

THE HAMMER & SICKLE VERSUS THE SWASTIKA: A SURVEY OF TWO STATE SYSTEMS OF OPPRESSION AND PRISON LABOR

*Dawn A. Ericksen*¹

“Unlimited power in the hands of limited people always leads to cruelty.”

- *Aleksandr Solzhenitsyn, The Gulag Archipelago, 1918-1956*

I. INTRODUCTION

Conventional wisdom suggests correctional facilities should do as their name implies: correct the behaviors of those they house. But too often, this aim is lost. When correctional facilities no longer have rehabilitation and security as their objective but rather profit and oppression, they descend a dangerous and well-traveled slope. Two of these most notable travesties in modern history are the Soviet Union’s Gulag system and the concentration camp network of Nazi Germany. This paper explores each countries’ legal processes and justifications for their camps and discusses where those destructive traditions find a home in the world today.

Both institutions began with the intent of removing and rehabilitating dangerous elements within their respective regimes. However, they became forced labor centers, transcending corrections and mutating into critical economic components of their states. As the need for forced labor increased and entire populations were targeted for segregation, the carceral system adapted to accommodate the transformations. Depravity, death, and the destruction of entire communities ensued.

Each system used the law to power this cycle of inhumanity. Despite condemnation by institutions such as the United Nations, forced labor camps targeting specific populations have not been relegated to history. They continue today in places like China, North Korea, Russia, and the United States.

¹Staff Editor, Rutgers Journal of Law and Religion’s Nuremberg Project; J.D. Candidate 2022, Rutgers School of Law

II. HISTORICAL BACKGROUND

It is important to note that the information available regarding the Nazi concentration camps and Soviet gulags vary greatly. As the victims of the Nazis were freed in 1945, many began to collaborate and document their stories². The Nazis were excellent record keepers, aiding researchers, and today there is a vast amount of reliable information available on all aspects of their concentration camps.

This is not true for the Soviet Gulags. Records were not well kept, and camp administration often restricted the transmission of information to oral communication or via “Secret” level documents promptly destroyed after use.³ Additionally, statistics were often doctored to make the camps appear compliant with guidelines or more productive than they truly were. Therefore, the data used herein are accurate based on information available today, but likely approximate or imperfect.

a. SOVIET GULAGS

The term GULAG is an acronym for *Glavnoe Upravlenie Lagerei*, or ‘Main Camp Administration.’⁴ However ‘Gulag’ commonly refers to the repressive Soviet system itself, including the prison camps and forced labor within, sometimes informally referred to as the ‘meat grinder.’⁵ At its peak, it consisted of 105 corrective labor camps, 9 special camps, and 97 colonies, along with their various administration sites.⁶

These camps had high turnover: prisoners finished their sentences and were released; they were discharged into the Red Army; or they were sometimes promoted from prisoner to prison guard.⁷ At any one time, an average of two million people were imprisoned in the Gulag; best estimates show that from 1929-1953, about 18 million people rotated through, with another 6 million sent into permanent exile in areas such as Siberia or the Kazakh deserts.⁸

²Nikolaus Wachsmann, *KL: A History of the Nazi Concentration Camps*, 10-11 (Farrar, Straus and Giroux 2016).

³V.P. Popov, *State Terror in Soviet Russia, 1923-1953*, 32 *Russian POL. & L.* 79, 98 (1994).

⁴ Anne Applebaum, *Gulag*, xv (Anchor Books 1st ed. 2004).

⁵ *Id.* at xv-xvi.

⁶ Popov, *supra* note 3, at 99-100.

⁷ Applebaum, *supra* note 4, at xvii.

⁸ *Id.* at xvii.

While most associated with the Stalin era, the Gulag's roots began in 17th century Tsarist Russia, where forced exile was considered a more humane form of punishment.⁹ *Katorga*, or forced labor, was a common element, notably used to build the city of St. Petersburg.¹⁰ Stalin himself had been arrested and exiled under this system four times (and escaped three).¹¹

During the 1917 Revolution, Vladimir Lenin called for "unreliable elements", including aristocrats and merchants, to be locked in camps outside towns.¹² These camp systems continued to formalize and expand during the ensuing decades and World War II, reaching their apex in the early 1950s and then declining immediately after Stalin's death in 1953.¹³ From 1923-1953, records show 39.1 million people were convicted under the Russian Soviet Federalist Socialist Republic, but this number does not include military tribunals, other specialized courts that kept their own individual records, or extrajudicial removals conducted by the Soviet secret police, the N.K.V.D.¹⁴ Therefore, although the statistic of 1 in 3 people in the Soviet Union convicted is likely underreported, it reveals the enormous scale of the Gulag machine¹⁵. The vast majority were first-time convicts, but not all those convicted were sentenced to imprisonment in the Gulag¹⁶.

