. See, e.g., Franz Kafka, *On the Examination of Firms by Trade Inspectors (1911)*, reprinted in THE OFFICE WRITINGS, *supra* note 18, at 120 [hereinafter Kafka, *Examination of Firms*]. Nevertheless, there is clear support for the idea that Kafka made frequent field trips into industrial Bohemia’s remote towns and villages, and that these visits “expos[ed] him to the injured and the exploited.” Dargo, *supra* note 63, at 524; see also PAWEL, *supra* note 2, at 183–98.

<sup>108</sup> Kafka was affected by what he saw. As Judge Posner put it, Kafka was “sympathetic to injured workmen and inclined to blame employers for indifference to safety. . . .” Posner, *The Writer as Lawyer*, *supra* note 30, at 211.

<sup>109</sup> Dargo, *supra* note 63, at 508–09 (describing Kafka’s aggressive efforts to use the powers of his office on behalf of unprotected workers).

<sup>110</sup> See Kafka, *Wood-Planing Machines*, *supra* note 30, at 109–15. Of all of Kafka’s office writings, this memo has “garnered the greatest scholarly attention.” THE OFFICE WRITINGS, *supra* note 18, at 118.

<sup>111</sup> Dargo, *supra* note 63, at 513 (“The old designs had the blades fixed on a rotating box which caused horrific injuries when workers caught their hands and fingers in the gaps created when the box rotated at high speed.”).

<sup>112</sup> Kafka, *Wood-Planing Machines*, *supra* note 30, at 109–15.

<sup>113</sup> This was the first report from the Institute that made use of illustrations. THE OFFICE WRITINGS, *supra* note 18, at 116. Illustrations in this context were a “media innovation” introduced by Kafka. *Id.* The illustrations were probably done by Kafka himself. See Dargo, *supra* note 63, at 513–15.

<sup>114</sup> Kafka, *Wood-Planing Machines*, *supra* note 30, at 109–15.

The report, written with “clarity and precision,” contains Kafka’s graphic description of the machine that caused so much unnecessary injury.<sup>115</sup> Many assert that this machine is the inspiration for the torture/killing machine in *In the Penal Colony*, which he wrote four years later.<sup>116</sup> Kafka’s report makes a compelling case that by altering the machine with the installation of a “cylindrical safety shaft,” it would dramatically reduce the risk of unnecessary injury.<sup>117</sup> Kafka demonstrated through prose and his own drawing how the redesigned machine, with the safety protections he identified, would be cheaper to install than the old shafts and could be operated at a lower cost.<sup>118</sup>

Kafka wrote this report against the backdrop of resistance to the idea of workers’ compensation from employers, who argued that oversight was bureaucratic and not needed.<sup>119</sup> Kafka’s advocacy was geared toward responding to those arguments in a way that displayed concern for workers’ safety while at the same time not adding to the manufacturer’s cost.<sup>120</sup>

The second example of Kafka’s accident prevention work involves his effort to improve safety at Bohemian quarries. Believing that the “Institute could no longer stand idly by” in the face of reports of unsafe conditions at these quarries, Kafka decided to inspect their conditions and document his findings on behalf of the Institute.<sup>121</sup> The results of Kafka’s inspections, including his photographs of the quarries,<sup>122</sup> which showed unsafe conditions, were published in a report written by Kafka that documented the problems and gave recommendations for changes in working conditions.<sup>123</sup> The danger of flying debris was ever present, yet safety goggles that could protect workers from eye injuries were often not used or even issued.<sup>124</sup> Mining was often done from the bottom up rather than from the top

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<sup>115</sup> Dargo, *supra* note 63, at 513–14.

<sup>116</sup> See, e.g., THE OFFICE WRITINGS, *supra* note 18, at 118.

<sup>117</sup> Kafka, *Wood-Planing Machines*, *supra* note 30, at 109–15.

<sup>118</sup> *Id.*

<sup>119</sup> THE OFFICE WRITINGS, *supra* note 18, at 117. His advocacy was geared to responding to those arguments in a way that displayed “a crucial sociopolitical dimension.” *Id.* From what we know, it was a success.

<sup>120</sup> *Id.* at 117–18.

<sup>121</sup> Kafka, *Accident Prevention*, *supra* note 86, at 272–98.

<sup>122</sup> Using photographs to illustrate the safety issues at the quarries was an innovation that Kafka pioneered. *Id.* at 299 (“Kafka’s extensive use of photography as a source of information on accident prevention is remarkable.”).

<sup>123</sup> See Kafka, *Wood-Planing Machines*, *supra* note 30.

<sup>124</sup> See Kafka, *Accident Prevention*, *supra* note 86, at 280–82.

down, which created the risk of falling stones and rocks.<sup>125</sup> Making matters worse, at a number of quarries Kafka found that employers were supplying workers with brandy to drink while they worked.<sup>126</sup> The high rate of injuries caused by these conditions created “an urgent need from both a social and a statistical standpoint” for intervention.<sup>127</sup> Kafka recommended mandating the use of safety goggles, prohibiting drinking on the job, requiring safer blasting techniques, cleaning debris from work sites, and quarrying from the top down.<sup>128</sup>

In his report, Kafka recognized that changes would not happen from mandates alone. Without “frequent and systematic” outside inspection to ensure that his recommendations were followed, Kafka wrote that there was little chance that the improvements in safety practices—even if ordered—would be maintained.<sup>129</sup> To be effective these inspections would have to be “systematic and continuing.”

A third example of Kafka’s accident prevention work is a report that he wrote on behalf of the director of the Institute<sup>130</sup> to the

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<sup>125</sup> *Id.* at 281.

<sup>126</sup> *Id.* at 278–80.

<sup>127</sup> *Id.* at 273.

<sup>128</sup> *Id.* at 275–82.

<sup>129</sup> *Id.* at 275–76. Kafka also recommended that photographs be a normal part of the inspections. *Id.* at 284. Kafka advocated for safety improvements in sugar refineries and pulp and paper mills. See Dargo, *supra* note 63, at 513 (citation omitted).

Additionally, Kafka was a passionate advocate for the protection and care of veterans returning from the bloody battlefields of World War I. During World War I, “one of Kafka’s chief responsibilities” was “the administration of welfare and medical benefits for disabled war veterans.” PAWEL, *supra* note 2, at 332–33. His office was in charge of assisting returning veterans. Kafka showed his compassion for their plight, recognizing the damage that the modern machinery of warfare inflicted on soldiers. *Id.* Writing eloquently about post-traumatic stress disorder before the syndrome had that name, Kafka said:

Soon after the outbreak of war, a strange apparition, arousing fear and pity, appeared in the streets of our cities. He was a soldier returned from the front. . . . His body shook without cease, as if he were overcome by a mighty chill, or he was standing stock-still in the middle of the tranquil street, in the thrall of his experiences at the front. We see others, too, men who could move ahead only by taking jerky steps; poor, pale, and gaunt, they leaped as though a merciless hand held them by the neck, tossing them back and forth in their tortured movements.

Franz Kafka, *A Public Psychiatric Hospital for German-Bohemia (1916)*, reprinted in THE OFFICE WRITINGS, *supra* note 18, at 336. Much of the work on this project was a private initiative by Kafka. See PAWEL, *supra* note 2, at 333.

<sup>130</sup> See Kafka, *Examination of Firms*, *supra* note 107. The document is signed by the director, but there is no doubt that the author is Kafka. See THE OFFICE WRITINGS, *supra* note 18, at 141 (stating that the report was “beyond reasonable doubt” written by Kafka).

Minister of the Interior protesting the absence of systematic power to inspect work places.<sup>131</sup> Private employers had successfully lobbied to prevent the staff of the Institute from regularly visiting their sites, on the ground that inspections threatened trade secrets.<sup>132</sup> They argued that private trade inspectors from private trade associations, rather than the Institute, should make these inspections.<sup>133</sup>

Without attacking the good faith of the trade association inspectors,<sup>134</sup> Kafka proved, through example after example, that insider inspectors could not be trusted to accurately report on conditions in the factories and workplaces that they were charged with inspecting.<sup>135</sup> For instance, one report by trade inspectors found that a brickyard was safe, but it was later discovered that “the property included some steep embankments” near a road next to a wall, which “threatened to collapse.”<sup>136</sup> Another report by trade inspectors said work was powered by an electric motor, which was safer than steam motors, and that the clay wall at the site was safe, but it was discovered that these claims were not true.<sup>137</sup> Rather, the plant had a steam motor, not an electric motor, and the clay wall was in fact “steep,” rendering conditions in the yard “adverse.”<sup>138</sup> The report is replete with many other equally egregious examples of unsafe practices.<sup>139</sup>

This report, which has been described as a “core document among Kafka’s office writings,”<sup>140</sup> demonstrates Kafka’s understanding of the need for outside oversight of closed institutions. Because this was

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<sup>131</sup> *Id.* at 120–140.

<sup>132</sup> *Id.* at 120.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 139.

<sup>135</sup> *See id.* at 120–40.

<sup>136</sup> *Id.* at 138.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 126–30 (discussing statements from inspectors that conflict with accident statistics). For example: “[t]ime and again, we find similar evaluations that purport to discover limited machine operation in commercial smokehouses, although the particular operating conditions of the smokehouses and their accident statistics contradict such an assumption,” *id.* at 127; “only certain types of commercial enterprises may be considered [exempt from coverage] . . . [b]ut in their eagerness to ally themselves with the owners whenever possible,” the inspectors give this designation to enterprises that are not within the purview of that exemption, *id.*; trade inspectors provided information that contradicted information that the employers themselves submitted, *id.* at 129; and the information is so unreliable that “neither the Institute nor the related authorities will ever learn the true conditions,” *id.* at 130.

<sup>140</sup> *Id.* at 120.

lacking, many of the firms covered by the workers’ compensation laws became “black boxes,” closed to outside, independent viewing.<sup>141</sup>

*c. Summary of Kafka’s Professional Work Experience*

Kafka’s professional life is anything but that of a petty bureaucrat.<sup>142</sup> Contrary to accepted wisdom, and Kafka’s complaint that his office work was a “dreadful impediment to my life,”<sup>143</sup> the Kafka that emerges from this examination enjoyed his work and took pride in his job-related successes. He once wrote “the whole world of insurance itself interests me greatly.”<sup>144</sup> There is evidence that Kafka was quite proud of his work at the Institute.<sup>145</sup> His talent and contributions were not lost on his supervisors and peers who often praised him in “consistently glowing job evaluations.”<sup>146</sup> He was considered so “indispensable” that the government exempted him from military service during World War I at the request of his superiors.<sup>147</sup> Kafka’s superiors commended him for his “outstanding zeal,” for being “eminently hardworking,” and for having “exceptional talent” and “devotion to duty.”<sup>148</sup> His peers also valued his contributions. According to one source, “Herr Doktor Kafka was highly esteemed as a staff member and universally popular as a person.”<sup>149</sup> Indeed, he was so highly regarded that he was one of the

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<sup>141</sup> THE OFFICE WRITINGS, *supra* note 18, at 141.

<sup>142</sup> PAWEL, *supra* note 2, at 186 (Kafka’s professional work “incisively refute[s] the caricature of Kafka as a bumbling fool.”).

<sup>143</sup> THE OFFICE WRITINGS, *supra* note 18, at 42; *see also id.* at x (citing a letter by Kafka to his fiancée Felice Bauer in 1913, one year before he wrote *In the Penal Colony*, complaining that the “writing and office cannot be reconciled”). Kafka often depreciated aspects of his life. *See* Posner, *The Writer as Lawyer*, *supra* note 30, at 207 (noting that Kafka “repeatedly expressed loathing for his job at the Institute” (citation omitted)).

<sup>144</sup> THE OFFICE WRITINGS, *supra* note 18, at 20 (“[T]his remarkable confession has been ignored by Kafka scholarship.”).

<sup>145</sup> Further evidence of his pride in his work is that he made it “a regular practice to send copies [of reports that he wrote to] his friends.” PAWEL, *supra* note 2, at 186; *see also* KOELB, *supra* note 2, at 26 (“Although he resented the effort it took, he was succeeding in the office and was proud of what he accomplished there.”).

<sup>146</sup> PAWEL, *supra* note 2, at 186; *see also* KOELB, *supra* note 2, at 26 (“He did his job well, and it was much appreciated by his supervisors.”).

<sup>147</sup> PAWEL, *supra* note 2, at 326.

<sup>148</sup> *Id.* at 186.

<sup>149</sup> *Id.* at 189.

“very few” Germans working in the office to survive an office purge when the government changed after World War I ended.<sup>150</sup>

Kafka’s peers’ esteem for him was justified. Kafka was a lawyer of “exceptional gifts and exemplary commitments”<sup>151</sup> whose work went “well beyond the routine itinerary of a new clerk.”<sup>152</sup> Even if he had never written a word of literature, Kafka would have left his mark as a man who had “a most remarkable professional career.”<sup>153</sup> As one exhaustive study of Kafka’s professional work concluded, “Kafka was not a ‘little clerk’ . . . . He was a significant innovator of modern social and legal reform.”<sup>154</sup> Another leading biographer wrote that “far from being a nameless cog in a giant engine run amok, he was from the very beginning in decision-making positions and contributed his share toward a significant reduction of crippling and fatal accidents in some of Bohemia’s major industries.”<sup>155</sup>

In his professional life, Kafka confronted life’s dark side, seeing firsthand “the raw reality of wounded, crippled, and killed workers.”<sup>156</sup> As one scholar put it, “Kafka’s preoccupation [with these issues] . . . was deep and long lasting.”<sup>157</sup> He possessed “strong progressive sympathies” and was concerned about the “plight of the industrial workers” that he knew firsthand.<sup>158</sup> Throughout his career, he devoted his legal talent to improving the lot of the “injured and the maimed, the downtrodden and the dispossessed.”<sup>159</sup>

A fair assessment of Kafka’s career is that he made a difference. Kafka saved many lives and improved livelihoods. For example, his investigations and report on wood-planing machines resulted in introducing “such safety measures as cylindrical lathe shafts less inclined to chop off workers’ fingers.”<sup>160</sup> Because of his advocacy,

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<sup>150</sup> *Id.* at 375.

<sup>151</sup> Dargo, *supra* note 63, at 495; *see also* Gray, *supra* note 63, at 54 (Kafka the professional is an “impressively capable young professional and a passionately idealistic social reformer.”).

