1980

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THE GULAG ARCHIPELAGO: IMPLICATIONS FOR AMERICAN CRIMINAL JUSTICE

By
Ira P. Robbins*

Woe unto those who have read The Gulag Archipelago,¹ for they shall never be the same again. It is a tour de force both in its conception and its execution; it is an act of witness unparalleled in its magnitude;² it is a study of prisons, prisoners, suppression, repression, oppression, rebellion, revolution, exile, and death, both physical and spiritual. But most of all, The Gulag Archipelago is a legend of life and humanity, of dignity and hope, of freedom and truth.

Gulag has accomplished precisely what Solzhenitsyn intended: to fight against untruth, against a regime that is hostile to mankind. Moreover, contrary to Solzhenitsyn’s fears,³ Gulag is a

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2. As with M. EASTMAN, STALIN’S RUSSIA AND THE CRISIS OF SOCIALISM (1940), one would be hard pressed to read Solzhenitsyn without realizing that the worst things he says about Russia are true. Accord, Conquest, Evolution of an Exile. Gulag Archipelago, in Solzhenitsyn: A COLLECTION OF CRITICAL ESSAYS 90, 95 (K. Feuer ed. 1976); Medvedev, On Solzhenitsyn’s Gulag Archipelago, id. at 96 (“I think that few people would get up from reading this book the same as when they turned to its first page. In this respect, I can think of nothing in Russian or world literature to compare with [it]”). The Gulag Archipelago is “the greatest and most powerful single indictment of a political regime ever to be leveled in modern times.” Kennan, Between Earth and Hell, N.Y. REV. OF BOOKS, March 21, 1974, at 3-4. Compare the effect of recent depictions of the German holocaust. See, e.g., N.Y. Times, May 9, 1979, § A, at 12, col. 1; id., Jan. 24, 1979, § A, at 2, col. 3.

3. All you freedom-loving “left-wing” thinkers in the West! You left laborites! You progressive American, German and French students! As far as you are concerned, none of this amounts to much. As far as you are concerned, this whole book of mine is a waste of effort. You may suddenly
warning to the West as well as East. Although some critics would consider any comparison between the Soviet and American prison systems to be an "idea that even Stalin would find amusing," many similarities do exist. American cases and commentary, in fact, have not missed the analogy to *Gulag.* Both systems, for

understand it all someday—but only when you yourselves hear "hands behind your back there!" and step ashore on our Archipelago.

**Volume III, supra note 1 at 518.** (Emphasis in original.) *See also, Volume II, supra note 1 at 147. For the experiences of an American in the Soviet prison system, see A. DOLGUN, ALEXANDER DOLGUN'S STORY: AN AMERICAN IN THE GULAG (1975).**

4. This may not have been a major theme of *The Gulag Archipelago,* see Stratman, *Political and Lumpen Prisoners, the Question of Compliance, and Socioliterary Investigation,* 27 STAN. L. REV. 1629, 1637-38 (1975), but such a point clearly was made in Solzhenitsyn's now-renowned 1978 Harvard commencement speech. "The split in the world is less terrible than the similarity of the disease plaguing its main sections." See NEWSWEEK, Dec. 25, 1978, at 72. *See also Solzhenitsyn, Misconceptions About Russia Are a Threat to America,* 58 FOREIGN AFF. 797 (1980).

5. N.Y. Times, Feb. 10, 1978, § A, at 24, col. 3 (Letter to the Editor) ("And he almost never smiled"). *See also Time,* Feb. 21, 1977, at 29: "To compare Russia's pervasive totalitarian system with the abridgments of freedom that occur in the United States is, of course, nonsense." Many Russians, no doubt, would agree. For example, Edoard Kuznetzov, a recently released Soviet dissident, said on his arrival in this country: "[T]oday, we are here in a country which for more than 200 years has been a symbol of freedom." N.Y. Times, April 29, 1979, § A, at 1, col. 1. But, for present purposes, part of the question is whether in practice the nation has lived up to this ideal. *See generally Agursky, Contemporary Socioeconomic Systems and Their Future Prospects,* in FROM UNDER THE RUBBLE 66, 75-76 (A. Solzhenitsyn ed., A. Brock et al. trans. 1975):

A man who has been accustomed to breathing fresh air all his life does not notice it, and never realizes what a blessing it is. . . . A man who has grown up in a democratic society and who takes the basic freedoms as much for granted as the air he breathes is in much the same position. People who have grown up under democracy do not value it highly enough. Yet there are weighty reasons for their dissatisfaction with this society.