The Statute on General Places of Detention was issued in 1920 by the People's Commissar of Justice and methodically delineated the code of penitentiary law in 232 sections.¹⁷ In 1929, Joseph Stalin solidified his sole command of the Soviet Union and launched economic reforms, calculatingly including forced industrialization and farm collectivization.¹⁸ Involuntary labor was key to industrial development and the extraction of Russia's valuable natural resources to modernize the country, produce raw materials, and

⁹ *Id.* at xvi, xxix.

¹⁰ *Id.* at xxxi.

¹¹ *Id.* at xxxiii

¹² Applebaum, *supra* note 4, at xvi.

¹³ *Id.* at xvi-xvii.

¹⁴ Popov, *supra* note 2, at 83.

¹⁵ *Id.* at 84

¹⁶ *Id.* at 84-5.

¹⁷ F.J.M. Feldbrugge, *The Soviet Penitentiary System and the Rules of International Order of Corrective Labor Institutions in Historical Perspective*, 12 REV. SOCIALIST L. 5, 7 (1986).

¹⁸ STEPHEN KOTKIN, *Stalin: Waiting for Hitler 1929-1941*, 28-9 (Penguin Press 2017).

generate much-needed revenue.¹⁹ Stalin took keen notice of the Gulag system and personally influenced its advancement.²⁰

In 1934, a federal arm of the N.K.V.D. was formed to take control of the penal system, removing it from supervision by the country's judicial structures.²¹ After that time, the laws regulating the Gulags were controlled solely by internal instructions from the N.K.V.D.²² The focus turned from correction and re-education of prisoners to the economic performance of the Gulags and societal repression completely.²³ Many of these directives were shrouded in secrecy and are still difficult to discern today.²⁴

The principal social law of "sharpening the class struggle" was Stalin's justification for the Great Terror and repression²⁵. Because so few convicts were recidivists, the Soviet State had to grow their forced labor population by expanding who was a criminal through Article 58 of the R.S.F.S.R. criminal code.²⁶ Although it laid out the punishment for "counter-revolutionary" acts, it did not limit their definition; virtually any behavior could be spun as criminal.²⁷ As the need for free labor continued, further decrees became necessary to criminalize actions and continue arrests: in 1932, underproduction of grain; in 1945, those working fewer than 8-hour workdays; and in 1946, for those "pillaging public property" (often grain).²⁸ Most criminal cases were completed in just 10-20 days.²⁹

After a sizable emptying during WWII, the Gulags began to grow again as the war waned.³⁰ Many were sentenced by 'Administrative Exile' which lacked both trials and sentencing.³¹ Political non-conformists and opponents (or anyone unlucky enough to be so accused) were simply removed from their homes and loaded

¹⁹ Applebaum, *supra* note 3, at vxii.

²⁰ *Id.* at 53.

²¹ *Id.* at vxii.

²² Feldbrugge, *supra* note 17, at 13.

²³ *Id.* at 14.

²⁴ *Id.* at 6.

²⁵ Popov, *supra* note 2, at 97.

²⁶ *Id.* at 89.

²⁷ Konstitutsiia RSFSR (1927) [Konst. RSFSR] [RSFSR Constitution] Article 58, RSFSR Penal Code of 21927.

²⁸ Popov, *supra* note 2, at 89, 92-3.

²⁹ *Id.* at 92.

³⁰ Thomas Earl Porter, *Hitler's Forgotten Genocides: The Fate of Soviet POWs*, 5 ELON L. REV. 359, 375 (2013).

³¹ Applebaum, *supra* note 4, at 422.

onto trucks for the perilous journey to a camp.³² This proved to be an ideal tool for the efficient gathering of forced labor and removal of unwanted citizens.³³

Immediately after Stalin's death in 1953, the camps ceased to grow. Inmate releases were modest at best until Khrushchev made his 'Secret Speech' in 1956.³⁴ It was the first time Soviet leadership publicly admitted to false arrests and prompted the M.V.D., K.G.B., and camp administration to begin large scale releases (about 617,000) in the following ten months.³⁵ The Gulag system remained active but continued to diminish over the following decades, finally being formally dissolved in the late 1980s as then President Gorbachev, himself the grandson of Gulag prisoners, moved to do so.³⁶

b. NAZI GERMANY CONCENTRATION CAMPS

Concentration camps were a distinct organism within the Third Reich, with its own administration, rules, and staff.³⁷ Like the Gulag, they went by their own acronym: KL, short for *Konzentrationslager*.³⁸ Under Hitler's guidance, they removed the 'impure' of society to bring about Germany's world supremacy. Hitler justified the use of the camps as a tool of the English, and Himmler declared the German variant much more moderate than the English form.³⁹

Shortly after Hitler's appointment in 1933, the Nazi Party (N.S.D.A.P.) solidified their power with a wave of violence and terror against opposing political parties and the organized working class, as well as racial and social outsiders.⁴⁰ After the Nazis falsely blamed communists for the Reichstag fire of 1933, approximately 200,000 political prisoners were rounded up under the watershed Decree of the Reichstag President for the Protection of People and State.⁴¹ This decree suspended basic civil liberties, and the line between the N.S.D.A.P. party and the German state became blurred⁴².