<sup>152</sup> THE OFFICE WRITINGS, *supra* note 18, at 36.

<sup>153</sup> *Id.*; *see also* PAWEL, *supra* note 2, at 186 (“His articles, for the most part highly technical in nature, combine an astonishing grasp of abstruse detail with a lucidity of presentation seldom encountered in writings of this sort.”).

<sup>154</sup> THE OFFICE WRITINGS, *supra* note 18, at ix.

<sup>155</sup> PAWEL, *supra* note 2, at 189.

<sup>156</sup> THE OFFICE WRITINGS, *supra* note 18, at 36.

<sup>157</sup> Dargo, *supra* note 63, at 503.

<sup>158</sup> *Id.* at 520.

<sup>159</sup> *Id.* at 522; *see also* PAWEL, *supra* note 2, at 187 (Kafka had an “instinctive identification with the underdog.”).

<sup>160</sup> THE OFFICE WRITINGS, *supra* note 18, at x.

“the lives and limbs of hundreds of workers, especially in the various branches of Bohemia’s dominant lumber industry,” were saved.<sup>161</sup> And he successfully introduced work rules prohibiting brandy drinking and pipe smoking near dynamite sheds in quarries.<sup>162</sup> He also successfully resisted challenges to premiums by “recalcitrant and chicaning” employers.<sup>163</sup>

The story of Kafka’s professional life is the story of a man who was “an ardent campaigner for improved safety measures for workers[,] . . . a scrupulous and careful analyst of highly technical safety problems, and . . . a talented publicist with a real flair for public advocacy and education.”<sup>164</sup> As a person in key “decision-making positions,” Kafka contributed “toward a significant reduction of crippling and fatal accidents in some of Bohemia’s major industries.”<sup>165</sup>

There is no evidence that Kafka knew about prisons or had ever visited one.<sup>166</sup> Yet in his professional life there is no doubt that Kafka brought to his work a clear understanding of the plight of powerless people, particularly workers employed in industrial settings who were subjected to dangerous, life-threatening conditions imposed by employers unconcerned with their well-being.<sup>167</sup> Kafka’s work improving conditions in quarries, and his resistance to efforts to prevent inspections of work sites, also demonstrates a deep understanding of the role of independent governmental oversight.

Highlighting Kafka’s professional life in this way does not provide a Rosetta Stone for unlocking the meaning of his stunning oeuvre, though.<sup>168</sup> There is no single pathway to understand this complex personality and the masterpieces he produced.<sup>169</sup> For example, Kafka

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<sup>161</sup> PAWEL, *supra* note 2, at 187.

<sup>162</sup> See THE OFFICE WRITINGS, *supra* note 18, at x.

<sup>163</sup> *Id.*

<sup>164</sup> Gray, *supra* note 63, at 54.

<sup>165</sup> PAWEL, *supra* note 2, at 189.

<sup>166</sup> See *supra* note 3.

<sup>167</sup> See generally Litowitz, *supra* note 63 (describing Kafka’s concern for the “situational outsider”).

<sup>168</sup> KOELB, *supra* note 2, at 10 (“There is no Rosetta Stone” for understanding Kafka.).

<sup>169</sup> Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1369 (1986) [hereinafter Posner, *Law and Literature*] (“Kafka’s writings have frequently been called the literary equivalent of the Rorschach test.”). See *supra* note 70 and accompanying text (describing the many ways that Kafka has been interpreted).

was a Jew in a Christian land plagued by anti-Semitism;<sup>170</sup> he was raised as a secular Jew, but became enamored with the trappings of his faith and mystical aspects of the religion in his adult life;<sup>171</sup> he spoke German in a country in which Czech was the common tongue;<sup>172</sup> he had an exceptionally difficult and conflicted relationship with his father;<sup>173</sup> he was sickly and often ill;<sup>174</sup> he was a deeply distrustful and neurotic person who had difficulty in relationships—he was engaged twice to the same person, and once to another, but broke off these engagements and never married;<sup>175</sup> and he was conflicted even about his genius and ordered his best friend to destroy his writings upon his death, many of which had not been published.<sup>176</sup>

These aspects of his life all help explain Kafka's writings.<sup>177</sup> But a focus on his professional life—dedicated as it was to using his legal skills to elevate the condition under which politically powerless people lived—is also an important, though often overlooked, lens through which to view Kafka generally and *In the Penal Colony* in particular.<sup>178</sup> The validity of this approach does not depend upon proving, or even suggesting, that Kafka wrote *In the Penal Colony* with prison reform in mind, or that his primary purpose in writing this

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<sup>170</sup> See, e.g., Posner, *The Writer as Lawyer*, *supra* note 30, at 207 (noting that, in his professional life, Kafka was “the only Jew in a responsible position in the Institute in a time and place when anti-Semitism was rife”).

<sup>171</sup> KOELB, *supra* note 2, at 32 (noting Kafka's intense interest in Yiddish and Eastern European practices of Judaism).

<sup>172</sup> RONALD GRAY, FRANZ KAFKA 29–30 (1973) [hereinafter GRAY, FRANZ KAFKA] (“He remained a German-speaker of Czech origin in a city where German-speakers were in a small minority.” (citation omitted)).

<sup>173</sup> See, e.g., FRANZ KAFKA, DEAREST FATHER: STORIES AND OTHER WRITINGS (Ernst Kaiser & Eithne Wilkins trans., 1954) (describing Kafka's painfully difficult relationship with his father); KOELB, *supra* note 2, at 15 (“The bond between father and son—which was as powerful as it was corrosive—was forged in the sporadic but intense fires of hyperbolic paternal rhetoric.”).

<sup>174</sup> See, e.g., PAWEL, *supra* note 2, at 111 (noting Kafka's frequent illnesses both real and imagined).

<sup>175</sup> For a powerful biography describing these relationships, see generally PAWEL, *supra* note 2.

<sup>176</sup> GRAY, FRANZ KAFKA, *supra* note 172, at 40.

<sup>177</sup> The literature of interpretations of Kafka is vast. See *supra* note 70 for a partial listing.

<sup>178</sup> See, e.g., Dargo, *supra* note 63, at 517 (“Kafka imported his life experience into his literary work.”).

tale was to make a social commentary or achieve a political end.<sup>179</sup> Rather, the more modest goal of this approach is to demonstrate Kafka’s record as an attorney who had a great deal of experience with situations not dissimilar to those facing American prisoners, and that Kafka, in his professional writings, demonstrated a concern and compassion for people caught in such circumstances. Put simply, Kafka was devoted to improving the plight of powerless people trapped in powerful institutions, and he understood the crucial role that outside observers can play in that effort. All of this means that “the impact of [Kafka’s] office writings on his stories and novels should not be underestimated.”<sup>180</sup> With this background, we turn now to examination of the American penal system and two of its most salient features: solitary confinement and the lack of oversight.

## II

### IN THE AMERICAN PENAL SYSTEM: SOLITARY CONFINEMENT AND LACK OF SYSTEMATIC OVERSIGHT

Kafka could not have known, but in our time America has established the largest penal system in the world.<sup>181</sup> The growth in incarceration rates over the past forty years is “historically unprecedented and internationally unique.”<sup>182</sup> Without even counting juvenile detention facilities and immigration detention centers, the United States has more than two million adults in its prisons and jails

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<sup>179</sup> Nevertheless, it is worth noting that *In the Penal Colony* is one of the few pieces that Kafka consented to have published during his lifetime. Thus it is within the body of selections that “he considered his most authentic work.” PAWEL, *supra* note 2, at 296.

<sup>180</sup> THE OFFICE WRITINGS, *supra* note 18, at x; *see also* BROD, *supra* note 3, at 84 (“It is clear that Kafka derived a great amount of his knowledge of the world and of life . . . from his experiences in the office [and] from coming into contact with workmen suffering under injustice.”); DARGO, *supra* note 63, at 524 (stating that “[t]here’s no soundproof concrete wall between Franz Kafka, the lawyer, and Franz Kafka, the writer” (citation omitted)).

<sup>181</sup> ROY WALMSLEY, INT’L CTR. FOR PRISON STUD., WORLD PRISON POPULATION LIST 1 (10th ed. 2013), *available at* [http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl\\_10.pdf](http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf). (“The United States has the highest prison population rate in the world, 716 per 100,000 of the national population.”).

<sup>182</sup> NAT’L ACAD. OF SCIS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) [hereinafter THE GROWTH OF INCARCERATION], *available at* [http://www.jjay.cuny.edu/\\_images/NAS\\_report\\_on\\_incarceration.pdf](http://www.jjay.cuny.edu/_images/NAS_report_on_incarceration.pdf).

on any given day.<sup>183</sup> No other nation in the world comes close to having as many prisoners in terms of absolute numbers; only the Seychelles, a nation with a population of less than 100,000,<sup>184</sup> has a higher rate of incarceration *per capita*.<sup>185</sup>

The system is so massive and so unprecedented that a new vocabulary has arisen to describe it; terms such as “the carceral state,” “mass incarceration,” or “the prison industrial complex” are now commonplace.<sup>186</sup> While there is not much well understood about American prisons,<sup>187</sup> two attributes of the system stand out: first, the

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<sup>183</sup> MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 1:1 (4th ed. 2010) (Supp. 2014–15). At the end of 2012, the United States maintained its position as the world’s leader in incarceration with approximately 2.2 million individuals confined in the nation’s prisons and jails, and 1,570,400 of those individuals incarcerated in state and federal prisons. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 1–2, *available at* [http://sentencingproject.org/doc/publications/inc\\_Trends\\_in\\_Corrections\\_Fact\\_sheet.pdf](http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf). The combined U.S. adult correctional system, including offenders living in communities on probation or parole and those held in state or federal custody or local jails, supervised about 6,937,600 offenders. LAUREN E. GLAZE & ERINN J. HERBERMAN, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012 (2013).

<sup>184</sup> The Seychelles had a population of 89,173 people as of 2013. *Population of Seychelles*, GOOGLE PUB. DATA EXPLORER, [http://www.google.com/publicdata/explore?ds=d5bncppjof8f9\\_&met\\_y=sp\\_pop\\_totl&idim=country:SYC&hl=en&dl=en](http://www.google.com/publicdata/explore?ds=d5bncppjof8f9_&met_y=sp_pop_totl&idim=country:SYC&hl=en&dl=en) (last updated Dec. 3, 2014).

<sup>185</sup> *Highest to Lowest–Prison Population Rate*, INT’L CTR. FOR PRISON STUDIES, [http://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All) (last visited Jan. 2, 2015); *see also* THE SENTENCING PROJECT, *supra* note 183, at 2 (“From 1973 to 2009, the state and federal prison populations that are the main focus of this study rose steadily, from about 200,000 to 1.5 million, declining slightly in the following 4 years.”); GLAZE & HERBERMAN, *supra* note 183, at 1 (0.7% fall in 2012, fourth year in a row).

<sup>186</sup> Development of the term “prison industrial complex” is commonly associated with Professor Mike Davis. *See* Mike Davis, *The Politics of Super Incarceration*, in CRIMINAL INJUSTICE: CONFRONTING THE PRISON CRISIS 73, 73 (Elihu Rosenblatt ed., 1996); *see also* Cynthia Chandler, *Death and Dying in America: The Prison Industrial Complex’s Impact on Women’s Health*, 18 BERKELEY WOMEN’S L.J. 40, 42 (2003); *see, e.g.*, Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693 (2006) (using the term “carceral state”); Willa Payne & Matt Luton, *A Relocation of Prisoner Identity*, 10 N.Y. CITY L. REV. 299, 299, 308, 310 (2006) (using the terms “mass incarceration” and “the prison industrial complex”); Dean Spade et al., *Law Reform and Transformative Change: A Panel at CUNY Law*, 14 CUNY L. REV. 21, 22 (2010). In an introduction to a panel discussion with Rickke Mananzala, Soniya Munshi, Nadia Qurashi, and Elana Redfield, Dean Spade asked “[i]f the prison industrial complex is an extension of chattel slavery and reform efforts tend to expand its work of racial violence, how should lawyers seeking to alleviate harms facing imprisoned people do our work?” *Id.*

<sup>187</sup> *See, e.g.*, THE GROWTH OF INCARCERATION, *supra* note 182, at 164 (“Concerns about the accuracy or reliability of official compilations of general criminal justice data—including data collected in and about the nation’s correctional institutions—are longstanding.”). Certain aspects of the current American prison system, however, are well

pervasive use of solitary confinement; and second, the lack of a systematic and effective system of oversight through either formal or informal mechanisms.

### A. Solitary Confinement

America was the first country in the world to institutionalize solitary confinement as part of the normal operation of its prisons. One might even say that Americans invented solitary confinement.<sup>188</sup>

The current American prison system makes extensive use of solitary confinement. On any given day, more than 80,000 people

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established, and they are not pleasant. These include serious overcrowding, *see id.* at 159; prisons placed in remote locations, *see, e.g.*, J.M. Kirby, Graham, Miller, & *the Right to Hope*, 15 CUNY L. REV. 149, 164 (2011) (“[P]risons are frequently located in remote rural areas, far from the primarily impoverished urban communities where prisoners’ friends and loved ones live.”); prisons lacking sufficient programs and meaningful work opportunities for many prisoners, *see, e.g.*, Lynn S. Branham, “*The Mess We’re In*”: *Five Steps Towards the Transformation of Prison Cultures*, 44 IND. L. REV. 703, 704 n.3 (2011) (“[W]hile a little over half of the prisoners eligible to work in prison—some are foreclosed from working for security or medical reasons—have job assignments, the vast majority of these inmates work in positions geared toward facility operations, such as janitorial and laundry work, rather than jobs specifically tailored to prepare them for reentry.” (citation omitted)); and high levels of sexual violence, *see* THE GROWTH OF INCARCERATION, *supra* note 182, at 166. In addition, there is no solid evidence that prisons have contributed in a significant way to the reduction in crime in the United States. *See* Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163 (2004); *see also* THE GROWTH OF INCARCERATION, *supra* note 182, at 322. Because levels of sexual violence are so high, the United States Congress passed the Prison Rape Elimination Act. *See infra* notes 277–78.

