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The Talk of Chief Justices,

By Warren E. Burger

I am no expert on the problems of prisons or corrections, but since I first became a United States judge 17 years ago, I have been deeply concerned at the "recall" rate, which, in American 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 last thirty or forty years—indeed it has become worse with the passage of time.

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 postconviction reviews—that can be found in any society in the world.

Yet with 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.

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 that the true picture would reveal more than two-thirds of those who are released from prison as returning to criminal conduct.

I suggest that this 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.

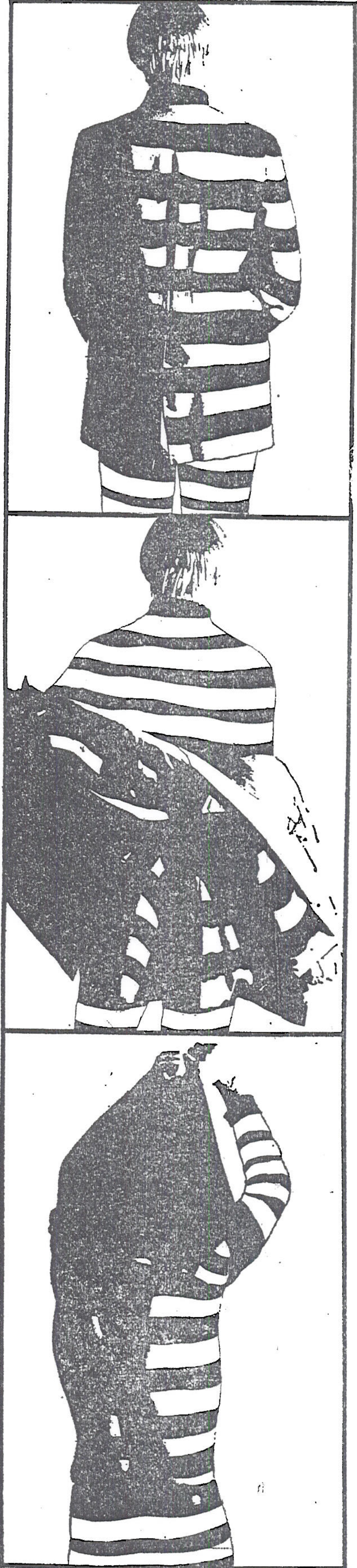
There are, it seems to me, perhaps only two other alternatives:

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 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 are ways to rehabilitate people with antisocial tendencies.

It should not surprise us when a young man from a dismal environment in the first place is found guilty and sentenced for two, three or five years in 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.

Chief Justice Warren E. Burger made these remarks in part before the National Conference of Christians and Jews.

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Past and Present

By Earl Warren

A man might be a very great liberal in political life, and he might be equally as conservative in judicial process, because they're entirely different. You see, in the political process, the legislative bodies have the oversight, within constitutional limits, of everything in their jurisdiction. And if they see something they don't like, something that needs to be remedied, they can single that out, and bring it in and try to legislate on it. And they can; they're in what you might call free-wheeling to advocate anything they want to accomplish, that accomplishes that purpose. And if they can't get a whole loaf, why, they settle for a half loaf, and if they can't get a half loaf, they may settle for a quarter, and if they can't get that, maybe they'll bypass the whole thing and let it go to another time.

But the court is not a self-starter in that respect. It can never reach out and grab any issue and bring it into the court and decide it, no matter how strongly it may feel about the condition it's confronted with. It is a creature of the litigation that is brought to it. So when they come to the Supreme Court the members of the Court have no way of determining what they want to hear, they have to determine what they get. And so many people can't understand that, because they believe that a lot of the people come there committed to a definite course of conduct and action depending upon their views, their political views. And they think if they see something they don't like, they just pull it into the court and decide it. But that is not true, the court is very limited in its jurisdiction.

[The phrase "all deliberate speed" in the school desegregation case] was used by Holmes, I think, in the case of Virginia v. West Virginia. And it's an old admiralty phrase that was used in England, oh, I think for centuries before that, but very rarely known or used in this country. But it was suggested that that would be a way to proceed in the case because we realized that under our Federal system there were so many blocks preventing an immediate solution of the thing in reality, that the best we could look for would be a progression of action; and to keep it going, in a proper manner, we adopted that phrase, all deliberate speed.

Well, I think it was an appropriate thing. In these days, though, you'll find a lot of people who are saying that that phrase should not have been used. That they should have said these people must be allowed to go to this school. Well if they had, it was the opinion, my opinion and most of us, that it would have solved nothing.

We would have one or two Negroes go to a public school, to a white school, but that would be all there was to it, so we treated it as a class action, so that everyone in the same situation as they were would be treated in the same manner judicially, and from that we knew that covering all the school districts in the country, and under different statutes and different organizations of the educational process, it would take a long time to work out.

I remember the first time we discussed how long we thought it would take. I remember someone suggested, I can't remember who it was, wouldn't it be wonderful if on the centennial of the Fourteenth Amendment that it would be a reality all over this country. And I've always remembered that and thought about it many times. It didn't become a reality by then but still much more has been accomplished than most people realize.

In my mind the most important case that we have had in all those years was the case of Baker v. Carr, which is what we might call the parent case of the one-man, one-vote doctrine, which guarantees to every American citizen participating in government an equal value of his vote to that of any other vote that is cast in the particular election. And the reason I say that is not because it decided any particular issue at that time but the courts had vacillated on that question for a great many years and there were decisions that ended up three, three and three, without a majority of the vote in any of them.

So I, in that case, the Court determined that whether a legislature or any body, elected body, was properly apportioned so far as voting strength is concerned was a judicial matter and could be decided by the courts. Theretofore, there had been great doubts as to whether it was a political question or whether it was a judicial question. And we held in Baker v. Carr that it was a judicial question, and that the courts, therefore, had jurisdiction.

And I believe that if we had had the decision shortly after the Fourteenth Amendment was adopted, that most of these problems that are confronting us today, particularly the racial problems, would have been solved by the political process where they should have been decided, rather than through the courts acting only under the bare bones of the Constitution.

These observations by former Chief Justice Earl Warren are derived from a talk with Abram Sachar, chancellor of Brandeis University, on WGBH, Boston and the Public Broadcasting Service.