

INTRODUCTION

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I

On behalf of the National Council on Crime and Delinquency (NCCD) and myself, I want to express at the outset my appreciation for the recognition given *A Model Act for the Protection of Rights of Prisoners*¹ (*Model Act*) by this symposium. In the minds of the members of the committee that drafted the *Model Act*, the help that such an act (or adoption of the procedures it recommends) affords prisoners is the kind of help that also improves the penal system. By administrative action two states² have adopted rules based on the *Model Act*.

Distinguished prison administrators were included on the committee³ that prepared the *Model Act*. Their role is perhaps better understood if a brief explanation is given of the nature of the invitation to

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1. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *A MODEL ACT FOR THE PROTECTION OF RIGHTS OF PRISONERS* (1972) [hereinafter cited as *MODEL ACT*].

2. See Kansas Department of Corrections, *Policy, Guidelines and Procedures for the Kansas Penal System* (1972) (adopting the *Model Act* almost verbatim, with supporting rules on discipline and grievances); New Mexico Department of Corrections, *Procedures, Rules and Regulations of the Classification Committee, Adjustment Committee, and Grievance Committee* (1972). To date, no state has enacted a statute based on the *Model Act*.

3. The following men comprised the Committee for a Model Act for the Protection of Rights of Prisoners [hereinafter referred to as the committee]:

1. Norman Carlson, Director, Bureau of Prisons, United States Department of Justice
2. Major John D. Case, Warden, Bucks County Prison, Doylestown, Pennsylvania
3. Joseph S. Coughlin, Assistant Director, Illinois Department of Corrections
4. Walter W. Finke, Chairman of the Board, Dictaphone Corporation; Member, Board of Trustees, NCCD
5. Dr. Peter Lejins, Director, Institute of Criminal Justice and Criminology, University of Maryland
6. Richard A. McGee, President, American Justice Institute
7. Dr. Karl Menninger, The Menninger Foundation
8. Dr. Elmer K. Nelson, Director, School of Public Administration, University of Southern California
9. Judge George H. Revell, Superior Court, Seattle, Washington
10. Sol Rubin, Counsel, NCCD

them, their interest in what was produced, and the purposes of the *Model Act*.

NCCD has published a number of model legislative acts⁴ drafted by its committees. Most of the acts are quite widely used. In most instances committee members were selected simply for their expertise in the subject area; there was no commitment to any principle in advance of the committees' work. This was true, for example, of the periodic revisions of the *Standard Juvenile Court Act*.⁵ Members of those drafting committees were chosen because they were experienced and able juvenile court judges, probation administrators, and so forth. An example of a somewhat different operation is the *Model Sentencing Act*,⁶ which was produced by NCCD's Council of Judges—a permanent body which has developed numerous standards and guides for judges and other professionals in the corrections field.

The idea for a "model prisoner protection" statute was outlined in advance in some detail by the NCCD staff, and submitted to the people invited to serve on the committee. Their participation in the work of the committee involved active assistance in implementing these original ideas. Most members of the committee gave direct help in amplifying and revising the original proposal and strengthening the rights of prisoners as they were finally formulated.

A major input of ideas for the drafting of the *Model Act* was our correspondence with prisoners and our contact with reform groups and attorneys litigating or in other ways attempting to salvage some rights of prisoners. On numerous occasions NCCD has criticized the *style* of litigation for what seemed to be too limited an approach to the correction of specific problems. Individual prisoners, and even prisoner groups, reflected the same limitation, as we saw it; they were concerned with fairness and with due process, while our concern was that litigation over due process is almost never-ending, and that even when successful it does not always remedy prisoner abuse. Indeed, litigation may fortify abuse by affording it greater "legality." This is also true

4. *E.g.*, MODEL SENTENCING ACT (2d ed. 1972); STANDARD ACT FOR STATE CORRECTIONAL SERVICES (1966); STANDARD JUVENILE COURT ACT (6th ed. 1959); STANDARD FAMILY COURT ACT (1959); STANDARDS AND GUIDES FOR THE DETENTION OF CHILDREN AND YOUTH (1958).

5. The *Standard Juvenile Court Act* was first published in 1925. The seventh edition is in preparation.

6. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT (2d ed. 1972).

of almost all efforts to inject "treatment" and "rehabilitation" into prisons.