<sup>188</sup> *See, e.g.*, Peter Scharff Smith, *Solitary Confinement: An Introduction to the Istanbul Statement on the Use and Effects of Solitary Confinement*, 18 TORTURE 56, 57–58 (2008), available at <http://solitaryconfinement.org/uploads/TortureJournalVol18No1.pdf> (describing the origins of the modern use of solitary confinement at the end of the eighteenth and the beginning of the twentieth centuries); *see also* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 328 (2006); *cf.* Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 622, 623 (2008); Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 PACE INT’L L. REV. 1, 6 (2006); Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT’L L. REV. 71, 73 (2005) (describing the origins of solitary confinement tracing back to eighteenth century prison practices of American Quakers).

throughout the country are imprisoned in solitary.<sup>189</sup> Solitary confinement is a form of imprisonment in which a person is confined to a cell alone for twenty-three hours each day with virtually no human contact.<sup>190</sup> The cells are normally equipped with just a bed, toilet, metal desk, and stationary chair.<sup>191</sup> Sometimes the doors are solid; sometimes they are barred.<sup>192</sup> Windows may or may not be present in the cells.<sup>193</sup> All meals are given to inmates in their cells, usually passed to them through slots.<sup>194</sup> Sometimes inmates in solitary are deprived of reading material, radio, and television.<sup>195</sup> In some cases lights are left on twenty-four hours per day.<sup>196</sup>

The one hour of out-of-cell time is often spent in solitude in small concrete-walled exercise areas or in individual exercise cages.<sup>197</sup> The

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<sup>189</sup> JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, COMM’N ON SAFETY AND ABUSE IN AMERICA’S PRISONS, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS 52 (June 2006), available at [http://www.vera.org/sites/default/files/resources/downloads/Confronting\\_Confinement.pdf](http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf); see generally MUSHLIN, *supra* note 183.

<sup>190</sup> See N.Y. CIVIL LIBERTIES UNION, BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK’S PRISONS 1 (2012), available at [http://www.nyclu.org/files/publications/nyclu\\_boxedin\\_FINAL.pdf](http://www.nyclu.org/files/publications/nyclu_boxedin_FINAL.pdf).

<sup>191</sup> See *Solitary Confinement FAQ*, SOLITARY WATCH, <http://solitarywatch.com/facts/faq/> (last updated 2012).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> These kinds of restrictions were upheld by the U.S. Supreme Court in *Beard v. Banks*, 548 U.S. 521 (2006). This treatment can have a significant impact. In at least one case, a prisoner who finally received a television began to hear voices emanating from it that he thought were speaking directly to him. Atul Gawande, *Hellhole*, NEW YORKER (Mar. 30, 2009), <http://www.newyorker.com/magazine/2009/03/30/hellhole>.

<sup>196</sup> *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996). In that case, an inmate complained about “large florescent lights directly in front of and behind his cell [that] shone into his cell 24 hours a day.” *Id.* In that case, the Ninth Circuit held that “[t]here is no legitimate penological justification for requiring [inmates] to suffer physical and psychological harm by living in constant illumination.” *Id.* at 1090 (citing *LeMaire v. Maass*, 745 F. Supp. 623, 636 (D. Or. 1990), *vacated*, 12 F.3d 1444 (9th Cir. 1993)). For similar examples, see *Bull v. Beard*, No. 13-CV-592 AJB WVG, 2014 WL 1456285 (S.D. Cal. Apr. 11, 2014) (sleep deprivation caused by constant illumination); *Grenning v. Miller-Stout*, 739 F.3d 1235, 1237–38 (9th Cir. 2014) (alleging lights are so bright as to deprive inmates of sleep even with “four layers of towel wrapped around his eyes,” and alleging that lights can give inmates “recurring migraine headaches” that cause pain and disorientation). As a leading psychiatrist who has studied solitary noted, it is no surprise that in this environment “the individual’s difficulty in maintaining a normal day-night sleep cycle is often far worsened by constant intrusions on nighttime dark and quiet, such as . . . flashlights shining in their face, and so forth.” Grassian, *supra* note 188, at 332.

<sup>197</sup> Angela Browne, Alissa Cambier & Suzanne Agha, *Prisons Within Prisons: The Use of Segregation in the United States*, 24 FED. SENT’G REP. 46, 47 (2011).

individual exercise cages resemble oversized dog kennel cages that are just large enough for a single person to stand and move about inside.<sup>198</sup> The other areas are either an open cage outdoors, called a yard, or an indoor area with an open-barred top.<sup>199</sup> Because exercise areas usually are exposed to the weather, prisoners must choose whether to use them during extreme weather conditions or remain in their cells.<sup>200</sup> Periods of extreme weather may greatly reduce the amount of time prisoners are out of the cell.<sup>201</sup>

The pain and suffering caused by solitary has long been known. Charles Dickens, whom Kafka much admired,<sup>202</sup> was shocked by the impact of solitary on prisoners and condemned it in memorable language:

I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers . . . . [T]here is a

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<sup>198</sup> See Shira E. Gordon, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J.L. REFORM 495, 497 (2014).

<sup>199</sup> Browne, Cambier & Agha, *supra* note 197.

<sup>200</sup> *Id.* at 200.

<sup>201</sup> *Id.*; see also Prieto v. Clarke, No. 1:12CV1199 LMB/IDD, 2013 WL 6019215, at \*1 (E.D. Va. Nov. 12, 2013) (describing recreation in solitary confinement on death row as “limited to a[n approximately 71 square foot] . . . outdoor cell with a concrete floor and no exercise equipment” (citation omitted)). For examples of extremes in temperature exposure, see *Bell v. McAdory*, No. 12-3138-CSB-DGB, 2014 WL 3907796, at \*4 (C.D. Ill. Aug. 11, 2014) (citing *Cameron v. Howes*, No. 1:10-CV-539, 2010 WL 3885271, at \*9 (W.D. Mich. Sept. 28, 2010), which “dismiss[ed] plaintiffs’ claim for failing to allege extreme deprivation as a result of inadequate ventilation causing high temperatures in the cells”); *Bull*, 2014 WL 1456285, at \*4 (claim of 120 degree temperatures “not so extreme to give rise to an Eighth Amendment violation”); *Bennett v. Chitwood*, 519 F. App’x 569 (11th Cir. 2013). The Eleventh Circuit affirmed the trial court’s dismissal of the claim and held that suffering “cold” of “50 degrees” while stripped nude for ten and one-half hours in the afternoon and evening subsequent to scabies treatment application was not sufficiently extreme to warrant Eighth Amendment violation, particularly where no evidence showed that detainee provided notice to jail officials that he was excessively cold. *Id.*; *Deal v. Cole*, No. 3:13-CV-158-RJC, 2013 WL 1190635, at \*2 (W.D. N.C. Mar. 22, 2013) (“Plaintiff’s allegations of cold air in his cell, without more, are not sufficiently objectively serious to state a claim under the Eighth Amendment.”); *Strope v. Sebelius*, 189 F. App’x 763, 766 (10th Cir. 2006) (“Mr. Strope claims that the prison lacks adequate ventilation, and that fans are necessary to control the ‘excessively hot’ temperature and to provide ventilation. He further asserts that the high temperatures make it hard to sleep. Although these conditions are no doubt uncomfortable, we conclude that Mr. Strope’s allegations are insufficient to state a claim of violation of the Eighth Amendment.”).

<sup>202</sup> See PAWEL, *supra* note 2, at 159 (describing Kafka’s “profound fascination and identification with individual writers such as . . . [Charles] Dickens”). “[T]he influence of Dickens was repeatedly acknowledged by Kafka himself.” *Id.* at 256.

depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow-creature. I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body . . . .<sup>203</sup>

In our time, Dickens' opinion that solitary exacts a horrible psychological toll has become a well-documented truth. We now know that "when kept under these conditions [of solitary confinement] for long periods of time, prisoners may experience a number of psychological problems and mental illnesses, including self-mutilation, anxiety, panic disorder, difficulty in thinking and remembering, suicidal tendencies, depression, and impulse control problems."<sup>204</sup> These harms are intensified when solitary is imposed, which is not infrequent, for long periods of time that stretch out to months and even years,<sup>205</sup> especially when it is inflicted on persons with prior mental illnesses, as is also often the case.<sup>206</sup> Anthony C.

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<sup>203</sup> CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 44 (1868); Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 118 (2008) (citing *id.*); see also *Madrid v. Gomez*, 889 F. Supp. 1146, 1230–31 (N.D. Cal. 1995) (noting clinical and scientific findings that human beings subjected to isolation may "deteriorate mentally and in some cases develop psychiatric disturbances"); *Davenport v. DeRobertis*, 844 F.2d 1310, 1316 (7th Cir. 1988) (noting that there is a wealth of literature concerning the detrimental effects of solitary confinement); *In re Medley*, 134 U.S. 160, 168 (1890) ("A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide, while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.").

<sup>204</sup> *Unlocking the Courthouse Door: Removing the Barrier of the PLRA's Physical Injury Requirement to Permit Meaningful Judicial Oversight of Abuses in Supermax Prisons and Isolation Units*, 24 FED. SENT'G REP. 268, 269 (2012). See also Grassian, *supra* note 188; John Jay Powers, *Head Cases: A Prison Dispatch About Solitary Confinement, Mental Illness and Drilling a Hole in Your Head*, COLO. INDEP. (Apr. 29, 2014), <http://www.coloradoindependent.com/147248/head-cases>; Michael B. Mushlin, *Breeding Psychotics*, N.Y. TIMES (Mar. 27, 2005), <http://www.nytimes.com/2005/03/27/opinion/nyregionopinions/27LImushlin.html?pagewanted=print&position=&r=0>; Michael B. Mushlin, *Solitary Confinement: New York's Hidden Problem*, N.Y. L.J. (Sept. 5, 2012), <http://www.newyorklawjournal.com/id=1202570044326/Solitary-Confinement-New-Yorks-Hidden-Problem?slreturn=20150004105701>.

<sup>205</sup> See, e.g., *Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739 (10th Cir. 2014); *After 4 Decades in Solitary, Dying Angola 3 Prisoner Herman Wallace Freed, Conviction Overturned*, DEMOCRACY NOW (Oct. 2, 2013), [http://www.democracynow.org/2013/10/2/after\\_4\\_decades\\_in\\_solitary\\_dying](http://www.democracynow.org/2013/10/2/after_4_decades_in_solitary_dying).

<sup>206</sup> As many as one-third of the people in solitary are mentally ill. See HUM. RTS. WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 147 (2003); *Madrid*, 889 F. Supp. at 1216 (expert testimony that inmates with existing mental

Graves, who spent eighteen and one-half years in solitary before being exonerated, testified before the United States Senate Judiciary Committee Subcommittee on the Constitution, Civil Rights, and Human Rights that solitary confinement

breaks a man’s will to live and he ends up deteriorating. He’s never the same person again. . . . This madness has a ripple effect. It doesn’t just affect the inmate; it also affects his family, his children, his siblings and most importantly his mother. . . . It is inhumane . . . by its design. . . . I am living amongst millions of people in the world today, but most of the time I feel alone. I cry at night because of this feeling. I just want to stop feeling this way, but I haven’t been able to.<sup>207</sup>

Another person held just as long in solitary wrote this poignant poem:

Imagine being so alone you feel you are surrounded by darkness.  
Having so much to say and no one to say it to. So much love to give  
yet no one to receive that love.

You want for a normal conversation the way a thirsty man wants for  
water in the desert.

You want for human contact, any kind of human contact to remind  
you you’re alive.

A letter would be wonderful but it seems all the people in your life  
who cared have drifted away like a leaf in an autumn breeze. You  
recognize the wrong you have done and often blame yourself for  
how bad things are though you know deep down no one deserves  
this treatment. Not even you.<sup>208</sup>

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health issues are “at a higher risk of deteriorating in the SHU” (citation omitted); see generally Grassian, *supra* note 188.

<sup>207</sup> *Reassessing Solitary Confinement: Hearing Before the S. Comm. on the Judiciary*, 158th Cong., 2012 WL 2314245 (2012) (statement of Anthony C. Graves, Founder, Anthony Believes), available at <http://www.judiciary.senate.gov/imo/media/doc/12-6-19GravesTestimony.pdf>; see also *Keynote Address: Five Mualimmak*, 20 CARDOZO J.L. & GENDER 719, 724 (2014) (“[P]eople have always asked me, how did you survive in solitary for over 40,000 hours? And the truth of the matter is that nobody survives. The truth of the matter is that you leave with a level of deterioration and it’s just that level of deterioration that you leave with.”).

<sup>208</sup> *Voices from Solitary: Reach Out*, SOLITARY WATCH (July 24, 2014), <http://solitarywatch.com/2014/07/24/voices-solitary-3/>. The excerpt comes from a poem by Ricky Silva, who is currently serving a life sentence at Florida State Prison. Silva, 34, has been held in solitary confinement for over four years. *Id.*

Dr. Atul Gawande, a noted physician and author, wrote in *Hellhole*—a seminal piece on solitary published in *The New Yorker*—the following about the impact of the experience:

[A]fter months or years of complete isolation, many prisoners “begin to lose the ability to initiate behavior of any kind—to organize their own lives around activity and purpose” . . . . “Chronic apathy, lethargy, depression, and despair often result. . . . In extreme cases, prisoners may literally stop behaving,” becoming essentially catatonic.<sup>209</sup>

There are three reasons why an inmate may be placed in solitary confinement. The first is that solitary is punishment for inmates who have violated a prison rule.<sup>210</sup> Sometimes serious rule infractions are committed, but other times people are held in solitary for trivial offenses such as failure to keep a tidy cell, wasting food, or littering.<sup>211</sup> Other offenses punishable by a stint in solitary confinement have included the possession of a photocopy of a book by George Jackson;<sup>212</sup> “telephone abuse” (“non-criminal”);<sup>213</sup> protesting after allegedly not receiving a daily lunch tray;<sup>214</sup> writing notes to other inmates or covering cell lighting;<sup>215</sup> or “excess postage stamps.”<sup>216</sup> In New York, solitary is imposed on inmates for long periods for similarly minor infractions such as an “untidy cell or

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<sup>209</sup> Gawande, *supra* note 195 (citation omitted).

<sup>210</sup> See generally N.Y. CIVIL LIBERTIES UNION, *supra* note 190.

<sup>211</sup> Jacob Zoghlin, *Punishments in Penal Institutions: (Dis)-Proportionality in Isolation*, 21 HUM. RTS. BRIEF 24, 25 (2014) (citation omitted).

