The Illinois Unified Code of Corrections - A Legislative Step in the Development of Prisoners' Rights and of Prison Administration

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The Illinois Unified Code of Corrections—
A Legislative Step in the Development of Prisoners’ Rights and of Prison Administration

The most striking aspect of a prison . . . is that prisons are a complex of physical arrangements and of measures, all wholly governmental, all wholly performed by agents of government, which determines the total existence of certain human beings (except perhaps in the realm of the spirit, and inevitably there as well) from sundown to sundown, sleeping, waking, speaking, silent, working, playing, viewing, eating, voiding, reading, alone, with others. It is not so with members of the general adult population.

Judge Doyle, Morales v. Schmidt

The most striking legal aspect of a prison is that traditionally, these agents of government have been left with little guidance and with unregulated discretion in their activities. The state designates its prison structure and the courts choose the population of the system. Once the prisoners are in the state institutions, the custodians are to keep the inmates secure and quiet, out of sight of the public until the prisoner returns to the streets of the society which imprisoned him. The substance of the in-prison custody, the real decisions as to what prison life is to be like, is left to the determination of the prison authorities.

While courts have been increasingly concerned with defining limits for the decisions of the prison authorities, the state legislatures are still reluctant to act. Through a reform of the Illinois Criminal Code,

which began with the adoption of the Model Penal Code of Criminal Procedure, the Illinois legislature has acted to define boundaries for the exercise of authority within the prisons. The new Illinois Uniform Code of Corrections both extends to one authority full responsibility for the prison system and controls how that authority may be exercised.

Those sections of the Code of Corrections which create the Department of Corrections, with responsibility for all Illinois juvenile and adult prisons, simply recognize the timely need for an agency capable of running a major prison system. These sections of the Code of Corrections are comparable to the changes suggested in the Model Penal Code.

But the new Code of Corrections goes far beyond the proposals of the Model Penal Code, setting out certain "prisoners' rights" which must be respected by the prison authorities. In passing this legislation, Illinois has adopted the first major statutory definition of prisoners' rights by any state. To date, court decisions have defined rights of prisoners which are to be considered constitutional rights. Regulations of prisons in many states now, implicitly, recognize additional rights; and certain states grant other rights by statute. Illinois, however, has taken a leading step by attempting a comprehensive statutory definition of such rights for prisoners. The legislature has, in effect, attempted to define the state's relationship to those it has imprisoned for criminal activities.

The most important element of this definition is that the state's control is to be limited; the state may interfere with a prisoner's life only in certain, defined circumstances. The prison administration will be controlled, for example, in any unjustified attempts to limit the right of a prisoner to receive or to send mail, or to practice his religion. The prison authorities will only be allowed to punish a prisoner to the end of preserving the security of the institution. The near total discre-

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5. See American Bar Association on Correctional Facilities and Services and the Council on State Governments, Compendium of Model Correctional Legislation and Standards (1972), which includes recommendations on statutory statements of the rights of prisoners by the American Law Institute and the National Council on Crime and Delinquency.
7. See the Prison Law Reporter which is published monthly by the American Bar Association's Young Lawyers Section for major case law developments in the area of prisoners' rights.
tion of the prison authorities to decide how prison life is structured can no longer exist in the law.

The Code of Corrections, then, must be reviewed to learn how the legislature has attempted to control this discretionary power. This study of the new Code will focus on the administrative powers given to the Department of Corrections. A history of the Illinois prison system will reveal the extraordinary amount of increased discretionary power over the lives of prisoners which lies hidden in the description of the administrative powers of the Department of Corrections. It will be seen, though, that budgetary limitations provide controls over this new legislative grant of power to the Department.

Given an understanding of the powers of the Department, we can then turn to the second thrust of the Code of Corrections—the statutory definition of certain prisoners' rights. The legislature has set up a complex interaction of controls on the actions of prison authorities, and these controls must be examined to know what limits are actually being placed on the decisions of the prison authorities. The statutory rights are but one set of controls. Standing alone, they do no more than define the legislative intentions toward the state's prisoners. But the legislature has added a second set of controls to effectuate these rights—a statutory requirement that the Department of Corrections promulgate Administrative Regulations to implement the statute.

Not only are prisoners to have rights under the statute, but the prison authorities are to follow internal policies in conformity with these rights. In requiring administrative controls on the actions of the Department, the legislature recognized the nature of the relationship of the guard to the prisoner as being the central concern in the dynamics of prison life. The legislature attempted to give its own directions to that relationship.

The possible actions of the courts for this jurisdiction, both federal and state, provide the third set of controls on the actions of the prison authorities. These must be considered before it can be determined how the Code of Corrections will actually affect the lives of Illinois prisoners; for the statute may be violated, and the internal policies of the Department of Corrections may prove inadequate. The question which must be answered is: how may the prisoners enforce these rights? If the courts enforce these statutory rights, then the Code of Corrections will actually stand as a legislative statement of penal philosophy. If the courts fail or refuse to check the actions of the prison authorities, because the legislature failed to state strong enough
controls, then the Code of Corrections simply will stand as a legislative wish, and not a command.

THE DEPARTMENT OF CORRECTIONS AS AN ADMINISTRATIVE AGENCY

A Department of Corrections was created for Illinois in 1970, and the Code of Corrections is the final statement of the powers and responsibilities of this new agency. The significance of the creation of this agency can only be understood, however, against the background of the history of the decentralized development of the Illinois prison system, beginning in the nineteenth century.

History of the Illinois Penal System

The first state-designated penal institution was built in 1827. Before this time, prisoners had spent their time in local lockups, workhouses or debtor prisons. When the new state prison was built, local inspectors were in charge of its daily administration. But by 1857 the legislature felt the need to construct a full-scale state penitentiary at Joliet to house the growing number of prisoners under state custody.

The Joliet prison was organized under a board of penitentiary commissioners who were directed by the legislature to adopt "those rules and regulations consistent with the discipline and reformation of the convicts." Although the board was responsible to the legislature, it was unique in that it was to be elected by the people. The legislature directed that the commissioners were to insure that the convicts would be suitably employed and provided with a chaplain. The board was to carefully investigate all grievances which came before it. Whipping was forbidden; the warden was instead given the power to place a convict in solitary confinement in a dark cell.

The legislation which was enacted over the next one hundred years added little of substance in defining what prison life was to be like for the state prisoners. The legislature concentrated on the administrative details of the system. More state prisons were created, and by

9. CODE OF CORRECTIONS § 1003-2-1.
14. Id. § 1.
15. Id. § 35.
1917 central responsibility for the prison system was placed in one state agency.\textsuperscript{16}

This state agency was the Department of Public Welfare, which also had responsibility for managing the whole state system of charitable and penal agencies. While at first Public Welfare had authority over the board of pardons, a separate Board of Pardons was created in 1927.\textsuperscript{17} In 1943, the Department of Public Safety succeeded to the powers of the Department of Public Welfare,\textsuperscript{18} and the legislature created a full Division of Corrections with responsibility for the prison and parole system. Although the Division had administrative responsibility for overseeing the prison system, it did not control the appointment of institutional personnel.

As other major states reorganized their prison systems after World War II,\textsuperscript{19} Illinois seriously lagged behind in organizing an appropriate prison authority. The first major organizational change did not come until the 1970 legislation creating the Department of Corrections, with the Code of Corrections completing the task of giving this administrative agency full responsibility for the state correctional institutions.

The sheer size of the Illinois prison system dictated some change in state policy. In 1971, Illinois had a prison population of over 6,000 and at least half as many corrections personnel were employed by the state for all stages of corrections.\textsuperscript{20} The corrections institutions included maximum security penitentiaries, reformatories, state farms and labor camps, juvenile institutions and half-way houses. Efficiency dictated that a centralized agency at the state departmental level be created to govern this system.