Instead, we urged that in many instances abuse of a prisoner's rights should result in the release of the prisoner, in the same way that a defendant may be acquitted as a result of police abuse. Surely the principal relief of habeas corpus is release.⁷

Although we were as concerned as others with fairness in *procedure*, we also tried to support *substantive* amelioration in the *Model Act*. In section 2, for example, certain things are simply prohibited—whipping, for example, which is still legal in many jurisdictions, and any use of physical force except in self-defense, in preventing an assault by one prisoner on another, or in preventing escape.

Section 3 prohibits solitary confinement as disciplinary punishment.⁸ The prevalence of homosexual assaults in all institutions, men's and women's, is a notorious violation of constitutional rights; we prohibit such assaults.⁹ But merely prohibiting specific abuses is not sufficient to ensure that prisoners will not be subjected to them. Even in the cases that have held prison systems unconstitutional,¹⁰ the prisons were not closed; prisoners were permitted to be held under unconstitutional conditions.

Our answer is provided in section 6, "Judicial Relief." Under this section, illegal or unconstitutional conditions may not be continued while efforts at correction, which may take months or years, are presumably made. The judge confronted with such conditions is expected to exercise the power given him to "prohibit further commitments to the institution," or, "if the abuses are found to be extensive and persistent," to "order the institution closed subject to a stay of a reasonable period, not to exceed six months, to permit the responsible authorities to

7. See generally Hopson, *Courts, Corrections, and the Eighth Amendment: Encouraging Prison Reform by Releasing Inmates*, 44 S. CAL. L. REV. 1060 (1971).

8. It is over six years since a landmark decision, *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966), applied the eighth amendment in condemning conditions in solitary confinement. But the "hands-off" policy has still persisted. Enactment of the *Model Act* would solve the problem quickly and decisively.

9. MODEL ACT § 2(c).

10. See *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *supplementing* 300 F. Supp. 825 (E.D. Ark. 1969), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Commonwealth *ex rel.* Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (1971). The cases are discussed in *The Need for a Statute*, in MODEL ACT 9, 11-12 [hereinafter cited and referred to as *Introduction*]. See generally Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175 (1970).

correct the abuses," or, if the abuses are not corrected to his satisfaction, to "order those prisoners who have a history of serious assaultive behavior to be transferred to another facility;" finally, the judge may "order the discharge of other prisoners."¹¹

The last section of the *Model Act*, "Visits to Prisoners and Institutions," is an attempt to "break down the walls"—if not the walls of the prisons, at least the walls between the prisons and the public. Courts are again charged with enforcement; they may not keep "hands off."

Is the *Model Act* a response to the massacre of prisoners and guards at New York's Attica Prison? Although it was published after that event, work on the *Model Act* had begun much earlier. It took no great wisdom, but only a familiarity with the evils of prisons in the United States, to see the need for such a statute. Attica was not its cause, but demonstrated its need.

II

I would like to comment briefly on the articles in the symposium. I find much of the material surprising, and therefore most illuminating and instructive. I am sure that this opinion will be shared by the other committee members, although I cannot speak for them.

Mr. Mann¹² suggests that the *Model Act* was addressed to courts, rather than to prison administrators, where the real need is, and that it should have sought to bolster programs of rehabilitation. My reply is twofold. First, when we initiated this project, we decidedly avoided any attempt to require programs of rehabilitation. We had done something of this kind in our *Standard Act for State Correctional Services*, published in 1966; but by this time Milton Rector,¹³ President of NCCD, and I,¹⁴ and others on our staff, had despaired of making prisons viable places of rehabilitation. We were getting closer to a position advocating the abolition of prisons, at least for all but a handful of dangerous persons. This is now, in fact, the position of the Board of Directors

11. MODEL ACT § 6.

12. Mann, *A Comment on the Model Act* 1973 WASH. U.L.Q. 617.

13. See Rector, *Corrections in 1993*, in GOALS FOR SOCIAL WELFARE, 1973-1993 (H. Trecker ed. 1973).

14. See Rubin, *Law and the Penal System*, 15 CANADIAN J. CRIM. & CORRECTIONS 59 (1973); Rubin, *Developments in Correctional Law—From Abolition of the Death Penalty to Abolition of Prisons*, 19 CRIME & DELINQUENCY 241 (1973).