³² *Id.* at 422-23.

³³ *Id.*

³⁴ *Id.* at 509.

³⁵ *Id.* at 508-09.

³⁶ *Id.* at xvii.

³⁷ Wachsmann, *supra* note 2, at 5.

³⁸ *Id.*

³⁹ *Id.* at 6-7.

⁴⁰ *Id.* at 27.

⁴¹ *Id.* at 28, 31-32.

⁴² Wachsmann, *supra* note 2, at 30, 32.

Police, judges, and prosecutors were largely sympathetic to the Nazi cause.⁴³ They used whatever legal means necessary to imprison the charged, although many of those charged did not go through a formal judicial process as their only crime was who they were: political opponents.⁴⁴ Himmler admitted to targeting the “Jewish-Communist” faction “completely illegally” under the guise of indefinite protective custody; those affected were not permitted to have legal representation.⁴⁵

The early camps were varied and included workhouses and prisons under local and state authorities.⁴⁶ They ranged in size and peril; they could be mostly harmless or life-threatening but life within was most often bearable.⁴⁷ Camps administered by the S.A. and S.S. (specialized Nazi paramilitary organizations) appeared in later 1933 to handle the increasing overflow from those held under the Decree of the Reichstag President, where violence against inmates was both dehumanizing and increasing in frequency.⁴⁸ To the public, Nazi Germany proudly projected an idealized image of the early concentration camps as a place of reform and re-education.⁴⁹

The cornerstone of the persecution and elimination of Jewish and other populations was the legal system. Throughout 1933, the Nazis destabilized and isolated Jewish communities by promoting boycotts and passing laws restricting their activities and professions, in effect making them second class citizens.⁵⁰ The 1933 Habitual Criminals Law allowed punishment of open-ended sentences, and by 1939 almost 10,000 prisoners had been sentenced this way, most of whom were minor property offenders.⁵¹ ‘Preventative police custody’ was introduced to charge ex-convicts with “criminal intent”; it did not require that a crime be committed before detention, thus widening the scope of who could be arrested.⁵²

⁴³ *Id.* 31-32.

⁴⁴ *Id.*

⁴⁵ *Id.* at 32, 93.

⁴⁶ *Id.* at 33.

⁴⁷ Wachsmann, *supra* note 2, at 33-34.

⁴⁸ *See generally*, Wachsmann, *supra* note 2, at 35-39.

⁴⁹ *Id.* at 73.

⁵⁰ Richard D. Heideman, *Legalizing Hate: The Significance of the Nuremberg Laws and The Post-War Nuremberg Trials*, 39 LOY. L.A. INT'L & COMP. L. REV. 5, 6-8 (2016).

⁵¹ Wachsmann, *supra* note 2, at 142.

⁵² *Id.* at 142-43.

In 1935, the infamous Nuremberg Race Laws were announced at the annual Nazi party rally in Nuremberg.⁵³ They dictated who could be considered a citizen of the Third Reich, and forbid Jews from marrying or having relations with Aryan Germans, further broadening the ability of the state to determine who could be persecuted.⁵⁴

During the years of deprivation during WWII, many Germans were removed straight to the KL as a ‘crime prevention’ measure; officials sometimes stated their return was ‘undesirable’.⁵⁵ Prior to 1938, Jews were a minority of prisoners as many other groups were targeted, such as Romani (derogatively called ‘Gypsies’), vagrants, welfare recipients, political opponents, ‘asocial’ people, the ‘work-shy’, Jehovah’s Witnesses, and various other groups deemed troublesome.⁵⁶ Legal officials remained complicit, and in 1937 one prosecutor wrote of the newly constructed Buchenwald camp, “The judicial proceedings have been stopped. Cooperation between the camp management and the Public Prosecutor’s office has so far been good”.⁵⁷

Prisoner labor was initially viewed as both punishment and rehabilitative.⁵⁸ Himmler insisted that arduous work inside the camps was a path to freedom; Dachau and other camp gates boasted “*Arbeit Macht Frei*” (“Work Sets One Free”)⁵⁹. It served the dual purpose of keeping inmates occupied and reducing the cost of incarceration.⁶⁰ In the mid-1930s, work became compulsory for all prisoners.⁶¹ Later, Hitler’s grand vision of Nazi construction projects utilized forced labor in quarries, mines, and brick factories.⁶² The early war years saw rapid economic expansion, and a large burden of it was carried by KL inmates in camp workshops and factories⁶³.

Surprisingly, economics and extermination went hand in hand; enemies had to be eliminated while all available remaining resources

⁵³ Heideman, *supra* note 49, at 9.