<sup>212</sup> See, e.g., *Percelle v. Pearson*, No. C12-5343 TEH, 2013 WL 6086918 (N.D. Cal. Nov. 19, 2013).

<sup>213</sup> *Bistran v. Levi*, 696 F.3d 352 (3d Cir. 2012).

<sup>214</sup> *Franks v. Fridley*, No. 13-0561-WS-N, 2014 WL 3540574 (S.D. Ala. July 17, 2014).

<sup>215</sup> *Ibrahim v. Rouse*, No. PJM-08-492, 2011 WL 503115 (D. Md. Feb. 10, 2011).

<sup>216</sup> *Lashway v. Fischer*, 117 A.D.3d 1141 (N.Y. App. Div. 2014).

During the 21-month period from March 2012 through November 2013, a total of 3,158 adolescent inmates [on Rikers Island in New York City] . . . received a total of 8,130 infractions, resulting in a total of 143,823 sentence days. Several of the most common infractions were for non-violent conduct, such as failure to obey orders from staff (1,671 infractions), verbally harassing or abusing staff (561 infractions), failure to obey orders promptly and entirely (713 infractions), and shouting abusive-offensive words (392 infractions). Outside of a correctional facility, such conduct is often viewed as characteristic adolescent behavior. At Rikers, this behavior can lead to substantial time in solitary confinement.

U.S. DEP’T OF JUSTICE, CRIPA INVESTIGATION OF THE NEW YORK CITY DEPARTMENT OF CORRECTION JAILS ON RIKERS ISLAND 49 (2014) (citation omitted), available at <http://www.justice.gov/usao/nys/pressreleases/August14/RikersReportPR/SDNY%20Rikers%20Report.pdf>.

person,” “littering,” and hundreds more for “unreported illness.”<sup>217</sup> The second reason solitary may be used is to isolate an inmate, not because he violated a prison rule, but rather because of his offense, notoriety, perceived gang affiliation, or his level of dangerousness, any one of which might be characterized by prison officials as a risk to the general prison population.<sup>218</sup> The final reason solitary is imposed in the United States is to separate vulnerable prisoners, such as transgendered women who are held in male prisons, or inmates threatened by other inmates.<sup>219</sup> These persons are held in solitary ostensibly to protect them from attacks from inmates in the general population.<sup>220</sup>

In all of these situations, there is no legal requirement that the decision to confine prisoners in solitary confinement be subjected to meaningful review.<sup>221</sup> Inmates sent to solitary often have no right to a due process review, and even when there is a due process right to a hearing, the hearing requirements are minimal and often feckless.<sup>222</sup>

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<sup>217</sup> Martin F. Horn & Michael B. Mushlin, *Reform Prison Isolation*, ALBANY TIMES UNION, <http://www.timesunion.com/opinion/article/Reform-prison-isolation-4933317.php> (last updated Oct. 29, 2013, 7:08 AM).

<sup>218</sup> See *Silverstein v. Bureau of Prisons*, 559 F. App’x 739 (10th Cir. 2014); *In re Villa*, 154 Cal. Rptr. 3d 506 (Cal. Ct. App. 2013), *reh’g denied* (Apr. 9, 2013) (inmate’s signature on birthday card of a known gang member and drawings of gang symbols in inmate’s cell helped validate the classification of the prisoner as a gang “associate”); *Ruiz v. Cate*, 436 F. App’x 760, 761 (9th Cir. 2011) (A prison official’s “reliance on evidence that [defendant] associated with a gang member was reasonably related to legitimate penological interests.” (citation omitted)); *Voices from Solitary: “That Which Does Not Kill Us. . .,”* SOLITARY WATCH (May 19, 2014), <http://solitarywatch.com/2014/05/19/voices-from-solitary-analyzing-isolation-part-iii/>.

<sup>219</sup> See, e.g., Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 536–47 (2009).

<sup>220</sup> AM. BAR ASS’N [ABA], STANDARDS ON TREATMENT OF PRISONERS § 23-2.7(a)(2), at 52 (3d ed. 2011) [hereinafter ABA STANDARDS], available at [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/Treatment\\_of\\_Prisoners.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf) (stating that isolation can be used to protect a prisoner from a threat).

<sup>221</sup> Lobel, *supra* note 203, at 115–16, 125–31.

<sup>222</sup> *Id.* at 125–26. (“Yet the trend in prolonged supermax confinement is for the federal or state government to simply designate certain prisoners for essentially lifetime or very long solitary confinement. In such cases, the due process requirement of periodic review becomes meaningless. While prison officials may still go through the formality of providing review, the decision is predetermined, the review is a sham, and there is nothing the prisoner can do to get out of solitary confinement.”); see also Donna H. Lee, *The Law of Typicality: Examining the Procedural Due Process Implications of Sandin v. Conner*, 72 FORDHAM L. REV. 785 (2004).

Hearings are not required in many cases because the United States Supreme Court, in *Sandin v. Conner*, held that inmates are not deprived of any “liberty interest” triggering due process protection unless the deprivation is an “atypical and significant” change in the incidents of ordinary life of a prisoner.<sup>223</sup> In that case the inmate was placed in solitary confinement for thirty days, but the Court held that a stay of that duration in solitary confinement was not an atypical and significant hardship.<sup>224</sup> Several years later in *Wilkinson v. Austin*, a case involving indefinite stays in solitary confinement in “administrative segregation” units, the Supreme Court held that liberty interests were implicated and due process protections were required.<sup>225</sup> These decisions left open how long a stay in solitary—beyond one month and short of indefinite detention—is enough to constitute an “atypical and significant” hardship.<sup>226</sup> The Supreme Court has not revisited this issue, leaving it to the lower courts to grapple with the question.<sup>227</sup> While there is variation among the circuits, the line currently seems to be at about one year.<sup>228</sup> That is to say, unless an inmate faces the possibility of a stay of a year or more in solitary, the inmate has no right to a hearing. Thus, courts have routinely held that placements in solitary confinement for months come without any due process protections.<sup>229</sup>

Even in those cases in which an inmate is sentenced or sent to solitary for a period long enough to trigger a hearing, the protections that surround the inmate are slight.<sup>230</sup> Notice can be as short as twenty-four hours;<sup>231</sup> there is no guaranteed right to call witnesses;<sup>232</sup>

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<sup>223</sup> 515 U.S. 472 (1995).

<sup>224</sup> *Id.* at 486.

<sup>225</sup> 545 U.S. 209, 223–24 (2005).

<sup>226</sup> MUSHLIN, *supra* note 183, § 10:16.

<sup>227</sup> *Id.* (indicating that there is no per se rule, and that courts have not come to rest on the issue of how long a sentence in disciplinary confinement is required before due process protections apply).

<sup>228</sup> *Id.*

<sup>229</sup> *See, e.g.,* Toston v. Thurmer, 689 F.3d 828, 832 (7th Cir. 2012). The possession of Huey P. Newton literature available from the prison library may or may not constitute gang affiliation, but solitary confinement “is a change in the character rather than length of confinement, and is unlikely to be deemed a deprivation of liberty.” *Id.*; *see also* MUSHLIN, *supra* note 183, § 10:16.

<sup>230</sup> *See Wilkinson*, 545 U.S. 209; *Hewitt v. Helms*, 459 U.S. 460 (1983); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *see also Zoghlin*, *supra* note 211, at 25.

<sup>231</sup> *Wolff*, 418 U.S. at 564.

<sup>232</sup> *Id.* at 566; *see also Brown v. Braxton*, 373 F.3d 501, 506 (4th Cir. 2004) (noting the serious administrative burden that the unrestricted right to call witnesses would cause on the already burdened prison system, given the high caseload volume for prison disciplinary

inmates do not have a right to a lawyer at any point;<sup>233</sup> the rights of confrontation and cross examination are not provided;<sup>234</sup> and the standard of review is the bare minimum: as long as there is “some evidence” supporting the decision, there is no due process violation.<sup>235</sup> For these reasons, the due process review to which inmates are theoretically entitled is, in most cases, illusory.<sup>236</sup>

A representative example of the application of these principles is *Barnes v. Holder*.<sup>237</sup> In that case, an inmate was placed in a “Drunk Tank,” a solitary confinement unit, without a hearing for thirty-eight hours for an alleged disciplinary infraction.<sup>238</sup> The inmate claimed his bedding was removed, he was denied recreation, and he was made to reside in “subfreezing temperatures,” while the lights remained on for

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hearings); *Choyce v. Cockrell*, 51 F. App’x 483, at \*1 (5th Cir. 2002) (“*Wolff* also forecloses [appellant inmate’s] argument that the refusal of prison officials to permit him to call [a prison officer] as a defense witness violated his due process rights.”); *Albert v. Karnes*, No. 1:07-CV-0007, 2008 WL 755804, at \*1–2, \*6–7 (M.D. Pa. Mar. 19, 2008) (finding that inmate intended to call three witnesses, but ruling that allowing inmate to call only one of those three did not violate due process).

<sup>233</sup> See *Wolff*, 418 U.S. at 570; *Baxter v. Palmigiano*, 425 U.S. 308, 314–15 (1976) (citing *Wolff*); *McGee v. Feneis*, No. 07-CV-4868 (PJS/FLN), 2009 WL 2928245, at \*8 (D. Minn. Sept. 8, 2009) (citing *Wolff* and *Baxter* for the premise that “[p]rison inmates do not have a right to consult with or be represented by either retained or appointed counsel during a prison disciplinary hearing”); *Barko v. Samuels*, No. 91-3346-DES, 1994 WL 747872, at \*3 (D. Kan. Jan. 5, 1994) (finding that failure to provide inmate with representation by an attorney in a disciplinary hearing, even when inmate was permitted such representation by statute, was “harmless error” under *Wolff*); see also *Substantive Rights Retained by Prisoners*, 41 GEO. L.J. ANN. REV. CRIM. PROC. 1025, 1068 (2012) (“Prisoners retain a Sixth Amendment right to counsel for criminal prosecutions that occur while they are incarcerated. That right, however, does not extend to disciplinary actions and does not apply to administrative segregation based on suspected criminal activity, unless the prisoner has been charged with a crime.” (citations omitted)).

<sup>234</sup> *Wolff*, 418 U.S. at 567; see also *Eugene v. Klecker*, 636 F.2d 250, 251 (8th Cir. 1980) (“[W]hile prison officials [can] provide an inmate with the opportunity to confront and cross-examine his accusers [sic], due process [does] not, under the circumstances, require it.” (citation omitted)); *Wright v. Esgrow*, No. 10-CV-6502 CJS, 2013 WL 1826053, at \*8 (W.D.N.Y. Apr. 30, 2013) (“[a]n inmate does not possess a constitutional right to confront or cross-examine witnesses in prison disciplinary hearings” (citing *Wolff*, 418 U.S. at 567–68)); cf. *Smith v. Mass. Dep’t of Corr.*, 936 F.2d 1390, 1399 (1st Cir. 1991) (“The discretion of prison officials in such matters is undeniably broad, but it is still subject to judicial review for abuse.”).

<sup>235</sup> See *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 447 (1985) (“[W]here good time credits constitute a protected liberty interest, a decision to revoke such credits must be supported by some evidence.”).

<sup>236</sup> MUSHLIN, *supra* note 183, § 10:46; Zoghlin, *supra* note 211, at 25.

<sup>237</sup> No. 1:14CV0003 SNLJ, 2014 WL 1478440 (E.D. Mo. Apr. 15, 2014).

<sup>238</sup> *Id.* at \*2.

twenty-four hours per day.<sup>239</sup> The court dismissed his claim, holding that the inmate's allegations, even if true, "simply do not rise to the level of a constitutionally protected liberty interest."<sup>240</sup>

Not infrequently, solitary units are in places where there is an excessive amount of violence.<sup>241</sup> Craving human contact and driven irrational by the harsh conditions, people subjected to solitary—many of whom are mentally ill,<sup>242</sup> fragile to begin with, or juveniles<sup>243</sup>—frequently lash out with strange and belligerent behavior. Self-harming, throwing feces and urine, banging on walls, and shouting are all common occurrences in solitary confinement units.<sup>244</sup> Glenn T. Turner, who spent almost two decades in solitary confinement in Wisconsin, wrote:

I've seen prisoners who were unable to endure such long terms of confinement in solitary attempt to commit suicide, smear their fecal matter over their bodies, cells, and even eat their body waste. I've witnessed them cut themselves, and some who - lacking any sharp object to cut themselves with, use their teeth to rip their flesh so as to expose their veins and rip those out to spray their blood all over their cell doors, windows, floors, etc.

I've seen yet others simply cry like unfed, hungry babies all day and all night, and some lash out yelling and screaming all day, all night, banging on walls and cell doors, trying to get some form of

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at \*4–5; see also Philip W. Sbaratta, Sandin v. Conner: *The Supreme Court's Narrowing of Prisoners' Due Process and the Missed Opportunity to Discover True Liberty*, 81 CORNELL L. REV. 744, 767 (1996) (noting that the Court "would not look to state law to implicate due process concerns [e.g., a protected liberty interest] unless the deprivation at issue is so uncharacteristic that it is beyond what a prisoner would expect upon being sentenced to prison"); *Substantive Rights Retained by Prisoners*, *supra* note 233, at 1063 ("To prevail on such a claim, the prisoner must allege that a prison official acted knowingly, oppressively, or abusively. Negligent conduct by officials toward prisoners or their property does not give rise to a procedural due process claim, even if no remedy exists under state law." (citations omitted)).

<sup>241</sup> See *Uncovering Brutality at a New York City Jail*, N.Y. TIMES (July 15, 2014), <http://www.nytimes.com/times-insider/2014/07/15/uncovering-brutality-at-a-city-jail/> (providing just one vivid example of pervasive violence in solitary confinement units at Rikers Island).

<sup>242</sup> See Gordon, *supra* note 198, at 503–04. In a Washington State study, researchers found that mentally ill prisoners were more than four times more likely than other prisoners to have been held in solitary confinement. *Id.* (citing David Lovell et al., *Recidivism of Supermax Prisoners in Washington State*, 53 CRIME & DELINQ. 633, 642 (2007)).

