Prisoners' Rights ERUPTION

The American people are (obviously) not seriously concerned about the ever-mounting crime rate. Incredible as this statement may seem, it is indisputable truth; the bulk of the proof is present within the walls of any "correctional" institution, almost without exception, where homicide, maiming, homosexual assault, drug abuse, and sadistic acts are a way of life. Our prisons are a breeding place for crime and schools for criminals to the extent that almost one half of prisoners are serving their second or third terms.[1] If a convict emerges a reformed man it is never because of his experience, but in spite of it. These statements are broad, but deliberate and not irresponsible. Penologists, correctional officers and judges will readily accede to them.

Of the approximately 460 federal and state long term institutions for sentenced offenders, twenty-five are over one hundred years old and sixty-one opened prior to 1900. Over seventy-six percent of all misdemeanants and sixty-seven percent of all felons on probation are assigned to a probation officer with a case load of one hundred or more. Less than four percent of probation officers in the nation carry caseloads of forty or less.[2]

If one is a normal individual he is appalled by all this and asks himself how society allowed this to happen. No one can satisfactorily answer that question but perhaps some contributing factors can be found. Society has always been eager to insure that the means are available to apprehend the offender and to take him out of the community, affording him all that is required for due process of law. But during past election campaigns I cannot recall any "law and order candidate" being concerned about what happened to an offender after sentencing. When a politician running for the legislature recommends prison reform, he is talking dollars of no small quantity which will have to be taken from other "more worthwhile" budget items. In the past this platform was not a winner. Thus one might say that the average citizen is content that prisons exist which punish by confinement and at the same time protect the public from the criminal, a least for the duration of his sentence. Even one hundred-year-old buildings can do this, and this reasoning is at least partly responsible for our current dilemma. Furthermore it is obvious from the record that most state legislatures have not found corrections to be important enough to warrant the budgeting of funds at the risk of undercutting some more popular or politically expedient program. The federal legislative record is little better; however, in 1971 Senator Birch Bayh took the initiative by introducing the Omnibus Correctional Reform Act, which would establish a twenty-year program to phase out large rural prisons by transition to smaller community-based facilities.[3]

More shocking than this legislative inaction is the fact that it was over one hundred years ago that the first prison reform movement was undertaken. In 1870 in Cincinnati a Prison Reform Conference was convened. At that time it was recognized, among other things, that no purpose was served by pure confinement. Yet today our prisons have not caught up to the recommendations of that conference.[4] In most instances our correctional institutions are little different in terms of goals and programs from the first prison for the punishment of criminals begun in 1681 by the Quakers, who disliked corporal punishment and decided that a workhouse would be more beneficial to both the convict and the community.[5]

APATHY OF THE PEOPLE—ACTIVISM BY THE COURTS

Thus in the face of the apathy of both the legislatures and the citizenry, the aggrieved prisoner turned to the courts. Historically, prior to the past decade, little if any relief was gained by this method.

There were numerous reasons which a court might select to justify its decision not to hear a prisoner suit: (1) lack of expertise in the handling of penological problems,[6] (2) the possibility that judicial review would interfere with institutional discipline and hinder officials in the performance of their duties,[7] (3) if in a federal court, the use of the abstention doctrine in deference to the principles of federalism, and, most significantly, (4) while the courts had recognized that prisoners had constitutional rights within certain limitations, these rights remained undefined, difficult to invoke, and therefore nearly meaningless.[8] This reluctance of the courts to review cases of prisoner mistreatment has been referred to as the "hands-off doctrine,"[9] and was finally rejected by the Supreme Court in 1964.[10]

Since that landmark suit eight years ago the courts have made decision after decision, enhancing the rights of the prisoner with each one. In recent years we have seen marked advancement in the areas of racial discrimination,[11] religion,[12] and access to the courts,[13] and major inroads have been made into the unregulated and arbitrary authority of prison personnel.[14]