6. *See, e.g., United States ex rel. Schuster v. Vincent,* 524 F.2d 153, 154 (2d Cir. 1975) (Kaufman, C.J.) (inmate unjustifiably languished in state confinement for more than three decades, apparently because of efforts to expose prison corruption) ("Although we are reasonably certain that the shocking story revealed in The Gulag Archipelago could not take place in this country, the facts of [this] case are reminiscent of Solzhenitsyn's treatise") (footnote omitted); Lieggi v. Immigration & Naturalization Serv., 389 F. Supp. 12, 19-20 (N.D. Ill. 1975) (first-offense marijuana conviction used as basis for deportation of alien who had lived in United States for twelve years, who was sole source of support for family, and who had maintained steady employment, constituted cruel and unusual punishment) (counsel claimed that deportation would not only punish petitioner, but also destroy his American family, citing *Gulag*), rev'd without opinion, 529 F.2d 530 (7th Cir. 1976) cert. denied, 429 U.S. 839 (1976); Wilson v. Beame, 380 F. Supp. 1232, 1236 (E.D.N.Y. 1974) (pretrial detainees alleged lack of due process in assigning them to administrative segregation, as well as treatment differing from that given to other inmates) ("There is no place in this country for any form of Gulag Archipelago"); In re Andrea B., 94 Misc. 2d 919, 926, 405 N.Y.S.2d 977, 982 (Fam. Ct. 1978) (evidence inadequate to warrant continued psychiatric hospitalization of minor) ("Viewed against the present-day dark backdrop of the
example, are fraught with deprivations of freedom, dignity, showpiece 'trials,' 'gulags' and psychiatric hospitalization of political dissidents in totalitarian regimes, the core concept of Powell v. Alabama, [287 U.S. 45 (1932) (right to counsel)] stands out in bold relief); State v. Ochoa, 23 Ariz. App. 510, 534 P.2d 441, (1975), rev'd, 112 Ariz. 582, 544 P.2d 1097 (1976) (law enforcement agents cannot stop automobiles for routine license and registration checks without any indication that a statute has been violated) ("Any other holding would raise a specter over this state potentially as forbidding as Solzhenitsyn's 'Gulag Archipelago'"); Commonwealth v. Devine, 233 Pa. Super. Ct. 99, 110, 334 A.2d 725, 730-31 (1975) (Van der Voort, J., dissenting) (reversing conviction for unlawful possession of marijuana because evidence was not sufficient to establish probable cause for the issuance of a search warrant) ("It is true that upon reading the book, The Gulag Archipelago by Aleksandr I. Solzhenitsyn, one learns of the horrors of unbridled searches." But here, in reaction, "we have gone overboard . . . in paralyzing law enforcement"); N. Morris & G. Hawkins, Letter to the President on Crime Control 66 (1977) (considering, inter alia, the race of our prisoners, if the pattern continues "we would have built a different but no less terrible Gulag Archipelago"); Jacobs, Stratification and Conflict Among Prison Inmates, 66 J. CRIM. L. & C. 476, 476 (1976); Nagel, An American Archipelago: The United States Bureau of Prisons, Address to General Session of National Institute on Crime and Delinquency (June 25, 1974).

Solzhenitsyn's other works also have by their great moral force influenced a broad range of areas of American life, including its prisons. See, e.g., Laird v. Tatum, 408 U.S. 1, 28, 37-38 (1972) (Douglas, J., dissenting) (claim that Army surveillance of lawful civilian activity chilled exercise of first amendment freedoms: held, no justiciable controversy) ("This case involves a cancer in our body politic. It is a measure of the disease which afflicts us") (citing statements of Solzhenitsyn on surveillance); Byrne v. Karalexis, 396 U.S. 976, 980 (1969) (Douglas, J., dissenting) (motion for stay of temporary injunction against movie, I Am Curious (Yellow), granted conditionally) ("we cannot be faithful to our constitutional mandate and allow any form or shadow of censorship over speech and press") (citing and quoting a letter of Aleksandr Solzhenitsyn to the Russian Writers' Union, on occasion of his expulsion, dated Nov. 2, 1969: "it is time to remember that the first thing we belong to is humanity. And humanity is separated from the animal world by thought and speech, and they should naturally be free. If they are fettered, we go back to being animals." See Saturday Review, Dec. 13, 1969, at 70, 72); American Sec. Council Educ. Foundation v. FCC, 607 F.2d 438, 474 n.73 (D.C. Cir. 1979) (Wilkey, J., dissenting) (free speech on the airwaves) (citing and quoting Solzhenitsyn's 1978 Harvard commencement speech); Collin v. Smith, 578 F.2d 1197, 1210 (7th Cir. 1978) (Wood, J., concurring) (action by members of National Socialist Party of America seeking declaration of unconstitutionality of three village ordinances restricting demonstrations; held, for plaintiffs) ("It may . . . be well to remember that often 'words die away, and flow off like water—leaving no taste, no color, no smell, not a trace.' Any exception, however, to the First Amendment which we might be tempted to fashion for these particular persuasive circumstances would not 'die away.' It would remain a dangerous and unmanageable precedent in our free and open society") (quoting Solzhenitsyn's 1972 Nobel Lecture), cert. denied, 439 U.S. 916 (1978); Minarcini v. Strongsville City School Dist., 541 F.2d 577, 581 (6th Cir. 1976) (inter alia, quoting a minority school board report recommending that Solzhenitsyn's One Day in the Life of Ivan Denisovich be purchased as a supplemental reader for the high school social studies program, "in the interest of a balanced program"): United States ex rel. Wolfish v. Levi, 439 F. Supp. 114, 152 (S.D.N.Y. 1977), (systemic challenge to conditions of confinement for pretrial detainees) ("We all are, or ought to be, aware enough of past and present concentration camps to know that [affording only] crumbs and scraps [to
human appearance, family, clothing, and food. There is harassment, psychological and physical brutality, inadequate compensation for work performed, atrocious medical treatment, retaliation against those who seek redress, and the ever-present threat of being transferred elsewhere. Both Russian and American prison officials are typically undertrained and underqualified, and are often arrogant, autocratic, malicious, ignorant, and self-garding.

