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PARADOXES IN THE ADMINISTRATION OF CRIMINAL JUSTICE

WARREN E. BURGER

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A native of St. Paul, Minnesota, Judge Burger attended the University of Minnesota and St. Paul College of Law (now Mitchell College of Law), where he was graduated magna cum laude. Upon graduation, he was appointed an adjunct professor and served on the Faculty for many years, while engaging in a private law practice in St. Paul.

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This article is based upon a Commencement address which Judge Burger delivered at Ripon College, Ripon, Wisconsin on May 21, 1967.

Society's problem with those who will not obey law has never loomed so large in our national life as it does today. People murder others in this country at the rate of more than one for every hour of the day. There are more than 140 crimes of theft every hour; assault and violence and rape grow comparably. The murder rate is 10,000 human lives a year, which is higher than the death rate in our current military operations in Viet Nam which inspire such emotional and violent public demonstrations. And the growth rate of crime is now far greater than the growth in our population.

Perhaps the most alarming thing is the large amount of crime committed by persons under age 20, which suggests that homes, parents, schools, churches and communities have somewhere failed. Even worse is the fact that the highest rate of recidivism is in the under 20 age bracket. Nearly 60 per cent of the 20 age and under bracket are repeaters.

In 1964, for the first time in our national history, the subject of crime became an issue in a national Presidential campaign. It became an issue because a vast number of people of this country were deeply apprehensive about the security of their homes, their children, their possessions and their personal safety on the streets, especially in large cities. This led President Johnson to create a National Commission on Law Enforcement and Administration of Justice under the Chairmanship of the Attorney General of the United States,

with a score of distinguished Americans and a staff of highly qualified experts.¹

At a recent Conference in Washington to which the President had called about 100 lawyers, judges and others concerned with law enforcement, to consider ways of implementing the Crime Commission's Report, the President stated that next after the war in Viet Nam, the problems of law enforcement ranked highest.

We often hear the claim that the breakdown of law and order is due to this decision or that decision of some court—most often the Supreme Court. It would be good if things were that simple, for if the overruling of one or two opinions would solve the problems of crime, I suspect the Supreme Court would be willing to reconsider. It is no aid to sensible public discourse to attribute the crime problem to any one decision or any one court.

Unfortunately, the problems and their solutions are far too complex to be resolved so easily. Let's probe into it.

OUR SYSTEM OF ORDERED LIBERTY

Our whole history as a nation reflects a fear of the power of Government and a great concern for individual liberty, and these feelings led us to place many protections around persons accused of crime. This has resulted in the development of a system of criminal justice in which it is often very difficult to convict even those who are plainly

¹The Challenge of Crime in a Free Society (A Report by The President's Commission on Law Enforcement and Administration of Justice (1967)).

guilty. You know that this was a response to the abuses which people had suffered from the absolutist attitudes of rulers in Europe and in England in the 16th and 17th Centuries.

During the middle of this century—that is, from about 1933 to 1966—we have witnessed more profound changes in the law of criminal justice than at any other period in our history. In addition to court decisions, there have been many legislative enactments in both Congress and State Legislatures which have enlarged the protections of a person who is accused of crime. No nation on earth goes to such lengths or takes such pains to provide safeguards as we do once an accused person is called before the bar of justice and until his case is completed.

Governments exist chiefly to foster the rights and interests of its citizens—to protect their homes and property, their persons and their lives. If a government fails in this basic duty it is not redeemed by providing even the most perfect system for the protection of the rights of defendants in the criminal courts. It is a truism of political philosophy rooted in history that nations and societies often perish from an excess of their own basic principle. In the vernacular of ordinary people, we have expressed this by saying, "Too much of a good thing is not good".

We know that a nation or a community which has no rules and no laws is not a society but an anarchy in which no rights, either individual or collective, can survive. A people who go to the other extreme and place unlimited power in Government find themselves in a police state, where no rights can survive.

Our system of criminal justice, like our entire political structure was based on the idea of striking a fair balance between the needs of society and the rights of the individual. In short, we tried to establish order while protecting liberty. It is from this we derive the description of the American system as one of ordered liberty. To maintain this ordered liberty we must maintain a reasonable balance between the collective need and the individual right, and this requires periodic examination of the balancing process as an engineer checks the pressure gauges on his boilers.

