

5-1-1986

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## Recommended Citation

Chief Justice Warren E. Burger, *The High Cost of Prison Tuition*, 40 U. Miami L. Rev. 903 (1986)  
Available at: <http://repository.law.miami.edu/umlr/vol40/iss4/2>

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# University of Miami Law Review

VOLUME 40

MAY 1986

NUMBER 4

## The High Cost of Prison Tuition

WARREN E. BURGER\*

Increasingly in this century, the people in our country—and in the world—have been and are confronted with many agonizing problems. In just the past twenty-five years, we experienced the great national trauma of the assassinations of one President, of that President's brother, of a dynamic civil rights leader, and three assassination attempts on yet two other Presidents. In our century, warfare and violence have come to be a constant in the human condition. And now a cult of terrorism spreads pervasive fear throughout the world in a new form of warfare. The world has not yet been able to cope with this new phenomenon.

Today we could well discuss war and peace, poverty and affluence, the breakdown of the home, the declining influence of the church, the alienation of a vast number of young people, the decline of self-discipline, the disintegration of cities, or indeed the terrorism of which I have spoken. All of these problems lie on our doorsteps. All of them will lie on the doorstep of the present college generation well beyond the turn of the next century.

However, I will limit myself to one problem—one which is not wholly unrelated to these others. Like the others, this subject affects every person in America, and hangs over every home, and lurks at every dark corner. But this one is a problem we can do something about—if we have the will. We might call it Crime and Punishment in a pragmatic sense.

What should be done with those persons who cannot seem to adjust to an orderly life pattern of discipline, study, work, family ties,

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\* Chief Justice of the Supreme Court of the United States. The Chief Justice delivered these remarks at the first annual Robert B. Cole lecture held at the University of Miami School of Law on Friday, January 31, 1986.

and responsible citizenship. This is not a conventional college lecture subject, but these are not conventional times.

Society's problems with those who will not obey law has loomed larger in our national life with each passing year. We are told that people murder people in this country at the rate of more than one for every half-hour and the statisticians tell us that each American has one chance in 133 of being murdered during his or her life. There are more than 2,500 crimes of theft every hour. Assault and violence and rape grow comparably. If anything, the numbers are understated, for we are also told that fewer and fewer crimes are actually reported. The murder rate is nearly 20,000 human lives a year, which is higher than the annual death rate during the tragic military operations in Vietnam, and the growth rate of crime is far greater than the growth in our population.

Perhaps one of the most alarming factors is the large amount of crime committed by persons under age twenty, which means that parents, schools, churches and communities have somehow failed. Even worse is the fact that the highest rate of criminal repeaters—recidivists—is in this under twenty age bracket. Nearly sixty percent of the age twenty and under convicted offenders are repeaters.<sup>1</sup>

Our whole history as a nation reflects a skepticism, if not mistrust, of the power of government and deep concerns for individual liberty. These concerns led to our revolution 210 years ago. Our system still reflects those concerns by maintaining and expanding a multitude of protections around persons accused of crime.

During the central third of this century, we witnessed more profound changes in the law of criminal justice than at any other period in our history—largely by way of court decisions. No other nation on earth goes to such lengths or takes such pains to provide safeguards once a person is accused and called before the bar of justice.

When people climbed down from rude tree houses and out of caves to band together in tribes—and later in villages and towns—they did so largely for security. If we accept the premise that the government of an organized society exists chiefly to foster the rights

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1. Recent Bureau of Justice statistics are startling:

-61% of those admitted to prison had previously served a sentence;

-46% of the recidivists entering prison would still have been in prison at the time of their admission had they fully served their maximum sentences;

-recidivists account for approximately two-thirds of the burglaries, auto thefts, and fraud among admittees; and

-an estimated one-half of the recidivists had four or more prior sentences and about one of nine had more than 10 prior convictions.

and interests of its people—to protect all the people—all the people—in their homes, their persons, their property, and their lives—is it not fair to ask this question: if government fails in this basic duty, is it redeemed because it provides the most elaborate, the most expensive, and the most prolonged system, for the protection of the rights of the accused?