In the Gulag and in American prisons, inmates routinely suffer the indignity of cell and body searches and are impelled to escape or even to commit suicide. In addition, many American prisons are plagued by "rampant violence and [a] jungle atmosphere" and otherwise have been found to be "unfit for human habitation." Moreover, in both countries an elaborate system of censorship and widespread overcrowding aggravate all these ills. No less a figure than Chief Judge Irving R. Kaufman has generalized:

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When the history of our criminal justice system is chronicled, no doubt one of its most sobering pages will describe the sad state of this nation’s prisons and jails. Whether it be in filthy, narrow cells of an Alabama penitentiary or in overcrowded dormitories in a Bronx house of detention, we have quartered individuals . . . under [inhuman and barbaric] conditions that shock the conscience of civilized men.12

Assuredly, we are dealing with a continuum; American prisons are not the Gulag. But differences in degree should not blind us to the striking similarities.13 For example, the Soviet plan, as described by Solzhenitsyn, was more methodical, more purposeful, charted on a more definite course than are American prisons. The Marxist plan declared that “the one and only means of correcting offenders . . . was not solitary contemplation, not repentence, and not languishing . . . but productive labor.”14 In contrast, the American federal and state systems characteristically are not so theoretically oriented, perhaps only because we do not know what the goals ought to be. But even on this point scholars have noted that, before it acquired its humanitarian underpinnings, parole in this country was rooted in brutal but productive slave labor, as well as in religious, ethnic, and racial prejudice.15

Another distinction, less clear than we might like to believe,
concerns the types of crime for which people are arrested and imprisoned. In the Soviet Union, writes Solzhenitsyn, many persons were confined for being "socially harmful"—"simply for believing in God, or simply desiring truth, or simply for love of justice. Or indeed for nothing at all." They were, to put it briefly (albeit not simply), political criminals. However harmless by other standards, they threatened the economic and political viability of the regime. Because of the nature of the political order in Russia, such criminals became not only "enemies of the people," a term used throughout Gulag, but also of the ultimate goodness of man.

What underlies these statements, however, is the political nature of all crime: a crime is a violation of a rule established by a politically constituted government. All acts presumably represent particular values of the prevailing social power. If there were no such rules and values, there would be no crime. Thus,


17. VOLUME III, supra note 1, at 220. "[E]ven a tailor who stuck a needle in a newspaper could get Article 58." Id. at 514. Or even "a gift of bread and water could be a political crime." Id. at 161.

18. VOLUME III, supra note 1, at 39, 54, 220, 221, 226, 483, 513.

19. See, e.g., Stratman, supra note 4, at 1639.


21. "[W]e must not say that an action shocks the common conscience because it is criminal, but rather that it is criminal because it shocks the common conscience." E. DURKHEIM, supra note 20, at 81. See E. DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 66, 67, 70 (1938).

What is normal, simply, is the existence of criminality, provided that it attains and does not exceed, for each social type, a certain level. . . .

To classify crime among the phenomena of normal sociology is not to say merely that it is inevitable, although regrettable phenomenon, due to the incorrigible wickedness of men: it is to affirm that it is a factor in public health, an integral part of all healthy societies. . . .

Crime is, then, necessary; it is bound up with the fundamental conditions of all social life, and by that very fact it is useful, because these conditions of
in this broad sense, virtually every society in recorded history, including the United States, has had political criminals. But even in a narrower sense this country has had its lot of political criminals and political prisoners—persons who shared the "common characteristic that at a certain time in their lives they were placed on trial because of behavior found reprehensible by the political elite of their day," or whose sentences were "based upon extraneous political considerations having no legitimate or legal connection with the crime charged against them." Furthermore, the scheme for enforcing the system of criminal laws also plays a large part in producing political criminals. In the Soviet Union, Solzhenitsyn writes, "[i]t was clear to our jailers and to us that justice, length of sentence, formal documentation, had nothing to do with [a case]; the point was that once we had been declared enemies, the state would ever after assert the right of the stronger and trample us, crush us, squash us, until the day we died." Judges were "not at all interested in the substance of the case, in the truth." The legal system, whose laws even had retroactive effect when "[they] itch[ed] to apply . . . to persons already in custody," was clairvoyant as well as "infallible." In one astonishing example, Solzhenitsyn relates the incident of a 

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which it is a part are themselves indispensable to the normal evolution of morality and law.


