Imprisonment under the Illinois Unified Code of Corrections: Due Process, Flexibility, and Some Future Doubts

Patrick D. McAnany
IMPRISONMENT UNDER THE ILLINOIS UNIFIED CODE OF CORRECTIONS: DUE PROCESS, FLEXIBILITY, AND SOME FUTURE DOUBTS

PATRICK D. McANANY*

WHEN THE GENERAL Assembly passed the Unified Code of Corrections into law in its 1972 legislative session, it provided the State of Illinois with the first comprehensive overhaul of its post-adjudicative processes in history. Prior to this, Illinois had had many piecemeal changes, some quite extensive, in matters relating to sentencing and incarceration, but none had attempted to approach these matters as a whole and view them in a systematic manner. Indeed, even at this point in our jurisprudential development as a nation, there has been little systematic study of these areas. Building on what had been done elsewhere and what Illinois experience had been at home, the Code forges a new and more complete rationale for the processes of our sanctioning system.

If there were few guidelines for the general post-adjudicatory system, there were even fewer for the vexed area of imprisonment and its consequences. Since incarceration has become the norm for sanctioning

* A.B. 1951 Rockhurst; M.A. 1958 St. Louis; LL.B. 1960 Harvard; Associate Professor of Criminal Justice, University of Illinois Chicago Circle. Prof. McAnany served as Project Director and Reporter for the Unified Code of Corrections.

1. Pub. Act 77-2097, Approved July 26, 1972. The Code, as passed, contained two major sections: Chapter III, dealing with the Department of Corrections and Chapter V dealing with sentencing. Chapter VI, dealing with the organization of probation services, was deleted from the Code prior to passage. Changes in the Juvenile Court Act which were introduced together with the Code deal with dispositional matters. See Pub. Act 77-2096, Approved July 26, 1972. Treatment of juveniles committed to the Juvenile Division of the Department of Corrections is dealt with in Chapter III of the Code.

2. The most comprehensive approach to date has been made in the American Law Institute's Model Penal Code (P.O.D. 1962) which included in its structure all the basic areas which the Illinois Unified Code of Corrections, Ill. Rev. Stat. ch. 38, §§ 1001-1008 (1971) (hereinafter referred to as IUCC), dealt with. Clearly, however, the substantial effort of the Institute was devoted to areas of substantive criminal law rather than corrections. Other partial efforts are contained in the American Bar Association's Project on Minimum Standards for Criminal Justice and the various model acts produced by the National Council on Crime and Delinquency, e.g., Model Sentencing Act (1963), California's Committee on Penal Reform has recently produced a comprehensive criminal code proposal.

criminal offenses in the United States, its treatment in any code of corrections is central. The problems with its use, however, raise most serious questions of freedom, discretion and due process. This article will attempt to draw together and comment on those sections of the Code dealing with the issue of imprisonment and its consequences for those on whom it is imposed.

I. Discretion and Due Process: Conflict In A Correctional System

Chapter Three of the Unified Code of Corrections is devoted to the Department of Corrections and its task of "care, custody, treatment and rehabilitation," of committed persons. It is based upon scattered sections and chapters of former Illinois law and attempts to create a consolidated and unified approach to what had been legislation by accretion. Its purpose is to spell out an administrative structure for the execution of the sanction of imprisonment. Imprisonment in Illinois, as elsewhere, has left the administrator more or less free to exercise his discretion over the inmate. Thus the committed person lives by rules that are created, enforced, and changed entirely by administrators. This situation in a closed institution of hostile and sometime violent persons can generate rules and decisions of the most arbitrary and abrupt kinds. On the other hand, the need for flexibility by administrators is obvious where so little hard data exists. What is needed, and what the Code attempts to provide, is a set of objective control factors that will protect inmates from the personal arbitrariness of individual administrators and from the general degrading conditions that have nothing to do with the

5. Imprisonment indicates incarceration in the Department of Corrections, usually reserved for felony convictions only, and not incarceration in county or other local penal institutions. See IUCC § 1005-8-6. The term also excludes those sections of the Code dealing with the confinement of adjudicated juveniles committed to the Juvenile Division of the Department. See IUCC §§ 1003-9 to 1003-10.
6. Chapter Three is devoted to the Department of Corrections and the Parole and Pardon Board. It contains fifteen articles detailing the structures, powers, administration, facilities, and programs of these two agencies.
7. IUCC § 1003-2-2(a).
8. Juveniles are excluded from the discussions. See supra n.5.
9. See IUCC (West Pub. Co., 1972). Citations to these statutes are contained in the commentary following each section of the Code.
orderly operation of a secured institution. At the same time, the Code does not propose such a strict set of guidelines as to eliminate creative programing and reasonable responses to requirements of order and discipline by administrators.

A. Five General Control Principles

The Code introduces five general principles which are applicable to the imprisonment process and which tend to limit the range of discretion administrators can exercise over committed persons. The primary control factor imposed by the Code is on the initial use of imprisonment at all. Since the possibilities remain strong, under any system, that imprisonment will result in many arbitrary denials of freedom without compensating gains in achieving rational penal goals, the Code creates certain presumptions against the use of imprisonment. While it cannot be said that the Code makes incarceration the last sanction an alternative, it remains clear that it gives preference to probation and conditional release where these alternatives are available. For one thing, it requires the sentencing judge to consider a pre-sentence report in all felony convictions prior to imposition of sentence. For another, it places conditions on the imposition of a sentence of imprisonment which requires the judge to determine from the nature and circumstances of the offense, and the condition of the offender, that imprisonment is called for. Finally, prior to any use of the extended term of imprisonment, the court must have the defendant thoroughly examined by a diagnostic clinic and base any

12. Probation is disallowed for murder, rape, armed robbery, and certain drug offenses. IUCC § 1005-5-3(d)(1).

13. "A defendant shall not be sentenced before a written presentence report of investigation is presented to and considered by the court where the defendant is convicted of a felony." IUCC § 1005-3-1.