\textit{Powers and Responsibilities of the Department of Corrections}

The Department of Corrections has complete control over an individual once he is sentenced to a state penitentiary. A judge may not commit a prisoner to a particular institution, but must instead commit him to the custody of the Department.\textsuperscript{21} Once the prisoner is in the control of the Department, the place of commitment, the time of re-

\textsuperscript{16} Act of March 7, 1917, Ill. Laws, § 53.
\textsuperscript{17} Act of July 6, 1927, Ill. Laws, § 54(a).
\textsuperscript{18} Act of June 23, 1943, Ill. Laws § 55(a).
\textsuperscript{20} See \textit{Illinois Department of Corrections, New Directions} 3 (1972).
\textsuperscript{21} Code of Corrections § 1005-8-5.
lease, and the type of parole supervision are all decided by the Department. Juveniles, too, are under the Department's authority.\(^2\)

More important than this obvious control over all prisoners are the Department's new powers of control over the structure of its institutions and services:

The Department shall designate those institutions and facilities which shall be maintained for persons assigned as adults and juveniles; the types, numbers and population of institutions shall be determined by the needs of committed persons for treatment and the public for protection.\(^2\)

Former law had designated the institutions and programs for the penitentiary system. The new, broad grant of authority to the Department of Corrections is administratively consistent with the new status of the Department as an administrative agency.

This wide administrative power, however consistent with the responsibilities of the Department, is quite unusual in the United States. The only similar existing power among major states is that given to the New York Correctional Authority, which has the statutory authority to add to or to close existing facilities, and to establish new ones.\(^2\)

The New York law expressly recognizes the inherent limitations on this power in that expenditures for such purposes are within amounts made available by appropriations.\(^2\)

The Illinois Department of Corrections is, of course, subject to these same budgetary limitations. The practical meaning of these limitations is obvious as the Department faces the problems of its present penitentiary structure. Three of the adult institutions in the Illinois system were built before 1900, and only one institution was built after World War II.\(^2\)

One of the institutions presently in use was declared obsolete in 1907.\(^2\)

The structure of the prison system reflects more than the problem of providing housing for the prisoners. The structure of the institutions also defines the philosophy of corrections which is to be carried out in the institutions.\(^2\)

The nominal and practical power of the Department of Corrections to build prisons effectively enables it to define what happens to those in custody.

\(^{22}\) CODE OF CORRECTIONS § 1003-2-2.
\(^{23}\) CODE OF CORRECTIONS § 1003-6-1.
\(^{24}\) NEW YORK CORRECTIONS LAW § 70-3 (McKinney Supp. 1971-72).
\(^{25}\) Id.
\(^{26}\) ILLINOIS DEPARTMENT OF CORRECTIONS, MONTHLY POPULATION REPORT 1-2 (1972).
\(^{27}\) Act of June 5, 1907, Ill. Laws, § 3.
\(^{28}\) See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION, TASK FORCE REPORT: CORRECTIONS 6-13 (1967).
In giving the Department the authority to structure the prison system, the legislature has also dictated several goals of imprisonment. Two of these goals are to prevent arbitrary and oppressive treatment of prisoners, and to restore offenders to useful citizenship. Corrections philosophers have repeatedly and consistently emphasized that the nature of the prison—its very physical structure and set-up—is integrally important in determining whether or not these goals can be carried out.

An early statement of this theory came in the Declaration of Principles of the American Correctional Association: "The architecture and construction of penal and correctional institutions should be functionally related to the programs to be carried on in them." In specific terms, commentators suggest that the rehabilitative institution must be small, informal in structure and located in or near population centers.

The Code of Corrections, then, must be credited for giving the Department of Corrections the power to actually change the institutional structure. However, given the present need for budgetary support to carry out change and the unlikelihood of adequate funding, the Department will probably be unable to fulfill its mandate for change.

The legislature has also given the Department of Corrections a second significant grant of authority. Within the institutional structure, the Department of Corrections has the power to designate the type and population of an institution. A prison may be deemed maximum or minimum security, containing high risk prisoners or less dangerous felons. The "type" of prison would designate the extent of security and control which would be applied at the institution; the "numbers" would characterize the numerical population of an institution. This apparently neutral power actually clothes the Department with extraordinary power in deciding what a prison will be like for different classes of prisoners.

The effect on the life of a prisoner of the use of this type of power can be seen in the history of the development of the "Special Program Unit" at the state's maximum security institution for men.

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31. Id. at 327-50.
32. Code of Corrections § 1003-6-1(b).
33. "A Special Program Unit has been established at the Joliet Branch of the Illinois State Penitentiary where inmates, who clearly demonstrate an inability or unwillingness to adjust satisfactorily and derive measurable benefits from programs of the various Adult Division institutions, may be transferred. This unit is designed to deal
Instituted under the Department of Corrections after disturbances in 1970, this program was “designed to deal with inmates presenting special behavioral problems, through intensive therapeutic techniques.” The program involved the use of behavior modification techniques, with prisoners in the first two stages of the program receiving more restricted privileges than the general prison population.

The Special Program Unit (SPU) was subsequently attacked in several lawsuits as constituting cruel and unusual punishment forbidden by the eighth amendment. The courts, however, have consistently held the program to be constitutional punishment. Critics of the program have stated that the major objection to the program is the discretionary power of the Department to designate which prisoners were to be subjected to the additional restrictions of the program; these critics have suggested that the prisoners placed in the SPU were the “political leaders of the Illinois prison system.” One court which analyzed the SPU did indeed find that the selection of inmates for the program was based on the feelings of institutional personnel that these prisoners were generally considered “agitators and troublemakers.”

The viewpoints of the critics and of the prison authorities are compatible to a certain degree. What would be political action in support of his rights from the viewpoint of a prisoner could be seen as agitation and troublemaking by a prison administrator. Prison life is defined by the dynamics of power between prison guard and prisoner. If the prisoner has no rights within the prison, then any struggle is disciplinary, and can be controlled with punishment. But as prisoners increasingly assert rights which may indeed be statutorily and constitutionally guaranteed, then the struggle takes on a truly “political character.”

Some theorists believe that all prisoners are political prisoners, and

with inmates presenting special behavioral problems through intensive therapeutic techniques,” Illinois Department of Corrections, Administrative Regulations: Adult Division 808 (as revised Jan. 1, 1973) [hereinafter referred to as Administrative Regulations].

34. “The Special Program Unit is operated as a three stage progressive system, whereby an inmate can earn greater privileges and promotion to successive stages and ultimately can progress to the point where he will be considered for release. There are no specified standards for progression from one stage of the unit to another.” Findings of trial judge in Armstrong v. Bensinger, No. 71 C 2144 (N.D. Ill. Jan. 12, 1972) modified sub nom. United States ex rel. Miller v. Twomey, 479 F.2d 701, (7th Cir. 1973).

35. Id.

36. See the analysis of the Chicago People’s Law Office in the newspaper of the National Lawyer’s Guild’s Up Against the Bench, Jan. 1972, at 10, col. 2.