24. VOLUME III, supra note 1, at 407. When defendant M.I. Brodovsky complained that forged documents were being used against him, "they barked back at him: 'The law will crush you, smash you, destroy you!'" Id. at 517 (Emphasis in original.) "And we were so used to it, it had become so much part of us, that no other state of affairs would have seemed normal either to the regime or to us." Id. at 407.

25. Id. at 516, 519. Compare the following statement of an American prisoner: "Justice, itself an elusive abstraction, is a fiction. It assumes an air of reality only because the majority of people in this country live their lives without being required to seek justice. The unfortunate ones who seek justice find that it exists only in the minds of the judges." Larsen, A Prisoner Looks at Writ-Writing, 56 CALIF. L. REV. 343, 343 (1968).

26. VOLUME III, supra note 1, at 522.

27. [Our hulking brute of a judicial system] is so strong and so sure of itself only because it never reconsiders its decisions, because every officer of the court can lay about him as he pleases in the certainty that no one will ever
newspaper article dated December 27, 1961, reporting the trial of some Estonian war criminals at Tartu:

The writer described the questioning of witnesses, the exhibits before the court, the cross-examination of one defendant ("the murderer cynically answered"), the reactions of the public, the prosecutor's speech. [The article] further reported that the sentence of death was passed. All of these things, indeed, occurred exactly as described—but not till January 16, 1962, . . . by which time the journal was already in print and on sale.28

The licentious system provided neither for notice of charges nor for a tape recorded or stenographic transcription of the trial,29 and it delegated broad authority to the lowliest of functionaries. Judicial review, too, was a "phantom process."30 Judges answered only to that "shiny black visage of truth—the telephone. . . . This oracle will never fail you, as long as you do what it says."31

During the 38 years of Solzhenitsyn's saga, the 12 additional years until the completion of the book, and even today, nothing has changed. Still there are trials under catch-all laws against the "dissemination of anti-Soviet propaganda" or "hooliganism."32 Still there are illegal and contrived proceedings, many held in se-

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28. "The trial had been postponed, and the journal had not been warned. The journalist concerned got one year's forced labor." Id. at 523 n.11. On the predetermined character of the Soviet legal system, see, e.g., M. BEGIN, WHITE KNIGHTS; THE STORY OF A PRISONER IN RUSSIA (1957).

29. "Only what the judge confirms will remain on the record, will have happened in court. While things that we have heard with our own ears vanish like smoke—they never happened at all!" VOLUME III, supra note 1, at 521.

30. See also, supra note 27. "[T]here are no courts of appeal, no proper channels and due procedures through which a malignant, a corrupt, a soul-searingly unjust verdict can be undone," VOLUME III, supra note 1, at 524-25, "because the judicial caste might collapse." Id. at 519.

31. "Endure and flourish, O noble company of judges! We exist for you! Not you for us! May justice be a thick-piled carpet beneath your feet. If all goes well with you, then all is well!" Id. at 521.

32. See, e.g., TIME, Feb. 21, 1977, at 22-23.
cret, against defendants who already have served many months of pretrial detention. Still there is exile to Siberia or confinement in mental institutions in which one can be harassed in dozens of ways, many brutal, including forced feeding with boiling liquids. Still there is a frightening fate for the families of political prisoners.

Consider, for example, the case of Anatoly Shcharansky, an obscure scientist who has been brought to prominence only by the Soviet Union's actions against him, in a classic frame-up marking the first time since the Stalin era that a treason charge has been used for such a blatant political purpose. Shcharansky was arrested on March 15, 1977, without official charges having been brought. His only indictment was an article in Izvestia accusing him of being a subversive element. The arrest had been triggered, according to one source, by his "audacity to take seriously

33. "We no longer try people in closed courts, as under Stalin, we no longer try them in absentia, we try them semi-publicly (that is to say, in the presence of the semi-public)." VOLUME III, supra note 1, at 515.


35. VOLUME III, supra note 1, at 500 n.10. See, e.g., TIME, Feb. 21, 1977, at 23. "The tube is often jammed into the mouth by breaking the patient's teeth." Id. Sometimes instructions are given to "fix" a particular prisoner, "so he will come out an idiot." Id. "Psychiatrists in the Soviet Union plainly tell you that having different political views is reason enough to be considered insane." N.Y. Times, May 1, 1979, § A, at 6, col. 6 (statement of Valentyn Moroz, recently released Soviet dissident). See generally AMNESTY INTERNATIONAL, PRISONERS OF CONSCIENCE IN THE U.S.S.R.: THEIR TREATMENT AND CONDITION (1980); S. BLOCH & P. REDDAWAY, PSYCHIATRIC TERROR: How SOVIET PSYCHIATRY IS USED TO SUPPRESS DISSENT (1977); V. BUKOVSKY, TO BUILD A CASTLE: MY LIFE AS A DISSENTER (1979); H. FIRESIDE, SOVIET PSYCHOPRISONS (1979); L. PLYUSHCH, HISTORY'S CARNIVAL: A DISSIDENT'S AUTOBIOGRAPHY (1979); Comment, Soviet Abuse of Psychiatric Commitment: An International Human Rights Issue, 9 CALIF. W. INTL. L.J. 629 (1979); Reich, Grigorenko Gets a Second Opinion, N.Y. Times, May 13, 1979, § 6, (Magazine), at 18, id., April 29, 1979, § A, at 30, col. 4.


