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Warren E. Burger

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OUR OPTIONS ARE LIMITED*

WARREN E. BURGER†

WHEN I TOOK my present office in 1969, one of the three subjects I presented to the legal profession was that of the most neglected phase of our system of criminal justice in America — the penal and correctional institutions and processes. We had finally come to realize that the system of criminal justice is not simply a system of courts, but a process that begins with the first contact of police authority with an individual, continues on through the criminal charge and trial resulting in acquittal or a judicially-imposed sentence, and, for many of those found guilty, ends in our prisons.

The American Bar Association responded immediately by creating a distinguished Commission on Correctional Facilities and Services, chaired by former Governor Richard J. Hughes of New Jersey, who had been a judge before he became Governor. That Commission has concentrated on action programs to make the best use of the knowledge and facilities we now have.

When I addressed myself to these problems in 1969, it was not the first time I had discussed the subject. As it turned out, it was an opportune time to enlist the aid and the support of the 150,000 lawyers who comprise the American Bar Association, for the country was soon to witness a new surge of turmoil in prisons.

I am no expert on the problems of prisons or corrections, but since I first became a United States judge seventeen years ago, I have been deeply concerned at the "recall" rate, which, in American

† Chief Justice of the United States.

* This paper was presented in substantially its present form at the 1972 Annual Dinner of the National Conference of Christians and Jews held in Philadelphia on November 16, 1972 in honor of Bernard G. Segal, Esquire, President of the American Bar Association during 1969. The *Villanova Law Review* is particularly honored and pleased to be able to publish these remarks since the Chief Justice has been so generous with his time and advice in helping to establish an Institute for Correctional Law at Villanova, under the direction of Professor Donald W. Dowd of the Law School, and since Mr. Segal is serving on the organizing committee for the Institute. Professor Dowd and the *Villanova Law Review* wish to take this opportunity to express their gratitude to both the Chief Justice and Mr. Segal for their contributions in this endeavor.

industry, is the rate at which products found defective are returned to the manufacturer for further processing and repair. The "recall" rate for the American penal system varies over the years, but for present purposes it is safe to use the figure of two-thirds. By that I mean, at any given time, two-thirds of the persons found in prisons have prior criminal records. There is very little evidence that we have improved this situation in the past 30 or 40 years — indeed it has become worse with the passage of time.

We are often reminded that man is distinguished from all of God's creatures in his capacity to look about him, to be dissatisfied with what he sees, to search for better ways, and to make changes. He is further distinguished from the world of animals, in that man begins where his forebears left off and builds on their knowledge and experience — or at least he is capable of doing so. The zoologists tell us that although man and the lowly ant each has a highly developed and highly organized society, the world of the ant has remained static for 65 million years. Each generation of ants lives and moves and functions essentially as his forebears. Man, on the other hand, has been changing his mode of existence and his institutions for at least 50 centuries and at an extraordinarily accelerated rate in our time. A fair appraisal would be that we have experienced more change in human existence in the past 30 or 40 years, or certainly in this century, than in all previous human history.

I emphasize this capacity for change because it is the key to survival. Laying aside compassion for other human beings, self-interest, if nothing else, should have led us long since to apply our capacity for change to the problems of penal corrections. Our failure represents more than a failure to be practical — it is a retreat from the instincts that have characterized Americans and set them apart as a people always ready to lend a helping hand.

Since 1969, and right up to this day, we have witnessed one tragic outbreak after another in penal institutions all over the United States. No one can justify the violence in these outbreaks; we are dealing with hard facts of life, and in a civilized society we have an obligation to find the causes and to correct the situation.

During the middle third of this century, we have seen a wide range of developments, both in the decisions of courts and in acts of state legislatures and of the Congress, by which we have expanded the rights of persons accused of crime. Today the American system of adjudication of guilt or innocence in criminal cases is the most comprehensive — and indeed the most complex in terms of trials, retrials, appeals, and post-conviction reviews — that can be found in any

society in the world. No nation can match the United States in these manifestations of profound concern for the rights of accused persons. Yet in spite of all this development of the step-by-step details in the criminal adversary process, we continue, at the termination of that process, to brush under the rug the problems of those who are found guilty and subject to criminal sentence. In a very immature way, we seem to want to remove the problem from public consciousness.

It is a melancholy truth that it has taken the tragic prison outbreaks of the past three years to focus widespread public attention on this problem. This concern comes at a time when the demands upon society for other changes and improvements, most of which are very costly, are likely to depress the problems of prisons and correctional institutions into a lower priority than they ought to have in a civilized society.

We must, at the very minimum, dedicate the same attention and concern and expense and manpower that we have lavished on the adversary contest between society and the accused to the processes of correctional institutions. It must be ironic to a prisoner to recall that society spared no expense to afford him — as too often happens — three, four, or five trials and appeals, at enormous costs, but then proceeded to forget his plight. We need not diminish the one to expand the other, but we must not continue this illogical allocation of limited resources to the correctional systems.