⁵⁴ *Id.* at 10.

⁵⁵ Wachsmann, *supra* note 2, at 416.

⁵⁶ *See generally, Id.* at 139-152.

⁵⁷ *Id.* at 96.

⁵⁸ *Id.* at 62.

⁵⁹ *Id.* at 100.

⁶⁰ Wachsmann, *supra* note 2, at 158.

⁶¹ *Id.* at 159.

⁶² *Id.* at 164.

⁶³ *Id.* at 206.

were utilized.⁶⁴ The need for forced labor was the saving grace of many prisoners who would have otherwise been executed outright.⁶⁵ Workers were often driven to death to maximize output.⁶⁶

The full terror of the KL culminated in the death camps of the final years of WWII.⁶⁷ The 1938 pogrom (*Kristallnacht*) led to mass arrests and a sharp rise in the KL population.⁶⁸ On the day France and Britain declared war on Germany, Hitler announced that anyone undermining the home front would be “destroyed as an enemy of the nation” and were to be condemned without trial.⁶⁹ In early 1942, there were 80,000 prisoners in 13 main camps; many more were held in ghettos and prisons.⁷⁰ Increasingly, Polish and other foreign prisoners from the Eastern front were transported and held in the camps.⁷¹ The concentration camps were at their largest and most lethal in 1944 as Himmler repeated, “Armaments! Prisoners! Armaments!” and the growth only stopped with the advancements of the Allied armies.⁷²

The law was a serious weapon: it was central to the Nazi’s power, particularly in the pre-war years.⁷³ Oppression of social and racial outsiders occurred using the traditional German legal apparatus already in place prior to Hitler’s rise to power; his promise to restore law and order held wide appeal to the German nation.⁷⁴ It not only legitimized Nazi rule, but provided a convenient scapegoat for inevitable failures.⁷⁵

III. ANALYSIS

a. SIMILARITIES

Both the KL system and the Gulag were born of ideologies, and both belonged exclusively to the nation and time in which they

⁶⁴ Wachsmann, *supra* note 2, at 344.

⁶⁵ *Id.*

⁶⁶ *Id.* at 393.

⁶⁷ *Id.* at 15.

⁶⁸ *Id.* at 180-1, 185.

⁶⁹ Wachsmann, *supra* note 2, at 217.

⁷⁰ *Id.* 192.

⁷¹ *Id.* 235.

⁷² *Id.* at 455, 543.

⁷³ NIKOLAUS WACHSMANN, *HITLER’S PRISONS: LEGAL TERROR IN NAZI GERMANY*, 374 (Yale University Press 2015).

⁷⁴ *Id.* at 372-373.

⁷⁵ *Id.* at 373.

existed. However, they did not arise out of thin air, and their inhumanness reflects the inhumane nature of their larger culture and the events of the time.⁷⁶ They were imbued with the legacy of WWI industrialized warfare and prisoner of war camps.⁷⁷ Recent technology allowed the mass incarceration of populations with machine guns and inexpensive barbed wire making cheap, industrialized labor a necessity.⁷⁸ Arguably, they were a continuation of thousands of years of similar institutions: the ancient Greeks and Romans sent their dissidents to far-off penal colonies; Britain sent her convicts to Australia; and in modernity, similar camps were used by the Spanish in Cuba, the U.S.A. in the Philippines, and Britain in South Africa.⁷⁹

They are similar to each other and notable, too, for whom they held: non-criminal civilian prisoners, considered ‘enemies’ not for what they had done, but who they were.⁸⁰ This process did not happen overnight but began with blaming and demeaning certain groups, progressed to enacting legislation against them, and finally removing them to the camps⁸¹. The dehumanization of these people through legal, behavioral, and thought patterns allowed their fellow man to permit and carry out the policies.⁸² Shunning, beating, stripping, humiliating, and starving the prisoners were *de riguer* in both countries and facilitated persecution on a mass scale.⁸³

The need for unpaid labor fueled the laws criminalizing people but was not the only reason for doing so. Hitler’s hatred of Jewish people and obsession with racial purity dovetailed neatly with the need for labor. Similarly, Stalin’s Great Terror was in full swing in the 1930s as he hardened his grip on authority. Both countries felt the effects of the Great Depression and knew war was again on the horizon. The need for raw materials, food, equipment, and most importantly, domination, was growing more urgent. The legal systems already in place were able to be adjusted and weaponized to fulfil those needs at the expense of their inhabitants.

⁷⁶ Applebaum, *supra* note 4, at xxvii.

⁷⁷ *Id.* at xxxiii.

⁷⁸ Wachsmann, *supra* note 2, at 8; Applebaum, *supra* note 4, at xxxiii.

⁷⁹ Applebaum, *supra* note 4, at xxix; Wachsmann, *supra* note 2, at 7.

⁸⁰ Applebaum, *supra* note 4, at xxxiv, xxxvi.