38. On Stalin's "show trials," involving bureaucratic terror imposed under the guise of the rule of law, see generally A. KOESTLER, DARKNESS AT NOON (1941); Reston, Those Moscow "Trials," N.Y. Times, June 30, 1978, § A, at 27, col. 1.

39. See Proceedings of the Ad Hoc Commission on Justice for Anatoly Shcharansky,
the Soviet Union's legal obligations under the Helsinki Accords,' including recognition of the right to emigrate freely. Another source added that Shcharansky was arrested "because he spoke the truth, and had the temerity to speak it in perfect English." His incommunicado detention lasted for more than a year, with the final six months resulting from a special, secret decree of the President of the Supreme Soviet that applied only to Shcharansky. Lawyers who had agreed to represent him immediately lost their security clearances. "The striking thing [was] that many Soviet attorneys indicated they would represent Shcharansky if he were prepared to plead guilty and simply seek the mercy of the court." But this occurred even before the investigators had concluded that any charges were to be brought! After he had rejected the government-chosen attorney, he and fellow dissident Aleksandr Ginzburg chose attorney Dina Kaminskaya to represent them. She was then promptly disbarred for her vigorous defense of several other dissenters, and herself forced into exile. So, Shcharansky conducted his own defense. After a five-day trial, during which entry to the courtroom was blocked to all but a selected few—his mother and a United States official not


42. Dershowitz, supra note 39, at 246. See also Proceedings, supra note 39, at 277.

43. See Resolution of Deans and Law Professors on Behalf of Anatoly Shcharansky, quoted in Dershowitz, supra note 39, at 285.

44. See Proceedings, supra note 39, at 272.

45. Id. (statement of Alan Dershowitz).

46. See id.

47. See TIME, July 24, 1978, at 28. Kaminskaya since has been deported; she now lives in the United States. See N.Y. Times, Sept. 3, 1979, § A, at 4, col. 3.
among them—and in which he frequently was interrupted by the judge, prohibited from calling defense witnesses, and forbidden to cross-examine government witnesses, Shcharansky concluded his case: “To my wife and my people, I can only say, ‘Next year in Jerusalem.’ To this court, which decided my fate in advance, I say nothing.” The court found him guilty, and sentenced him to 13 years in prison at a hard labor camp.

Still there is no law, no “objective legal standard.” Still the Soviet Union is a nation in which it has been abundantly demonstrated that “glittering generalities can lead to unworkable policies.” Thus, with sarcastic understatement, Solzhenitsyn declares, “The Law in our country, in its might and its flexibility, is unlike anything called ‘law’ elsewhere on earth.” Perhaps so. But certainly it is not for a lack of competition for this singular recognition.

48. See Time, July 24, 1978, at 25. See also, supra note 33.
49. See Time, id. at 31. Compare F. Kafka, The Trial 57 (W. & E. Muir trans. 1937): “[T]here can be no doubt that behind all the actions of this court of justice, . . . behind my arrest and today’s interrogation, there is a great organization at work.”
50. See Time, supra note 48, at 24. Aleksandr Ginzburg, who had formerly served a five-year prison term for circulating “anti-Soviet propaganda” after gathering data for a book on the 1966 trial of writers Andrei Sinyavsky and Yuli Daniel (both of whom had been sentenced to terms of hard labor), see Time, Feb. 14, 1977, at 30, was sentenced to eight years of hard labor on similar charges. When the judge asked Ginzburg the routine question, “What is your nationality?” he insolently replied, “Zeka” (prisoner). See Time, supra note 48, at 26; infra note 72. Underlying the charge against Ginzburg was his administration of a fund, consisting of the proceeds of The Gulag Archipelago, to assist political prisoners and their families.

To the present, Shcharansky has been unable to enjoy regular visits with his family. See N.Y. Times, Jan. 13, 1979, § A, at 6, col. 2. See also id., Aug. 9, 1979, § B, at 18, col. 1. The same is true of Ginzburg. See N.Y. Times, June 3, 1979, § A, at 36, col. 1.

The recently released Soviet dissidents were exchanged for other Soviet citizens who had been imprisoned in the United States. Another Soviet dissident had been expelled from Russia in exchange for a Chilean Communist leader. This prompted the statement that in Russia “[t]hey don’t . . . know either how to jail or release you properly.” V. Bukovsky, supra note 35, at 76.
53. Volume III, supra note 1, at 522.
54. This is not to disbelieve other recent periods of human misery; yet without a
Although few in this country would compare to Russia's the violence, brutality, and unfairness of our criminal processes—for admittedly there is a considerable difference between a systemic policy of oppression and a tangled skein of individual abuses, though they may be too numerous to mention—the problem goes much deeper than this. In both the Soviet Union and the United States there are many departures from the way human beings, even criminals, could, and should, be treated. No matter what the country, virgin rights once compromised are irremediably vitiated. Moreover, again we are dealing with the nature of crime in our society. And, beyond the fine lines and unclear demarcations of the concept, and apart from the particular acts of particular individuals, without any doubt we have created a nation of political criminals in yet another mien, for it is the unequal distribution of wealth in our society that gives rise to crime as we know it. From unofficial suspicion through the formal criminal process, including arrest, trial, and sanction, we disproportion-