37. United States ex rel. Miller v. Twomey, 479 F.2d 701, 710 (7th Cir. 1973).

38. See American Friends Service Committee, Struggle for Justice 100-23 (1972).
would deem the relationship between the custodian for the state and
the prisoner to be a continuing political struggle. Increasingly, courts
and legislators are defining certain activity by prisoners created by
tensions between state and prisoner to be “protected” political activ-
ity and thus excepted from disciplinary restrictions of the prison au-
thorities. In contrast to this increasing protection, the use of techniques
such as the Special Program Unit gives additional powers to the Depart-
ment to define its controls on the activities of the prisoners, whether
the activities are political or protected, or troublemaking and subject to
disciplinary control.39 If the activities are seen as troublemaking but are
indeed “protected” political action, then the intervention of the court
is required to insulate the prisoner from attempts to discipline him
and to modify his behavior.

The Code of Corrections, in giving the Department of Corrections
broad authority to designate programs for various prisoners, neces-
sarily increases the tension of this struggle. What is ostensibly a
simple administrative power, necessary to directing the Department’s
activities, is in effect a broad legislative grant of discretion to the De-
partment of Corrections. The attempts of the legislature to limit the
discretionary power of the prison authorities will be noted at length,
but this attempt must be set in the context of the broad powers of con-
trol over prisoners which the Department has been given in the legis-
late grant of authority to the new administrative agency.

Davis has noted that the principal ways of controlling necessary dis-
cretionary power are “structuring and checking.”40 The Department of
Corrections has been given extraordinary administrative and discre-
tionary power in the new Code of Corrections. As seen in the ex-
amination of the institutional powers of the Department, the discretion
of the Department is partly checked by the need to fund any new major
institutional changes with legislative appropriations. Budgetary limi-
tations are likely to have the greatest effect on the size and number
of the prisons, as opposed to the type of programs carried out within
the prison. The legislature has structured the authority of the De-
partment of Corrections so as to actually emphasize its administrative
powers.

The legislative counter-thrust to the grant of administrative power
is seen in the enumeration of certain checks on the Department’s use

39. “The jailer in a white coat and with a doctorate remains a jailer—but with
larger powers over his fellows.” Morris, Impediments to Penal Reform, 33 U. Chi.
of its delegated powers of control over the lives of the state's prisoners. The principal legislative check is the enumeration of certain procedures which the Department must follow in dealing with prisoners. "The ideal, of course, is to put all necessary discretionary power within the boundaries, to put all unnecessary such power outside the boundaries, and to draw clean lines."41 The boundaries must be examined, and if not measured against an ideal, then at least against the boundaries established in this jurisdiction by the judiciary for actions by prison authorities. The Code of Corrections is of value only if the legislature has effectively said, "this, and no more, can be imposed as punishment."

**THE CODE OF CORRECTIONS: STANDARDS FOR THE TREATMENT OF PRISONERS**

Before discussing the "prisoners' rights" which have been created in the new Code of Corrections, it should be noted that the "rights" have not been created in a vacuum. The rights come into existence against the background of an already existing prison system, within which little legislative direction had been given to the authorities.

Without any legislative guidance for policy making, the prison administrators were forced to create for themselves a "common law" of corrections.42 In dealing with prisoners in day-to-day situations, prison authorities developed informal rules and policies with which to run the institutions. This common law was developed by those who actually had to deal with the prison populations; no judicious neutrality guided it. The common law of corrections, then, understandably emphasized the concerns of safety for the custodians and security for the institutions. Often unwritten and outdated, this common law of corrections gave little direction to either prisoner or prison guard.

The deficiencies of the common law of corrections were increasingly reviewed in the cases which came before the federal courts in the 1960's; the abuses were dramatically brought to the public in the forms of "demands" by rioting prisoners. Lack of work and educational opportunities, inaccessible medical care, religious and racial discrimination, oppressive discipline, inadequate contact with family and friends on the outside—these were the concerns of prisoners demanding the attention of the courts and the public.43 And the concerns were not new

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41. *Id.*
42. The author was first introduced to this concept of a "common law" of corrections at the Central States Correctional Association Conference in the summer of 1973.
or revolutionary, for they had been the focus of concern for state and presidential commissions throughout the century. The Wickersham Commission had written for President Hoover in the 1930's that the prime emphasis for prison administrators had to be that the prisoner was going to return to society, for prison doors worked both ways.\textsuperscript{44} The task of the prison administrator, it found, was to shape the prison society so that the prisoner could indeed again return to being a free person.

The common law of corrections formulated the rules by which the corrections officials shaped the prison society. The prisoners' rights revolution has had the effect of suggesting that this common law must be subjected to the control and direction of those ultimately responsible for deciding who is to be punished for offending society. The courts, the legislature and the public are to be the source of the ultimate decision on punishment, and the prison administrator must be limited and checked in taking control and custody of society's offenders. This simple proposition is a major policy decision made in the Code of Corrections.

The conflict arises, however, in defining the areas of decision making. By the nature of the imprisonment, the state has control over all the hours of the prisoner's day, the work he does, any possible contact with the outside world and his physical needs. Imprisonment necessarily involves control, confinement, custody and security, for otherwise the state would not opt to maintain the difficult control of an institution.

The prisoners who are of prime concern to the prison authorities are those whose imprisonment is necessary for the protection of the public and who are in need of correctional treatment. These prisoners are most likely to be subjected to the disciplinary control of the authorities and to the maximum restraint of the liberties which do exist within the prison and in contacts with the outside world.

The provisions of the Code of Corrections in defining certain statutory rights for prisoners, the policies of the Department of Corrections in recognizing these rights and the decisions of the courts are of significance only if some statement can be found defining how much control the authorities can exercise over these prisoners. The Code of Corrections attempts to implement a scheme whereby the prison authorities may act within their discretionary powers only in the neces-

\textsuperscript{44} \textit{REPORT OF THE NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT} 179 (1931).
sary area of custody incident to imprisonment. This scheme has three bases of control.

The first basis of control is a statutory definition of certain substantive rights for prisoners, corresponding to constitutional rights of free persons. Not only are the prisoners given rights to communicate with the outside world, they are also given certain rights to basic living standards within the institution. In addition, the prisoners are given certain rights to challenge the disciplinary actions of the prison administrators, creating a means by which the prison administrators must justify disciplinary activities.

The second basis for legislative control is a requirement that the prison officials "promulgate Rules and Regulations in conformity with this Code." This "secondary basis" for limiting the discretionary power of the Department, while an obvious administrative control, is still of sufficient novelty to be of interest. As noted, one major failing of the common law of corrections was its lack of any requirement that the prison administration formulate internal policies. The Administrative Regulations of the new Illinois Department of Corrections will be examined in light of the statutory requirements in order to judge the value of this administrative control required by the legislature.

The courts potentially provide the third basis of control over the Department of Corrections when constitutional or statutory rights of prisoners may be at stake. If the state and federal courts have jurisdiction to consider violations of these new prisoner's rights, then another potential source of discretionary control exists. The impact of the Code of Corrections, then, must be judged against the likelihood of the courts actually taking action in this area in reviewing the activities of the prison authorities. A study of litigation in the Illinois courts, both before and after the enactment of the Code of Corrections, suggests that prisoners in Illinois are unlikely to find major support from the courts in any "reform efforts." Instead, the burden of reform taken on by the legislature in the Code of Corrections has been clearly placed on the Department of Corrections, and the impetus of any reform will come from the strength of the legislative controls on its administrative agent.

Contacts by the Prisoners with the Outside World

The range of problems with which prison authorities must deal is a

45. CODE OF CORRECTIONS § 1003-7-1.
function of the total control which is exercised over the lives of prisoners. One obvious area of control is that of a prisoner's contacts with the outside world. A free person is constitutionally protected in his rights to communicate with his government, the press and with his family by virtue of the protections of the Bill of Rights. But how much can these rights be restricted within the prison system?