But let us not be too easily satisfied with this wave of humanitarianism. While expansion of prisoners' rights will serve to mitigate the deterioration of the spirit which results from prison existence and may be a significant step toward striking a balance between

and Prison Reform— of a NEW ERA

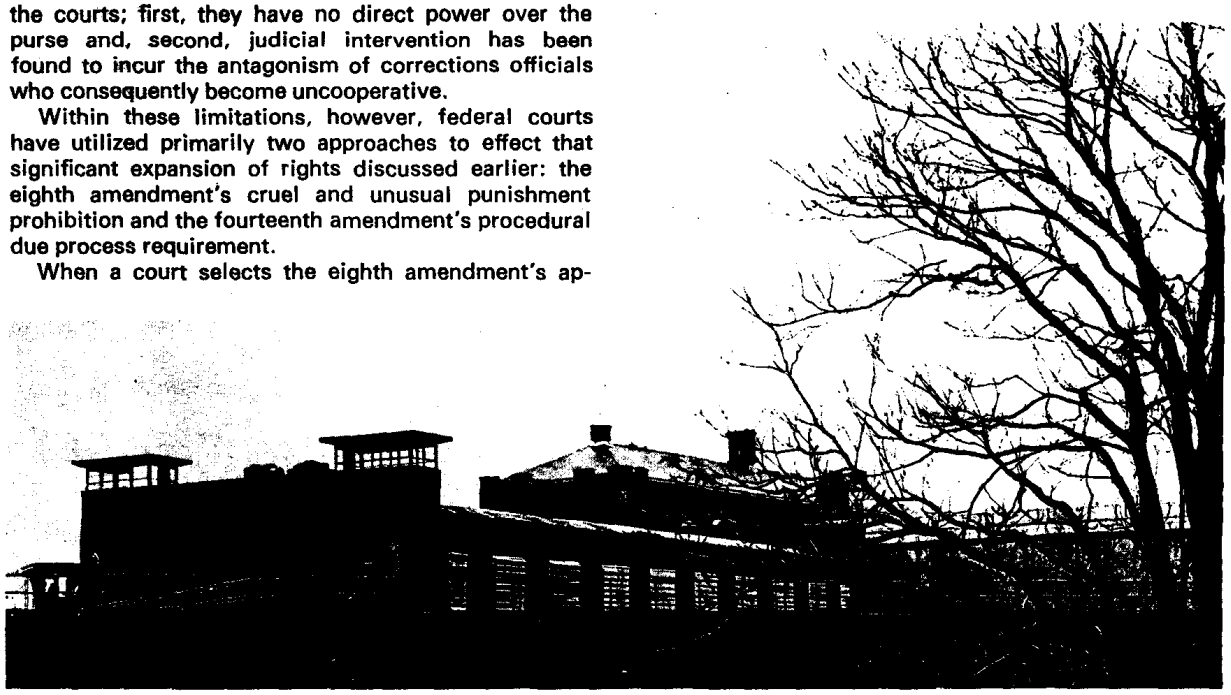
—Mike Inman

the correctional value of punishment and the dignity of the individual prisoner, it cannot affirmatively help rehabilitation or ease the problems of administration. The courts are judicially and statutorily limited in their role as reformers. The federal statute which has been the vehicle for the majority of prisoner suits is 42 U.S.C. §1983 (1970), under which, to maintain an action, the plaintiff must prove deprivation of a right, privilege or immunity secured by the Constitution or laws of the United States, and that such deprivation resulted from action under the color of state law. In essence this means that courts cannot prohibit a given condition or type of treatment unless it reaches a level of constitutional abuse. Furthermore, 18 U.S.C. §4001 (1970) makes it clear that prison administration is not meant to be a duty of the courts, but that such duties are assigned to the Attorney General.

Additionally there are more practical limitations on the courts; first, they have no direct power over the purse and, second, judicial intervention has been found to incur the antagonism of corrections officials who consequently become uncooperative.

Within these limitations, however, federal courts have utilized primarily two approaches to effect that significant expansion of rights discussed earlier: the eighth amendment's cruel and unusual punishment prohibition and the fourteenth amendment's procedural due process requirement.

When a court selects the eighth amendment's approach it asks the question: is the punishment given, because of its excessive length or severity, greatly disproportionate to the offense charged? [15] This cruel and unusual punishment protection extends to a panoply of deprivations: corporal punishment, punitive segregation (e.g. solitary confinement), living conditions, personal security, medical care, and finally, in aggravated cases, mail censorship and loss of "good time."



Where the claim presented involves arbitrary exercises of power by lower echelon officials, inmates are best protected under the fourteenth amendment's due process requirement. Generally courts attach a presumption of validity to administrators' actions, merely asking whether or not there was a rational basis for the act. The better approach, however, is to allow the prisoner to overcome the presumption of validity by showing a prima facie case of arbitrary treatment, thereby shifting the burden to the official to prove the reasonableness of his action.[16] The better prisons (primarily federal) have written procedural requirements which are an affirmative advantage—not only for prisoners, but also for administrators who have records to rely upon in punishing, thereby gaining the respect of inmates.