14. "The court shall impose a sentence of imprisonment upon an offender if, having regard to the nature and circumstances of the offense, and to the history, character and condition of the offender, the court is of the opinion that:

(1) his imprisonment is necessary for the protection of the public; or
(2) the offense is in need of correctional treatment that can most effectively be provided by a sentence to imprisonment; or
(3) probation on conditional discharge would deprecate the seriousness of the offender's conduct and would be inconsistent with the ends of justice."
IUCC § 1005-6-1(a).

15. IUCC § 1005-8-2 provides for a term of imprisonment up to twice the maximum for a felony where the defendant inflicted or attempted to inflict serious bodily harm or used a firearm in the commission of a felony, and presents a "continuing risk of physical harm" to the public, and where the court finds that is necessary for the protection of the public.

16. IUCC § 100-5-3-3 provides for a period of commitment for examination up to
sentence choice on such report.\textsuperscript{17} While these guidelines would not eliminate the use of imprisonment altogether in most felony convictions, their presence in the Code, together with the provisions for a pre-sentence hearing at which these matters are open to challenge,\textsuperscript{18} should assure defendants of improved protection from arbitrary and automatic imposition of imprisonment.\textsuperscript{19}

A second control factor involves the Code's specification of goals for corrections. While the Code does not attempt to deal in an extensive way with the very difficult problem of goals,\textsuperscript{20} it does set out some general norms which should govern the use of imprisonment: a) protection of the public;\textsuperscript{21} b) restoration of offenders to useful citizenship;\textsuperscript{22} and c) avoidance of arbitrary and oppressive treatment of imprisoned persons.\textsuperscript{23} Punishment as a goal of imprisonment is not mentioned, though the clear implication of language in the Code indicates that the punitive goal is present.\textsuperscript{24} Rehabilitation is mentioned as a goal of corrections,\textsuperscript{25} as is treatment,\textsuperscript{26} but these terms would have to be read within the larger goal of restoration to useful citizenship. Clearly, the Code does not propose a "medical model" for correctional treatment,\textsuperscript{27} though it does recognize the need for medical and mental health services

\textsuperscript{60} days in a diagnostic clinic, either in the Department of Corrections or in a court provided clinic.
17. IUCC § 1005-8-2(b).
18. IUCC § 1005-4-1.
19. Appellate review of sentences is a matter not dealt with by the Code, but it seems obvious that the provisions set out in the foregoing paragraphs will provide the appellate courts even broader scope for their present jurisdiction; cf. A.B.A., Minimum Standards Relating to Appellate Review of Sentences (1968).
21. IUCC § 1001-1-2(b).
23. IUCC § 1001-1-2(c).
24. For instance, the requirement that sanctions be proportionate to the seriousness of the offense, IUCC § 1001-1-2(a), and that sentences reflect the seriousness of the offense, IUCC §§ 1005-6-1(a)(3) and 1005-35(c)(2), indicates punitive purposes. Besides, any fair reading of Chapter V on sentencing forces one to conclude that rehabilitation and social defense do not account for the imposition of sanctions. Whether retribution is a legitimate punitive goal, or only a deterrent, is not resolved. For a general discussion of such issues, see Gerber and McAnany, Contemporary Punishment (1972).
25. E.g., IUCC § 1003-2-2(a), (b), and (d). The term "rehabilitation" is not defined in the Code.
26. E.g., IUCC § 1003-2-2(a), 1003-6-1(b). The term "treatment" is not defined in the Code.
27. The "medical model" approach to corrections has been thoroughly discussed in Kitttrie, The Right to be Different (1971). For a review of recent litigation challenging the medical approach, see Prettyman, The Indeterminate Sentence and the Right to Treatment, 11 Amer. Crim. L. Rev. 7 (1972).
for those who require them. In reading all of this language together, the correctional administrator is given guidance in implementing programs and the inmate is protected from arbitrary overreach into areas of privacy lying outside these stated goals. Any action taken by the Department of Corrections in dealing with committed persons must be able to answer the question of "Why?" in terms of the Code language.

A third control factor is the establishment of certain minimum standards for the physical and social treatment of committed persons. These standards set out requirements for sanitation and safety, and food, clothing, recreation, mail, visits, religious ministrations, and protection of persons and property. While these standards are necessarily general in tone, there are certain specifications detailed in the Code, and there is a general mandate to the Department to provide rules and regulations for the implementation of these standards. These minimum standards by their wording impose a duty on the Department to provide resources to meet them. They provide a readily identifiable norm for determining whether or not the Department is meeting its obligations.

28. The Code provides for certain medical care, see IUCC § 1003-6-2(e) and 1003-8-2(a), as well as mental health treatment, see IUCC § 1003-82(a), 1003-84(b) and 1003-8-5 to 8-6. The Code does not preserve a statutory provision for a separate psychiatric division within the Illinois Penitentiary System. See, Ill. Rev. Stat. ch. 108, § 106 (1971). The Code allows the Department to create and designate institutions and programs according to needs of the population. See, IUCC § 1003-6-1, which would include medical care centers. See also, Zalman, Prisoners' Rights to Medical Care, 63 J. Crim. L. 185 (1972).


30. IUCC § 1003-7-3.
31. IUCC § 1003-7-2(c).
32. Id.
33. IUCC § 1003-7-2(a), (b).
34. IUCC § 1003-2(d). Whether the type of censorship allowed under this section conforms to constitutional standards being forged by the courts remains to be seen. See, e.g., Meola v. Fitzpatrick, 322 F. Supp. 878 (D. Mass. 1971).
35. IUCC § 1003-7-2(e).
36. IUCC § 1003-7-2(f).
37. IUCC § 1003-7-4. For a recent and strong statement of the obligation to protect inmates from guards and other inmates, see Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969), aff'd, 442 F.2d 304 (8th Cir. 1971).

38. For example, the Department must provide postage for at least three first class letters each week, IUCC § 1003-7-2(a); allow individuals to leave their cells for at least one hour each day, IUCC § 1003-7-2(b); take a bath at least once a week, and have access to TV and radio, IUCC § 10037-2(a); and provide at least 50 square feet of floor space for each person in any newly created or remodeled cell, IUCC § 1003-7-4. The words "at least" indicate the minimal nature of these standards.