What are the dominant characteristics of our system of criminal justice today? First, it is a system in which there are many checks and reviews of the acts and decisions of any one person or tribunal. Second, it is a system which reduces to a

minimum the risk that we will convict an innocent person. Third, it is a system which provides the utmost respect for the dignity of the human personality without regard to the gravity of the crime charged. There are exceptions to these generalities in some states and in some courts, but I think this is a fair appraisal of the plus side of our system of criminal justice.

NEGATIVE ASPECTS OF OUR SYSTEM

What are some of the negative aspects of our system?

1. Our criminal trials are delayed longer after arrest than in almost any other system;

2. Our criminal trials extend over a greater number of days or weeks than in almost any other system;

3. Accused persons are afforded more appeals and re-trials than under any other system;

4. We afford the accused more procedural protections, such as the exclusion and suppression of evidence and the dismissal of cases for irregularities in the arrests or searches, than under any other system.

It sometimes happens that a development in the law which is highly desirable, standing alone, interacts with an equally desirable improvement and produces a result which is largely or even totally lacking in social utility. Let me give one example: the bail reforms of recent years were long overdue and helped to give meaning to the constitutional provisions on bail; similarly the decisions and statutes assuring a lawyer to every person charged with serious crime, were long overdue. Now look at the interaction: every person charged has a lawyer supplied to him and at the same time he has enlarged rights to be released without posting a conventional bail bond.

We can now see that in a great many cases, no matter how strong the evidence against him, or how desirable the long range value of a guilty plea and the benefits of reduced charges and more moderate sentencing, the two "good" things—bail reform and free defense—interact to discourage a guilty plea because the "jail house grapevine" tells the accused that the thing to do is enter a not guilty plea, demand release without bond, and then use every device of pretrial motions, demands for a new lawyer, and whatnot to delay the moment of truth of the trial day. This may mean up to two years' freedom

during which witnesses might die, or move, or forget details while the case drags on the calendar and consumes untold time of judges, lawyers and court staffs to process motions and continuances. This is one of the large factors in the congestion of the criminal dockets. Here, to repeat, two basically good things combine to produce a result never intended and wholly lacking in social utility or any meaningful relationship to the proper administration of criminal justice; in short, an excess of a basic principle.

If there is a general impression that the administration of justice is not working, one important result is that the deterrent effect of the law and punishment is impaired or lost. If people generally—law abiding and lawless alike—think the law is ineffective, two serious impacts occur: the decent people experience a suppressed rage, frustration and bitterness, and the others feel that they can “get by” with anything.

This is not because the people—good people or bad people—read the opinions of appellate courts. Of course they do not. But they *read about* and *hear about* the extraordinary cases, and, as I suggested, they read and hear most about the failures of the law as in the Caryl Chessman and Willie Lee Stewart type of cases.²

The celebrated case which takes 5 to 10 years to complete is common talk in the best clubs and the worst ghettos. If lax police work and lax prosecution will impair the deterrent effect of the law, repeated reversals and multiple trials in the highly publicized cases will likely have a similar effect. The existence of “speed traps” and the knowledge of vigorously enforced traffic laws will make us all more careful drivers. Many people, though not all, will be deterred from serious crimes if they believe that justice is swift and sure. Today no one thinks that.

Is a society which frequently takes 5 to 10 years to dispose of a single criminal case entitled to

call itself an “organized” society? Is a judicial system which consistently finds it necessary to try a criminal case 3, 4, 5 times deserving of the confidence and respect of decent people?

These are the negative factors. But by that I do not mean to say that any one of these is unreasonable or undesirable in and of itself. It is a hard fact, however, that in the present state of the law there are more and more cases in which a defendant is tried and re-tried and re-tried again so that the trials and appeals may extend anywhere from two to five and occasionally as much as 10 years.

THE NEGLECTED ELEMENT OF CRIMINAL JUSTICE

Many people tend to think of the administration of justice in terms of the criminal trial alone because this is the part of the process which occurs in the local community, but, more than that, because it is charged with the human element; it is exciting, colorful, and dramatic. This is why the movies and TV have given so much time to criminal trials.