As is evidenced in the footnotes, the Fourth Circuit has been more active than most in effecting basic rights for prisoners. But no decision to date has had the express scope of relief found in Federal District Judge Robert R. Merhige's five-month-old decision in *Landman* v. *Royster.*[17] Not only was the decision unique in terms of scope, but the court heard the testimony of eighteen prisoners among whom the following deprivations of rights were found: imposition of twenty to forty days of solitary confinement for such "misbehavior" as writing a letter to a local newspaper, "writ-writing" for fellow inmates, advising other inmates of their rights, informing others of a court decision about prisoners' rights or attempting to contact an attorney; bread and water diets; loss of all accumulated "good time" for reading aloud a letter from a senator (the effect of which was to extend the sentence over a year); handcuffing and chaining to cell bars without release for elimination of waste because of screams for medical attention; keeping men nude in a bare meditation cell for seventeen days for refusal to surrender a food tray; confinement of four to seven men in a one man cell in "solitary"; corporal punishment by means of nightsticks.[18] This list is far from exhaustive.

While a "discipline committee" seems to have existed for some time, only certain types of offenses or administrative actions were entitled to, or received, review. When hearings were conducted no written charges were served, the charging guard did not testify, there was no confrontation, no factfindings were made and no appeal allowed—all of which are required by *Landman.*

Most stunning of the facts in this case is that until October 1, 1970, the Virginia Penal System had no substantive written regulations on inmate discipline procedures. The procedures employed were those passed down and invented as the need arose. Even the new written rules were vague and left much to the discretion of higher echelon administrators.

Judge Merhige employed both the eighth amendment and the procedural due process approach. He held that corporal punishment, bread and water diets, chaining to cells, crowding of cells, use of tear gas, enforced nudity, and inhibition of access to the courts and counsel, constituted cruel and unusual punishments, and that failure to provide hearings, with all the attending due process rights, for in-prison violations for which punishment was given or "good time" taken, violated the fourteenth amendment. The Virginia corrections administrators were enjoined from employing the offensive practices and were ordered to file, within fifteen days, a list of rules and regulations concerning standards of behavior expected of inmates.

In so ordering, Merhige added weight to a minority method of giving relief in prisoner suits. This method consists of the court coming forth with a plan aimed at all aspects of prison life. Although the order is directed at specific constitutional violations, it, in effect, forces corrections officials to deal with a broader scope of improvement.[19] The majority of recent decisions has been typlified by a plan, directed at a specific abuse, which has had wide implications, usually involving due process, racial discrimination or freedom of religion.[20]

Landman v. *Royster* also illustrates a federal judge's utilization of one of three devices used to effect the desired relief. The first device, used in *Landman*, consists of requiring prison administrators to come forth with a plan to correct constitutional violations, with the court laying down certain guidelines that must be

met in order to receive the court's approval.[21] Another device for relief relies upon the American Corrections Association's *Manual of Correctional Standards* for giving guidelines which will meet with the approval of penologists.[22] A more unique device, which can be extremely time-consuming, is arbitration between the litigants with the court serving as arbiter.[23]

Thus the courts, having rejected the traditional "hands-off doctrine," are responding to the pleas for reformation; they are taking judicial notice of the inadequate conditions in many contemporary prisons; they recognize the limitations and inadequacies of other judicial remedies available to prisoners.[24]

—Chief Justice Warren E. Burger and Virginia's Andrew Miller

WHAT LIES AHEAD?

In December of 1971 the first National Conference on Corrections was held in Williamsburg, convening four hundred of our nation's leading penologists, corrections administrators, and concerned legislators and lawyers with the goal of making recommendations to the Justice Department for establishing penal reform programs. The distinguished speakers, one after another, echoed what has been said for a century—our prisons systems are unquestionable failures; they are not achieving their supposedly constructive goals. In his keynote address, Attorney General John N. Mitchell noted that most states do not have *correctional* programs, only ten to twenty per cent of all prison systems' budgets is spent on programs of corrections, and only twenty per cent of institutional personnel are assigned correctional duties. In addition, Mr. Mitchell announced plans for a National Corrections Academy, more federal aid for correctional systems, a national clearing house for criminal justice architecture and education, and a goal of one-third minority employment in prisons.[25]

> *"...Reform and revolt have moved in the same harness. ...reform...tends to lay bare the inner contradictions of the system."*

A multitude of much-needed reformatory measures was proposed and discussed at the conference and the concepts presented below are those which appear to have earned the endorsement of the majority of the participants.