39. IUCC § 10037-1.
A fourth control factor is the requirement of the Department to produce rules and regulations for the administration of its programs. The Code, like other legislation dealing with governmental agencies, allows the Department to create rules and regulations for the purpose of carrying out its legislative mission. But it goes on to require the Department to promulgate rules intended to specify general legislative norms. This requirement had its first public expression with the publication of a set of administrative regulations for the Adult Division, in February and December 1972, based on the proposed Code of Corrections. These regulations serve as a secondary basis for limiting discretion exercised by Department officials over inmates and provide a detailed set of norms against which action affecting inmates can be judged.

A final control factor affecting administrative discretion is the requirement of informational input on certain key program decisions, together with a recording of reasons for the decision. Clearly one of the most fundamental complaints voiced by inmates has been that decisions are made without any appropriate input of information, and/or without any record or information of how the decisions were made. In a word, administrators, from wardens down to guards, could make a decision on their subjective judgment without being bound to hear other informational sources, and these decisions were not recorded, or recorded in such general terms as to be unreviewable at a later date. The Code goes a long way toward requiring accountability for correctional decisions by specifications of certain informational input before decisions can be made. It also requires a timely recording of decisions, plus the informational basis upon which they rest and in some in-

40. IUCC § 1003-2-2(m).
41. E.g., IUCC § 1003-7-1 (general requirements); § 1003-8-3(b) (program assignment procedures); § 1003-7-4 (protection of persons and property); § 1003-8-7(d); § 1003-8-8(a) (grievance procedures).
42. Illinois Department of Corrections, Administrative Regulations, Adult Division (Feb. and Dec. 1972) (hereinafter referred to as Ad. Regs.).
43. One of the issues which such detailed regulations will complicate is the requirement of the exhaustion of state remedies for federal jurisdiction; cf. Edwards v. Schmidt, 321 F. Supp. 68 (W.D. Wis. 1971); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Wilwording v. Swanson, 404 U.S. 249 (1971).
45. Sentencing in general, IUCC § 1005-3-1; sentences of imprisonment, IUCC § 1005-6-1(a); extended term of imprisonment, IUCC § 1005-8-2(b); parole, IUCC § 1003-3-4(d); social evaluation and assignment to an institution, IUCC § 1003-8-2(a); program assignment, IUCC § 1003-8-3(a); institutional transfer, IUCC § 1003-8-4(b); transfer to Department of Mental Health, IUCC § 1003-8-5(a); disciplinary procedure, IUCC § 1003-8-7(c).
46. Sentencing, IUCC § 1005-4-1(d)(2); parole, IUCC § 1003-3-5(f); transfer,
stances communication of the decision and the reasons for it to the person affected.\textsuperscript{47}

II. DUE PROCESS REQUIREMENTS FOR MAJOR CORRECTIONAL DECISIONS

Beside the above-mentioned general control factors placed on all administrative decision-making concerning inmates, the Code selects six decisions as particularly important and sensitive and requires certain specific procedural safeguards to be afforded. These six areas are: granting and revocation of parole; reception and evaluation; program assignment; transfer; imposition of discipline; and hearing of grievances.\textsuperscript{48} To anyone familiar with prison problems, these areas represent the heart of most inmate grievance lists.\textsuperscript{49}

A. Parole

The initial parole decision, under the Code, is surrounded with procedural safeguards which, while in no way detracting from the discretionary nature of the decision,\textsuperscript{50} protect an eligible prisoner from arbitrariness. They are as follows: the Board must consider a person 30 days prior to his eligibility date;\textsuperscript{51} before making its decision it must consider certain informational input, including material submitted by the eligible person;\textsuperscript{52} it must hold an interview with the eligible person before a Board member;\textsuperscript{53} it must make its determination in panels of at

\textsuperscript{47} Parole, IUCC § 1003-3-5(f); discipline, IUCC § 1003-8-7(e)(5). An inmate must be advised of the factual basis of any decision of the Department which affects the length of his confinement, IUCC § 1003-5-1(b). The meaning of this section awaits the interpretation of the courts. Clearly it is a major breakthrough for protection against the use of inaccurate information that heretofore remained anonymous to the person affected.

\textsuperscript{48} The American Correctional Association in its Manual of Correctional Standards (1966) deals with most of these problems: parole, at 113-34; reception and evaluation, at 351-65; program assignment, discipline, at 401-21; cf. the list of grievances set out in Morris v. Travisono, \textit{supra} n.44, at 860-61.

\textsuperscript{49} In an average month in California adult institutions, prisoner complaints constituted the following order of frequency: (1) parole; (2) transfer and classification; (3) legal; (4) medical; (5) program treatment; (6) religion and race; (7) property; (8) mail and visits; (9) protection. Note, \textit{The Penal Ombudsman; A Step Toward Penal Reform}, 3 Pacific L.J. 166, 168-71 (1972).

\textsuperscript{50} Morrissey v. Brewer, 408 U.S. 471, 477 (1972).

\textsuperscript{51} IUCC § 1003-3-4(a).

\textsuperscript{52} IUCC § 1003-3-4(d).

\textsuperscript{53} IUCC § 1003-3-5(b).
least three Board members; its decision must be based on standards set out in the Code; it must render it within a reasonable time, and communicate to the person in writing, the basis for the decision. The Board must set a rehearing no later than one year, and follow up on a positive decision to release by review if the paroled person is not released within ninety days. No provision is made in the Code for representation by counsel at the hearing, though, of course, counsel may be retained to prepare any written statement that the eligible person wishes to submit.

