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Campaign and Advocacy

close

Search

close

close

by Solitary Watch Guest Author | July 9, 2015

*Michael Mushlin, professor at Pace Law School, has a long history of involvement with prisoners rights as a lawyer and legal scholar. He has lectured and published widely on the subject andisauthor of the four-volume*Rights of Prisoners. *He serves on the board of the Correctional Association of New York, was a member of the Task Force on the Legal Status of Prisoners of the American Bar Association, and served as co-chair of the Subcommittee on Implementation of the ABA Resolution on Prison Oversight. He wrote the following as aprefaceto the article republished in partbelow,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, which appearsin full in the* Oregon Law Review *93:3 (2015). The article is accessible to all, and can be read in full here.*

A century ago Franz Kafka wrote *In the Penal Colony,* a masterpiece that I believe has direct relevance to the ongoing struggle to reform solitary confinement and to open prisons and jails to oversight. To mark the occasion I wrote thefollowingarticle.

I wrote the article to inject Kafka into the debate because his 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. I hope the article will make a contribution to the national effort now underway to implement meaningful prison oversight and to free this nation of the horrors of solitary confinement.

Abstract

This is the 100th anniversary of Franz Kafkas *In the Penal Colony*. The story brilliantly imagines a gruesome killing machine at the epicenter of a mythical prisons 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 Americas 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 Kafkas 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*, Kafkas voice has not yet been heard in this debate. This Article is intended to fill that void and to reveal how Kafkas 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.[i] These words, which are spoken by a traveler to an imaginary prison on an unnamed island, come at a critical moment in Franz Kafkas masterpiece, *In the Penal Colony*.[ii] Written a century ago, in the heat of a writing frenzy during the 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 colonythe newCommandantlacked 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,[iii] *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.[iv] 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.

Americas prisons need oversight. At the core of Americas vast prison system[v] is the pervasive practice of solitary confinement, a practice which inflicts great psychological and often physical pain on the people subjected to it.[vi] 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 ways.[vii] Despite this, solitary confinement continues to be used on a massive scale.[viii] Like the punishment inflicted by the machine in Kafkas tale, solitary confinement is inflicted on inmates with little in the way of due process and often for petty reasons;[ix] like the machine, it is cruel and torturous;[x] like the old Commandant, its defenders justify the practice as necessary for control and enlightenment.[xi]

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[xii] or by interested citizen groups.[xiii] Although the leadership of American correctional systems has increasingly become more professional and reform minded than in the past,[xiv] and some of these new leaders like the new Commandant want to reform solitary confinement practices,[xv] they operate largely in the dark without oversight and, thus, are unable to effectuate meaningful change.[xvi] In the shadows it is almost impossible for these professionals to make progresseven 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.[xvii]

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.[xviii] 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.[xix] 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 Kafkas 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.

Art:Piranesi, from The Imaginary Prisons (1761)

[i] Franz Kafka, In the Penal Colony, in THE METAMORPHOSIS AND OTHER STORIES 125, 148 (Donna Freed trans., Barnes & Noble Books 1996).

[ii] 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 11819 (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 Kafkas life of astonishing productivity. KOELB, supra note 2, at 45; see also REINER STACH, KAFKA: THE DECISIVE YEARS 46869 (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 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 35051. 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).

[iii] 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 Devils 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 Devils 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.

[iv] 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.

[v] The American prison system has expanded at an astonishing rate in the past three decades. Currently, America imprisons more peopleand at a higher per capita rate of incarcerationthan any other country in the world by significant margins. See infra notes 18182.

[vi] See infra notes 181265 and accompanying text.

[vii] See infra notes 181265 and accompanying text.

[viii] See infra notes 181265 and accompanying text.

[ix] See infra notes 181265 and accompanying text.

[x] See infra notes 181265 and accompanying text.

[xi] See infra notes 181265 and accompanying text.

[xii] See Houchins v. KQED, 438 U.S. 1, 37 (1978) (holding that the press has no greater right of access to prisons and jails than citizens, so if citizens are denied accessas they are routinelythe press may also be denied access).

[xiii] See infra notes 26684 and accompanying text.

[xiv] 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).

[xv] See generally Stan Stojkovic, Prison Oversight and Prison Leadership, 30 PACE L.

REV. 1476 (2010).

[xvi] 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.).

[xvii] See infra notes 26684 and accompanying text.

[xviii] See FRANZ KAFKA: THE OFFICE WRITINGS, at ixx (Stanley Corngold, Jack Greenberg & Benno Wagner eds., Eric Patton with Ruth Hein trans., 2009) [hereinafter THE OFFICE WRITINGS].

[xix] Unlike Kafka, the writings of Charles Dickens have been used in contemporarydiscussions of prisons. See, e.g., DICKENS, infra note 203.

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by Juan Moreno Haines

October 25, 2022

by Solitary Watch Guest Author

October 13, 2022

by Vaidya Gullapalli

September 29, 2022

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Having never read the book I was captivated as I read these lines,

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.

Similar to American prisons, Kafkas 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 communitys values is not heard.

In the end, Kafkas dirty 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.

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 is enough for the use of the machine to end.

Then reality hit me as I learned that Michael B. Mushlin had first confronted conditions in solitary confinement units over thirty years ago when he served as trial counsel in a federal civil rights case involving Unit 14, the solitary confinement unit at Clinton prison in

upstate New York close to the Canadian border. What he saw there was deeply disturbing he has said repeatedly.

So this Traveler has seen and spoken out but, do his sentiments reflect the mainstreams view? Although one would hope so why is it no surprise to read David Sweat is headed to upstate New York to yet another solitary confinement cell for the remainder of his life.

Excerpts from a New York Times article by ASHLEY SOUTHALL on
JULY 5, 2015 titled:

David Sweat, Escaped Convict, Is Released From Hospital and Transferred to Upstate Prison

David Sweat, the New York prison escapee who was shot and taken into custody on June 28, has since been released from the hospital and transferred to the Five Points Correctional Facility, a maximum-security prison in Romulus, N.Y.

In the past, inmates who have been convicted of attempted escape
have been sentenced to up to 10 years in solitary confinement, officials said.

New York State tends to use solitary confinement much more liberally, Ms. Murtagh said. I would imagine that in this case, Mr. Sweat would be subject to a very lengthy term of solitary confinement.

After serving his penalty, Mr. Sweat would face another hearing, during which officials might seek to place him in administrative segregation under
conditions that are exactly the same as solitary confinement, Ms. Murtagh said.

It kind of brings you back to reality just read the values of the community through their comments on William Blakes well written story A sentence Worse Than Death.

http://solitarywatch.com/2013/03/11/voices-from-solitary-a-sentence-worse-than-death/#disqus_thread

Seems to me we might have some work to do there.

P.O. Box 11374
Washington, DC 20008

info@solitarywatch.org

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