It was the opinion of Norval Morris, the Director of the Center for Studies in Criminal Justice at the University of Chicago, that society must reject the futility and inhumanity of the mega-prisons which characterize most state systems. This idea was ratified by other correctional experts who pointed out the need for small correctional units, "communities" of two hundred offenders with a ratio of staff to inmates that would permit rapport and trust to grow, so that rehabilitation could be more of a reality. When Chief Justice Warren E. Burger addressed the conference he noted that many problems flow from the oversized institutions which are poorly located so as to be inaccessible to families, and too far away from facilities for work release programs.

But the Chief Justice's primary area of concern was that contemporary prisons are not providing a balanced educational-recreational program for men who have mental and physical energy to burn up. He bemoaned the fact that he had, in visiting prisons, "seen the terrible effects of the boredom and frustration of empty hours and a pointless existence." He asserted that if society decides to place a man in confinement, it takes on an obligation to try to change the person. In view of the astounding percentage of inmates who cannot read or write and the even larger percentage who have no marketable skill, the Chief Justice urged the development of "sentencing techniques to impose a sentence so that an inmate can literally learn his way out of prison as we now try to let him earn his way out with 'good behavior.'"[26]

Perhaps the boldest and most utopian reformatory measure urged is the community treatment center-work release idea, and it has many vocal advocates. Logically since nineteen out of twenty men who enter prison return to society, correctional efforts should

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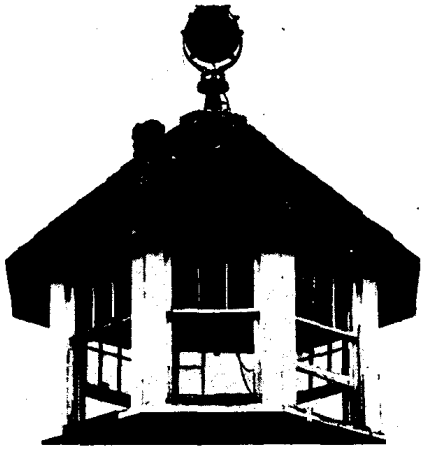
REFORM *(from page 13)*

and must emphasize the process of reintegration into the community as the best way of protecting it. Furthermore, it is fiscally advantageous to place corrections within the community because its resources can be more efficiently utilized in the rehabilitative effort. This method also avoids the isolating effect of institutionalization, and permits the building of sound social ties between the offender, his family and the community.



The community treatment center, popularly referred to as a "halfway house," is not a new idea, but experiments have been sporadic and without much interchange of ideas. The result has been failure for varied reasons. But now, under the leadership of the U.S. Bureau of Prisons, a coordinated effort is being made to insure the success of these endeavors by setting out guidelines for planning and operating such centers. In one publication on the subject, the Bureau points out that "[g]eneral public acceptance and some degree of public sharing in deciding [principles, policies and procedures] is the first vital step,"[27] and advocates establishment of citizen advisory committees. In general the largest group for such treatment is the low-risk, young, male offender who will only be debilitated by confinement in a large institution, yet is not judged prepared for parole or probation. Individuals are often sent to federal centers, by the courts, for observation and study prior to sentencing; also parolees and probationers in need of a stabilizing experience are assigned without full violation proceedings.[28]

The primary community resource which is made available by such centers is employment, allowing an offender to maintain some semblance of normalcy in his life and also enabling him to pay for his room and board. These work-release programs depend, of course, on employment opportunities being made available by local businessmen willing to hire a convict. The cooperation problems are obvious.

Employment is not the only instance of public resistance. Halfway houses are typically established in residential areas, whether in refurbished houses or new structures, and the record shows that people have a strong aversion to having a commune of convicts for neighbors. Perhaps when and if more funds become available for this type of program more "inoffensive" locations can be selected.

Another very new and recently implemented correctional technique is pretrial intervention or deferred prosecution. This method involves low-risk, first, and in some cases second, offenders in crimes not involving violence. They are interviewed with the purpose of selecting those who, in the opinion of the administrators, can be better reintegrated without conventional punishment. The offender appears before a judge for his review to determine if a pretrial probation program is the best solution. If so, indictment is postponed for six months to two years while the offender undergoes the therapy program.[29] Such programs are being successfully operated in Philadelphia and Baltimore (and perhaps more cities). An interesting feature of the Baltimore program is that it is administered by ex-convicts.