Revocation is the other significant decision in the parole process. In light of the Supreme Court's 1972 decision in *Morrisey v. Brewer*, the provisions of the Code for a hearing are clearly inadequate. The Code provides for a hearing before at least one member of the Board acting for a panel of three. The Code provides for a record of the hearing, and allows the alleged violator to appear, answer and bring witnesses in his behalf. While these provisions may have appeared generous in comparison with the practice of other boards, *Morrisey* renders them far too niggardly in due process content. The Supreme Court now requires an on-site hearing for probable cause before a neutral party (not the parole officer recommending revocation); together with notice of the alleged violations; presence of the parolee;

54. IUCC § 1003-3-5(a).
55. "The Board shall not parole a person eligible for parole if it determines that:
   (1) there is a substantial risk that he will not conform to reasonable conditions of parole; or
   (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or
   (3) his release would have a substantially adverse effect on institutional discipline."
   IUCC § 1003-3-5(c). The origin of the wording of this section is the American Law Institute's Model Penal Code, § 305.9(1) (P.O.D. 1962), with certain changes. It appears the Board is mandated to either make a positive finding under one of these standards or grant the eligible person parole.
56. IUCC § 1003-3-5(f).
57. Id. Monks v. New Jersey State Board of Parole, 58 N.J. 238, A.2d 193 (1971). What the Board will include in its statement of the "basis" is not yet determined. Rules for the operation of the Board under the Code have not yet been issued. Clearly a denial of parole would entitle a person to a statement that includes any "factual information" on which it relied. IUCC § 1003-5-1(b).
58. IUCC § 1003-3-5(f).
59. Id.
60. Parole Board Rules have allowed counsel to make a presentation to the Board, both by written document and by personal appearance, at eligibility hearings.
62. IUCC § 1003-3-9(d). Legislation amending this section to conform it to the basic requirements of *Morrisey* v. Brewer was approved Dec. 27, 1972, Public Act 2827.
63. Id.
64. Id.
65. Id.
the right to answer and present other evidence; and a limited right to confront adverse witnesses. The initial hearing must be summarized and the determination must be based on the evidence before the hearing officer, together with reasons for the determination and the evidence relied on. The formal revocation hearing before the Board must have the basic due process protection given any right, conditional or absolute, whose violation would constitute a "grievous loss." A summary of these procedural safeguards include: notice, discovery, opportunity to be heard in person and present other evidence, including witnesses, confrontation and cross-examination; a neutral hearing body and a written statement of reasons and evidence relied on if the decision is negative.

B. Reception and Evaluation

When a prisoner is received by the Department of Corrections the Code requires that the individual's identity be verified before he can be received, and that all pertinent reports and papers forwarded by the court be presented with the prisoner. Prior to permanent institutional assignment the Department is required to make a thorough social evaluation of each individual. On the basis of this evaluation an institution is chosen which best fits the individual's program needs. A complete program assignment is recommended, including custodial status, by the staff of the Reception and Diagnostic Center and these recommendations are forwarded to the receiving institution. A record of the

67. Id. at 487.
70. IUCC § 1003-8-1(b).
71. This includes the sentence imposed, any statement by the court of the basis for imposing the sentence, credited time, presentence report and statements by the State's Attorney and defense counsel. IUCC § 1005-4-1(d). This requirement is intended to make available immediately on arrival of the prisoner any court-generated materials pertinent to his correctional treatment. Under former law, when presentence reports were prepared for the courts, no requirement or practice made them available to the Department of Corrections.
72. IUCC § 1003-8-2. The language of the section allows for flexibility: "in so far as practicable". Id. § 1003-8-2(a). The Code does not provide for specific institutions within the Department as former law did. Cf. Ill. Rev. Stat. ch. 108, § 105 (1971). Instead it allows the Department to determine the number, kinds, functions, etc., of institutions according to the needs of "committed persons for treatment and the public for protection". IUCC § 1003-6-1(b). See Ad. Regs. § 801.
report and recommendation are to be included in the individual’s master record file.\textsuperscript{74} While the receiving institution of permanent assignment has the final authority to make program assignments and to determine custodial status for the individual, the Social Evaluation Report must be considered in so doing. The significance of this initial evaluation continues throughout the individual’s entire prison term. Unfortunately, there is no provision in the Code or Administrative Regulations which allows an individual to see his Social Evaluation Report and, as a practical matter, he must depend on his counselor to interpret for him what the Reception and Diagnostic staff has said of him.

\textbf{C. Program Assignment}

Once an individual has been assigned to an institution, he must be given a permanent program assignment within sixty days.\textsuperscript{75} This is done by an Assignment Committee or Program Team composed of three staff members, one of whom must be a Program Services staff member.\textsuperscript{76} The inmate must be given the opportunity to appear before the Committee and address it when his case is under consideration.\textsuperscript{77} But once permanent assignment has been made, there is provision for a change of a non-training assignment by the Assignment Captain without consulting the Committee, based on the recommendation of the inmate’s supervisor “for cause.” A hearing for such changes may be requested through the inmate’s counselor.\textsuperscript{78} All decisions, whether by Committee or by the Assignment Captain, must be preceded by an interview of the inmate and a review of the inmate’s master record file.\textsuperscript{79} All decisions must be in writing and the basis for the decision stated in the body of the decision for review by the Chief Administrative Office or his designee.\textsuperscript{80}

The central importance of the Assignment Committee is not hard

\begin{itemize}
\item \textsuperscript{74} IUCC § 1003-8-2(b).
\item \textsuperscript{75} Ad. Regs. § 802.
\item \textsuperscript{76} \textit{Id.} Program Services is a term designating non-custodial staff members assigned to classification and all treatment programs. \textit{Cf.} Ad. Regs. § 1000.
\item \textsuperscript{77} Ad. Regs. § 802.
\item \textsuperscript{78} \textit{Id.}
\item \textsuperscript{79} \textit{Id.}
\item \textsuperscript{80} \textit{Id.} There is no provision for communication of this information to the inmate. Since these decisions as to assignments often reflect a judgment by the institution as to the progress of the inmate and could affect his ultimate release on parole, an appropriate policy of informing him should be developed in the Administrative Regulations. It is doubtful whether an inmate could utilize the Code provision for access to information in his records in the case of program assignments since its effect on the length of his incarceration is indirect at best. IUCC § 1003-5-1(b).
\end{itemize}
to fathom. It makes program and security determinations which have direct and indirect bearing on how an inmate will serve his time. The power of the Committee is great, particularly in the area of security classifications, on which depend eligibility for furloughs and work release, and ability to earn good time. The development and communication of more fully detailed procedures in this area should include disclosure to the inmate, of the basis for any decision affecting him, together with more fully developed channels of review.