The legislature stated in the Code of Corrections a general proposition which is a starting point for examining this question: "Conviction and disposition shall not entail the loss by the defendant of any civil rights, except under this section." The base point, then, is that the prisoner shall have those civil rights of a free person. Given this viewpoint it would seem consistent for the legislature to define the most important of the protected civil rights and to explain those situations in which reasonable restraints may be imposed. If the prisoners are to be protected in their civil rights, recognition should be given to the observation that "the freedoms of conscience, of thought, and of expression, like all the rest of life, are cramped and diluted for the inmate. But, they exist to the fullest extent consistent with prison discipline, security and the punitive regime of a prison." The specific enumeration of those rights and privileges does attempt to balance these "rights" against the needs of the authorities to maintain control, security and discipline within the prison. The rights of prisoners are listed in the Code of Corrections under the section on "facilities."

All institutions and facilities of the Department shall provide every committed person with . . . a library of legal materials, published materials including newspapers and magazines approved by the Director, and a radio or television system. . . .

All institutions and facilities of the Department shall permit every committed person to send and receive an unlimited number of uncensored letters, provided, however, that the Director may order that mail be inspected and read for reasons of the security, safety or morale of the institution or facility. . . .

All of the institutions and facilities of the Department shall permit every committed person to receive visitors, except in case of abuse of the visiting privilege, or when the chief administrative officer determines that such visiting would be harmful or dangerous to the security or safety or morale of the institution or facility. Clergy, religious chaplain and attorney visiting privileges shall be as broad as the security of the institution or facility will allow. . . .

All institutions and facilities of the Department shall permit reli-
religious ministrations and sacraments to be available to every committed person, but attendance at religious services shall not be re-
quired.48

**Access to Published Materials**

The discretion which the Code of Corrections still leaves to the prison authorities even after its enumeration of “rights” can perhaps best be seen in the statute and regulations regarding access to published materials. The statute provides for access to approved materials. The Department of Corrections implements this requirement by allowing prisoners to read those periodicals on the approved list of the library committee of the American Correctional Association.49 A prisoner may request a publication not on this list, but his request must be reviewed by the prison library service.

The Administrative Regulations list one seemingly valid ground for refusing material: that the publication is obscene by the standards set out by the United States Supreme Court. If this standard is applied, then the Department does grant the prisoners as much access to non-pornopraphic materials as the free person has. The Department has set clear limits for its own discretionary activity here.

But the Administrative Regulations allow the authorities to refuse printed matter on yet another ground. If the materials present a “clear and present danger” to the security of the institution, then the prisoner may not read them. Some courts have demanded that prison officials show no less than a clear and present danger to the institution before refusing published materials to a prisoner.50 The Seventh Circuit has not yet subjected the censorship of written materials to such stringent constitutional activity, and recent case law indicates that it would be reluctant to so bind the discretionary power of the authorities.51

It would seem, then, that for the present the Department is free from court review in its censorship of dangerous materials. The question exists as to whether the legislature intended the Department to have such powers of control. The statute directs the Department simply to have an approved list of materials, without defining how that approval is to be given. If material must be dangerous to be cen-

48. CODE OF CORRECTIONS § 1003-7-2(a), (d), (e), (f).
49. ADMINISTRATIVE REGULATIONS 828.
sored, must the danger be real, or can it be just speculative? Can the institution forbid an "inflammatory" publication to an "agitator" while allowing another inmate access to the publication? The statute sets no bounds for the Department's discretion in choosing how to interpret its own requirements.

**Mail Privileges**

The statutory guidelines relating to mail privileges reveal very clearly an area in which the legislature did wish to provide guidelines for the exercise of discretion by prison officials. The inmates are, by statute, free to send and receive an unlimited number of uncensored letters, except that the mail may be inspected and read for reasons of the safety, morale or security of the institution. The statute, however, contains a loophole—can correspondence be censored, in the sense that it is completely forbidden?

The Department of Corrections has answered that question affirmatively. The Administrative Regulations give the prison authorities the right to completely forbid a prisoner from corresponding with certain persons. The right to list an unlimited number of persons on a correspondence list is given to the inmates, but the list is to be approved by the correctional administration. The criteria for this approval are undefined by the regulations, except that they must be related to the purposes of confinement and the need for security in the institution.

How the Department of Corrections will apply these criteria is unknown. No examples are given in the Regulations. A prisoner who might wish to criticize the application of these criteria to a particular case is left with little recourse to challenge such a practice.

The question exists, of course, as to whether or not the legislature intended to leave open this loophole. Since the statute allows the Director to read and inspect the mail, it would seem that the legislature intended the Director to be able to use his powers. What at first glance was a broad statutory right for prisoners is in actuality the grant of a limited right of correspondence.

The courts in this jurisdiction are unlikely to grant the prisoner any broader right to correspondence. The most recent Seventh Circuit opinion on mail rights upheld the right of Wisconsin prison authorities to censor correspondence between a prisoner and his paramour. The Seventh Circuit held that the state was not compelled to show a clear and

52. Administrative Regulations 823.
present danger from the correspondence. The state censorship could be justified as simply rationally related to the legitimate state purpose in rehabilitating the inmate, a purpose which might be defeated by the unusual correspondence. The Administrative Regulations in Illinois also allow censorship when "the purposes of confinement" are taken into account. The courts, then, are unlikely to demand any further accounting by the Department in the use of its censorship powers. The discretionary power of the Department in this area is actually only subject to adherence to its own administrative regulations.

While the statute allows the Director the power to read and inspect all mail, the Department in its own regulations broadly interprets this power to allow censorship of ordinary mail. Under the same statutory authority, the Administrative Regulations explaining the treatment of mail to attorneys, courts and government officials greatly restrict the discretionary power of the Department. Outgoing letters from inmates to this group of people are not to be read, even if sent by prisoners in solitary confinement. Incoming mail from this class of correspondents may be read to verify the addressee and to ascertain that the content is in fact official. The distinction made in the Regulations between the treatment of ordinary and "official" mail reveals the strength of the second and third sources of control on the power of the prison officials. For if the statute is not the source of the Departmental policies, then the Department itself is restricting its own discretionary power.

It is clear that an important source of the Departmental policy is the directives of the courts. While many courts have emphasized protection of all rights of correspondence, the Seventh Circuit has tended to give special attention to protection of official correspondence with courts and governmental officials. The Administrative Regulations reflect this emphasis and limit the discretionary power of the Department.

The basis for this distinction between ordinary rights of correspondence and more fundamental rights of communication with the government was suggested by the Seventh Circuit in Morales v. Schmidt. Communications with courts, attorneys and state officials were deemed sui generis, deserving of greater protection from the courts. The

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54. Administrative Regulations 824.
55. "The prohibited communication was between an inmate (now a parolee) and the mother of his child, not between an inmate and his attorney, or the courts, or appropriate state officials regarding the legality of his conviction or the conditions of his incarceration. Courts now regard the latter kind of communications as sui generis." Morales v. Schmidt, No. 72-1373 n.6 (7th Cir. Jan. 17, 1973).
56. Id.
57. Faced with the decision of the Seventh Circuit in Morales, Judge Doyle of the
regulations on mail reflect a realization of this legal principle. Thus the Code of Corrections alone is not the source of the check on the Department's discretion.

**Visiting Privileges**

The Code of Corrections provides that all inmates shall be able to receive visitors, except when the visit would be "harmful or dangerous to the security, safety or morale of the institution." Clergy and attorney visiting privileges, however, shall be as broad as the security of the facility will allow. Here the statute clearly distinguishes between the importance of the rights of the prisoners to see and contact family and friends and the significance of rights to contact clergy or attorneys. Where the contact is merely an expression of the "right" to associate with family and friends, the concerns of the institution for its own order may predominate. Where the contact possibly affects the right to a defense or the right to practice a religion, this contact is given more protection.