We know that a nation or a community that has no rules and no laws is not a society, but an anarchy in which no rights can survive. And a people who go to that other extreme with a government unrestrained by an organic law—a constitution—take the risk of finding themselves in the kind of totalitarian police state that fascist and communist regimes impose. When that happens, no individual rights can survive. Adolf Hitler and others of his kind proved that.

The authors of our Constitution began that document by stating that its purpose was to “establish Justice,” *and* to “insure domestic tranquility.” We are still struggling to achieve the fair balance implicit in those words—the kind of ordered liberty the Founding Fathers hoped for.

Our system of criminal justice, like our entire political structure, was designed to strike that fair balance between certain imperative needs of all people—of society—and certain fundamental rights of the individual. In short, we tried to establish order while protecting liberty. Can we maintain this ordered liberty if we do not maintain a reasonable balance between the collective need and individual rights? To answer that question requires periodic examination of the balancing process much as engineers check the pressure gauges on steam boilers to make sure that a mechanism intended to produce benefits does not produce disaster.

Over the next 30, 40, 50 years, the student generation of today will struggle with these problems, for in a democracy, there are no final solutions. Reinhold Neibuhr once defined democracy as “a method of finding proximate solutions for insoluble problems.” Not perfect solutions, just proximate ones.

When I speak of the administration of justice, I do not refer only to what goes on in the courts. The administration of justice is a spectrum that can begin when a police officer stops a car and asks to see the driver’s license or when the officer knocks at a door and asks to speak to an occupant. The far end of that spectrum is the confinement of a person found guilty—and until the sentence is fully served.

How successful have we been in meeting the mounting crime rate in this most affluent society on the globe? What have we done?

(1) We have increased police forces, local, state and national;

(2) we have added costly, sophisticated technology and equipment to the police arsenals; and

(3) we have enlarged prisons and built new prisons.

Have we reduced crime? No. In 1985, a Roper poll found that forty-two percent of Americans thought crime was the nation's top concern—up eight percent over the year before. And, of course, it might have been worse had we not launched these series of “wars on crime.” Look back over the past ten years. We have doubled the number of inmates in American prisons in just ten short years—from about 240,000 to approximately 500,000.

Virtually all prisons are overcrowded and one report is that nearly 40 states have had some form of judicial intervention because of overcrowding and other conditions found incompatible with statutory or constitutional standards. One warden said, “We are feeling the strain. . . . It's like putting four or five families in a single family house.”

Beginning with the tragic Attica riots fifteen years ago, when more than forty people were killed, there have been about 300 prison riots. All of them were bad in terms of human values and millions of dollars in property damage. In recent months we have read of riots in Oklahoma, West Virginia, and Iowa. What we do about these problems has a direct impact on human lives—in and outside prison walls—on each one of us.

As with physicians confronted with terrible diseases like cancer, we can speculate as to causes for this massive increase in crime and prison populations. We cannot be certain. But I will venture a diagnosis based on a lifetime in the law and nearly thirty years in the judiciary, with regular visits during all those years to prisons in the United States and around the world—including the Soviet Union and China.

I hardly need say I did not visit prisons because it was a pleasant experience, but to probe at the reasons why—in our affluent society—crime continues to increase, prisons become more and more overcrowded, riots increase and recidivism continues.

Occasionally in the past year or two, we have seen news stories of a five percent or six percent decrease in reported crime. If the figures were accurate—and in reality they are very difficult to secure and compile—could it be that since 1975, we have taken an additional quarter of a million offenders—many of them chronic offenders—off the streets and put them into prison? Does that mean we should lock them up and throw the keys away? No.

What are we doing about it? Is there some new thinking? Are we

really using our American ingenuity, that old “Yankee Spirit” to deal with the problem? I have already said we pay more attention and spend more time and more money in the process of determining guilt or innocence—and then reviewing the process—than any other society in the world.