<sup>243</sup> The prevalence of juveniles in solitary was criticized in a recent report on Rikers Island by the U.S. Attorney's Office in the Southern District of New York. See U.S. DEP'T OF JUSTICE, *supra* note 216 and accompanying text.

<sup>244</sup> See generally Grassian, *supra* note 188.

acknowledgement from their jailers that they are human beings

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. . . .

The response to these acts of provocation by prison staff often escalates the violence and chaos of life in solitary confinement units.<sup>246</sup> Not an atypical reaction by corrections officers to the desperate acts of isolated inmates is to forcefully extract the recalcitrant inmate from his cell and then restrain and shackle him almost in the configuration that prisoners are placed in the torture/killing machine of *In the Penal Colony*.<sup>247</sup> An example of this approach is the case of Kevin DeMott, a nineteen-year-old inmate with bipolar disorder who was confined in a maximum-security prison in Michigan, sometimes without medication needed to control his illness.<sup>248</sup> DeMott began banging his head against the cell wall.<sup>249</sup>

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<sup>245</sup> *Voices from Solitary*, *supra* note 218. Sometimes, shockingly, guards may actually encourage this behavior. Turner, for example wrote that:

[A mentally ill prisoner in solitary] is often cheered on and encouraged by bored corrections officers to regress even lower. I've witnessed officers [in GBCI's new Segregation Unit] encourage a mentally ill prisoner who had smeared feces all over his control cell window, to lick it off, and they would give him some milk. And this prisoner licked most of the fecal matter off of the window, and was "awarded" by the officer who threw an old milk to the prisoner through a lower trap door to the cell.

*Id.*; see also Powers, *supra* note 204 ("John Jay Powers, federal inmate 03220-028, had no signs of mental illness when he went to prison in 1990."). Powers, a federal prisoner convicted of bank robbery and then transferred to the ADX supermax prison in Florence, Colorado, spent twelve years in extreme isolation. *Id.* "In solitary confinement 23 hours a day, he tried to kill himself several times and amputated his fingers, earlobes, his testicle and scrotum." *Id.* After spending time in the general population, an altercation with a guard landed Powers back in isolation, where he drilled a hole in his head. *Id.* "I feel like I am trapped within a disease," he once wrote. *Id.*

<sup>246</sup> See, e.g., U.S. DEP'T OF JUSTICE, *supra* note 216 (discussing the pattern and practice of excessive force and violence at New York City jails on Rikers Island).

<sup>247</sup> See Kyle Feldscher, *Water Deprivation, Hog-Tying of Mentally Ill Inmate Among Complaints at Prison Near Ann Arbor*, ANN ARBOR NEWS (Sept. 7, 2014, 5:36 AM), [http://www.mlive.com/news/ann-arbor/index.ssf/2014/09/alleged\\_human\\_rights\\_abuses\\_at.html](http://www.mlive.com/news/ann-arbor/index.ssf/2014/09/alleged_human_rights_abuses_at.html) ("Witnesses have reported seeing mentally ill prisoners denied water and food, 'hog tied' naked for many hours, left to stand, sit or lie naked in their own feces and urine, denied showers for days and tasered." (quoting Kary Moss, executive director of the ACLU of Michigan)).

<sup>248</sup> See Jeff Gerritt, *Mentally Ill Get Punishment Instead of Treatment*, DET. FREE PRESS (Feb. 5, 2012), <http://www.freep.com/article/20120205/OPINION02/202050442/PUNISHMENT-INSTEAD-OF-TREATMENT-Hundreds-of-Michigan-s-mentally-ill-inmates-lost-in-a-prison-system-ill-equipped-to-treat-them>.

<sup>249</sup> For a photograph of Mr. DeMott, see *id.*

When he refused an order to stop, corrections officers pepper sprayed him, removed him from his cell, and placed a helmet on his head.<sup>250</sup> They then manacled DeMott in belly chains and leg irons, fastening all of his limbs to a prison bed.<sup>251</sup> Even though mental illness caused DeMott's irrational behavior, prison authorities charged him with disobeying a direct order, a charge that leads to loss of good time and a longer sentence in solitary confinement, thereby simply repeating the process.<sup>252</sup> To make matters even worse, there is disturbing evidence that suggests that solitary is imposed disproportionately on minority inmates, particularly African Americans.<sup>253</sup>

Despite all its problems, the current system of solitary confinement is not without its defenders. Some claim the practice is beneficial for inmates because, as the eighteenth-century Quakers—who began America's infatuation with solitary—believed, the solitude it imposes provides the inmate opportunities for reflection and enlightenment.<sup>254</sup>

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* DeMott's case echoed the death of Timothy Joe Souders in 2006. Souders, strapped to a steel bed in an isolation cell after resisting prison officers, perished after four days in his restraints without food, water, or medical treatment. Jeff Gerritt, *Neglect in Custody, A Special Report: Mentally Ill Inmate Dies in Isolation*, DET. FREE PRESS (Nov. 25, 2006, 1:57 AM), <http://www.freep.com/apps/pbcs.dll/article?AID=/20060820/NEWS/06/111250005>; see also *The Death Of Timothy Souders* (CBS 60 Minutes television broadcast Feb. 11, 2007), available at <http://www.cbsnews.com/news/the-death-of-timothy-souders/>.

Joe Giarratano, currently an inmate at Wallens Ridge State Prison in Virginia, described the use of shackling in SHU cell extractions at Red Onion Supermax. There, shackling of prisoners in the course of their confinement is a frequent occurrence:

Often times guards would kick on doors, or refuse to feed someone, and that would set off some hours of noise. Sometimes guys would just snap and the goon squad would do a cell extraction. They would gas the cell, rush in with electric shield [sic], and take the person down hard. That person would wind up strapped down to a bed."

*Joe Giarratano—Stories from Solitary*, ACLU, <https://www.aclu.org/prisoners-rights/joe-giarratano> (last visited Jan. 18, 2015); see also *Chappell v. Mandeville*, 706 F.3d 1052, 1061–63 (9th Cir. 2013) (The Ninth Circuit held that shackling inmates in solitary confinement may, in some circumstances, be constitutional. In this case, the inmate was placed in ankle shackles and chained to the bed. He complained that the waist restraints were not loosened for meals, forcing him to “eat [his] food like a dog.”).

<sup>253</sup> Margo Schlanger, *Prison Segregation: Symposium Introduction and Preliminary Data on Racial Disparities*, 18 MICH. J. RACE & L. 241, 241 (2013).

<sup>254</sup> See, e.g., W. PAUL JONES, *A DIFFERENT KIND OF CELL: THE STORY OF A MURDERER WHO BECAME A MONK* (2011). Jones describes the tale of Clayton Fountain, who reformed himself while in solitary after being sentenced to several life sentences for five violent murders, four of which he had committed behind bars. Fountain's spiritual awakening led to a religious conversion; he ultimately became a hermit and a brother in the Trappist Order. *Id.*

In 1833, Alexis de Tocqueville praised solitary confinement at Eastern State Penitentiary in Pennsylvania for exactly these reasons. Following an inspection, he wrote:

Can there be a combination more powerful for reformation than that of a prison which hands over the prisoner to all the trials of solitude, leads him through reflection to remorse, through religion to hope; makes him industrious by the burden of idleness, and which, whilst it inflicts the torment of solitude, makes him find a charm in the converse of pious men, whom otherwise he would have seen with indifference, and heard without pleasure?<sup>255</sup>

Modern day defenders of solitary also claim that solitary is necessary to maintain prison security and safety.<sup>256</sup> And, there are those who deny that solitary is harmful.<sup>257</sup>

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<sup>255</sup> GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE; WITH AN APPENDIX ON PENAL COLONIES, AND ALSO, STATISTICAL NOTES 51 (1833). For more modern defenders of solitary based on its redemptive capabilities, even Dickens—who condemned solitary in eloquent language as unremitting torture—acknowledged that people who impose it were not necessarily doing it for evil reasons and that in fact, while misguided, their reasons might be “kind, humane, and meant for reformation.” DICKENS, *supra* note 203, at 43; see also Jeffrey Smith McLeod, Note, *Anxiety, Despair, and the Maddening Isolation of Solitary Confinement: Invoking the First Amendment’s Protection Against State Action That Invades the Sphere of the Intellect and Spirit*, 70 U. PITT. L. REV. 647, 650 (2009) (“Early in the nineteenth century, Philadelphia Quakers implemented a program of solitary confinement at the city’s Cherry Hill prison, keeping prisoners in isolation so that they might ‘reflect on their bad ways, repent, and then reform.’”).

<sup>256</sup> ZACHARY HEIDEN, ACLU OF MAINE, CHANGE IS POSSIBLE: A CASE STUDY OF SOLITARY CONFINEMENT REFORM IN MAINE 20 (2013), available at [http://www.aclu-maine.org/sites/default/files/uploads/users/admin/ACLU\\_Solitary\\_Report\\_webversion.pdf](http://www.aclu-maine.org/sites/default/files/uploads/users/admin/ACLU_Solitary_Report_webversion.pdf) (MDOC Commissioner Martin Magnusson stated at a hearing on prison reform bill LD 1611 before the Joint Committee on Criminal Justice and Public Safety, “[t]his [solitary confinement reform] bill would seriously jeopardize the health and safety of both staff and inmates and require substantial additional costs to the Department and the State during a budgetary crisis. I can tell you with 100% certainty that more of our staff and inmates would be at serious risk to be injured or killed if this LD was passed.”); *Correction Dept. Adding 300 COs and Tries to Isolate Unstable Cons*, CORR. OFFICERS’ BENEVOLENT ASS’N, INC. (Apr. 9, 2013), <http://www.cobanyc.org/correction-dept-adding-300-cos-and-tries-isolate-unstable-cons#sthash.FEWHKdVm.dpuf> (statement of Norman Seabrook, the president of the Correction Officers Benevolent Association of New York City, that because jail violence is increasing at an “alarming rate,” solitary is necessary); Gordon, *supra* note 198, at 497 (argument of Don Poston, an administrator of the Estelle supermax prison in Texas, stating, “It’s sad to say, but there are some people who deserve to be treated like animals.”).

<sup>257</sup> See MAUREEN L. O’KEEFE ET AL., COLO. DEP’T OF CORR., ONE YEAR LONGITUDINAL STUDY OF THE PSYCHOLOGICAL EFFECTS OF ADMINISTRATIVE SEGREGATION ii (2010) (maintaining that offenders with mental illnesses placed in

## B. Oversight of American Prisons and Jails

### 1. The Absence of Oversight

Prisoners are under lock and key twenty-four hours a day, seven days a week, and therefore they must depend on their keepers for all their human needs. They are held behind walls and closed doors, living “in a shadow world that only dimly enters our awareness.”<sup>258</sup> American prisons in particular “mainly confine the most powerless groups . . . poor people who are disproportionately African-American and Latino.”<sup>259</sup> Making matters worse, the United States, unlike most other developed countries,<sup>260</sup> operates “without a comprehensive mechanism for the routine inspection and monitoring of all places of confinement.”<sup>261</sup>

Because comprehensive and meaningful oversight does not exist in most places, the gigantic American prison system, like Kafka’s *In the Penal Colony*, is isolated from the society it is designed to serve.<sup>262</sup> The lack of oversight transforms American prisons into a

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solitary did not deteriorate over time at a rate more rapid and more extreme than for those without mental illness).

<sup>258</sup> O’Lone v. Estate of Shabazz, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting).

<sup>259</sup> GIBBONS & KATZENBACH, *supra* note 189, at 77.

<sup>260</sup> Correctional oversight mechanisms in other developed countries are far more advanced than in the United States and should serve as models for our prison systems as we move toward reform. Michael B. Mushlin & Michele Deitch, *Opening Up a Closed World: What Constitutes Effective Prison Oversight?*, 30 PACE L. REV. 1383, 1392 (2010). In the United Kingdom, for example, three governing bodies exist for oversight, and each performs its own distinct function: (1) a Prison Inspectorate that conducts routine inspections of all detention facilities; (2) a Prison Ombudsman who investigates prisoners’ complaints; and (3) Independent Monitoring Boards made up of lay citizens who are appointed to monitor particular facilities. In Canada, the Office of the Correctional Investigator operates to investigate conditions in Canadian prisons and report its findings to the public and political officials. In Europe, the forty-seven states (countries) that are parties to the Council of Europe all operate under the umbrella of the Committee for the Prevention of Torture and the Inhuman and Degrading Treatment of Prisoners, which is an intergovernmental treaty body that has the power to inspect and report on the conditions of any detention facilities in those states. *Id.* (citations omitted).

<sup>261</sup> ABA STANDARDS, *supra* note 220, § 23-11.3, at 353. See generally, Mushlin & Deitch, *supra* note 260, for a comprehensive discussion of the current state of oversight in the United States.

<sup>262</sup> In past instances of prison reform, the media often served as a platform to spark debate about operations behind prison walls. However, the Supreme Court’s holding in *Pell v. Procunier*, that the press has no right of access to prisons or inmates beyond what is given to the public, severely inhibits the media’s ability to shed light on these inhuman conditions and thus hinders subsequent transparency to the public. 417 U.S. 817 (1974).

“netherworld.”<sup>263</sup> In this netherworld, abuses occur, and the public and even public officials are left ignorant of prison conditions without the information needed to ensure that the prisons reflect society’s core values.<sup>264</sup> Even well-meaning prison officials, who genuinely want to effectuate change, cannot succeed because they lack the authority and support that only comes when prisons operate in public view.<sup>265</sup>

## 2. Calls for Oversight

There have been persistent calls for oversight of American prisons. The American Bar Association (ABA) has twice gone on record for the establishment of systematic oversight of American penal facilities.<sup>266</sup> The ABA *Standards for the Treatment of Prisoners*, adopted in 2010, require that a government agency with oversight responsibilities for each prison and jail in its jurisdiction be established for every prison and jail in the country.<sup>267</sup> The oversight agency must be independent of the correctional facility it has oversight responsibility for, and it must “conduct regular monitoring and inspection of the correctional facilities in that jurisdiction and . . . issue timely public reports about conditions and practices in those facilities.”<sup>268</sup>

Recognizing that “the inner workings and conditions of correctional and detention facilities largely are insulated from the public eye,” the ABA also passed a resolution calling for oversight.<sup>269</sup> This resolution seeks to make prisons more transparent so the public is no longer “mostly oblivious about conditions in prisons [and] jails . . . even those within their own communities.”<sup>270</sup> It highlights that

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<sup>263</sup> Memorandum from Stephen J. Saltzburg, Chair, ABA Section of Criminal Justice, to ABA House of Delegates (Aug. 2008), *available at* [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_policy\\_am08104b.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104b.authcheckdam.pdf).