⁸¹ *Id.* at xxxvi-viii.

⁸² *Id.* at xxxvii.

⁸³ *Id.* at xxxvii.

Article 58 of the R.S.F.S. criminalized all 'counter-revolutionary' acts but did not limit the activities that qualified as 'counter-revolutionary'⁸⁴. It included a wide array of conduct: treason; contact with foreigners with 'counter-revolutionary purposes'; any kind of help to 'international bourgeoisie'; espionage; undermining of state industry: damage of transport, communication, water supply, warehouses and other buildings or state and communal property; and non-reporting of a "counter-revolutionary activity", among others.⁸⁵

Virtually any crime or infraction committed in the Soviet Union could and would fall under this code, creating an effortless way to populate the Gulag. The notorious Moscow Show Trials of 1936, 1937, 1938 were showcases of political alienation and legal procedural sham. They proved there was no need for evidence when one was accused of a crime, as it would either be fabricated or a confession extracted via torture. There was no due process, as the 'meat grinder' was aptly named.⁸⁶

Similarly, the Third Reich's laws of 1933 and 1935 created many criminals and 'undesirables' that could be charged and removed to the camps as necessary. As production increases were needed in the late 1930s and war years, more charges were made under the Decree of the Reichstag President, the Habitual Offenders Law, and the Nuremberg Race Laws.⁸⁷

Stalin and Hitler were aware of each other's camp systems and some unfortunates experienced imprisonment in both.⁸⁸ Dachau concentration camp guards were told to act as brutally as the Cheka (Soviet secret police forerunner to the N.K.V.D. initially head of the Gulag).⁸⁹ Both systems held POWs during WWII. Estimates show about 3.6 million Soviet POWs died as slave laborers and captives in Nazi Germany, although many who surrendered were turned over to the S.S. for execution.⁹⁰

⁸⁴ Konstitutsiia RSFSR (1927) [Konst. RSFSR] [RSFSR Constitution]

⁸⁵ *Id.* 58-1; 58-3; 58-4; 58-6; 58-7; 58-9; 58-12.

⁸⁶ Jonathan D. Greenberg, *The Kremlin's Eye: The 21st Century Prokuratura in the Russian Authoritarian Tradition*, 45 *Stan. J Int'l L.* 1, 7-8 (2009).

⁸⁷ Wachsmann, *supra* note 2, at 32, 42; Heideman, *supra* note 49, at 10.

⁸⁸ Applebaum, *supra* note 4, at xxxiii; *see also* MARGARETE BUBER-NEUMANN, *UNDER TWO DICTATORS: PRISONER OF STALIN AND HITLER*, (Pimlico 2008).

⁸⁹ Wachsmann, *supra* note 2, at 9.

⁹⁰ Porter, *supra* note 30, at 360- 361.

Hitler often equated ‘Jewishness’ with Bolshevism and therefore the Soviets were viewed as *Untermenschen* (“subhuman”), and the June 6th Commisar Order held German soldiers legally blameless for their actions against Soviet POWs, demanding Soviet officers be executed “as a matter of principle”.⁹¹ Himmler’s General Plan for the East called for the removal of some 80 million Russians to allow German citizens to colonize the region.⁹² In contrast, German troops were ordered to not mistreat the French in 1940; a crime such as rape in France would earn a German soldier a prison sentence but was merely considered ‘fraternization’ if committed while in Soviet territory.⁹³

b. DIFFERENCES

No television cameras ever filmed the Gulag prisoners as did the concentration camps, and therefore their impact is more abstract. The two do not illicit the same reaction in people today: we are horrified at denial of the Nazi death camps but if the same were said of the Gulag, many may simply shrug their shoulders. The differences between the two were larger than their similarities; they had their own forms and functions.⁹⁴

The goal of the concentration camps ultimately became one of extermination, whether they were sentenced to a work camp or death camp.⁹⁵ In the Gulag, many prisoners were released, and one could go from prisoner to freed and vice versa relatively easily.⁹⁶ The Soviets had no equivalent to the death camps of Nazi Germany, although the Soviets did execute many of its citizens inside and outside the Gulag, and some labor camps all but guaranteed death would ensue.⁹⁷ In Nazi Germany, one was more likely to die in the wartime S.S. camps than be released, while the opposite was true of the Gulag, as some estimates say as many as 90% of the prisoners were released.⁹⁸

Mass extermination in the KL began in 1941 with the slaughter of Soviet POWs.⁹⁹ Previously, murder was primarily

⁹¹ *Id.* at 365, 367.

⁹² *Id.* at 386.

⁹³ *Id.* at 372.

⁹⁴ Wachsmann, *supra* note 2, at 9.

⁹⁵ Applebaum, *supra* note 4, at xxxviii-ix.

⁹⁶ *Id.* at xxxviii.

⁹⁷ *Id.* at xxxix.