The Administrative Regulations provide that six friends and relatives may be designated as visitors. The Chief Administrative Officer is to interview each visitor to determine whether his visit would jeopardize the safety, security and/or morale of the institution, in which case he may be excluded. Any attorney of record may visit a prisoner, as well as any clergyman who can produce evidence that he is in good standing with a recognized faith. Visits are allowed to all prisoners, even those in disciplinary isolation or in segregation.

The statutes and the regulations, however, provide no guide to how the visits may be conducted. The Seventh Circuit has suggested that more stringent protection must be given to the sacrosanctness of the communications between an inmate and his attorney; partitions cannot be maintained in an attorney visiting room without a showing of some threat to the order or security of the institution. The statute and the regulations move beyond the commands of the courts by actually recognizing that the prisoner does have a right to associate with people on the outside world. Restrictions on normal communications

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58. **Code of Corrections** § 1003-7-2(e).
59. **Administrative Regulations** 829.
61. *Id.* at 18.
Illinois Prisoners' Rights

are not to be an ordinary incident of imprisonment, but are subject to the reasonable needs of the institution. This thought has been philosophically stated by more than one court to mean that "deprivation of freedom of movement is punishment enough, and further restrictions must be related both reasonably and necessarily to the advancement of some justifiable purpose of imprisonment." What the legislature has recognized in granting a statutory right of association for the prisoner is that the deprivation of human association is not reasonably and necessarily justified by imprisonment. An obvious notion to a prisoner, this thought is in fact a major step in recognizing the limitations on how the state may punish one who has violated its laws.

Religious Practices

Another of the rights which a prisoner wishes to maintain vis-à-vis the outside world is his right to practice his religion. This fundamental right for a free person is peculiarly subject to control in an institution where the practice of religion might affect the security of the prison. The Code of Corrections requires that the Department make available to all inmates religious ministrations and sacraments. The Department is to allow the broadest possible clergy visiting privileges.

The difficult security questions arise when prisoners seek to jointly practice their religious beliefs within the institution, by meeting together, reading religious materials, or adhering to a particular religious diet. The Administrative Regulations leave many of these decisions to the chaplains and the Chief Administrative Officer, who have the ultimate authority for permitting religious meetings. The officials, however, are under no administrative requirement to allow any such meetings. The officials must permit religious materials, although they may be forbidden if of such nature as to "injure the good order of the institution."

The Seventh Circuit has noted that "although a prisoner retains his complete freedom of religious belief, his conviction and sentence have subjected him to some curtailment of his freedom to exercise his belief." This same principle seems to exist in the Code of Corrections. The Seventh Circuit has also noted that the reasonableness of a restriction will be more closely scrutinized where "the adherents of one faith are more heavily restricted than the adherents of another." Thus

63. CODE OF CORRECTIONS § 1003-7-2(e).
64. ADMINISTRATIVE REGULATIONS 839.
65. Cooper v. Pate, 382 F.2d 518, 521 (7th Cir. 1967).
66. Id.
the principal judicial restriction would seem to be a requirement for nondiscrimination in prison practices, and not a requirement that prisoners be free to exercise their religious beliefs except when compelling prison interests exist.

The Code of Corrections and the Regulations fail to give any more guidance to the prison officials on what use of discretionary power is to be considered reasonable. Emphasis is given, instead, to the maximum amount of discretion necessary to deal with security concerns. Once the burden on the exercise of beliefs is demonstrated to be nondiscriminatory, it is unlikely that courts will review considerations of security and administrative expense claimed by the prison authorities.

The area of permissible limitations on prisoners' rights is still a developing one. Courts are more likely to restrict review of the activities of prison officials if these activities are based on reasonable regulations following intelligible legislative guidelines. If, however, the state does not fully recognize a "right" which the courts find necessary to protect, the Department of Corrections will not be made vulnerable to judicial review by simply implementing the statutory guidelines. The rights and privileges given to the prisoners must be no less than those recognized by both the legislature and the court. The total effect of the existence of twin checks, from courts and the legislature, is to provide an impetus to prison officials to increasingly recognize rights for prisoners which are not subject to the discretionary control of the Department.

The Rights of Prisoners to a Minimum Standard of Living Within the Prison

The powers of the Department of Corrections define not only what contact the prisoner has with the outside world, but also what the prison world itself shall be. The prison authorities control the clocks and the heat and the food and the color of the institution. A free person, of course, has no right to demand food or clothing from the government. At best he has a "conditional entitlement" to the necessities of life. A prisoner under the total control of the state, however, is potentially just as powerless to demand the necessities of life from his custodians. Recently, it has been acknowledged that a prison may not be so lacking in the basics of life so as to constitute "cruel and unusual punishment." The Code of Corrections defines certain basic standards of living which must be recognized within the prison as those
basics which cannot be taken from a person by the state.  

The Code of Corrections requires that the committed person be given a nutritious diet, adequate clothing and bedding, and access to bathing and toilet facilities. No restrictions on the right to “wholesome food” are to be imposed, and other restrictions are allowed only upon a showing that the prisoner has abused these rights.

These general requirements are further defined in the Administrative Regulations. Inmates in solitary confinement are to have toilet articles and one shower a week, and other prisoners are given less restricted access to cleaning facilities. The inmate in solitary confinement is provided with clothing and bedding unless the inmate destroys same or is suicidal. These Regulations on solitary confinement give the only indication of what the Department considers to be an abuse of a privilege. The Regulations seem to be within the permissible limitations accepted by courts in reviewing strip conditions in solitary confinement. A similar New York state law limiting restrictions on clothing and bedding has been found to be an acceptable statutory guideline.

While the statutory guidelines seem clear, definitive and intelligible, the Regulations point out another situation in which the Department has acted to give itself discretionary power not disclosed in the statute. The Regulations allow the prison authorities to restrict access to toilet facilities when such action is “deemed necessary by the Chief Administrative Officer of the prison for the safety or security of the institution.” Clearly this Regulation speaks to the situation of an institution riot, when a general lockup is deemed necessary. It must be assumed that the legislature intended to leave this power to take immediate precautionary measures within the hands of the prison officials; the Code of Corrections expressly grants the prison officials all necessary emergency anti-riot powers. The regulations illustrate, however, the Department’s apparent need to expressly reserve for itself full discretion in exercising this power, even in situations which might never be questioned by the legislature. But by phrasing its discretionary powers to deprive inmates of their living facilities in such a broad fashion, the Department seems to attempt to escape the commands of the statute.

The result is that the regulations thwart the legislative attempt to

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68. Code of Corrections § 1003-8-7(b).
69. Administrative Regulations 806.
70. See Wright v. McMann, 460 F.2d 126, 131 (2d Cir. 1972).
72. Code of Corrections § 1003-6-4.
define absolutely the minimum conditions of living for inmates. The statutory language on minimum standards represents the strongest attempt by the Illinois legislature to limit the discretion of the Department of Corrections. The Department, on the other hand, felt the need to define its own discretionary powers. The "common law" of corrections, which has focused on the need to maintain security, has won out over the legislative control.

*The Rights of Prisoners Against Their Custodians: Discipline*

The prime duty of the custodian is to keep the prisoner under control. The Code of Corrections defines several policies on discipline which restrict the custodian in the ways in which he may use his powers of custody. One substantive limitation is described in the use of solitary confinement as discipline. Another legislative limitation on discipline has been created in defining certain formal procedures which must be implemented before discipline may be imposed. Both limitations represent a legislative attempt to set boundaries on how far and how much punishment may be imposed on those already under the restrictive confines of the state.