Solzhenitsyn to describe them they are often difficult to comprehend. See, e.g., N.Y. Times, May 10, 1979, § A, at 22, col. 1 (editorial entitled The Chinese Gulag); id., May 7, 1979, § A, at 1, col. 1. ("It may be a tribute to the efficiency of its security apparatus that there has not yet been anyone like Aleksandr I. Solzhenitsyn to chart the dimensions of China's gulag system"); id. § A, at 1, col. 2 (article about wall poster describing China's political prisons). For a description of the recent revival of the labor camp system in China, see Wash. Post, June 1, 1980, § A, at 1, col. 4.


56. At the least, although the term may be difficult to define, see, e.g., COMPARATIVE HUMAN RIGHTS ix (R. Claude ed. 1976), "human rights" includes the right to be free from governmental violation of the integrity of the person; the right to the fulfillment of the vital needs of food, shelter, health care, and education; and the right to enjoy civil and political liberties. See generally G.A. Res. 217A, U.N. Doc. A/810, at 71-77 (1947) (Universal Declaration of Human Rights); Christopher, supra note 52, at 198-99; Cranston, HUMAN RIGHTS, REAL AND SUPPOSED, IN POLITICAL THEORY AND THE RIGHTS OF MAN 53 (D. Raphael ed. 1967). "The legislative imperfections in the definition of human rights and freedoms and the lack of mechanism for implementation do not constitute a reason for denying their existence and the need for their legal protection." South West Africa Cases, Second Phase Judgment, [1966] I.C.J. 248, 290 (Tanaka, J., dissenting).

ately segregate the poor from the rest of our people. Clearly, as Debs noted, "[p]overty populates the prison." The indigenous iniquity of the social and legal systems convicts people with impunity for being born into this unhappy world, and then punishes them for attempting to survive in it. Compounding this economic and racial stratification are more general vicious sociological circles involving education, employment, health care, and housing, as well as the calcified attitudes of those on the outside. Furthermore, on the inside, we have created a double punishment. Not only must inmates endure the terms of their imprisonment, but often they must do so under conditions that are so repulsive as to shock the stomach as well as the conscience. Thus, we have not merely political criminals, but political prisoners as well—

58. See, e.g., Ridenour, Who Is a Political Prisoner? 1 BLACK J.L. 17 (1971). "[T]here are hundreds, perhaps thousands of political prisoners in the United States . . . . I do think there are some people who are in prison [much] more because they are poor than because they are bad . . . ." N.Y. Times, July 13, 1978, § A, at 3, col. 6 (statement of Andrew Young, then chief United States representative to the United Nations). See also infra notes 78 & 81. Not surprisingly, Moscow supported Young on this remark. N.Y. Times, July 16, 1978, § B, at 40, col. 5.


62. See generally Robbins & Buser, Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment, 29 STAN. L. REV. 893 (1977). Chief Justice Burger has noted, in fact, that "[j]udicial findings of impermissible cruelty have been limited, for the most part, to offensive punishments devised without specific authority by prison officials, not by legislatures." Furman v. Georgia, 408 U.S. 238, 384 (1972) (Burger, C.J., dissenting). Many of our jails are so overcrowded, so filthy, and so brutal, that "[t]hey grind the soul into dust." Rector, Renewing the Law-Enforcement Agency, N.Y. Times, Jan. 8, 1979, § A, at 21, col. 2. See supra note 12 and accompanying text. Perhaps not so ironically, the same issue of TIME that reported on Solzhenitsyn's recent advice to the West also reported on the most savage prison riot in American history. See TIME, Feb. 18, 1980, at 30, 48.

63. Amnesty International employs the term "prisoners of conscience" to include "men and women who are imprisoned anywhere for their beliefs, colour, ethnic origin, language, or religion . . . ." AMNESTY INTERNATIONAL HANDBOOK 9 (1977).
prisoners not all that far removed from Solzhenitsyn and his fellow prisoners.