⁹⁸ Wachsmann, *supra* note 2, at 9.

⁹⁹ *Id.* at 242.

individual but it eventually became wholesale.¹⁰⁰ Sites like Majdanek, Auschwitz, and Birkenau (Auschwitz II) became factories of death via gas chamber.¹⁰¹ Research was conducted into the most efficient ways to slaughter and dispose of human remains to achieve the Final Solution in minimum time.

Additionally, only the Gulag held its own returning POWs. Many Soviet POWs resisted being repatriated as Stalin had decreed those who surrendered would be treated as deserters.¹⁰² Those freed by advancing Soviet forces were subject to interrogation through a special agency, *Smert' shpionam* ('Death to Spies'), sending nearly 10% of the recently released POWs to the Gulag.¹⁰³

The most notable difference between the two systems are their final outcomes: the concentration camps are well documented; perpetrators have faced justice at the post-war International Military Tribunals at Nuremberg and continue through today. Survivors have had the opportunity to testify against their abusers in a court of law.¹⁰⁴ Some even took vengeance upon their release, killing and torturing S.S. personnel.¹⁰⁵ Additionally, the German government has offered compensation to the victims.¹⁰⁶

However, there is no similar justice for the victims of the Gulag. Unlike the KL, the Gulag went out with a whimper, not a bang. Many of those responsible were dead, some even as victims of the 'meat grinder' itself. Today, memorials to the victims and the removal of names from the State Enemies list are the closest to justice and closure that can be had.

IV. USE OF FORCED LABOR CAMPS TODAY

The Gulag and Nazi concentration camps are but two notable points in the long cross-cultural and multinational history of forced labor, exile, incarceration, prisons, and concentration camps.¹⁰⁷

¹⁰⁰ *Id.* at 287.

¹⁰¹ *Id.* at 316, 319.

¹⁰² Porter, *supra* note 30, at 373.

¹⁰³ *Id.* at 374.

¹⁰⁴ Wachsmann, *supra* note 2, at 606.

¹⁰⁵ *Id.* at 607.

¹⁰⁶ *Id.* at 616.

¹⁰⁷ Applebaum, *supra* note 4, at xxix.

Intentional separation of those who might harm or contaminate society goes back thousands of years.¹⁰⁸

Today, the United Nations Standard Minimum Rules for the Treatment of Prisoners (also known as the ‘Nelson Mandela Rules’) adopted in 2015 emphasizes the protection of human rights of those incarcerated.¹⁰⁹ It forbids torture and other cruel or inhuman punishments, as well as discrimination on the grounds of race, sex, religion, political opinion, or national or social origin (among others).¹¹⁰ Furthermore, it affirms that the legitimate purpose of imprisonment is to protect society against crime and to reduce recidivism.¹¹¹ Rule 97 holds “Prison labour must not be of an afflictive nature” and “Prisoners shall not be held in slavery or servitude”.¹¹² Any labor which prisoners perform must be fairly paid and “The interests of the prisoners... must not be subordinated to the purpose of making a financial profit”.¹¹³ All of these are contravened in the concentration camps and Gulag.

The United States does not recognize the U.N. Standard Minimum Rules for the Treatment of Prisoners as a binding treaty.¹¹⁴ They were opposed to the revision tightening the original 1955 rules and are an outlier in areas such as solitary confinement, still commonly practiced in U.S. penal institutions.¹¹⁵

The 13th Amendment protects against slavery and involuntary servitude but allows it as a form of punishment.¹¹⁶ While not exactly like the Gulag or concentration camps, there are a disturbing number of similarities. U.S. prison labor is mandatory and underpaid (or

¹⁰⁸ *Id.* at xxix.

¹⁰⁹ *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* GA Res 70/175, UNGAOR, 70th Sess, U.N. Doc. A/RES/70/175 (2015).

¹¹⁰ *Id.*, Rule 1 & Rule 2.

¹¹¹ *Id.*, Rule 4.1

¹¹² *Id.*, Rule 97.1, Rule 97.2

¹¹³ *Id.*, Rule 103, Rule 99.2

¹¹⁴ *Serra v. Lappin*, 600 F.3d 1191, 1197 (9th Circuit, 2010).

¹¹⁵ Jennifer Peirce, *Making the Mandela Rules: Evidence, Expertise, and Politics in the Development of Soft Law International Prison Standards*, 43 *QUEEN'S L.J.* 263, 278, 288 (2018).

¹¹⁶ U.S. Const. Amend. 13. (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction”).

wholly unpaid) and keeps the sizable prison system in business.¹¹⁷ Companies such as Victoria's Secret, Whole Foods, and Starbucks have all made use of prison labor.¹¹⁸ Critically, large racial disparities in prison populations mean these laborers are overwhelmingly minorities; Black Americans are sentenced at five times the rate of whites.¹¹⁹ The U.S. has 5% of the world's population but their prisons hold 25% of the world's prison population.¹²⁰ Ironically, the U.S. condemns countries like China for their use of forced labor and imprisonment of political dissidents.¹²¹ This continues the legacy of these institutions that are claimed to be firmly in the past.