D. Transfers

Once permanent assignment has been made to an institution, any transfer to other institutions can seriously affect the individual's chance to continue in a program, to enjoy certain privileges, and in the end to be given parole. The decision to transfer an inmate thus is a correctional decision that is in need of careful procedural control.

The scope of the transfer power in the Department of Corrections is considerable. Under Section 1003-4-4 (Interstate Corrections Compact) of the Code, the Department has the power to transfer inmates outside of the State "in order to provide adequate quarters and care or an appropriate program of rehabilitation or treatment." A general grant of power to "transfer (committed persons) to other appropriate agencies," is given. Within this general power, the Department is given power to transfer certain adults to the Department of Mental Health for up to six months or longer. A committed person may be transferred to other institutions or facilities of the Department, or to its special psychiatric facilities after appropriate psychiatric examination. There is a provision also for transfer from the Juvenile Division to the Adult where a committed juvenile, tried and convicted as an adult, reaches the age of seventeen. The Code abolishes the distinction

81. Ad. Regs. § 817(IV)(B) (home visit furloughs); Id., § 1200(3) (work release); Id. § 815(1) (conditional release).
83. IUCC § 1003-4-4(iv)(a).
84. Id. § 1003-2-2(b).
85. Juvenile Division enjoys considerably more power to transfer persons committed to it to other agencies. See, e.g., IUCC § 1003-10-2(4).
86. Id. § 1003-8-5 and 6.
87. Id. § 1003-8-4(a).
88. Id. § 1003-8-4(b).
89. Id. § 1003-10-7. When such a sentenced juvenile is not paroled by his twenty-first birthday, his transfer to the Adult Division is automatic. Id. § 1003-10-7 (b).
between institutions for misdemeanants committed to the Department; consequently such persons are subject to transfer under general Code provisions. 90

The aforementioned wide ranging power is circumscribed by a Code provision which places the power of transfer directly under the Director. "After the initial assignments . . . . , all transfers of committed persons to another institution or facility shall be reviewed and approved by a person or persons designated by the Director."91 The Administrative Regulations designate the Office of Program Services for this reviewing and approving role.92 This assignment of authority outside of the individual institutions will help generate policies withdrawn from the foibles of individual administrators and the needs of particular institutions. The process of transfer can be initiated by either the inmate himself or by staff and must pass first before the Assignment Committee and then on to the Chief Administrative Officer, both of whom must recommend it before its going forward to the Reception and Diagnostic Staff, within the Office of Program Services, for final approval or disapproval.93 In this process a report must be prepared by the Assignment Committee in which the reasons for such transfer are to be set out,94 and this report must be included in the inmate's master record file.95 There is no provision for a hearing on such matters, either in the Code or in the Regulations, but it is suggested that an opportunity to be heard and to understand the reasons proposed for transfer should be part of any procedurally sound system.96

Special provisions for transfer to psychiatric facilities within the Department97 or to the Department of Mental Health98 indicate recognition of the equal protection principles advanced in Baxtrom v. Herold,99 in that an inmate may not be treated differently from other citizens in regard to his mental health problems. Where the Department wishes to transfer the inmate to its own psychiatric facilities, it must certify to the Director that such transfer is necessary based on a

90. Cf. Ill. Rev. Stat. ch. 118, § 15 (1971), where under former law inmates at the State Farm (misdemeanants) could be transferred to a prison for felons at the discretion of the Department.
91. IUCC § 1003-8-4(a).
92. Ad. Regs. § 1000(1).
93. Ad. Regs. § 819.
94. Id., § 819(3) and IUCC § 1003-8-4(a).
95. IUCC § 1003-8-4(a).
96. Shone v. Maine, 406 F.2d 844 (1st Cir. 1969), and cases cited supra n.82.
97. IUCC § 1003-8-4(b).
98. IUCC § 1003-8-5 and 6.
psychiatric examination, and once transferred his case must be reviewed at least every six months.\textsuperscript{100} Where the transfer is to the Department of Mental Health, any transfer for six months or less must be consented to by the inmate, in writing, with opportunities to object by the spouse, guardian, nearest relative or attorney of record.\textsuperscript{101} Where objection is made by one of these, or where the transfer is for more than six months, ordinary court proceedings for involuntary commitment to the Department of Mental Health are required.\textsuperscript{102} The inherent protection provided by court commitment proceedings should prevent any misuse of this transfer power, even where the self-interest of the Department of Mental Health fails to resist abuses.\textsuperscript{103}

E. Discipline

"Discipline" is defined by the Code as "the rules and regulations for the maintenance of order and the protection of persons and property within the institutions and facilities of the Department and their enforcement."\textsuperscript{104} The problem of order maintenance in the prison setting can be singled out as the major occupation—pre-occupation some would say—of the corrections profession.\textsuperscript{105} Clearly it must serve as a sub-stratum to any intelligent program of rehabilitation. But its very importance can be used to minimize the way in which it is achieved, to the detriment of all else. When discipline, though superficially effective is unfair or inhuman, like the criminal law itself, it tends to sacrifice the very ends it seeks to achieve.\textsuperscript{106} These facts have generated issues almost constantly before the courts in the past ten years and have

\textsuperscript{100} IUCC § 1003-8-4(b).
\textsuperscript{101} Id. § 1003-8-5(a) and (b).
\textsuperscript{102} Id. § 1003-8-5(c) and (d).
\textsuperscript{103} For consent to transfers of less than six months, the consent of the Department of Mental Health is required. While they thus have power to block such transfers on the basis of inadequate security, lack of appropriate programs and the like, they have not done so frequently. An interesting parallel might be drawn from the series of Mental Health transfers which the Department of Children and Family Services has been accused of making for purposes of "dumping" its problem cases. They are reported in a study prepared for Judge Joseph Schneider of the Cook County Circuit Court by Attorney Patrick Murphy of Chicago Legal Aid Office. Chicago Daily News, Dec. 20, 1972, p. 1 col. 5.
\textsuperscript{104} IUCC § 1003-1-2(h).
\textsuperscript{105} A survey conducted by the President's Commission on Law Enforcement and Criminal Justice in 1967 indicated the following ratios of personnel to inmates among state adult correctional institutions: custodial 1:4.3; professional 1:119.0; educational 1:88.4. Pres. Com. Task Force, Report on Corrections, Tab. 3, p. 180 (1967).
\textsuperscript{106} In the end the Justice System becomes the "enemy" and the person who resists it the moral hero. See George Jackson's eloquent letters from prison. Soledad Brothers: The Prison Letters of George Jackson (1970).
resulted in a series of decisions relating to prison disciplinary procedures which the Code is intended to reflect.\(^{107}\)