The Code of Corrections permits the confinement of a prisoner to a solitary cell as a disciplinary tool, but time limits are imposed on its use: "No person in the Adult Division may be placed in solitary confinement for disciplinary reasons for more than fifteen consecutive days or more than thirty days out of any forty-five day period." Additional periods of punishment may be authorized in cases of violence or attempted violence against another person or property. No other legislative direction is given as to when solitary confinement should be used as discipline.

This legislative acceptance of solitary confinement is reflected in the law of every state, and only recent reform proposals have suggested the abolition of solitary confinement as a punishment. Courts, too, accept solitary confinement as a punishment when properly administered. The legislative change, then, is of interest in that it sets a time limit on the acceptable duration of such punishment. Various studies suggest that the fifteen-day limit is a sufficient statement of any

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73. CODE OF CORRECTIONS § 1003-8-7(b).
76. See Adams v. Pate, 445 F.2d 103, 106-07 (7th Cir. 1971), for a judicial statement that solitary confinement in and of itself does not constitute cruel and unusual punishment under the U.S. Constitution.
disciplinary use of solitary punishment,\textsuperscript{77} and if this is so, the intention of the legislature becomes clear. Solitary confinement is to be permitted only when it does serve a disciplinary purpose and is not to be simply an additional punishment for the prisoner. While this would appear to be a reasonable limitation, it is an unusual legislative dictate to those with responsibility for the prison system.

The legislature, however, failed to follow up this policy initiative in other areas of discipline. The statute and the Administrative Regulations list seven different disciplinary sanctions which may be imposed on prisoners,\textsuperscript{78} but neither the statute nor the Regulations ever explicitly state that the punishment must be in proportion to the offense. The failure of the legislature to suggest this principle is remarkable in light of the express restrictions on the use of solitary confinement. The exercise of discretion by the Disciplinary Committee is undoubtedly assumed to follow some proportionate relationship of punishment and offense, but nowhere is this standard expressly required.

The courts have traditionally provided little guidance in this matter, choosing instead to require procedural due process in the making of the decision and bowing to administrative expertise as to the substance of the decision.\textsuperscript{79} This stand has strong roots in judicial conservatism and carries its own wisdom, but it offers little of substance in checking the exercise of administrative discretion. The legislature in the Code of Corrections has also provided a minimum of guidelines. A classical statement of the minimum guidelines for disciplinary discretion was made in \textit{Wright v. McMann}:

\begin{quote}
The word discretion is not talismanic. We think that when an inmate is punished as severely as possible for an act which the warden testifies deserves no sanctions whatsoever, it behooves the punishing official to come forth with some justification other than the "particular circumstances" warranted such discipline.\textsuperscript{80}
\end{quote}

The emphasis of the legislature in the Code of Corrections is on the means by which the disciplinary decision is made and the process by

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\textsuperscript{77} The American Correctional Association recommends a 15-day limit on the use of solitary confinement with a restricted diet, \textit{Manual of Correctional Standards} 414-15 (1966); but see N. Glaser, \textit{The Effectiveness of a Prison and Parole System} 180 (1964), for the suggestion that an overnight stay in isolation is the appropriate sanction, since the author feels that solitary confinement rapidly loses effectiveness past a day or two.

\textsuperscript{78} Administrative Regulations 804. The possible disciplinary actions may be one or a combination of the following: dismissal of the charge, reprimand, recommendation for program change, recommendation for housing change, denial of recreation or other privileges, confinement to quarters, placement in disciplinary isolation, recommendation for loss of good time or demotion in grade, recommendation for consideration for placement in the Special Program Unit.

\textsuperscript{79} Judicial Intervention in Prison Discipline, \textit{supra} note 3, at 200.

\textsuperscript{80} Wright v. McMann, 460 F.2d 126, 133 (2d Cir. 1972).
which the circumstances are judged. Instead of providing guidelines for the use of discretionary disciplinary power, the legislature has opted to define formal procedures for the disciplinary decision. These formal procedures include both of the means by which Davis suggests unnecessary discretion be eliminated. The legislature has *structured* the disciplinary process by providing formal procedures for decisions of a serious nature, procedures which are based on written rules and followed by a written finding. The legislature has *checked* the disciplinary process by requiring a system of administrative review. The procedures must be examined with the Department's interpretations of the legislative mandate for one to know how the Department intends to implement its disciplinary powers.

The Department is required by statute to formulate rules for the behavior of the inmates, and each incoming inmate must be informed of these rules. The rules promulgated by the Department cover obvious types of improper behavior in a prison such as destroying property, leaving an appointed place without permission, making or having a weapon and stealing or destroying any property. The list of inmate violations also includes being "disrespectful to any employee," using "improper language," "gathering around an employee in a threatening or intimidating manner" and even "tattooing the body or piercing the ears." The latter list of violations might not pass constitutional scrutiny if applied to free persons, but their legitimacy in a prison setting is obviously unquestioned by the Department of Corrections.

This varied list of violations demonstrates the wide range of security concerns of the Department. "The problem of order maintenance in the prison setting can be singled out as the major occupation—pre-occupation one would say—of the corrections profession." It is possible that a court might not give credence to an official claim that tattooing is legitimately a prison concern; it is more likely, though, that a court would accept a professional decision on how such behavior might be controlled.

The attention of the Code of Corrections and the courts focuses on how discipline is administered, rather than why. If an offense has been committed and the prison authorities find that a major disciplinary action is in order, formal procedures for instituting the disciplinary

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81. CODE OF CORRECTIONS § 1003-8-7(a).
82. ADMINISTRATIVE REGULATIONS 805.
83. See, e.g., Coates v. Cincinnati, 402 U.S. 611 (1971) (not a sufficient criminal offense to "gather in a threatening manner").
action must be used. The inmate, by statute, must have written notice of the charges against him. He must have a hearing before an impartial disciplinary board. The inmate must also receive a written statement of the reasons for any action taken against him. By Administrative Regulation, the disciplinary action must be taken within 72 hours of the discovery of the rule violation.

These formal procedures are notable for the lack of emphasis on the role of the prisoner in the disciplinary hearing. The inmate may address the Committee and present his version of the incident if he wishes. The Committee need not call any witnesses, however. Only if the Committee does call witnesses does the prisoner have any right to cross-examine his accusers. No provision is made for counsel for the prisoner, or any counsel substitute.

While many courts have called for more stringent due process requirements in prison disciplinary proceedings, the leading Seventh Circuit opinion in the area requires far fewer procedural protections. The Seventh Circuit will only require that the prisoner be given "fair opportunity to explain his version of the incident." While the Seventh Circuit may require that the prisoner have the right to present his own witnesses, that court is not ready to grant the prisoner the right to cross-examine the witnesses brought before the Committee. Counsel for the prisoner is not a due process requirement for the disciplinary decision, and a written statement of the Committee findings is also not constitutionally commanded.

A more definitive statement of the requirements for disciplinary hearings may yet be forthcoming from the federal courts, but to date the Administrative Regulations grant the maximum required protection to the prisoner facing disciplinary action.

The goal of the Regulations and the Code of Corrections is to shape the procedure for the decision, rather than to direct what disciplinary action should be taken. In using this approach, the legislature, the courts, and the Department have taken a practical approach to controlling the discretionary powers of the prison officials, emphasizing internal procedures. One writer who has advocated this approach of trusting the officials to follow their own internal procedures suggests that there is no alternative:

86. Administrative Regulations 804.
88. United States ex rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973).
89. Id. at 716.
90. Id. at 722 (Swygert, C.J., dissenting).
Recourse to rule of law in an effort to eliminate or reduce discretion is a natural reaction to the abuse of discretion; but it is nevertheless a naive reaction. For, in recognizing the place of discretion, we perforce accept the limitations on verbalized law. Inherently, the guidance of discretion lends itself not to rigid particularized rules, but rather to the reason of the law operating sensitively in the "clutch of circumstances."