A recent study showed that the cost of arresting, prosecuting, and trying a single, “typical” New York City robbery case ranged up to \$32,000. In one case, the defendants pleaded guilty and received a sentence of four to twelve years. And even that procedure cost about \$6,500. When the costly process or pre-trial hearings, trials, appeals, and post-conviction reviews is completed—often running three or four years and sometimes ten, twelve or thirteen years—what does our society do?

Sadly, once the expensive battle is over, we tend to “brush the problem under the rug,” and forget about it—at least until the next prison riot fills the evening T.V. screens and the front pages of the morning newspapers. When the news of the riot is stale, the problem goes “back under the rug” again.

Yes, we have done a little—but far from enough. A few states—and remember this is essentially a problem of the states where all but about seven percent of American prisoners are confined—have begun to turn the corner, but even that little progress is heartening. One is my native state, Minnesota, and another is your state of Florida. There are others, but today I will focus on these two.

Two of the most significant programs have come in recent years, not from penologists or behavioral experts alone, but from the imaginative, innovative chief executives of large business enterprises. One of them came from the head of a “Fortune 500” corporation located in Minnesota—William Norris of Control Data Corporation.

He tested and then trained 150 prisoners to assemble computers—in the prison. But in common with all private enterprises, the business of prison industries responds to the marketplace. Just this month imperative business conditions forced Control Data to suspend this splendid program. Despite this setback, that program is still one of the good “breakthroughs” in recent years and I am sure it will be reinstated in some form in the future.

Here in Florida we see another great step forward in the “Pride” program started in 1981—just five short years ago. By 1984, “Pride” had assumed control over all Florida’s prison industries, with over twenty-two types of industries employing more than 1,800 inmates in half of all the Florida institutions. We see that Florida is ahead of Minnesota in prison industries, as it is in citrus fruit!

Under the leadership of Jack Eckerd, "Pride"—or Prisoner Rehabilitation Industries and Diversified Enterprises—is a comprehensive program that duplicates as closely as possible private sector production and service operations. It combines education, training, jobs, and post-release job placement. This reduces idleness in prison, a prime cause of tension and violence. One inmate said, "The best way to serve your time is to stay busy." This is the kind of program that will give inmates the self-esteem and training so they will have a marketable skill to sell when they are released. Long ago some wise person said that "idleness is the Devil's handmaiden." Our prisons prove that!

I was delighted to learn that in 1986, "Pride" expects to generate more than \$40 million in sales and produce a profit of more than \$2 million. In 1985, it donated \$100,000 to the state victims' aid fund. Of its total inmate payroll of \$1.7 million, \$1 million goes to the state annually to reduce the cost to Florida's taxpayers.

"Pride" is a true success story, and it makes Florida a leader in the nation in the area of reshaping prison industries—converting them into factories with fences!

Will programs like those in Florida, Minnesota, and a few other states guarantee that inmates will all become good, law-abiding citizens? No, sadly not, but I put this question to you: once these prisoners have learned to rely on themselves, learned new skills that can be sold in the labor market, learned to respect themselves, will they return to crime? There are no guarantees. Freedom is a risky business and inevitably some offenders who can function in the tightly controlled environment of a prison will not be able to cope with freedom and the responsibilities outside. Some will repeat criminal conduct. But is it not probable that many will learn to cope with freedom, with responsibility, with the enlarged self-esteem that programs like "Pride" will give them?

There are some other bright spots on the melancholy horizon I have described. Yes, a few; in Kansas, in California, and one is beginning in Maryland. In Kansas, about 150 inmates are bussed to a sheet metal firm three miles from the prison; they have repaid the state nearly a quarter of a million dollars in room and board over the past four years.

The federal prison system continues to be a model. Federal Industries, Inc., conducts seventy-five manufacturing operations in forty-seven federal prisons employing 9,000, or about twenty-five percent of the federal inmates. With a line of 140 products, Federal

Industries had gross sales of \$210.8 million in 1984, with net earnings of \$18 million—\$18 million off the backs of the taxpayers.