I have been speaking of new methods and techniques, but equally important is the improvement of correctional personnel. This is a formidable task involving consideration of three areas of great scope—recruitment, training, and career planning. The prison guard of today is not a popular individual from any viewpoint—the inmate resents him (often justifiably), higher echelon administrators use him, and society shuns him. Worse yet, inmate resentment often takes the form of outright killing, which, of course, causes a morale problem among guards.[30]

It only makes sense that if we're going to fight the recurrence of crime we should recruit qualified people and properly train them for the job. A prison employee, from top administrator to lowest guard, should be selected particularly for his temperament and attitudes, among other qualifications, and then specially trained for his particular role in rehabilitation. In response to this need we have the Attorney General's proposal to establish a National Correctional Academy to educate personnel for every level of the correctional effort. A significant increase in the ratio of trained staff to inmates could be a determinant in the decrease in the crime rate.

In order to successfully recruit qualified employees, corrections must be given a career structure similar to other occupations with opportunity for advancement and a comparable pay scale.

Perhaps the proposal which we can implement most quickly is the improvement of classification procedures. Recognizing that the mega-prison will be with us for many years to come and further recognizing that the high price we pay for inadequate classification procedures is, in the words of Chief Justice Burger, "a mingling of youthful offenders and first offenders with recidivists, incorrigibles, drug addicts and others who are seriously mentally disturbed,"[31] a priority should be given to a systematized separation of prisoners dependent upon such factors as "prison experience," psychological characteristics, intelligence and educational background when possible.

CONCLUSION

It should now be apparent that philosophically we have progressed a great distance from that seventeenth century Quaker workhouse, but practically we have been at a virtual standstill.

Many people are critical and hesitant about any attempts at reform—they point to the recent revolts at Attica and San Quentin, both modern facilities, as examples of the result of expansion of prisoners' rights. However, a valid retort to such pessimism was voiced by Norval Morris when, addressing the Corrections Conference, he admitted no surprise "that reform and revolt have moved in the same harness. As one begins the difficult task of reform, one tends to lay bare the inner contradictions of the system."[32]

I submit that prison revolts are merely an inevitable outer manifestation of the suppressed and latent maladies which afflict our correctional systems. These eruptions only make the need for remedies more clearly urgent. When we consider the failure of our systems and the tragic consequences, it is obvious that we must be bold with our reforms. When we consider that two-thirds of offenders are on probation or parole it is obvious that communities must play a more active role in rehabilitation.

I must agree with those writers and judges who assert that the people, our legislatures, and county governments, rather than the courts, are the optimum media for reform.[33] There is no question that sufficient funding is fundamental to any meaningful efforts, and the people—through the legislatures—control the purse. If a reform effort is to be sustained it must come from the people, not from an order by a judicial body, for it is the community which has the resources for the "new penology." Furthermore, by means of grants from the federally-funded Law Enforcement Assistance Administration, states and municipalities can receive more aid for corrections this year and hereafter than has ever been available.[31]

We know, therefore, what must be done, and the resources exist with which to begin; all that remains is for us to take action. Let us be militant moderates, proceeding with determination, content with modest victories; but let us not fail to make the steady progress necessary to attain those victories. ■