The circumstances in which discipline is imposed are the most critical and sensitive to the institution. The legislative emphasis on the procedures by which the circumstances are judged perhaps best allows the reason of the law to guide how the disciplinary discretion will be manifested.

The particular sensitivity of the legislature to the concerns of the prison administrators in the disciplinary decisions is overstated. Bowing to administrative expertise, the legislature failed to require that discipline be in proportion to the offense. Emphasizing formal adjudicatory procedures, the legislature failed to require that the disciplinary decision be supported by any evidence, for there is no requirement that evidence meet any standard of proof.

In addition, neither the Code of Corrections nor the Administrative Regulations provide an adequate means of appeal of the disciplinary decision. If the prisoner does have a method of appeal, it is to the grievance procedure of the prison system. The statute and the Regulations command, however, that the grievance procedure be used primarily for problems dealing with "food and nutrition, health, personal property, safety and mail procedures." The lower levels of the grievance procedure, if used in an appeal of the disciplinary decision, would merely duplicate the work of the Disciplinary Committee.

The practical value of emphasizing the procedures for making the disciplinary decision a formal procedure is obvious. But the legislature and the Department have failed to give full consideration to those procedures which would give any significance to the formal procedures. This most sensitive area of institutional authority is still left largely undirected by the provisions of the Code of Corrections and the Administrative Regulations.

Within the prison, the relationship between custodian and prisoner has a further substantive limitation; the use of solitary confinement as a punishment. Other major punishments for breaches of discipline by prisoners are to be met with certain duties on the part of the custodian

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92. CODE OF CORRECTIONS § 1003-8-8.
93. ADMINISTRATIVE REGULATIONS 845.
Illinois Prisoners' Rights

to observe fairness in punishing for the breach. But the terms of the relationship, the definition of a breach and the sanctions to be imposed are left to be decided by the custodian.

The Rights of Prisoners against their Custodians: Programs of Rehabilitation

One final question remains to be answered in this examination of the guidelines which the legislature has given the Department: besides observing certain rights and privileges of the prisoners, do the custodians have any positive duties toward these committed persons?

At least three such positive duties toward the prisoners do exist. The Department must, by statute, give all inmates the opportunity to "attain the achievement level equivalent to the completion of the twelfth grade." The Administrative Regulations translate this requirement literally, adding that the Department shall develop special educational programs for illiterate prisoners. A second statutory duty is that the Department provide medical and surgical care for all inmates in need of such care. The Administrative Regulations further require that the inmates be provided with medical services and a level of care "commensurate with good medical practice."

The third statutory duty of the Department is to provide, "in so far as possible," employment at useful work for all inmates capable of such work. The employment is to equip the prisoners with "marketable skills, promote habits of work and responsibility, and contribute to the expense of the employment program." The Administrative Regulations further emphasize that correctional employment is "intended to play a major role in re-educating and preparing an inmate, both mentally and physically, for a successful non-criminal life after release."

The impetus behind defining these duties of the custodians has been suggested by Sol Rubin: "If we think that there are programs needed in prison, then we must add provisions that define those things as rights of prisoners, access to or denial of which should be subject to court review." In theory, the provisions of the Code of Correc-

94. Code of Corrections § 1003-6-2(d).
95. Administrative Regulations 501.
96. Code of Corrections § 1003-6-2(e).
97. Administrative Regulations 836.
98. Code of Corrections § 1003-12-1.
tions are strong enough to make these programs "rights" which must be granted the prisoners and which will be subject to review by courts.

Court cases to date indicate that these "rights" are not being recognized by the Department of Corrections. Two federal court decisions in the Northern District of Illinois\(^ {101} \) have recognized claims that access to educational, medical and employment programs was not being given in compliance with these statutory provisions. These reviewing courts, however, found themselves without jurisdiction to consider the claims of the prisoners, for the "rights" were not of a constitutional nature which had to be recognized by the federal courts.\(^ {102} \)

If the prisoners have no federal claim for protection of the new statutory rights, it would seem that a claim for relief could be raised in the state courts. The state forum, though, is rarely chosen as a vehicle for protection of prisoners' rights.\(^ {103} \) Among the many reasons for avoiding state courts has been the traditional reluctance of the Illinois courts to review the actions of the prison administrators.\(^ {104} \) The enactment of the state Code of Corrections would seem to give the state courts a further basis for review of the state prison authority.

The latest decision of the Illinois Supreme Court, however, offers little hope to those who would opt for state court review of the duties of the Department of Corrections. The court in \textit{In re Owens}\(^ {105} \) vacated a judicial order for program changes at a juvenile institution and emphasized that the Department of Corrections was to be given the opportunity to implement its new programs and regulations. In noting the discretion given to the Department under the new laws and regulations, the Illinois Supreme Court wrote that "reasonable action within the range of this discretion does not violate a prisoner's constitutional rights."\(^ {106} \) The court did go on to add that "it is well established that inmates do not lose all their constitutional rights."\(^ {107} \)

\textit{In re Owens} dealt with conditions in a juvenile institution, and the lower court had assumed jurisdiction under the Illinois Juvenile


\(^{102}\) "Attendance at a prison school is not in itself a constitutionally protected interest absent some evidence tending to show that the authorities acted unreasonably in withholding or suspending such a program." United States \textit{ex rel.} Nelson v. Twomey, 354 F. Supp. 1151, 1153 (N.D. Ill. 1973).


\(^{104}\) See People \textit{ex rel.} Willis v. Dept. of Corrections, 51 Ill. 2d 382, 282 N.E.2d 716 (1972).

\(^{105}\) \textit{In re Owen}, 54 Ill. 2d 104, 295 N.E.2d 455 (1973).

\(^{106}\) \textit{Id.} at 109, 295 N.E.2d at 458.

\(^{107}\) \textit{Id.}
Court Act. The Illinois Supreme Court in review stated that the Illinois courts did not have jurisdiction under this Act to direct the actions of the Department of Corrections. The unanswered question of what basis of jurisdiction a court could have in reviewing the actions of prison administrators was not addressed by the court.

The actions of the Department officials do not seem to be subject to review under the State Administrative Review Act. That Act covers only the actions of officials from agencies which are expressly recognized by the legislature as subject to this mode of review. No such express statement exists in the enabling legislation for the Department of Corrections.

A cause of action would not be appropriate under the state civil rights act, which speaks to denials of rights to public accommodations and does not have the broad language prohibiting violations of civil rights of the federal statutes such as 28 U.S.C. § 1983. A claim that a right of a prisoner given in the Code of Corrections was violated by the prison officials is simply not given redress by private suit for monetary damages in the Code of Corrections or other statutory provisions dealing with civil rights. If such a private suit were to exist, it would be the unlikely creation of the state court itself.

The prisoner, then, is left with a "public suit" to redress his grievances under the Code of Corrections. He might seek a declaratory judgment from the state court which would result in a construction of the statutory language and a declaration of his rights, a judgment which would need further enforcement by the state courts. The prisoner might also seek a writ of mandamus against the Department officials, if the prisoner could show that the statute does indeed create a civil right which is not being recognized by the prison authorities.