In 2014, Uighur separatists in China attacked and killed 29 people in the city of Kunming.¹²² President Xi Jinping vowed to "severely punish" those responsible.¹²³ Since that time, members of the Uighur ethnic group have faced imprisonment in 're-education' camps, although discrimination against the Uighur minority is nothing new.¹²⁴ They are a Muslim Turkic minority group of about 11 million in the northwest of China and estimates state more than one million Uighurs have spent time in the camps.¹²⁵ Those released report torture, rape, and forced labor.¹²⁶ Satellite images show large camp structures in the area, but China does not allow reporters or independent agencies to visit or inspect.¹²⁷

¹¹⁷ *Criminal Justice Fact sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet/> (last accessed May 1, 2021); Lan Cao, *Made In The USA: Race, Trade, and Prison Labor*, 43 N.Y.U. REV. L. & SOC. CHANGE 1, 3 (2019).

¹¹⁸ *Id.* at 2-3.

¹¹⁹ *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project, at 5 (2021). <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

¹²⁰ Cao, *supra* note 115, at 1, 3.

¹²¹ *Id.* at 6.

¹²² Johnathan Kaiman, *Kunming Knife Attack: Xinjiang separatists blamed for 'Chinese 9/11'*, THE GUARDIAN (Mar. 24, 2014), <https://www.theguardian.com/world/2014/mar/02/kunming-knife-attack-muslim-separatists-xinjiang-china>.

¹²³ *Id.*

¹²⁴ Matthew Hill, David Campanale and Joel Gunter, *'Their goal is to destroy everyone': Uighur camp detainees allege systematic rape*, BBC NEWS (Feb. 2, 2021), <https://www.bbc.com/news/world-asia-china-55794071>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

China has held Uighurs in pretrial detention, prisons, and re-education camps, but they have no basis under Chinese law.¹²⁸ Reports state that those detained have been denied due process.¹²⁹ Forced labor by Uighurs are part of China's economy, reportedly supplying labor for companies like Apple, Gap, Huawei, and Volkswagen.¹³⁰ Conservative estimates place more than 80,000 Uighurs from Xinjiang in factories across China between 2017 and 2019, some sent directly from the detention camps.¹³¹ The government-sponsored work assignments are enmeshed with the detention camp system and China's economy, in which manufacturing has a large part.¹³²

In 2021, President Biden signed into law a bi-partisan piece of legislation called the Uyghur Forced Labor Prevention Act, which bans from U.S. import goods made with forced Uighur labor.¹³³ However, many large companies, such as Coca-Cola and Nike lobbied for a weakening or veto of the legislation while it was under consideration, arguing that it would be detrimental to their supply chains.¹³⁴

Other countries continue to hold prisoners in institutions that closely resemble Gulag or concentration camp systems. North Korea's penal code under Kim Jong Un, the 'eternal president', forbids cruel and inhumane treatment of prisoners but reports of torture, forced labor, starvation, and executions are numerous among defectors.¹³⁵

¹²⁸ "Eradicating Ideological Viruses" *China's Campaign of Repression Against Xinjiang's Muslims*, HUMAN RIGHTS WATCH (Sep. 9, 2019), <https://www.hrw.org/report/2018/09/09/eradicating-ideological-viruses/chinas-campaign-repression-against-xinjiangs#>.

¹²⁹ *Id.*

¹³⁰ *Uyghurs For Sale*, AUSTRALIAN STRATEGIC POLICY INSTITUTE (Mar. 1, 2020), <https://www.aspi.org.au/report/uyghurs-sale>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Ana Swanson, *Nike and Coca-Cola Lobby Against Xinjiang Forced Labor Bill*, NY TIMES (Jan. 20, 2021);

<https://www.nytimes.com/2020/11/29/business/economy/nike-coca-cola-xinjiang-forced-labor-bill.html>; Ana Swanson, Catie Edmonson, and Edward Wong, *U.S. Effort to Combat Forced Labor Targets Corporate China Ties*, NY TIMES (Jan. 5, 2022); <https://www.nytimes.com/2021/12/23/us/politics/china-uyghurs-forced-labor.html>.

¹³⁴ *Id.*

¹³⁵ 2019 Country Reports on Human Rights Practices: Democratic People's Republic of Korea, U.S. DEPT. OF STATE (last accessed May 1, 2021), <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/north-korea/>.