<sup>264</sup> Stojkovic, *supra* note 15.

<sup>265</sup> *See* Mushlin & Deitch, *supra* note 260; *see also* MUSHLIN, *supra* note 183.

<sup>266</sup> STEPHEN J. SALTZBURG, ABA, CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES 2 (2008) [hereinafter REPORT TO THE HOUSE OF DELEGATES], *available at* [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_policy\\_cjpol.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_policy_cjpol.html).

<sup>267</sup> ABA STANDARDS, *supra* note 220, § 23-11.3, at 352.

<sup>268</sup> *Id.* § 23-11.3(a).

<sup>269</sup> REPORT TO THE HOUSE OF DELEGATES, *supra* note 266.

<sup>270</sup> *Id.* at 3 (urging federal, state, and territorial governments to establish public entities—independent from correctional agencies—to regularly monitor and report to the

key requirements for effective monitoring of prisons should include, inter alia, that the monitoring entity must be independent, adequately funded and staffed, have expertise, conduct regularly scheduled and unscheduled inspections, and issue reports on particular problems.<sup>271</sup> In addition, the ABA specifies that the entity must have access to all relevant records and the authority to conduct confidential interviews.<sup>272</sup> After an investigation, it must make those reports public to the extent possible, have the authority to require prison administrators to respond publicly to monitoring reports, and develop plans to rectify problems identified in them.<sup>273</sup>

The Commission on Safety and Abuse in America's Prisons, which surveyed the state of the American prison system in 2006, also called for a comprehensive system of oversight.<sup>274</sup> It based this recommendation on the reality that "[m]ost correctional facilities are surrounded by more than physical walls; they are walled off from external monitoring and public scrutiny to a degree inconsistent with the responsibility of public institutions."<sup>275</sup> To rectify this imbalance, the Commission called on every state to create an independent agency to monitor prisons and jails and on the federal government to create a national nongovernmental agency to inspect penal facilities at the request of prison administrators.<sup>276</sup>

Joining the movement for greater oversight, the Attorney General of the United States, utilizing the power granted under the Prison Rape Elimination Act (PREA), recently promulgated standards that call for oversight of virtually all penal institutions in the United States.<sup>277</sup> The standards of PREA aim to ensure that the prisons and jails receiving federal funding take steps to respond to instances of sexual abuse of prisoners and take preventative measures against such abuse.<sup>278</sup> Following the recommendation of the National Prison Rape

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public on the conditions of correctional facilities operating in their respective jurisdictions, in an effort to promote transparency and accountability into the operations at these facilities).

<sup>271</sup> *Id.* at 1–2.

<sup>272</sup> *Id.* at 10.

<sup>273</sup> *Id.*

<sup>274</sup> GIBBONS & KATZENBACH, *supra* note 189.

<sup>275</sup> *Id.* at 15.

<sup>276</sup> *Id.* at 16, 79.

<sup>277</sup> Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–15609 (2012).

<sup>278</sup> *Id.* §§ 15601–15602. The Prison Rape Elimination Act was enacted by Congress in 2003 to address the problem of sexual abuse of persons in custody of U.S. correctional agencies, including private and public institutions housing both adult and juvenile offenders, as well as community-based agencies. The Act addresses both inmate-on-

Elimination Commission (NPREC)<sup>279</sup> in 2009, the Attorney General decided that beginning in August 2013, compliance with PREA standards required audits of all confinement facilities covered under the PREA at least every three years. These audits are necessary for the facilities to be considered compliant with PREA standards, with one-third of the facilities operated by an agency—or private organization on behalf of an agency—audited each year.<sup>280</sup> These include adult prisons and jails, juvenile facilities, lockups (housing detainees overnight), and community confinement facilities, whether operated by the Department of Justice or a unit of a state, local, corporate, or nonprofit authority.<sup>281</sup> This oversight, when implemented, will be a significant change, but it is very limited in its scope by focusing on only one problem.

Both the ABA and the Commission on Safety and Abuse in America’s Prisons also recognize the added importance of opening

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inmate sexual abuse and staff sexual misconduct. The major provisions of PREA include a zero tolerance standard for inmate sexual assault and rape; the development of standards for detection, prevention, reduction, and punishment for prison rape; the collection and dissemination of information of incidents of prison rape; and the award of grants to help state and local governments implement the Act.

Under PREA, the Bureau of Justice Statistics (BJS) is required to carry out a comprehensive statistical review and analysis of incidents and effects of prison rape for each calendar year. The review and analysis must be based on a random sample of no less than ten percent of all federal, state, and county prisons; a representative sample of municipal prisons; and include at least one prison from each state. The BJS must utilize surveys and other statistical studies of current or former inmates and ensure the confidentiality of each survey participant. To comply with these requirements, the BJS developed the National Prison Rape Statistics Program (NPRSP), which is comprised of four separate data collection efforts designed to collect multiple measures on the incidence and prevalence of sexual assault, including the Survey of Sexual Violence, the National Inmate Survey, the National Survey of Youth in Custody, and the National Former Prison Survey. Each survey operates as an independent effort which together allow for a deeper understanding of sexual victimization in correctional facilities. *Id.* §§ 15601–09; *see also Prison Rape Elimination Act (Sexual Violence in Correctional Facilities)*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=tp&tid=20> (last visited Jan. 26, 2015).

<sup>279</sup> NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT (2009) (recommending “detailed” and “robust” oversight in order to “open up” prisons to review of their efforts to fight sexual abuse), *available at* <https://www.ncjrs.gov/pdffiles1/226680.pdf>; *see also* Dara Lind, *After 11 Years, States are Finally Committing to Fight Prison Rape*, VOX, <http://www.vox.com/2014/5/20/5731152/states-prison-rape-PREA-certification-standards-11-years> (last updated May 20, 2014, 10:20 AM).

<sup>280</sup> NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT, *supra* note 279, at 87–88.

<sup>281</sup> *Id.* at 3.

prisons to public view through unofficial, nongovernmental means. Because “[t]he heightened public awareness resulting from prison and jail visits will result in improvements in conditions and operations,”<sup>282</sup> the ABA standards are calling on government to “encourage and accommodate” visits to prison facilities by “judges and lawmakers and by members of faith-based groups, the business community, institutions of higher learning, and other groups interested in correctional issues.”<sup>283</sup>

The Commission on Safety and Abuse in America’s Prisons took a similar position. Recognizing that oversight also includes the involvement of an engaged citizenry, the Commission urged that prisons should be open to visits by citizens and organized groups, and that the media should be given broad access to what happens inside prisons, including having access to facilities, prisoners, and correctional data.<sup>284</sup> Thus, these groups stress that oversight visits, such as what occurred in *In the Penal Colony*, play a critical function to prevent or expose abuses.

### 3. Prison Administrators and Prison Oversight

Without oversight, and the public support that it provides, even prison administrators with the best of intentions are not able to achieve substantive sustainable reform.<sup>285</sup> One notable example recounted by Dean Norval Morris is the story of Captain Alexander Maconochie, the captain who, in the 1840s, unsuccessfully attempted to implement major reforms to the barbaric practices at the Australian prison colony on Norfolk Island.<sup>286</sup> Captain Maconochie quickly abandoned his reform efforts due to a lack of outside support.<sup>287</sup> So too was the fate of Thomas Mott Osborne, who became the warden of Sing Sing Prison with a reform agenda, but whose efforts were overturned.<sup>288</sup> More recent examples include the experience of the

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<sup>282</sup> ABA STANDARDS, *supra* note 220, § 23-11.2, at 351.

<sup>283</sup> *Id.* § 23-11.2(e), at 348.

<sup>284</sup> GIBBONS & KATZENBACH, *supra* note 189.

<sup>285</sup> See Barbara Attard, *Oversight of Law Enforcement is Beneficial and Needed—Both Inside and Out*, 30 PACE L. REV. 1548 (2010); Andrew Coyle, *Professionalism in Corrections and the Need for External Scrutiny: An International Overview*, 30 PACE L. REV. 1548 (2010); Stojkovic, *supra* note 15.

<sup>286</sup> NORVAL MORRIS, *MACONOCHIE’S GENTLEMEN: THE STORY OF NORFOLK ISLAND AND THE ROOTS OF MODERN PRISON REFORM* (2002).

<sup>287</sup> *Id.*

<sup>288</sup> See *Thomas Mott Osborne*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/433764/Thomas-Mott-Osborne> (last visited Jan. 3, 2015).

leaders of the penal system of New York City. Despite their efforts, violence against inmates on Rikers Island, the penal island of N.Y.C., has reached epidemic proportions.<sup>289</sup>

These examples suggest that progressive prison administrators who wish to bring positive change must embrace prison oversight. Stan Stojkovic, a prison administrator trainer, has urged prison administrators to take this approach. He wrote that “[w]ithout adequate oversight, correctional problems compounded. Issues like correctional health care, prison crowding, prison violence, and the management of prisons become almost impossible to address.”<sup>290</sup>

Over the last three decades, a new breed of prison administrators, those seeking to create change, has emerged.<sup>291</sup> These people are more professional than past administrators, who all too often were “good ol’ boys who were recruited through a system of patronage, and all but ignored by governors and legislatures.”<sup>292</sup> Speaking broadly, the old prison administrators defended existing practices.<sup>293</sup> By contrast, while there are of course variations and holdouts, this new breed of prison administrator is more progressive and reform-minded than past administrators.<sup>294</sup> For one thing, unlike past administrators, the new breed is more “comfortable with the *idea* of prisoners’ rights.”<sup>295</sup>

Many of these new prison officials, drawing on the lessons of the past, recognize the importance of public oversight. For example, Jack Cowley, a warden from Oklahoma, wrote that without accountability that comes with oversight, “the culture inside the prisons becomes a

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<sup>289</sup> Editorial Board, Op-Ed., *A ‘Culture of Violence’ at Rikers Island*, N.Y. TIMES (Aug. 5, 2014), <http://www.nytimes.com/2014/08/06/opinion/a-culture-of-violence-at-rikers-island.html>.

<sup>290</sup> Stojkovic, *supra* note 15, at 1483.

<sup>291</sup> Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 PACE L. REV. 433, 443 (2004) (“Prison conditions litigation enhanced and accelerated the professionalization of corrections . . . . It provided a new and important forum for national correctional leaders to promote ideas they had long advocated; and it fostered the recruitment of a new type of correctional administrator.”).

<sup>292</sup> *Id.* (citing MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS 182, 193 (1998)).

<sup>293</sup> See generally Stojkovic, *supra* note 15.

<sup>294</sup> See Feeley & Swearingen, *supra* note 291, at 444–46.

<sup>295</sup> *Id.* at 445 (citation omitted).

place that is . . . foreign to the culture of the real world.”<sup>296</sup> A.T. Wall, the director of corrections in Rhode Island, made a similar point when he observed that without “light, light, and more light,” there is a real danger of prison abuse, and “we [the public] cannot sit idly by. If we do so, we run the substantial risk that the dynamics of these environments will default to a position where misconduct can ultimately flourish.”<sup>297</sup> Gawande also noted that corrections officials, even well-meaning ones, lack power to change because “[i]t is pointless for commissioners to act unilaterally . . . without a change in public opinion.”<sup>298</sup>

#### 4. *The Impact of Oversight*

While prison oversight is still largely lacking in the United States,<sup>299</sup> oversight has recently begun to take root in some places. Where it has, when it is combined with prison leadership committed to change, oversight has produced, or promises to produce, reform to solitary confinement. Two recent examples illustrate this important point.

In Maine, a number of outside groups concerned about the abuses in solitary confinement units came together to form the Maine Prisoner Advocacy Coalition (M-PAC) to provide oversight of Maine’s prisons.<sup>300</sup> At first, these groups proposed legislation substantially reforming solitary confinement.<sup>301</sup> When that effort was unsuccessful, they moderated their demands, asking the legislature to commission a study by a group of corrections officials and mental health professionals on the effects of solitary confinement and mental health issues.<sup>302</sup> In response to the report and recommendations of the study,<sup>303</sup> the newly appointed progressive commissioner created a department-wide committee to oversee the implementation and

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<sup>296</sup> GIBBONS & KATZENBACH, *supra* note 189, at 16.

<sup>297</sup> *Id.* at 78 (citing testimony of Rhode Island Corrections Director A.T. Wall).

<sup>298</sup> Gawande, *supra* note 195.

<sup>299</sup> See Michele Deitch & Michael B. Mushlin, *Let the Sunshine In: The ABA and Prison Oversight*, 2011 ABA SEC. CRIM. JUST. 243 (2011).

<sup>300</sup> See HEIDEN, *supra* note 256, at 20.

<sup>301</sup> *Id.* at 19–26.

<sup>302</sup> Lance Tapley, *Reform Comes to the Supermax*, PHOENIX (May 25, 2011), <http://thephoenix.com/boston/news/121171-reform-comes-to-the-supermax/>.

<sup>303</sup> STEVEN SHERRETS ET AL., FINAL REPORT OF REVIEW OF DUE PROCESS PROCEDURES IN SPECIAL MANAGEMENT UNITS AT THE MAINE STATE PRISON AND THE MAINE CORRECTIONAL CENTER (2011), available at [http://www.maineprisoneradvocacy.org/FinalReport\\_MaineSMUdueprocessprocedures.pdf](http://www.maineprisoneradvocacy.org/FinalReport_MaineSMUdueprocessprocedures.pdf).

adoption of the recommended reforms.<sup>304</sup> The committee—initially comprised of top prison officials—also included representatives from outside oversight groups.<sup>305</sup> The newly appointed Maine Department of Correction Commissioner Joseph Ponte, who spearheaded expansive efforts for solitary reform in Maine’s prison system, recognized the need for transparency in order to effectuate change.<sup>306</sup> In furtherance of his determination to open Maine’s prisons to public view, Ponte removed a number of “high-ranking administration officials who had been standing in the way of transparency” and tried to undermine his efforts.<sup>307</sup>

As a result of these developments, Maine reformed the state’s use of solitary confinement. The recommendations included that the prison must consider less punitive measures before sending an inmate to solitary, the prison warden must personally sign off on a transfer to solitary for punishment, and the corrections commissioner must approve any proposal to keep an inmate in solitary for more than seventy-two hours.<sup>308</sup> With these reforms, the solitary confinement population decreased by more than fifty percent, and the average length of a stay reduced to thirty or forty days.<sup>309</sup> Self-mutilation among segregated inmates has also declined.<sup>310</sup>

In New York State, too, the combination of prison oversight and forward-thinking prison administrators has begun to yield significant reform to solitary confinement in the state’s large prison system. New York advocates have long been calling for reform, citing the disproportionate number of people who are held in solitary in the state, the conditions of their confinement, and the fact that they are often confined in solitary for long periods for offenses that do not

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<sup>304</sup> See HEIDEN, *supra* note 256.