In the first place, the Code makes some traditional general provisions for order-maintenance in prisons. Among these provisions are the creation of all custodial employees as conservators of the peace, with the power of peace officers both on and off premises relating to prisoner custody.\(^{108}\) Use of deadly force to prevent riot, mutiny and similar unusual disturbances is granted, but limited to situations in which the user reasonably believes it to be necessary.\(^{109}\) Escape, holding of hostages, and destruction of property are punished as Class 2 Felonies.\(^{110}\) The Code also provides the Chief Administrative Officer with certain emergency transfer powers by which he can evacuate an institution or facility without the formality of the regular transfer procedures, but he must provide for a review of the decision as soon as practicable.\(^{111}\) The Administrative Regulations provide for institutional lockups in which all, most, or some of the inmates may be confined to their cells for an indeterminant length of time.\(^{112}\) In order to exercise this extraordinary power, the administrator must be confronted by a “clear and immediate threat to the security of the institution or to the safety of its employees or inmates,” and before acting must consult with the Director or Assistant Director.\(^{113}\)

For ordinary discipline cases, the Code makes provision for a two-fold procedure depending on the gravity of the sanction imposed. Where the sanction “may involve the imposition of disciplinary isolation; the loss of good time credit . . . or eligibility to earn good time; a change in work, education, or other program assignment of more than 7 days duration,”\(^{114}\) the Code requires a full hearing with certain minimum due process requisites discussed below. For the imposition

---

107. No single source is available which is comprehensive and up to date, but reference should be made to Singer, Prisoners' Legal Rights: A Bibliography of Cases and Articles 38-46, 58-59 (1971).
108. IUCC § 1003-2-2(h).
109. \(\text{id.}\) § 1003-6-4(b). This section provides uniformity for the use of force in all escapes, riots, destruction of property and like acts of serious import. \(\text{Cf.}\) former Illinois law on these matters: Ill. Rev. Stat. ch. 23, § 2807; \(\text{id.}\) ch. 108, §§ 38, 119, 121; \(\text{id.}\) ch. 118, § 18. It also narrows the standard for the use of deadly force to conform to the standard established in the Criminal Code of 1961 of general application. See Ill. Rev. Stat. ch. 38, § 7-8 (1971).
110. IUCC § 1003-6-4(a).
112. Ad. Regs. § 809.
113. \(\text{id.}\)
114. IUCC § 1003-8-7(d).
of lesser sanctions, the Code allows other hearing procedures which have been approved by the Director. The Administrative Regulations spell out these less formal procedures. In the first instance, an infraction may be so minor that verbal correction or counseling is sufficient. If the incident is considered important enough to write up an Inmate Violation Report, this report is then sent, on the same day, to the Disciplinary Captain who further determines which reports should be handled directly by him in an informal way and which forwarded to the Disciplinary Committee for formal hearing. Where he handles the infraction himself, he must interview the inmate(s) involved and may impose any sanction less than the major sanctions of isolation, good time loss and major change of program.

For serious rule violations, the Code sets out the following procedural requirements; an impartial hearing body; notice of charges; personal appearance before the body with the right to address; a right in the hearing body to call other witnesses; the conditional right of the accused to cross-examine such witnesses; a written statement of any guilty finding, which includes the basis for the decision and the sanction to be imposed, given to the accused and also placed in his file; review of the decision, either through the grievance procedure or automatic review by the Assignment Committee where the sanction is change of program. While these procedures do not represent the full minimum due process required by some courts for prison discipline, they do make Illinois one of the first states to respond, legislatively, to the growing demands for constitutional protection of prisoners' rights.

Some of the omissions in the Code are significant, including the following five areas, which may open the Code provisions to attack.

First, the right of the accused to be present and address the hearing body leaves unexpressed the fuller right to present evidence, including

115. Ad. Regs. § 804(2).
116. Id. § 804(5) and (6).
117. Id. § 804(6).
118. IUCC § 1003-8-7(e).
119. See cases and their holdings for due process requirement listed in Smoot, Introductory Outline to Selected Prisoner Federal Civil Rights Problems, to be found in Practicing Law Institute, II Prisoners' Rights 361-70 (1972).
120. The ordinary course of events has been the initiation of litigation over disciplinary matters followed by a hasty publication of rules conforming to due process standards, either while the case is pending or after an equitable decree commanding it. For the former, see, e.g., Bundy v. Canon, 328 F. Supp. 165, 174 (D. Md. 1971); for the latter, see, e.g., Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970).
other witnesses, in his behalf.\textsuperscript{122} This right, ordinarily accorded any person in a due process hearing, becomes even more critical where the accused inmate is charged with a rule violation which also constitutes an indictable offense under state law. Therefore, the accused, limited to his own version of the events, is placed in a \textit{Miranda} dilemma. The testimony given after the appropriate warnings, would be available in any later prosecution.\textsuperscript{123} The Administrative Regulations add nothing to the Code in this regard. One solution, despite the practical problems it would create for orderly administration, would be to create this fuller right by amending the Regulations. Included would be the right to present other evidence with witnesses and, at a minimum, make this a right where outside prosecution is possible.\textsuperscript{124}

Second, the right to cross-examine any witnesses called by the hearing body should be guaranteed. While the Code makes this right conditional on the consent of the hearing body,\textsuperscript{125} the Administrative Regulations go on to indicate that this right is mandatory when witnesses are called.\textsuperscript{126} While this appears to meet any objection to the full right to cross examination, there are questions remaining of whether the hearing body need call any witnesses at all, or may omit calling witnesses even when the accused requests it. Admitting that discretion should remain in the hearing body as to the limits of relevancy and materiality, central witnesses like the complaining guard should be made available and should be subject to cross-examination.\textsuperscript{127}

\textsuperscript{122} Cluchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971).