Of course, the reasons for some of the similarities are evident. People are being punished for their commission of crimes, however defined. Their physical separation from their fellows occurs in every society. While this is not to deemphasize the many distinctions between the theories and practices of the various systems, when the similarities begin to cloud the differences we must seek to penetrate the political veil and scrutinize the individuals who make up the body politic, which itself is susceptible to all the ills to which its constituents are heir. Solzhenitsyn notes what is common to any incarceration:

[A] man is deprived of his native place; he lives with men with whom he has no wish to live; he wants to live with his family and friends, but cannot; he does not see his children growing up; he is deprived of his normal surroundings, his home, his belongings, right down to his wristwatch; his name is disgraced . . . ; he is deprived of freedom of movement; denied as a rule even the possibility of working at his own trade; he feels the constant pressure of strangers, some of them hostile to him, [and] of other prisoners . . . ; [he is] denied the softening influence of the other sex (not to mention the physical deprivation); and even the medical attention he gets is incompa-rably poorer.64

These are plain facts. Throughout the droning monotony of their days, weeks, months, and years, prisoners cannot help but encounter the realities of institutional life—the sounds, the sights, the tastes, and the smells of prison, as well as the feel of compulsory life in common. But we should not overlook another plain fact: we have put them there. Their lives cannot totally be separated from our own.65 Prisons merely epitomize the way people are controlled and repressed today;66 they are a means to avoid concentration on the more fundamental problems of society.67

64. Volume III, supra note 1, at 497.
65. See E. Debs, supra note 59, at 11: "While there is a lower class I am in it; While there is a criminal element I am of it; While there's a soul in prison I am not free."
67. See, e.g., Time, Feb. 21, 1977, at 30 (article by Natalya Solzhenitsyn, wife of
It should, therefore, be surprising neither that prisoners resent their treatment and circumstances, nor that their reactions to and attitudes toward the government, whichever one it may be, are not anomalous. The more severe the sentence or conditions, for example, the greater the resolve against the State that imposes them. Further, not unlike Solzhenitsyn's “committed escaper,” who “never for a minute doubts that a man cannot live behind bars,” virtually every prisoner has an “urge to stop being a slave and an animal.” It is only human to be outraged by injustice, particularly when that injustice begets a ruck of serfs who are unable to improve their lot. And especially when what is essential to them if forbidden, whether it be religion, appearance, or just basic dignity, the time may come when this race of prisoners is transformed by its conscience and its consciousness, and propelled to seek a new truth and a new order—a time when they seethe with the spirit of revolt to purge themselves of oppressive forces.

These observations are not intended to portend that we are in the throes of revolution. But in a civilization in which true equality can be achieved only when there is no discrimination, no exploitation of man by man, there necessarily will be nascent discontent with any system that is unfair and unjust to any measurable degree. One should not forget Attica, the most far-reaching expression of prisoner hopelessness and bitterness in our

Aleksandr Solzhenitsyn); E. Debs, supra note 59, at 138: “[P]overty is the crime, penalized by society which is responsible for the crime it penalizes.”

68. VOLUME III, supra note 1, at 125.
70. Not every prisoner, of course, desires or is able to transcend his routine. Solzhenitsyn is outraged, for example, by “[t]he prisoner's irrational passion for shows, his ability to forget himself, his grief, and his humiliation for a scrap of nonsense, on film or live, insultingly showing that all's right with the world.” VOLUME III, supra note 1, at 122. “Bread and circuses” were all that it took to keep most prisoners content most of the time. Id. at 272. See also VOLUME II, supra note 1, at 607-08.
71. See generally U.N. CHARTER preamble: “We the Peoples of the United Nations determined . . . . to reaffirm faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . .” See also Machan, Human Dignity and the Law, 26 De Paul L. Rev. 807 (1977); supra note 56 and accompanying text.
72. “I am proud to belong to this mighty race! We were not a race, but they made us one! They forged bonds between us, which we, in our timid and uncertain twilight, where every man is afraid of every other, could never have forged for ourselves.” VOLUME III, supra note 1, at 462.
recent history, and the Report of the New York State Special Commission on Attica, which cautioned us that "the elements for replication [of the 1971 riots] are all around us. Attica is every prison; and every prison is Attica." 74 If revolution requires aims, 75 rebellion itself does not. And without doubt we have prisoners who feel so tired, so downtrodden, so oppressed, with so little to lose, 76 that rather than slavishly serve out their sentences they are prepared, if not zealous, to bleed in freedom's cause. 77 Revolt can liberate the soul, even if only for a while. 78 And like Gulag, it is not inconceivable that if we passively and unwittingly fail to appreciate our human and humane obligations, then we will be perceived to be the oppressors calmly sitting atop a hierarchy of guilt. 79

We must recognize the immediacy and the agony of the prison experience, the hurt and anger of people in cages—pariahs in their own society, systematically humiliated by their rulers. 80 How long shall we silently mark time before our doomed, nettled by their fate, decide that they have suffered the limits of human

74. New York State Special Commission on Attica, Attica: The Official Report (1972) [hereinafter cited as ATTICA], xii, 458-59. See also T. Wicker, A Time To Die (1975). For a recent report on a less drastic but nevertheless important prison disorder, see Wicker, Catch-22 Behind Bars, N.Y. Times, May 22, 1979, § A, at 19, col. 1. See also TIME, Feb. 18, 1980, at 30. Dumdum bullets were used both at Attica and in the Gulag. See ATTICA, supra this note, at 352-56.


76. "[Y]ou are strong only as long as you don't deprive people of everything. For a person you've taken everything from is no longer in your power. He's free all over again." A. Solzhenitsyn, The First Circle, supra note 51, at 83. (Emphasis in original.)