FOOTNOTES

1. Memorandum from President Richard M. Nixon to Attorney General John N. Mitchell, November 13, 1969.
2. *Marshaling Citizen Power for Corrections*, published by The Chamber of Commerce of the United States, 1972. Virginia escaped from being part of these statistics by 4 years—the A cellblock building at the Spring Street Penitentiary was occupied in 1904.
3. 117 CONG. REC. 180 (daily ed. November 22, 1971).
4. Spaeth, *The Courts' Responsibility for Prison Reform*, 16 Vill.L.Rev. 1031,1039.
5. *Id.* at 1038.
6. McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964).
7. Note, *Prisoners' Rights Under 1983*, 57 Geo.L.J. 1270, 1274. As to the third point *see* Sostre v. McGinnis, 334 F.2d 906 (2nd Cir.) *cert. denied* 379 U.S. 892 (1964).
8. Spaeth, *supra* note 4, at 1033-37. *See also* Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) *cert. denied* 325 U.S. 887 (1945).
9. Note, *Decency & Fairness: An Emerging Judicial Role in Prison Reform*, 57 Va.L.Rev. 841 (1971). *See also* Note, *Judicial Intervention in Prison Administration*, 9 Wm.& Mary L. Rev. 178 (1967); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L.J. 506 (1963).
10. Cooper v. Pate, 378 U.S. 546 (1964) *per curiam, rev'g* 324 F.2d 165 (7th Cir., 1963).
11. Lee v. Washington, 390 U.S. 333 (1968) *per curiam;* Rivers v. Royster, 360 F.2d 592 (4th Cir. 1966).
12. Cooper v. Pate, 378 U.S. 546 (1964) *per curiam;* Pierce v. LaVallee, 293 F.2d 233 (2nd Cir. 1961).
13. Johnson v. Avery, 393 U.S. 483 (1969); Edwards v. Duncan 355 F.2d 993 (4th Cir. 1966).
14. Howard v. Smyth, 365 F.2d 428 (4th Cir.), *cert. denied* 385 U.S. 988 (1966); Landman v. Royster, Civil No. 170-69-R (E.D. Va. filed Oct. 31, 1971); Holt v. Sarver, 309 F.Supp. 362 (E.D. Ark. 1970).
15. Note, *supra* note 9, 57 Va.L.Rev. 848-49.
16. Howard V. Smyth, 365 F.2d 428 (4th Cir. 1966). *See* note, *supra* note 9, 57 Va.L.Rev. at 867.
17. Civil No. 170-69-R (E.D. Va. filed Oct. 31, 1971).
18. *Id.*
19. Holt v. Sarver, 300 F.Supp. 825 (E,D. Ark. 1969), where the entire Arkansas prison system was held unconstitutional as cruel and unusual punishment.
20. Lee v. Washington, 390 U.S. 333 (1968), *aff'g* 263 F. Supp. 327 (M.D.Ala. 1966), where complete desegregation of Alabama prison system was ordered and in putting the order into effect numerous consequential reforms resulted. *See* Note, *supra* note 9, 57 Va.L.Rev. at 879-80.
21. Holt v. Sarver, 309 F.Supp. 362, 383-85 (E.D. Ark. 1970); Prewitt v. Arizona, 315 F.Supp. 793, 794 (D. Ariz.). This approach allows prison officials and corrections experts to rewrite the rules themselves with only guidelines being imposed by courts.
22. Jordan v. Fitzharris, 257 F.Supp. 674, 684 (N.D. Cal 1966), *aff'd per curiam* 390 U.S. 333 (1968).
23. Morris v. Travisono, 310 F.Supp. 857 (D. R.I. 1970), where prisoners challenged the classification and disciplinary procedures used throughout the R.I. penal system. *See* Note, *supra* note 9, 57 Va.L.Rev. at 882.
24. Tort, habeus corpus, and others.
25. The Daily Press (Newport News, Va.), December 7, 1971 at 3, *col.* .
26. Spoken in an address to the National Conference on Corrections on December 7, 1971.
27. U.S. Bureau of Prisons, *The Residential Center: Corrections in the Community* (1971), at 1.
28. *Id.* at 3
29. James D. Crawford, *Prisoners' Rights—A Prosecutor's View*, 16 Vill.L.Rev. 1055, 1061 (1971).
30. Remarks of Raymond K. Procunier, Director, California Department of Corrections, at the National Conference on Corrections, December 6, 1971.
31. *Id.* note 26.
32. Remarks of Norval Morris, Director, Center for Studies in Criminal Justice, University of Chicago, to National Conference on Corrections, December 6, 1971.
33. Chief Justice Warren E. Burger, addressing the National Conference on Corrections, December 7, 1971; James D. Crawford, *supra* note 29, at 1066-67. There are some commentators who feel that the courts have a heavy burden in reform beyond declaring relief in constitutional rights violations cases. They consider the courts responsible for administration of prisons, parole and probation with a right to demand adequate funds. *See*, Spaeth, supra note 4, at 1041-43.
34. The LEAA was created in 1968 and its powers enhanced by the Omnibus Crime Control Act of 1970. States may submit requests for "action funds", technical assistance or educational aids. In a press conference at the National Conference on Corrections on December 6, 1971, Richard W. Velde, Associate Administrator of the LEAA, stated that $225 million had been set aside for corrections oriented grants to states and localities for this fiscal year.