The actual trial is not the whole of the administration of criminal justice. The total process is a deadly serious business that begins with an arrest, proceeds through a trial, and is followed by a judgment and a sentence to a term of confinement in a prison or other institution. The administration of criminal justice in any civilized country must embrace the idea of rehabilitation of the guilty person as well as the protection of society. In recent years, we have been trying to change our thinking in order to de-emphasize punishment and emphasize education and correction.

I have suggested that our system of trials to determine guilt is the most complicated, the most refined, and perhaps the most expensive in the world. We now supply a lawyer for any person who is without means and it is the lawyer's duty to exercise all of his skill to make use of the large numbers of protective devices available to every defendant. But where do we stand in the second stage of the administration of criminal justice—the treatment and disposition of those who are found guilty? We can gain some light by a comparison of our entire system with the countries of North Europe.

To begin with we find that in Norway, Sweden, Denmark and Holland, for example, there is

² Caryl Chessman was executed in California after 12 years of litigation. Willie Lee Stewart was sentenced to death in the District of Columbia in 1953 for first-degree murder but, after a series of trials, he was allowed to plead guilty to second-degree murder in 1963 and received a sentence of 15 years to life. The Stewart case required 9 unpaid lawyers in the District Court, 14 unpaid lawyers in the Court of Appeals and 3 unpaid lawyers in the Supreme Court; it required 13 United States Attorneys or Assistants, 5 of whom worked on 2 stages and 1 of whom worked on 3 stages of the case; it required 20 trial-level judges and over 50 judges when the Court of Appeals and Supreme Court are considered; and the transcript ran to approximately 5000 pages.

much less crime generally than in the United States. In Sweden, with 8 million people, there are about 20 murders each year, and crimes of other kinds are at an appreciably lower rate than in this country. Washington, D. C., with about 800,000 population, has 160 to 170 murders each year.³

I assume that no one will take issue with me when I say that these North Europe countries are as enlightened as the United States in the value they place on the individual and on human dignity. When we look at the two stages of the administration of criminal justice in those countries, we find some interesting contrasts. They have not found it necessary to establish a system of procedure which makes a criminal trial so complex or so difficult or so long drawn out as in this country. They do not employ our system of 12 men and women as jurors. Generally speaking their criminal trials are before three professional judges. They do not consider it necessary to use a device like our Fifth Amendment under which an accused person may not be required to testify. They go swiftly, efficiently and directly to the question of whether the accused is guilty. By our standards their system of finding the facts concerning guilt or innocence is almost ruthless. In those systems they do not have long drawn out cases where everyone loses sight of the factor of guilt and even the most guilty convict comes to believe the press releases of his own lawyer.

In our comparison with the second stage of the administration of criminal justice we encounter an interesting paradox. The swift and efficient determination of guilt in Northern Europe is followed by a humane and compassionate disposition and treatment of the offender. The whole process from the moment of arrest to the beginning of sentence is free from the kind of prolonged conflict which characterizes our administration of criminal justice in which we have glorified and idealized the adversary system with its clash and contest of advocates.

I recently made a study of specific cases in Holland and Denmark. A typical case in Denmark, for example, is disposed of in about six weeks and the first offender is almost always placed on probation under close supervision and free to return to a gainful occupation and normal family life. By contrast it is not unusual for an American case

to have 2 or 3 trials and appeals over a period of from 3 to 6 years. When the American defendant is finally sentenced after this prolonged process, he has been engaged in a bitter warfare with Society for years.

Even after the American is committed to a prison we afford him almost unlimited procedures to attack his conviction or seek reduction of his sentence, and as a result American courts are flooded with petitions from prisoners and the warfare continues. Under our system the "jailhouse lawyer" has become an institution. In short, while the correction system struggles to help the man reconcile his conflict with Society, the statutes and judicial decisions encourage him to continue the warfare.

PARADOX OF INDIVIDUAL RIGHTS THAT PROLONG THE "WARFARE" WITH SOCIETY

If the prisoner is like most human beings, his battle with authority and in the courts develops a complex of hostilities long before he goes to prison. These hostilities are directed toward the police who caught him, the witnesses who accused him, the District Attorney who prosecuted him, the jurors who judged him, and the judge who sentenced him, and finally, even the free public defender who failed to win his case. I doubt that any defendant can conduct prolonged warfare with Society and not have his hostilities deepened and his chance of rehabilitation damaged or destroyed. To encourage the continuance of this warfare with Society after he reaches the prison hardly seems a sound part of rehabilitation, nor is it likely to contribute to restoring him to good citizenship.