<sup>305</sup> The group included members from various human rights advocacy groups, including the National Association for the Advancement of Colored People (NAACP), the M-PAC, and the chairman of the state’s prison’s board of visitors. See HEIDEN, *supra* note 256, at 20–21.

<sup>306</sup> Lance Tapley, *Prison Reforms Under Maine’s New DOC Commissioner*, 24 PRISON LEGAL NEWS 28 (2013), <https://www.prisonlegalnews.org/news/2013/mar/15/prison-reforms-under-maines-new-doc-commissioner/>.

<sup>307</sup> *Id.* (quoting Maine State Prison chaplain, Stan Moody).

<sup>308</sup> *Our View: Prison Reforms Take Maine in Right Direction*, PORTLAND PRESS HERALD (Apr. 25, 2014), [http://www.pressherald.com/2014/04/25/our\\_view\\_\\_prison\\_reforms\\_take\\_maine\\_in\\_right\\_direction\\_/](http://www.pressherald.com/2014/04/25/our_view__prison_reforms_take_maine_in_right_direction_/).

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

justify such harsh punishment.<sup>311</sup> A report published by the Correctional Association in 2003 stated that New York prisons confine 7.6% of the total inmate population—about 5000 inmates—in solitary confinement.<sup>312</sup> In 2007, New York appointed a new prison administrator, Brian Fischer, as the Commissioner of Correctional Services.<sup>313</sup> Commissioner Fischer admitted that solitary was “overuse[d].”<sup>314</sup> But despite his publicly expressed view, little change occurred until a scathing report about solitary was released by the New York Civil Liberties Union,<sup>315</sup> which was combined with a class action lawsuit in federal court seeking a declaratory judgment that New York’s use of solitary confinement is unconstitutional.<sup>316</sup> This combination of vigorous oversight and more open leadership led to a landmark agreement which provided immediate partial reform and the promise of sweeping changes in the near future to New York’s use of solitary confinement.<sup>317</sup> The agreement calls for alternatives to solitary confinement of sixteen- and seventeen-year-olds, a presumption against solitary confinement for pregnant inmates, and alternatives to solitary confinement for prisoners with limited intellectual, adaptive, functioning, and/or coping abilities.<sup>318</sup> Additionally, the agreement requires the appointment of a new assistant commissioner and a research staff position to oversee and monitor the disciplinary system throughout the state.<sup>319</sup> Furthermore, the agreement obliges the department to send plaintiffs’ counsel periodic reports which include information about the demographics of

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<sup>311</sup> See Jennifer R. Wynn & Alisa Szatrowski, *Hidden Prisons: Twenty-Three-Hour Lockdown Units in New York State Correctional Facilities*, 24 PACE L. REV. 497, 499–500 (2004); N.Y. CIVIL LIBERTIES UNION, *supra* note 190; see also Horn & Mushlin, *supra* note 217; *supra* note 201 and accompanying text.

<sup>312</sup> CORR. ASS’N OF N.Y., LOCKDOWN NEW YORK: DISCIPLINARY CONFINEMENT IN NEW YORK STATE PRISONS 2 (2003), available at [http://www.correctionalassociation.org/wp-content/uploads/2012/05/lockdown-new-york\\_report.pdf](http://www.correctionalassociation.org/wp-content/uploads/2012/05/lockdown-new-york_report.pdf).

<sup>313</sup> Testimony of Brian Fischer, Commissioner, Before the Review Panel on Prison Rape (Apr. 27, 2011), available at [http://ojp.gov/reviewpanel/pdfs\\_apr11/testimony\\_fischer.pdf](http://ojp.gov/reviewpanel/pdfs_apr11/testimony_fischer.pdf).

<sup>314</sup> N.Y. CIVIL LIBERTIES UNION, *supra* note 190 (quoting Commissioner Fischer, Address to the New York State Bar Association Panel on Solitary Confinement (Jan. 2012)). The quote appears before the acknowledgements and table of contents.

<sup>315</sup> See *id.*

<sup>316</sup> See *Peoples v. Fischer*, 898 F. Supp. 2d 618 (S.D.N.Y. 2012).

<sup>317</sup> See Stipulation for a Stay with Conditions, *Peoples v. Fischer*, No. 11-CV-2694 (SAS) (S.D.N.Y. Feb. 19, 2014), available at [http://www.nyclu.org/files/releases/Solitary\\_Stipulation.pdf](http://www.nyclu.org/files/releases/Solitary_Stipulation.pdf).

<sup>318</sup> *Id.* at 2–4.

<sup>319</sup> *Id.* at 4.

inmates in solitary confinement, who is in solitary confinement and why, the length of total continuous solitary confinement time served by inmates currently in solitary, deprivation orders, and exceptional circumstances.<sup>320</sup> The agreement allows the parties’ experts to conduct up to three tours of the facilities and give reports detailing suggestions or proposals for the facilities.<sup>321</sup> Adding impetus to the reform effort, in October 2014, the Prisoners’ Legal Services of New York (PLS) reached a landmark settlement with the State of New York in *Cookhorne v. Fischer*.<sup>322</sup> Among other regulations, there is now a mandate that a juvenile’s age is a mitigating factor in disciplinary proceedings. The regulations also abolish solitary confinement for juveniles by limiting their time of confinement to no more than eighteen hours per day during the week, and twenty-two hours during the weekend.<sup>323</sup> In the press release announcing the settlement, PLS Executive Director Karen Murtagh stated, “I want to personally thank former DOCCS Commissioner Brian Fischer for his tremendous efforts in getting this ball rolling and Acting DOCCS Commissioner Anthony Annucci for the progressive steps he has taken to bring us to this moment.”<sup>324</sup>

Adding even further momentum to the effort to reform solitary, a coalition of prison reformers has formed an organization called New York Campaign for Alternatives to Isolated Confinement<sup>325</sup> and have proposed the Humane Alternatives to Long-Term (HALT) Solitary Confinement Act.<sup>326</sup> The HALT Act ends long-term solitary confinement by stating that no person may be held in isolated confinement more than fifteen consecutive days, or twenty days in any sixty-day period.<sup>327</sup> Additionally, the Act would mandate that any

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<sup>320</sup> *Id.* at 7–8.

<sup>321</sup> *Id.* at 8.

<sup>322</sup> 104 A.D.3d 1197 (N.Y. App. Div. 2013).

<sup>323</sup> Press Release, Prisoners’ Legal Servs. of N.Y., Prisoners’ Legal Servs. Reaches Landmark Settlement for Juveniles 1–2 (Oct. 22, 2014) (on file with author).

<sup>324</sup> *Id.* at 2.

<sup>325</sup> *Legislation: Summary of the Humane Alternatives to Long-Term (HALT) Solitary Confinement Act*, N.Y. CAMPAIGN FOR ALTS. TO ISOLATED CONFINEMENT, <http://nycaic.org/legislation/> (last visited Jan. 26, 2015).

<sup>326</sup> Humane Alternatives to Long-Term (HALT) Solitary Confinement Act, Amend. §§ 137, 2, 401-a & 45, Cor L, available at <http://open.nysenate.gov/legislation/bill/A8588-2013>. This bill is currently in committee.

<sup>327</sup> *Legislation: Summary of the Humane Alternatives to Long-Term (HALT) Solitary Confinement Act*, *supra* note 325.

person separated from the general population for fifteen continuous days must be in a separate, secure residential rehabilitation unit (RRU), which focuses on providing therapy and support.<sup>328</sup> The HALT Act places restrictions on the criteria for placement in solitary confinement or RRUs, and it bans persons younger than twenty-one or older than fifty-five; persons with a physical, mental, or medical disability; pregnant women; and anyone who is or perceived to be LGBTI.<sup>329</sup> The HALT Act enhances due process protections—including an assessment to determine if the person is in a special population and is therefore prohibited from being placed in solitary—and allows legal representation at hearings.<sup>330</sup> These developments presage real change to the use of solitary confinement in New York.<sup>331</sup>

Maine and New York are not the only places where, thanks to oversight and open-minded prison administrators, substantial reforms to solitary confinement are underway. Colorado is another example. The ACLU of Colorado recently issued a report about solitary in that state's prisons.<sup>332</sup> The report draws on eighteen months of research including interviews with prisoners, analysis of Colorado Department of Corrections data, site visits, and review of prisoner health files; the report finds that, while the overall number of prisoners held in solitary confinement has decreased in Colorado in recent years, the proportion of those prisoners who suffer from mental illnesses has increased.<sup>333</sup>

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<sup>328</sup> *Id.*

<sup>329</sup> *Id.* "LGBTI" refers to lesbian, gay, bisexual, transgender, and intersex individuals.

<sup>330</sup> *Id.*

<sup>331</sup> Unfortunately, however, the changes have not translated to a reduction in the use of solitary in New York. According to one knowledgeable advocate,

[t]he last census for the Special Housing Units was 3,763, representing 7.13% of the total DOCCS population. The previous month was closer to 3,850. The number of people in the SHU has been fluctuating around 3800 for the last year or a little more. There had been a slight decline in the SHU census between 2012 and mid 2013 (from around 4300 to around 3800), but since that time it has remained around 3800. This percentage of 7.13% is similar to the percentage in 2007 (7.11%), and higher than the percentage in 2003 (5.17%). ([T]he percentage steadily increased between 2007 and 2012, when again it dropped a little into 2013). Basically it seems there was a slight decrease a little over a year ago, and then not much change since then.

E-mail from Scott Paltrowitz, Corr. Ass'n of N.Y., to Michael B. Mushlin (Nov. 10, 2014) (on file with author).

<sup>332</sup> ACLU OF COLO., OUT OF SIGHT, OUT OF MIND: COLORADO'S CONTINUED WAREHOUSING OF MENTALLY ILL PRISONERS IN SOLITARY CONFINEMENT (2013), available at <http://aclu-co.org/wp-content/uploads/files/imce/Solitary%20Report.pdf>.

<sup>333</sup> *Id.*

In addition, Colorado has had two recent corrections leaders committed to changing solitary confinement. The first, Tom Clements—who had been working with the ACLU—was tragically killed on March 19, 2013, by a former inmate who had served eight years in prison, mostly in solitary confinement.<sup>334</sup> His successor, Rick Raemisch, pledged in early 2014 to reduce the number of prisoners in solitary confinement to fewer than three percent of the state’s prison population by next summer.<sup>335</sup> As a result of this combination of progressive leadership and outside oversight, on June 6, 2014, Colorado Governor John Hickenlooper signed into law S.B. 14-064, restricting the use of long-term isolated confinement for inmates with serious mental illnesses in state prisons.<sup>336</sup> The act created “a work group” within the department which will consist of the deputy executive director; director of clinical and correctional services; the director of prisons; chief of psychiatry; the director of behavioral health; two representatives from a nonprofit prisoners’ rights advocacy group, one who is appointed by the Colorado House of Representatives and another who is appointed by the Colorado Senate; and two mental health professionals independent from the department, one who is appointed by the Colorado House and another who is appointed by the Colorado Senate.<sup>337</sup> The work group is responsible for advising “the department on policies and procedures related to the proper treatment and care of offenders with serious mental illness in long-term isolated confinement.”<sup>338</sup>

This bill kept with the trend in the state to reexamine the solitary confinement system. Governor Hickenlooper had already given Raemisch the charge to “[l]ower the number in administrative segregation overall; reduce the number of prisoners who are released

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<sup>334</sup> Kirk Mitchell et al., *Tom Clements, Executive Director of Colorado Prisons, Killed in His Home in Monument*, DENV. POST (Mar. 20, 2013, 5:27 AM), [http://www.denverpost.com/ci\\_22830150/tom-clements-director-colorado-department-corrections-killed-his?source=infinite](http://www.denverpost.com/ci_22830150/tom-clements-director-colorado-department-corrections-killed-his?source=infinite).

<sup>335</sup> Allison Sherry, *Colorado Corrections Chief: I Will Reduce Solitary Confinement*, DENV. POST (Feb. 25, 2014, 5:22 PM), [http://www.denverpost.com/news/ci\\_25227021/colo-corrections-chief-i-will-reduce-solitary-confinement](http://www.denverpost.com/news/ci_25227021/colo-corrections-chief-i-will-reduce-solitary-confinement); see also Rick Raemisch, *My Night in Solitary*, N.Y. TIMES (Feb. 20, 2014), <http://www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html>.

<sup>336</sup> S.B. 14-064, available at [http://www.leg.state.co.us/clics/clics2014a/csl.nsf/fsbillcont/CC49C5479FE8AD7487257C3000062140?Open&file=064\\_enr.pdf](http://www.leg.state.co.us/clics/clics2014a/csl.nsf/fsbillcont/CC49C5479FE8AD7487257C3000062140?Open&file=064_enr.pdf).

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

directly to the free world from solitary; and eliminate or dramatically reduce major mentally ill people from serving in solitary.”<sup>339</sup> When the bill was signed into law, a spokeswoman stated, “as of today, we have no offenders with mental illness in solitary confinement.”<sup>340</sup>

Solitary confinement reform has also begun in Mississippi. This change, sparked by the ACLU, provided oversight by bringing litigation over the conditions in Unit 32, the solitary confinement unit at the Mississippi State Penitentiary at Parchman.<sup>341</sup> To resolve these cases, the State of Mississippi agreed to collaborate with the ACLU to reform a classification system that placed far too many inmates in solitary confinement. Because of this, the classification criteria were tightened so that only inmates who had committed serious infractions, were high-level gang members, or had prior escapes or escape attempts could be considered for placement in solitary units.<sup>342</sup> Moreover, even for those in solitary, the state eased the isolation by creating new recreation areas, allowing inmates to be out of their cells for several hours per day, constructing a dining hall, and expanding educational and mental health services.<sup>343</sup> These reforms led to a seventy percent reduction in violence levels since Mississippi closed its major solitary confinement unit.<sup>344</sup>

Nevertheless, much work remains before Mississippi achieves meaningful reform of its use of solitary confinement. Two recent cases filed by the ACLU and others reveal that Mississippi has contracted with private prisons that continue to use solitary confinement in a particularly harsh and inhumane way.<sup>345</sup> In addition, Commissioner Epps recently resigned his position after he pleaded

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<sup>339</sup> Sherry, *supra* note 335.