The statutory language creating the duties of the Department of Corrections to provide programs for the prisoners is not particularly

108. Id.
110. Id. § 265.
112. Id. § 13(2).
113. 42 U.S.C. § 1983 (1971), allows a cause of action to any party deprived of a right secured by the Constitution and law if the injury is caused by one acting under color of state law.
114. ILL. REV. STAT. ch. 110, § 57.1 (1971).
115. ILL. REV. STAT. ch. 87, § 1 (1971).
116. See People ex rel. Bibb v. Mayor of the City of Alton, 179 Ill. 615, 632-33, 54 N.E. 421, 428 (1899) (mandamus will issue to compel a school board to admit "colored" children to a local school).
susceptible to review by the state courts. The employment programs are to equip the prisoners with marketable skills, but such programs need be provided only “so far as possible.” If the Department of Corrections has a training program which is denied to a prisoner, the courts might have a basis for reviewing the actions of the Department. But if the Department has no training program or has an inadequate program which does not teach marketable skills, claims of budgetary limitations would seem to provide the Department with an adequate statutory defense to any court review.

Similar questions arise in respect to the other statutory duties of the Department. Medical and surgical care must be provided to all inmates “in need of such.” Would failure to provide screening tests for sickle cell anemia be a violation of this statutory duty? The educational program must allow a prisoner to obtain the equivalent of a twelfth grade education. Does the Department fulfill its duty by allowing a prisoner to take correspondence tests for the high school equivalency exam? Must classes be on the premises of the prison?

The statute simply does not define clear standards for review of the actions of Department officials in carrying out their statutory duties. The Illinois courts, then, if the traditional deference to the prison administrators is maintained, will not be a forum for review of any but the most abusive denials of rights of access to educational, medical and employment programs.

The promise of the Code of Corrections is far greater than what can be realistically demanded of the Department created by the new statute. One commentator has suggested that “any action taken by the Department of Corrections in dealing with committed persons must be able to answer the question ‘Why?’ in terms of this Code language.” There is no particular forum though, to whom the prisoner may ask “why not?” The accountability of the Department of Corrections for positive programs is only to the legislature and to the public as a whole, neither of which exhibit much interest in prison affairs.

CONCLUSION

It is much simpler to understand how the Code of Corrections has established administrative direction for a new, centralized prison authority in Illinois, than to describe the policies affecting prison life which were adopted in the Code. The Code has given the Department of Corrections complete organizational control over the institutions,
programs and policies of the penal system. The Code has protected certain rights of prisoners to act without institutional control minimizing the legal discretion of the authorities to restrict prisoners in the exercise of these rights. The Code has left open, without legislative control, the vast area of prison disciplinary measures. Institutional control of disciplinary policy is maximized, Departmental control is minimized and judicial review is largely foreclosed.

"The history of penal reform becomes the history of the diminution of gratuitous suffering."\textsuperscript{118} Perhaps the total effect of the legislative implementation of protections for the state prisoners can be so characterized—as yet another, well-organized attempt to diminish any gratuitous suffering of the prisoners of the State. The Code of Corrections recognizes, in statutory form, the necessity for protecting those in prison who would exercise the constitutional rights of free persons to speak and to write and to associate. These rights may be restricted under the Code, but the "necessary" limitations are more strictly defined now. For some of the rights, limitations may only be imposed when the inmate himself abuses them, an ultimate recognition of the "fundamental" character of these rights for all persons whether in prison or free.

In contrast to the prisoners' new rights of contact with the outside world, the prisoner is still left with few rights to assert against his custodian within the prison setting. Statutory importance is given to formulizing the procedures which the authorities must use in reaching their decision as to how the prisoner shall be controlled, but the initiative is on the authorities to follow the procedures. The decision as to why discipline is used still rests largely with the custodian.

The legislative development of an organized administrative agency bound by statutory guidelines and administrative rules and regulations is also in itself a recognition of certain rights on the part of prisoners.

It is the secret exercise of vast power over lives and human rights and the unsupervised delegation of control that makes prison life as it exists today unconstitutional. Prisons are not unconstitutional because abuses occur . . . [P]rison life at present is unconstitutional because the system fosters violations of the public trust, and because there is no means of redressing grievances.\textsuperscript{119}

The powers of the Department of Corrections over prisoners have in fact been expanded. The Department may now legally engage in behavioral control programs or isolate "agitators." The Depart-

\textsuperscript{118} Morris, \textit{Impediments to Penal Reform}, 33 U. CHI. L. REv. 627, 628 (1966).
ment may place its institutions near cities and families or in rural areas. The Department may place a prisoner in a maximum security institution of several thousand or a half-way house of twenty. These administrative powers are in fact vast powers to make policy decisions as to the nature of the Illinois prisons. These powers are no longer secret, but open and acknowledged.

These administrative powers are not balanced by any substantive duties of the authorities toward the prisoners. The duties of the Department to provide work and educational and medical programs are stated in the Code of Corrections, but no special means of recourse exists for the prisoner to enforce these duties. If the Department itself does not follow its statutory responsibilities, the uncertain forum of the state courts is the only source of control over the Department.

The legislature itself will be the source of any failure on the part of the Department of Corrections to follow its new mandate if appropriations for the Department are not made:

When appropriations, personnel or facilities are inadequate, the historical view of the prison as a place of isolation or punishment prevails, the rehabilitative function is subordinated to the grim necessity of keeping the felons safely separated from the outside world.\(^{120}\) Given the obsolescent structure of the Illinois prison system, appropriations, personnel and facilities will be inadequate. For all of the structuring and checking of the decisions of prison officials which exist in the Code of Corrections, the new administrative agency will be unable to carry out its functions, not for any administrative reason, but for lack of the proper support.\(^{121}\)

The standards for the treatment of prisoners embodied in the Code of Corrections are not revolutionary. The legislative principle that the punishment in prison must be limited reflects principles advocated by prisoners speaking of their own situations: "Inmates of prisons are entitled to exercise every constitutional right enjoyed by those incarcerated, except when inherently inconsistent with the purpose of the institution."\(^{122}\) The Illinois legislature has left the question of determining "inherent inconsistency" largely to the determination of the authorities responsible for the lives of those incarcerated. The legisla-

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121. See the Chicago Tribune, Sept. 30, 1973, at 3, col. 1, for a report of an announcement by the Director of the Department of Corrections, that architectural plans were being abandoned for a new diagnostic center for juveniles and a new medium security prison.
122. MINNESOTA CONNECTIONS, A BILL OF RIGHTS FOR PRISONERS 1 (1972).
ture and the custodians, however, show signs of accepting yet another principle of the Bill of Rights for Prisoners: "Prisoners are persons dependent for their development and well being on the same essentials as their fellow human beings outside the walls."\textsuperscript{123}

The conflict between the view of the prisoners and that of the prison authorities exists from the moment the state allows some persons to be incarcerated. Once human beings are under the state's custody, safety and security become paramount concerns for the prison personnel responsible to the state for that custody. The state has seen fit in adopting the Code of Corrections to define the limits of the actions regulating those who must be in the state custody.

"Correctional practices must cease to rest on surmises and on good intentions . . . ."\textsuperscript{124} The Illinois legislature has now demanded more than good intentions from the correctional authorities, and more than the protection of "constitutional" rights demanded by the courts. The legislature has set up an organic law for the prison system which is intended to structure the decisions of the prison authorities. This law, though, will be sufficient to actually control and direct such decisions only if it is followed internally by the Department of Corrections and enforced by the courts. In the areas of internal control of the prison, the center of concern of the authorities, the discretion, control and initiative of the custodial power is still left to the prison authorities.

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\begin{itemize}
\item 123. \textit{Id.} at 2.
\item 124. Morris, \textit{supra} note 117, at 638.
\end{itemize}