\textsuperscript{123} Cluchette v. Procunier, \textit{supra} n.121 at 782-83. The court held that counsel was also required when the loss involved in the sanction was great. \textit{Id.} at 783. \textit{See} Turner and Daniel, \textit{Miranda in Prison: The Dilemma of Prison Discipline and Intramural Crime}, 21 Buffalo L. Rev. 759 (1972).

\textsuperscript{124} By allowing evidence other than the inmate's own testimony, the administration would avoid the problem of forcing a \textit{Miranda} dilemma on him since the inmate could call other witnesses to rebut evidence presented against him. Of course the administration could always take the radical option of not proceeding against an inmate through internal discipline when he is subject to and prosecuted by local authorities under criminal law.

\textsuperscript{125} IUCC § 1003-8-7(e)(4).

\textsuperscript{126} "The inmate charged also has the right to question any person or persons so summoned to testify by the Disciplinary Committee." Ad. Regs. § 804(10).

\textsuperscript{127} The issue of confrontation and cross-examination has been litigated. \textit{See}, e.g., Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Cluchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971). The serious problems which such a practice would constitute in the eyes of professional corrections personnel can be read in the reaction to Judge Pettine's decree in Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1971); Harvard Center for Criminal Justice, \textit{Judicial Intervention in Prison Discipline}, 63 J. Crim. L. 200, 225-26 (1972). Judges, too, are not at all sure that the idea is good. Judge Wyzanski put the matter thus: "Cross-examination of a superintendent, a guard or a fellow prisoner would almost inevitably go beyond the usual consequences of such probing in a court. It would
Third, the question of counsel or counsel substitute needs to be raised. While no court has indicated an absolute right to counsel in prison discipline cases, there has been a consistent discussion of the problem of assistance at such hearings. Clearly, for some inmates whose mental capacity or emotional involvement disallows an intelligent presentation of facts or cross-examination, the presence of a third party to assist may be indispensable. Such a person may well alleviate the unnecessary wrangles between a guard witness and the cross-examiner. In any event, fairness probably dictates the availability of such third party assistance where facts would otherwise be distorted or lost.

Fourth, some courts require that the determination of guilt be based only on the evidence before the hearing body and the the evidence be “substantial” in quantum. Neither the Code nor the Regulations refer directly to this standard. Clearly fairness and due process would be violated and internal consistency of the Code would be lost if the decision could be made on evidence which was not presented at the hearing giving no opportunity for the accused to refute it. As to the quantum of evidence, the requirement of a majority decision, the open hearings, and the written decision with its basis, all suggest a norm of “substantial” evidence. This should be developed by the practice of internal review of those decisions where the evidence is slight or in dispute. However, there is always the possibility that a charge would be sustained, even after review, without substantial evidence because of loyalty to custodial personnel. This is an area where explicit evi-

tend to place the prisoner on a level with the prison official. Such equality is not appropriate in the prison. And it is hardly likely that in the prison atmosphere discipline could be effectively maintained after an official has been cross-examined by a prisoner. There are certain types of authority which do not have as their sole or even principal constituent, rationality.” Nolan v. Scafati, 306 F. Supp. 1, 3 (D. Mass. 1969), rev’d 430 F.2d 548 (1st Cir. 1970).

128. The court in Landman v. Royster, supra n.127, indicated that in more serious charges an inmate may have the right to retained counsel, but no right to appointed counsel. Id. at 654. In Cluchette v. Procunier, supra n.127, the court held that an inmate must be provided counsel to assist him in making the choice between silence or making his own defense before a prison disciplinary committee when the violation of which he is accused is also an indictable offense. Id. at 783.


130. See, e.g., Landman v. Royster, supra n.127, at 653-54; Cluchette v. Procunier, supra n.127, at 783-84; Nolan v. Scafati, supra n.127, at 3.

131. This loyalty has frequently been noted. Recently a Harvard University study of prison disciplinary procedures in Rhode Island found: “Board members may not act impartially because they feel that their duty is to support the staff in all cases. As one Board member put it, 'The philosophy in the past has been always back up your officers, whether they are right or wrong.' Such a view is particularly harmful to the integrity of the disciplinary process, when, as in most contested hearings, the evidence consists mainly of conflicting testimony by the prisoner and a staff member.” Harvard Center for Criminal Justice, supra n.127 at 210.
dentary norms would alleviate pressure to seek judicial review of individual decisions. Practice will help determine what is being done in this regard.

There remains a final problem which may raise considerable doubts as to the fairness of the total disciplinary process. It regards the problem of proportional and substantive due process. The Code requires that rules be published and posted so that inmates may have advance notice of what is expected of them. These rules are set out in the Regulations. While there may be some problems of vagueness as to the meaning of certain rules, the real problem lies in the lack of any schedule of sanctions attached to individual rules. It is quite clear from the Regulations that the determination of the seriousness of an individual violation is subjectively determined by the officials. In the first instance, it is the reporting guard who must determine whether to report the inmate or not. Included are both the Disciplinary Captain and finally the Disciplinary Committee. As far as is evident from the Code and Regulations, it is possible for an inmate to get disciplinary isolation, to lose good time, or to have his job reassigned for the smallest infraction of a rule. Of course, the ordinary unwritten norms of the institution would suggest otherwise, but there is that intangible thing called "attitude" which may subject an inmate to serious loss for a minor violation. Clearly, there is need for the Department to create some relationship between rules and possible sanctions so that advance notice of the seriousness of certain violations can be communicated to the inmates. Otherwise, the system as a whole is subject to attack as substantially unfair. This is particularly true under the Code where more formal due process protection is reserved for infractions entailing possible grave sanctions.