<sup>340</sup> Joe Palazzolo, *Colorado Becomes Latest to Back Ban on Solitary Confinement of Mentally Ill*, WALL ST. J. (June 6, 2014, 3:55 PM), <http://blogs.wsj.com/law/2014/06/06/colorado-becomes-latest-to-back-ban-on-solitary-confinement-of-mentally-ill/>.

<sup>341</sup> See *Presley v. Epps*, No. 4:05-CV-00148 (N.D. Miss. Nov. 8, 2011) (dismissed without prejudice); Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives and Sanity*, N.Y. TIMES (Mar. 10, 2012), <http://www.nytimes.com/2012/03/11/us/rethinking-solitary-confinement.html?pagewanted=all>; Terry A. Kupers et al., *Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 CRIM. JUST. & BEHAV. 1037 (2009), available at [https://www.aclu.org/files/images/asset\\_upload\\_file359\\_41136.pdf](https://www.aclu.org/files/images/asset_upload_file359_41136.pdf).

<sup>342</sup> Goode, *supra* note 341.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* (“Violence went down. The number of prisoners in isolation dropped to about 300 from more than 1,000. So many inmates were moved into the general population of other prisons that Unit 32 was closed in 2010, saving the state more than \$5 million.”).

<sup>345</sup> See, e.g., ACLU, NATIONAL PRISON PROJECT LITIGATION DOCKET, available at [https://www.aclu.org/sites/default/files/assets/2014.10.30.updated\\_npp\\_docket\\_8-14.pdf](https://www.aclu.org/sites/default/files/assets/2014.10.30.updated_npp_docket_8-14.pdf).

not guilty to a forty-nine-count indictment.<sup>346</sup> Epps is accused of taking more than one million dollars in bribes and kickbacks over the last eight years in exchange for hundreds of millions of dollars in prison contracts.<sup>347</sup>

### 5. Summary

Without oversight, despite the rise of professional prison administrators replacing older, more hardened, and unprofessional administrators, solitary confinement continues in American prisons. Thus, tens of thousands of inmates must endure unnecessary and cruel stays in solitary confinement. However, like Kafka’s fictional prison, in the limited situations in which oversight has begun to take root in collaboration with professional prison leadership, the old walls are beginning to break down, resulting in significant, positive changes in solitary confinement.

## III

### THE LESSON OF *IN THE PENAL COLONY*

*In the Penal Colony* is great literature that has meaning and relevance to those concerned about the American penal system.<sup>348</sup> This should not be surprising. One of the founders of the law and literature movement writes that literature is a “unique source of learning about key jurisprudential topics.”<sup>349</sup> “The links between law and literature have a long history dating back as far as the metaphors and parables of Socrates on matters of justice.”<sup>350</sup> According to Professor Paul Gewirtz, “[l]iterature makes its special claims upon us

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<sup>346</sup> Geoff Pender & Jimmie E. Gates, *Epps: “I’m Shocked by This,”* CLARION-LEDGER (Nov. 6, 2014), <http://www.clarionledger.com/story/politicalledger/2014/11/06/epps-indicted/18589879/>.

<sup>347</sup> *Id.*

<sup>348</sup> Great literature provides meaning and relevance to both legal and policy matters. See generally Richard H. Weisberg, *Entering with a Vengeance: Posner on Law and Literature*, 41 STAN. L. REV. 1597, 1624 (1989); TALL STORIES? READING LAW AND LITERATURE I (John Morison & Christine Bell eds., 1996) [hereinafter TALL STORIES]; Oscar Wilde, *The Decay of Lying*, in THE OXFORD AUTHORS: OSCAR WILDE 230 (Isobel Murray ed., 1889) (“Literature always anticipates life. It does not copy it, but [molds] it to its purpose.”).

<sup>349</sup> Weisberg, *supra* note 348, at 1624.

<sup>350</sup> TALL STORIES, *supra* note 348, at 1; see also Posner, *Law and Literature*, *supra* note 169, at 1352 (“The field of law and literature is not new.”).

precisely because it nourishes the kinds of human understanding not achievable through reason alone.”<sup>351</sup>

*In the Penal Colony*, Kafka’s dark story, is a parable that illustrates three critical truths that are relevant to contemporary prison issues. First, awful things can, and will, happen in prisons if they are closed to the public they are supposed to serve. Second, no matter how well-intended and enlightened prison officials are, change cannot occur solely from within. Third, outside oversight is essential if prisons are to be reformed to prevent abuses from occurring. These insights, so brilliantly conveyed a century ago in *In the Penal Colony* by Kafka, deserve to be a part of the important conversation today about the role of solitary confinement and the need for oversight of America’s prisons and jails.<sup>352</sup> But, to date, Kafka’s voice has been missing from this critical discussion. It is well past time to correct this imbalance.<sup>353</sup>

Kafka has long been cited as an author whose work “is highly relevant” to understanding cutting edge legal issues.<sup>354</sup> Indeed, Kafka’s work above all others has emerged as the “canon” of law and

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<sup>351</sup> Paul Gewirtz, *Aeschylus’ Law*, 101 HARV. L. REV. 1043, 1050 (1988).

<sup>352</sup> For a sampling of the amount of discussion currently taking place in the United States about solitary confinement, see e.g., ACLU, BRIEFING PAPER: THE DANGEROUS OVERUSE OF SOLITARY CONFINEMENT IN THE UNITED STATES (2014) (discussing the case law, media attention, and advocacy taking place around this issue).

<sup>353</sup> The approach taken in this Article is not without its critics. Some claim, Posner among them, that the interpretation of literature has no value to the resolution of legal issues. RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 35 (1988); Posner, *Law and Literature*, *supra* note 169, at 1356 (“If I want to know about the system of chancery in nineteenth-century England I do not go to *Bleak House*. If I want to learn about fee entails I do not go to *Felix Holt*. There are better places to learn about law than novels.” (citation omitted)). However, the use of literature in legal scholarship has powerful and persuasive support. See, e.g., Christine Bell, *Teaching Law as Kafkaesque*, in TALL STORIES, *supra* note 348, at 11 (indicating that there is great value in analyzing great works of literature not only when the literature explicitly is “about law,” but also when the literature is about legal institutions, the subject of *In the Penal Colony*); David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 HARV. ENVTL. L. REV. 79 (2004) (analyzing a novel by Barbara Kingsolver entitled *Animal Dreams*); Dragich, *supra* note 63.

<sup>354</sup> Litowitz, *supra* note 63, at 104 (2002). The major scholarly debate about the value of literature in understanding legal issues played out in a debate between Professor Robin West and Judge Posner about Kafka. See Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986); Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986).

literature.<sup>355</sup> As revealed earlier, *In the Penal Colony* is especially relevant to legal audiences because historic research demonstrates that Kafka, in his professional work on behalf of the industrial workers of Bohemia, understood the importance of opening closed institutions.<sup>356</sup>

*In the Penal Colony* highlights a key theme to today’s penal discussions—in a closed prison setting, the torture machine that Kafka so carefully and chillingly describes is at the very center of the operation of the prison, and it is considered essential to maintain order. We are told, as well, that even though the barbarity of the machine is abhorred by the new Commandant, and even though formally he has power to end the cruelty simply by ordering the machine dismantled, he has not done so. Instead, he invites the Traveler, the outsider, the voice of civilized values, to visit the colony to observe the machine and provide society’s judgment. It is only when the Traveler finally speaks up—saying to the Officer, “I am opposed to this procedure”—that the use of the machine, which the new Commandant had not been able to end on his own, ceases.

The analogy to America’s prisons and jails is compelling. Like Kafka’s machine, solitary confinement is central to the modern American prison system and is used to exert power and control over this country’s two million inmates. Like the machine, solitary is used to control prisoners by punishing them severely for minor infractions. Kafka’s condemned man is to be tortured and put to death for the absurd minor offense of failing to salute his superior’s door every hour during the night; in the United States, isolation is an extreme measure and it, too, is frequently used as punishment for slight transgressions. Kafka’s machine is considered by the Officer as essential to the operation of the penal colony. Similarly, many American prison personnel defend solitary confinement as an essential means of securing control and encouraging self-reflection. While the Officer views the machine as a means of enlightenment and redemption, advocates of solitary confinement see the “time out” nature of solitary confinement as a means of allowing an inmate to

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<sup>355</sup> Bell, *supra* note 353; see also ROBERT P. BURNS, *KAFKA’S LAW: THE TRIAL AND AMERICAN CRIMINAL JUSTICE VII* (2014) (noting that the law’s “gears, nuts and bolts become clearest when viewed through the eyes of Franz Kafka”).

<sup>356</sup> See *supra* notes 63–180.

reflect and to redeem himself.<sup>357</sup> In fact, as discussed earlier, the founders of the first prison in America, the very prison that Dickens and de Tocqueville visited, used solitary confinement for exactly those purposes and named their prison a penitentiary to signify that goal.<sup>358</sup>

Just as Kafka's apparatus inflicts severe pain and suffering, so too does solitary confinement. People who are subjected to solitary confinement suffer enormously.<sup>359</sup> It is more than a coincidence that a person as professionally knowledgeable and sophisticated as Kafka would imagine the use of such a device in a prison setting.<sup>360</sup> Kafka's story warns us that prisons are exactly the kind of modern institutions in which means of torture will be developed and used. Like the machine, solitary confinement is imposed on prisoners largely at the whim of prison administrators without meaningful due process: its utilization in the United States operates outside of the norms of enlightened society.<sup>361</sup>

Similar to American prisons, Kafka's penal colony is a closed institution; as far as we can tell, no one is allowed in or out without permission. In such settings, abusive practices are very difficult to end. Behind prison walls, separate cultures develop, old ways die hard, and the voice representing the community's values is not heard. The new Commandant clearly sees the machine as barbaric and wants to end its use. But although on paper he has the power to abolish the

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<sup>357</sup> This was the argument that the state of Pennsylvania made to justify severe deprivations in a solitary confinement unit in its prisons; the United States Supreme Court accepted this argument. *See* *Beard v. Banks*, 548 U.S. 521 (2006).

<sup>358</sup> *See* Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. AM. INST. CRIM. L. & CRIMINOLOGY 35, 51–53 (1921).

<sup>359</sup> This was noted by the Supreme Court almost 125 years ago. *In re Medley*, 134 U.S. 160, 168 (1890) (noting that when solitary was imposed on prisoners, “[a] considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide, while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community”).

<sup>360</sup> *See supra* notes 78–165 for a discussion of Kafka's professional career.

<sup>361</sup> The international community has condemned the American system of solitary confinement. *See, e.g.*, Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report*, ¶ 77, U.N. Doc A/66/268 (Aug. 5, 2011), available at <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf> (by Juan Mendez) (solitary beyond fifteen days constitutes torture); EUR. COMM. FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, 21ST GENERAL REPORT OF THE CPT 39 (2011), available at <http://cpt.coe.int/en/annual/rep-21.pdf> (Solitary confinement can amount to “inhuman and degrading treatment.”).

machine, without outside support he is incapable of achieving this goal. To be sure he can make it more difficult to use the machine—for example, he cut the number of regular shipments of replacement parts—but he cannot end the torture and the death that takes place under his watch.

The parallels to the current system are remarkable. There are prison directors in the United States (the new Commandants if you will) who deplore the way solitary confinement is used but lack the power, because of entrenched interests, to truly reform it. For example, the commissioner of correction of New York publicly stated that solitary in New York was “overused,” but he was not able to reform it by himself.<sup>362</sup> Litigation, reports of outsiders, and public agitation all have been necessary to get the topic on the public agenda. As is the case with the “new Commandant” in Kafka’s story, the “new Commandants” of American prisons cannot make lasting and complete change by themselves.

With openness, change can occur. The role of the protagonist Traveler illustrates the point. He is invited to the penal colony by the new Commandant to give his opinion as to the appropriateness of using the machine to torture and kill. The new Commandant, as well as the Officer, understand that oversight—openness—is the trump card that will either cause the machine to be endorsed or condemned. In an important sense, the Traveler is the conscience of the outside world, the holder of its values. The mere expression of his opinion—“I am opposed to this procedure”<sup>363</sup>—is enough for the use of the machine to end. So, too, in the United States: when prisons are opened to oversight and when coupled with leadership supportive of reforms, change can occur. In *In the Penal Colony*, as in Maine and New York, when outside groups were allowed access to prison systems that made extensive use of solitary confinement, and when these outside groups expressed the voice of the community condemning the practice, well-meaning administrators were able to finally begin to make reforms that will significantly improve their prison systems.<sup>364</sup>

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<sup>362</sup> See MUSHLIN, *supra* note 183 (reporting comment of commissioner of correction of New York State).

<sup>363</sup> Kafka, *supra* note 1, at 148.

<sup>364</sup> See *supra* notes 300–31 for a discussion of the progress that has been made in reforming solitary confinement in Maine and New York thanks to increased oversight. It has been claimed that the machine in *In the Penal Colony* in our time and place is the

In the end, Kafka's "dirty"<sup>365</sup> story then is really an optimistic one: when we open up prisons to oversight, we will bring the values of the community into their operation and end prison abuses like the rampant use of solitary confinement.

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death penalty. See Dragich, *supra* note 63. That analogy, while it has merit, is not as strong as the analogy to solitary confinement. The machine was used to inflict torturous punishment for behavior that occurred in violation of prison rules as a prison disciplinary and security measure. That is the function of solitary. The death penalty is imposed for criminal behavior outside the prison walls and is not used as a control device for prisoners.

<sup>365</sup> Kafka himself referred to *In the Penal Colony* as a "dirty" story. HAYMAN, *supra* note 2, at 214.