Let me pursue our paradox: After we in America have lavished years of the complex and refined procedural devices of trials, appeals, hearings and reviews on our defendant, our acute concern seems to exhaust itself. Having found the accused guilty—as 80 to 90 percent of all accused persons are found—we seem to lose our collective interest in him. In all but a few states we imprison this defendant in places where he will be a poorer human being when he comes out than when he went in—a person with little or no concern for law or for his fellow men and very often with a fixed hatred of all authority and order. Often, he is mindlessly and aggressively determined to live by plundering and looting.

In referring to the Northern Europe countries,

³ Report of the President's Commission on Crime in the District of Columbia 24 (1966).

I do not intend to suggest that they have completely solved all these problems, but only that they seem to deal with them more intelligently and less emotionally. They do so by recognizing that for the most part people who commit crimes are out of adjustment with society and that confusion and personality problems have something to do with this. They do not find that any useful social purpose is served by drawing out the warfare with Society through numerous trials and appeals. And when they finally make the decision to deprive a guilty person of his liberty, they look ahead to the day when he will be free. They probe deeply for the causes of his behavior and to do this they place behavioral scientists in the prisons. We do this, but only in a token sense. In the Federal prison system, which is far better than most of the states, there is a ratio of approximately 1 psychiatrist or psychologist for each 1,500 inmates. In the state prisons the ratio of psychiatrists to prisoners is far less—as little as 1 psychiatrist for each 5,000 inmates; some states in the United States have none. And remember, we are talking about maladjusted people confined by society with a purpose of healing them.

Yet in tiny Denmark the ratio is roughly 1 psychiatrist for each 100 prisoners and in the maximum security prisons, where the dangerous and incorrigible prisoners are confined, the ratio is 1 psychiatrist for each 50 prisoners.

The vocational and educational programs available in our best prisons are a help, but the rate of return of prior offenders shows that something is not working. With few exceptions in the more enlightened states the basic attitude of legislatures is that criminals are bad people who do not deserve more.

In part the terrible price we are paying in crime is because we have tended—once the drama of the trial is over—to regard all criminals as human rubbish. It would make more sense, from a coldly logical viewpoint, to put all this “rubbish” into a vast incinerator than simply to store it in warehouses for a period of time only to have most of the subjects come out of prison and return to their old ways. Some of this must be due to our failure to try—in a really significant way—to change these men while they are confined. The experience of Sweden, Denmark and the other countries I mentioned suggests two things: that swift determination of guilt and

comprehensive study of each human being involved and extensive rehabilitation, education and training may be the way. This, and programs to identify the young offenders at a stage early enough to change them, offer the best hope anyone has suggested.

In all of these countries there is also a more wholesome attitude toward the prisoner after he is released. The churches and the Government cooperate in maintaining what are called “after-care societies” which have existed for hundreds of years. Through these societies each released prisoner has an experienced and friendly counsellor and advisor to assist him with his problems. These people are volunteers who might be compared with citizens in this country who take part in the VISTA program or the Big Brother movement.

We lawyers and judges sometimes tend to fall in love with procedures and techniques and formalism. But as war is too important to be left to generals, justice is far too important to be left exclusively to the technicians of the law.

The imbalance in our system of criminal justice must be corrected so that we give at least as much attention to the defendant after he is found guilty as before. We must examine into the causes and consequences of the protracted warfare our system of justice fosters. Whether we find it palatable or not, we must proceed, even in the face of bitter contrary experiences, in the belief that every human being has a spark somewhere hidden in him that will make it possible for redemption and rehabilitation. If we accept the idea that each human, however bad, is a child of God, we must look for that spark.

Should our Society come to the conclusion, as it watches our system of justice work, that we lawyers have built up a process that is inadequate or archaic, or which is too cumbersome or too complex, or that we have carried our basic principle too far, or if for any reason that the system does not meet the tests of social utility and fairness, there is a remedy. The People have the right and the ultimate power to change it. Neither the laws nor the Constitution are too sacred to change—we have changed the Constitution many times—and the decisions of judges are not Holy Writ. These things are a means to an end, not an end in themselves. They are tools to serve us, not masters to enslave us. And we should not hesitate to change or discard mechanisms which do not work to the benefit of Society.