F. Grievances

If the Attica riot is used as a yardstick, the most significant of all correctional procedures would be an adequate grievance mechanism.
The stored hostilities arising in normal human intercourse can be significant enough, but in the prison setting, the exacerbation of human difference is raised to a high pitch. Where men are subject to daily control of the most autocratic sort, there are bound to be festering problems that have to be aired and dissipated before they become uncontrollable. On the other hand, simply because the nature of the prison system is inherently coercive, there will always be grievances which can never be alleviated. What is needed—indeed required—is a system of access to a source of power which can identify legitimate grievances and resolve them.

The Code provides that a grievance procedure be established by the Director of Corrections, which contains the following statutory requirements: notice of the grievance process must be given to all inmates; access to it must be unrestricted; an impartial reviewing course must be provided; a record of the grievance must be preserved for one year; and direct appeal may be made to certain individuals outside the institution. The Administrative Regulations spell out the details of this system.

Step One, under the present Regulations, is the placing of a grievance in locked mail boxes accessible to all inmates and directed to the Chief or Assistant Administrator, Chaplains, or Clinical Services staff. These grievances are routed to their addressees who must respond within five working days. If an inmate does not receive satisfaction, he may initiate Step Two, which is direction of his complaint to special institutional counselors appointed to handle such cases. They must respond within ten working days. Step Three, for a still disgruntled inmate, is to take his case to the Institutional Inquiry Board which meets weekly. An inmate must have the opportunity to appear before the Board and the Board may call other witnesses. A written

were instituted during the riot and lives depended on them, both sides were unable to communicate successfully. It was too late in a history of stored hostilities.

138. IUCC § 1003-8-8(a).
139. Id. § 1003-8-8(d).
140. Id. § 1003-8-8(a), (e).
141. Id. § 1003-8-8(a).
142. Id. § 1003-8-8(b).
143. Id. § 1003-8-8(c).
144. Ad. Regs. § 845.
145. Id. § 845(1).
146. Id. § 845(2).
report must be filed in ten days after receipt with the Chief Administrator who must take action within five days.\textsuperscript{147} Step Four involves taking him outside the institution to the Director or Assistant Director. If these persons find no merit in the complaint, the inmate is informed by letter.\textsuperscript{148} If there seems to be merit to the claim, the matter is then referred, in Step Five, to an Administrative Review Board. This Board will hold a hearing on the matter and call any witnesses it wishes, both staff and inmates. Its determination is presented to the Director who, in consultation with the Assistant Director, will make a final determination to be communicated to the inmate.\textsuperscript{149}

This procedure is set out in detail, indicating the seriousness with which the Department has apparently taken the problem of grievances. On the other hand, to an outside observer, not to say to the inmate, it appears needlessly elaborate and complicated and is dominated by the fact that only one person in this elaborate scheme, an appointed member of the Administrative Review Board,\textsuperscript{150} is a person from outside the Department. While this grievance procedure clearly fulfills any known requirement of due process, it overlooks the value of review of grievances by an outside party.

There have been suggestions and even implementation of other sources of review for grievances. It goes without saying that the courts remain available to resolve complaints of a constitutional or statutory nature.\textsuperscript{151} Inmates may also have a constitutional right of access to certain governmental officials outside the Department.\textsuperscript{152} Further, there is precedent for allowing the inmate to have access to the press, both by letter and through interviews.\textsuperscript{153} Probably the most discussed and seemly acceptable mode of grievance resolution lies in the use of the Ombudsman system.\textsuperscript{154} Whether or not such a system

\textsuperscript{147.} Id. § 845(3) to (9).
\textsuperscript{148.} Id. § 845(10), (11).
\textsuperscript{149.} Id. § 845(12) to (16).
\textsuperscript{150.} "The Administrative Review Board will be appointed by the Director and will be composed of three persons—one person from the Director's staff, one person from the Assistant Director's staff, and one person not employed by the Department of Corrections." Ad. Regs. § 845(13).
\textsuperscript{154.} James R. Reed, "Ombudsman", Pennsylvania Prison Society, Testimony at
comes to be common in corrections, the need for an outside—and thus "objective" in the inmates' view—source of review seems imperative, not only for the satisfaction of inmate complaints against the system, but also for the protection of the system itself. Clearly the judges would welcome any system which lessened the flood of prisoner rights cases that are inundating the courts.155

CONCLUSION

Any legislative approach to reform in corrections will always be subject to the limitations of such a method. The essence of reform lies in the men who administer the system. Clearly, Illinois has embarked on an ambitious program of reform and the Code of Corrections is integral to its efforts. But legislation will not necessarily preclude litigation. There are some doubts, as I have indicated, left by the Code in regard to the use and administration of the sanction of imprisonment. Not everything which a single court has decided in favor of inmate rights has been translated into legislative mandate. Rather, the Code is intended to replace unrestrained, subjective correctional decisions with the objectives of an "informational due process" in which the facts are determined by the best evidence, fairly arrived at. Clearly, incarceration is not the optimum choice for penal sanctioning, but reason dictates that it will continue to be used, even frequently, and the problem of limits to its impact on the individual must be faced and resolved.

The courts are the ultimate determiners of the parameters of incarceration, but they will be aided by a Code that creates a systematic set of guidelines.

Hearings on Prisoners' Representation Before Subcommittee No. 3 of the House Comm. on the Judiciary (Nov. 10, 1971); Md. Code Ann., Art. 41, 204F (1970 Cum. Supp); Fitzharris, The Desirability of a Correctional Ombudsman, Report to California Assembly Interim Committee on Criminal Procedure (1971). Though Maryland appears to be the only state that has to date adopted a legislative office of prison ombudsman, there are several prisons within states that are experimenting with it, including Pennsylvania and Minnesota.

155. 1970 Administrative Office of the United States Court, Annual Report of the Director, reported that prisoners' petitions amounted to 18 percent of the total civil filings in all federal district courts. It adds ominously that this figure represents an overall growth of 276 percent since 1963. Id. at II-44. The issue of exhaustion of state remedies thus becomes crucial in such federal suits as brought under § 1983 of the Civil Rights Act. See supra n.43.