NGO reports claim the government runs multiple prisons, detention centers, and camps, including those for forced labor and political prisoners.¹³⁶ There were 19 forced labor camps, or *kwanliso*, in 2018, each holding between 5,000 and 50,000 prisoners.¹³⁷

Although North Korean law prohibits arbitrary arrest and detention, limits detention during prosecution and trial, requires arrest by warrant, and prohibits forced confessions, these procedures cannot be confirmed to be taking place as the government does not share data nor not permit verification.¹³⁸ There is near total control of the population as citizens are rarely permitted to communicate or travel abroad, and the threat of imprisonment is an effective tool.¹³⁹ Forced labor is vital to its economy, and a large portion of ordinary citizens are mandated to perform ‘portrayals of loyalty,’ a form of unpaid labor, at some point in their lives.¹⁴⁰

While the Soviet Gulag system may have been disbanded, Russia has reportedly not reformed altogether. Although officials initially denied abuses, in 2019 Nadezhda Toloknnikova of Pussy Riot fame penned an open letter detailing her nightmare experiences in a remote prison where the women incarcerated were forced to work up to 17 hours a day and were subjected to physical harm.¹⁴¹ In December 2021, Tolokonnikova was declared a “foreign agent” by the Russian government for her criticism of President Vladimir Putin.¹⁴²

Currently, Russian attorney Alexei Navalny is being held in a prison camp he has described as “a real concentration camp” where

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *North Korea: Systematic Repression Totalitarianism Empowered with Absence of International Pressure*, HUMAN RIGHTS WATCH (Jan. 14, 2020), <https://www.hrw.org/news/2020/01/14/north-korea-systematic-repression>.

¹⁴⁰ *Id.*

¹⁴¹ Robert Coalson, *Heirs Of The Gulag? Russia's Prison System Faces Harsh Scrutiny*, RADIO FREE EUROPE (Feb. 3, 2019), <https://www.rferl.org/a/heirs-of-the-gulag-russia-s-prison-system-faces-harsh-scrutiny/29748646.html>.

¹⁴² REUTERS, via FRANCE24, *Russia declares Pussy Riot member, art collector and satirist ‘foreign agents’* (Dec. 30, 2021), <https://www.france24.com/en/europe/20211230-russia-declares-pussy-riot-member-art-collector-and-satirist-foreign-agents>

he is awoken from sleep every hour.¹⁴³ Navalny has been sentenced to 3.5 years in a penal colony for reportedly violating his probation over a 2014 money laundering case, which he claims is a sham and a result of his opposition to the current government.¹⁴⁴ He is widely known as an outspoken Putin critic, and Amnesty International claims his detention is a political tactic to intimidate others like him into silence.¹⁴⁵ Navalny's supporters, including members of Pussy riot, remain on house arrest.¹⁴⁶

V. CONCLUSION

Just as in Hitler's Nazi Germany and Stalin's U.S.S.R., in modern times the authoritarianism and terror of the state does not subside after a regime has established itself. Hitler's war on internal enemies, Jews, Communists, Social Democrats, criminals, and the like was largely carried out via fanatical policing against these "enemies of the state".¹⁴⁷

The line between prisoner labor being 'forced' or 'slave' labor is fine. An enslaved person holds value for their exploiter. However, a forced laborer has little value on their own, as they are easily and quickly replaced by another. Both the Nazi and Soviet camps used forced labor; they rarely saw value in an individual. KL labor was particularly worthless as the S.S. saw output maximized when the prisoners were being worked to death¹⁴⁸.

Today, history repeats itself as states become reliant on the persecution and labor of their 'dangerous' elements. They target those of specific races (U.S.), ethnicities (China), or beliefs (North Korea and Russia) because of who they are: either a threat to the current regime

¹⁴³ *Kremlin critic Alexei Navalny says he is at strict prison camp outside Moscow*, REUTERS (Mar. 15, 2021).

<https://www.reuters.com/article/us-russia-politics-navalny-idUSKBN2B71V7>.

¹⁴⁴ Lucian Kim, *Kremlin Critic Navalny Sent To Prison On Old Conviction*, NPR (Feb. 2, 2021),

<https://www.npr.org/2021/02/02/963160053/kremlin-critic-navalny-faces-court-hearing-could-see-3-5-years-in-prison>.

¹⁴⁵ *Id.*

¹⁴⁶ Luke Harding, *Prominent supporters of Alexei Navalny face 'indefinite' house arrest*, THE GUARDIAN (Mar. 17, 2021),

<https://www.theguardian.com/world/2021/mar/17/prominent-supporters-alexei-navalny-indefinite-house-arrest-pussy-riot-kremlin-protests>.

¹⁴⁷ Wachsmann, *supra* note 2, 198-9.

¹⁴⁸ *Id.* at 392.

or a group that can be exploited. Their legal systems are then tailored, twisted, ignored, or otherwise weaponized as necessary.

The KL and Gulag were so firmly a part of their states that they only disappeared as their respective nations crumbled. For the sake of humanity and justice, correctional facilities should be used sparingly and for their named purpose; reliance on forced or slave labor breeds an endless cycle of persecution for profit that is near impossible to stop.