The large percentage of unsolved crimes, particularly in the great cities of the country, suggests that the “recall” rate of the penal system is not the whole story, and the true picture would reveal that more than two-thirds of those who are released from prison are returning to criminal conduct.

I suggest that this situation presents society with a limited set of alternatives :

First, we can enlarge all sentences for all persons convicted of serious and violent criminal conduct and keep them off the streets in a sort of long-term quarantine ;

Second, we can multiply our police forces so as to give saturation protection day and night, with a policeman literally always in sight, in the hope that this would make public criminal conduct extraordinarily difficult, if not impossible.

Neither of these alternatives seems very fruitful or attractive. What little we do know about the correctional function does not suggest that longer and longer terms of imprisonment are a satisfactory solution. At best it is a short-term solution which might create more new problems than it solves. Nor is the multiplication of police forces

a solution. Adequate police protection is imperative, of course, but it is not consonant with the American tradition that we should live in what would virtually amount to a perpetual state of martial law in an occupied city. Armed police on every street corner, day and night, is not the kind of America that our forefathers envisaged, and it is not the kind of America that we want.

There are, it seems to me, perhaps only two other alternatives:

The first is the obvious one to improve the institutions, the facilities, and the programs that are connected with confinement of convicted persons.

The second, is to develop better means and processes to identify those convicted persons who should not be sent to prisons, but should be released under close supervision.

To do this, however, we must expand our supervisory processes and provide intensive training for the men and women in the probation and parole services. Judges and penologists despair over their inability to provide the close supervision that has been found to be one of the most useful devices in the correctional process.

What other things do we need to do to improve the correctional institutions?

Although the physical environment is of considerable importance, we know that new buildings alone do not make a good correctional institution, any more than they make a great school or college. If the age of its buildings, standing alone, is the test of an institution, many of the great universities of Europe and America must be overrated. Just as the faculty of a university is far more important than its plant, the personnel and programs of a correctional institution are the keys — if there really are ways to rehabilitate people whose past anti-social behavior has caused them to be imprisoned.

Some of the things done in the more enlightened programs in the states and some of the things done by institutions within the Federal Bureau of Prisons may point the way.

Over the years, I have visited numerous penal institutions, both in the United States and Europe. One of the marked differences between the United States and the countries of Northern Europe is their acceptance of the idea that well-supervised release is a far better solution than confinement in a prison, and that it is particularly better than confinement in a poor environment.

I have seen institutions in our country, some of them not far from Philadelphia and Washington, in which two prisoners are crowded into a cell made 100 years ago for one prisoner. Some of these cells

are not more than six feet by eight feet. When you find that kind of institution, you are likely to find that it has either no recreational facilities or inadequate facilities. In the same institution, you are likely to find no library worthy of the name. In that kind of an institution you will normally find no meaningful programs of vocational education. You are likely also to find poorly trained and poorly paid personnel.

Any visitor to a prison these days will observe that by far most of the inmates are young men with the drive and energy associated with youth. It is a depressing experience to see these young men trying to use an inadequate space to play volleyball or touch football, or to see them standing or sitting around in groups with nothing in the way of constructive activity during their nonworking hours.

It should not surprise us, therefore, that when a young man, more than likely from a dismal environment in the first place, is found guilty and sentenced for two, three, or five years in such an institution, he leaves it a worse, not a better, human being. The deadly monotony of a confinement with no constructive or productive activity apart from ordinary daily work is bound to be devastating. It is axiomatic that inmates of these institutions are people who, for one reason or another, have not been adequately motivated and self-disciplined in life. The guidance and the standards that make most human beings willing to study, to work, and to improve themselves are absent in such people. It would be an optimism approaching folly to rely on the assumption that every person convicted of serious criminal activity can be rehabilitated and restored to a useful life. Nevertheless, this is a near-universal human aspiration, and we must proceed on the assumption that most people can be improved. But to achieve that, we must begin with highly trained staffs of people who understand something of the problems of human motivation. Beyond that, there must be people qualified to train others in the useful arts and labor that Thomas Jefferson regarded as basic to American Democracy.

To go still beyond that, there must be people capable of identifying persons of exceptional talents and abilities and of motivating them to pursue more advanced education. All of these inmates must be provided with means and facilities to occupy their nonworking hours, and particularly with the means to improve themselves. Bear in mind, assuming a 40- or even a 48-hour work week in a prison factory of some kind, there remains nearly one-third of every day left which must not be characterized by deadly boredom. Into that vacuum of one-third of these lives there must be books and programs of activity, self-improvement, entertainment, and recreation if we really want to reduce the "recall" rate of American prisons.