77. "No one who has not experienced this transition can imagine what it is like!" Volume III, supra note 1, at 238. See also id. at 235. See generally Solzhenitsyn, The New Prisoner, in Prisoners' Rights Sourcebook: Theory, Litigation, Practice 35 (M. Hermann & M. Haft eds. 1973); TIME, Feb. 18, 1980, at 30, 31 (reporting on recent New Mexico prison riot).

78. "[W]e changed from crushed and isolated individuals into a powerful whole . . . ." Volume III, supra note 1, at 347.

79. "Imprisonment as it exists today is a worse crime than any of those committed by its victims; for no single criminal can be as powerful for evil, or as unrestrained in its exercise, as an organized nation." G. Shaw, supra note 60, at 13. "Oh, the length of the prisoners' bench with seats for all those who tormented and betrayed our people, if we could bring them all, from first to last, to account." Volume III, supra note 1, at 32. (Emphasis in original.)

despair, and seek to shed their chains? Perhaps the time is not yet ripe, but it may not be too distant. And perhaps a time will also come for those on the outside to join in rebellion, for certainly many of the "free" are no better off than those who are not. These are sobering thoughts that should cause us to beware and to be aware as well.

As Solzhenitsyn properly reminds us, "We must keep things in proportion." To be sure, we are not now his Gulag. But neither are we More's Utopia. Though we pay lip service to the value of human rights and individual dignity, we must eliminate the ambivalence in our rhetorical commitment to their full furtherance. As notable commentators have urged: "The test of a..."
society is not whether violations of human rights occasionally occur, but how they are dealt with by the authorities;88 "Despite our domestic failures, we must conform to our principles rather than be judged by the level of our practice. . . . We must prove our greatness as a nation not by the vastness of our territory, not by the number of peoples under our tutelage, but by the grandeur of our actions;"89 "There can be no double standards [concerning human rights]."90

More than anything else, we should become familiar with the plight and problems of individuals in our society, for Solzhenitsyn's sisyphian statement that "[e]very system either finds a way to develop or else collapses"91 is as important for our own sake as it is for his. "[T]he future of human rights is interdependent with the simultaneous growth of knowledge and commitment."92 At the very least, The Gulag Archipelago should leave us sensitive to this debasing era of human history, to the intractable character of inhumanity in the world, to the palpable truthfulness of general suffering, and constrain us to recognize the necessity to include with our regular diet of synthetic materialism a healthy dose of pure moral fiber to cleanse the system.93 The self-regulating cyt-
bernnetics of democratic capitalism simply are incapable of meeting all human needs.

Certainly crime must be prohibited. But crime and its punishment encompass a complex mass of acts, emotions, morals, and, unfortunately, ignorance. Among America's criminal justice systems, the only common denominator is that there is no common denominator. Until we can more accurately answer the questions of what acts should be declared deviant and what procedures should be employed to adjudge those who are accused, then our penal structure must always be viewed with critical circumspection. We should respect humans as humans, and not treat them like animals; we should afford them the benefits of our evolving knowledge in all areas of study, and avoid getting trapped by "inherited answers." While we await some Hegelian heaven, in the Western spirit of inquiry we must summon the courage to doubt our convictions (literally as well as metaphorically), the courage to embrace the creative tension whence comes direction, the courage to stand in humility before ultimate truths.

Yes, woe unto those who have read The Gulag Archipelago. But greater woe unto those who have not, to those who do not

94. "Will we every succeed . . . in giving free rein to the spirit that was breathed into us at birth, that spirit that distinguishes us from the animal world?" A. Sолженицын, Warning to the West 146 (1976).


The basic concept underlying the English Amendment is nothing less than dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

See also supra note 21. Although the Chief Justice was speaking only for a plurality (with Justices Black, Douglas, and Whittaker), a majority of the Court referred approvingly to these words in Furman v. Georgia, 408 U.S. 238 (1972): 408 U.S. at 242 (Douglas, J., concurring); 408 U.S. at 269-70 (Brennan, J., concurring); 408 U.S. at 306 n.1 (Stewart, J., concurring); 408 U.S. at 327 (Marshall, J., concurring); 408 U.S. at 409 (Blackmun, J., dissenting).

96. D. Rothman, supra note 57, at 295. "An awareness of the causes and implications of past choices should encourage us to a greater experimentation with our own solutions." Id.


98. See, e.g., Time, June 26, 1978, at 21 (comments of Daniel Boorstin in reaction to Sолженицын's Harvard commencement speech). Perhaps the pestilence of Gulag was "one of the innumerable penalties which we are continually paying, and will be paying for a long time yet, for the path we so hastily chose and have so stumblingly followed, with never a look back at our losses, never a cautious look ahead[.]" Volume III, supra note 1, at 12.
seek its guidance, to those who foster hate, prejudice, unfairness, and injustice. Woe unto all of us if we do not take heed. The fabric that is our civilization—woven as it is with very tenuous threads—is being stretched nearly to its limits. We must be wary, lest, like the Emperor, the roots of our society soon stand naked for all to see—a vast and barren human wasteland.