Three years ago, a project I had long hoped for finally materialized in the form of a prison visit project of American leaders from business, government, and organized labor. Churchill once said, democracy is a terrible form of government, but all other forms are worse. In that same vein, I say there is no such thing as a “good prison” but some are worse. The better systems, especially in Northern Europe—Sweden and Denmark—have long recognized that enforced idleness is a devastating thing. All prisoners work; they get paid. They pay the prison some of their earnings to help defray the cost of their “keep.” Some is impounded until they are released; some is sent to dependents.

To keep one person in an American prison costs more than the total cost of one student in a graduate school in the most expensive American university. And I hardly need say that education and training in a university produces better citizens than our prisons. The harsh reality is that all too many inmates who leave our prisons are worse in terms of prospects for the future than when they went in. That, in part explains the high rate of recidivism. Twenty-five or thirty years ago even the most compassionate penologists began to doubt their own concepts of rehabilitation as they watched the rate of recidivism and prison population rise and rise.

The prison visit team included three legislative leaders: Senators Mark Hatfield and Karl Snow and Congressman Robert Kastenmeier; two business leaders: Frank Considine, President of National Can Corporation, and Steven Hill, Director, Education and Training of Weyerhaeuser Corporation; J. Albert Woll, General Counsel of the AFL-CIO; and Norman Carlson, Director of the Federal Bureau of Prisons. When we returned, after ten days, we planned a National Conference on Corrections. The George Washington University had been the nominal sponsor of the Scandinavian visit and in turn, the University and The Brookings Institute sponsored a National Conference on Corrections in June 1984 at The George Washington University. From that came two more developments: the University created the National Center for Innovations in Corrections—the first university I know of to establish such a center within the structure of a university. The Center has completed its first year of operation under Dr. Judith Schloegel, who has spent years in prison work.

The 1984 Corrections Conference then created a National Task Force on Prison Industries, chaired by Frank Considine, and includ-



ing other business leaders, labor leaders, and specialists in correctional work. This task force will make recommendations to develop and improve prison industries in America. The Center has developed twenty-one concepts for prison industry projects that would link private employers with prison systems. One of the promising programs will involve Maryland State Prison inmates in manufacturing prefabricated housing components. This project, like Florida's, was initiated by an innovative business leader, William Fitzgerald of Washington, D.C., a member of the National Task Force.

The long-term goal of the National Center is to raise the employment of prison inmates from the present figure of about ten percent to at least fifty percent. Given the magnitude of the problem, these are small beginnings, but somewhere in your college studies you must have heard of the wise man who, centuries ago, said to go to India from Europe: turn East and take one step. Perhaps—but I am certain—we have taken that one step. At least we have turned.

After more than twenty-five years of observation of prisons in the United States, in Europe, in the Soviet Union, and in China, I think I see a small light down the dark tunnel. That light has been fueled by what has happened in Florida, Minnesota, and other states and by The George Washington University's great step forward.

We must stop relying on prison warehouses and create factories with fences around them, where there is some chance, however small, that the human beings we confine can break out of the "life sentences" of functional illiteracy, learn their way out with some marketable skills, secure some added basic education and begin to build that self-esteem without which we would all be lost. Learning achievement, not just good behavior, should be a large factor for reduction of sentences.

If we had begun twenty-five, thirty-five years ago to develop the kinds of correctional programs that are appropriate for an enlightened and civilized society, the word "recidivist" might not have quite as much currency as it does today.

What are the options to deal with criminals? What are the steps? One is to "lock them up and throw the keys away;" another is a policy of massive police protection that rises to the proportions of martial law; or the third is a policy of intelligent concern that enlists the best American brains, innovativeness, and drive in support of a program to make our prisons "factories with fences."

That incorrigible liberal, my late distinguished colleague William O. Douglas, once wrote in a Supreme Court opinion:

“We are a religious people whose institutions presuppose a Supreme Being.”

(*Zorach v. Clauson*, 343 U.S. 306, 313 (1952).)

One of the teachings of that Supreme Being is that in every human being, there is somewhere, however deeply buried or hidden, a spark of basic goodness.

Even if harsh experience and hard observation make us doubt that, our own safety and future demand that we proceed on that assumption and try to find that spark. That is more than compassion; it is realism and common sense.