Then there is another factor — one which demands the most urgent attention — and that is the area of communication. People in prison are necessarily regimented far more than those in a military unit or in any other area of life. The people in penal institutions are less likely to adapt themselves to a regimented existence than others. By definition most of them really think of themselves as “losers.” This means that the likelihood of tension and friction among inmates, and between the inmates and their custodians, is very great. One of the foremost penological authorities, Norval Morris of the University of Chicago, once commented rather bitterly that it would always be easier to make improvements in prisons “if we had a better class of people to deal with.”

The hint of any humor in that remark is far overshadowed by the hard reality. But this alone is reason why in every penal institution we need to open up the means of communication between the inmates and the custodians. By that I do not mean rigidly formalized means, but reasonable means which are known and understood. I do not suggest any parallel between the organized labor movement and the problems of prisons, except one: we tend to think of collective bargaining as the great contribution made by labor leaders to proper industrial relations; but the grievance procedures, developed over the past century as the great industrial plants expanded, are, I think, an even more important contribution to our society than collective bargaining. With proper grievance procedures in a large industrial operation, the hour-to-hour and day-to-day frictions and tensions of employees can be carried up through channels and either guided to a proper solution or dissipated by exposure.

This, in essence, is what every penal institution must have — the means of having complaints reach decision-making sources through established channels so that valid grievances can be remedied and spurious grievances exposed.

If we are really going to have any chance of making prison inmates useful members of society, the institution is the place to teach the fundamental lesson that life's problems are solved by working within the system — not by riots or the destruction of property. This matter is not one of legal rights but simply of common sense and ordinary human experience.

If the picture I have been painting is depressing and disturbing, it is perhaps useful that we be disturbed, but there are some brighter spots. Last year President Nixon convened a Conference on Corrections at historic Williamsburg, bringing together some of the ablest men and women in America and from abroad, experienced in the

problems I have been discussing. Growing out of that conference a training institute has been created that is, in a sense, the counterpart of the FBI Academy which, over a period of more than 30 years, has given advanced and expert training to local and state police officers in all parts of the country. Just as the FBI Police Academy has had an enormous impact on police work, the National Institute of Corrections will perform a comparable function in terms of training prison and correctional personnel. It has already begun work with seminars at Chicago and Long Beach. This is the kind of function which the states cannot very well perform for themselves, and it is a highly appropriate one for the federal government to perform as a service to the several states.

The ABA Commission on Correctional Facilities and Services has developed an active program aimed at modifying laws that foreclose large areas of employment for persons with criminal records. Its members advocate a program of minimum standards and accreditation for penal institutions, patterned after the hospital accreditation standards instituted more than a half century ago. They have proposed the creation of grievance procedures for prisoner complaints, community programs, and services to direct youthful first-offenders away from the criminal process entirely.

Another Commission program has already supplied 1,000 young lawyers as volunteers in twelve states to give counselling guidance and assistance to convicted persons released on probation or parole. This is a device used for more than 200 years in the countries of Northern Europe to supplement official governmental agencies.

In some places there are interesting and provocative experiments — for example, having persons convicted of minor crimes sentenced to perform from 40 hours to 500 hours of unpaid public or community-service work rather than short jail terms. This, too, requires supervision by probation counselors, and we are sorely lacking in this area.

An area which must be explored is to seek to motivate, particularly, the younger inmates at the time they are first placed in confinement. One method which must be explored is to take a person sentenced for five years and determine by testing methods what his areas of potential skills may be. Once they are identified, an opportunity for training in that field should be offered to the prisoner. Whether he should be trained as a plumber, an electrician, a stonemason, a bricklayer, a garage mechanic, or some other skill is relatively unimportant. Once the prisoner's potential skills have been identified, he should be offered the challenge that if he will use his time to train and educate himself

in one of these fields, he will be released as soon as he qualifies to meet certain standards. For example, when he qualifies as a journeyman plumber or a journeyman stonemason, he would be released. Literally, this would offer the prisoner the opportunity to learn his way out of confinement in less time than his sentence, and when he returns to society, he would be equipped with a marketable skill, and pride in that skill that may change his approach to life.

Obviously, I have touched on only a few factors of a highly complex subject in which both the problems and the solutions are only dimly perceived and partially understood. But I hope I have communicated to you the paradox of the most advanced industrial nation in the world tolerating a "recall" rate that would destroy a private enterprise.

The options available to us are limited:

- (1) a policy of "lock them up and throw the keys away;"
- (2) a policy of massive police protection that rises to the proportions of martial law; or
- (3) a policy of intelligent concern that enlists the best in American intelligence, innovativeness, and drive in support of a new approach to the problems of corrections.

This third alternative, I submit, is the only one compatible with our American tradition.