of NCCD.¹⁵ Secondly, it is quite true that greater power resides in prison administrators than in courts. That is precisely the problem—administration is the actual source of the conditions in prisons, although administrators can justifiably trace the source to conditions in our society. Courts are severely limited in what they can do. But how change administration—not by passing laws like the *Standard Act for State Correctional Services*. As limited as their powers may be, courts do have an impact on what is done to prisoners, and perhaps they induce some change in attitude on the part of administrators. We attempted to give courts exactly the kind of power—and prisoners the kind of rights—that would be of that persuasiveness.

A second point made by several of the articles is that the *Model Act* does not expand existing prisoners' rights. The committee did not have to repeat rights now clearly recognized, such as prisoner access to courts and religious equality. But we added several rights that have not yet been established by statutes or judicial decisions. (Professor Jablonski¹⁶ recognizes them, although he, too, feels we should have gone further.) Most important of these are the powers to close institutions and to enjoin further commitments to institutions that violate prisoners' rights, whether established by constitution or by statute.¹⁷

Mr. Park observes that enactment of the *Model Act* would "not bring about the liberal's dream of a 'nice prison'"¹⁸ If it is the liberal's dream, it is definitely not the committee's, or NCCD's, or my goal. And Mr. Park says the *Model Act* will not satisfy the "prison reformer on the far left,"¹⁹ who believes that prisons and parole should be abolished. Mr. Park correctly notes that the *Model Act* does not strive for either of these objectives. And he sees the "correctional conservative . . . angry with . . . the provisions reducing his power to manage the prison as he sees fit,"²⁰ noting, for example, that the *Model Act* includes the "necessity [on the part of the warden] to permit 'any other citizen' to wander about the warden's turf with impunity."²¹

15. NCCD Board of Directors, *The Nondangerous Offender Should Not be Imprisoned*, 19 CRIME & DELINQUENCY 365 (1973).

16. Jablonski, *Controlling Discretionary Power in Prison Organizations: A Review of the Model Act*, 1973 WASH. U.L.Q. 563.

17. MODEL ACT §§ 6(c)-(d).

18. Park, *On Being Medium Nice to Prisoners*, 1973 WASH. U.L.Q. 607.

19. *Id.*

20. *Id.*

21. *Id.*, quoting MODEL ACT § 7.

Since he is apparently angry with such provisions, I assume Mr. Park considers himself and other California wardens to be "correctional conservatives." In any event, in his "Section-by-Section Comments" he explores provisions of the *Model Act* considered significant by the committee that he would not want enacted in California.

Mr. Park also says, "A serious criticism of the presentation of the *Model Act* is that it strongly implies a promise that giving prisoners additional rights will stop riots."²² Standing alone, of course, it will not. Yet the *Model Act* does say, "Better writs than riots," and Mr. Park acknowledges that the writ does substitute for the riot on occasion. A group of West Virginia prisoners recently sued over conditions in their prison; NCCD supported them in an amicus curiae brief, quoting the *Model Act*. The trial court ruled in favor of the prisoners and sought to correct the conditions they complained of. The West Virginia Supreme Court reversed;²³ a riot followed.

Mr. Park's article is a fascinating contrast to Professor Cohen's.²⁴ The former views the *Model Act* as making unmanageable demands on prison administrators; the latter's view is that "with but one or two exceptions its only appeal will be to prison officials fighting a rearguard action against the further 'encroachment' of judicial decisions."²⁵ Mr. Park's worries are, I think, a sufficient repudiation of that view.

Professor Cohen suggests that some provisions (concerning solitary confinement, an ombudsman, and counsel representation in disciplinary hearings, for example) could be strengthened. This is useful criticism, the kind I (and I am sure some, if not all, members of the committee) welcome. The invitation is extended to others to improve on the provisions. I think we made a good start that will suffice until something better comes along. But would Professor Cohen support legislation of this kind, even with the improvements he recommends? Apparently not—he concludes by wishing the *Model Act* had never been written. He prefers to rely on litigation. Although he cites cases²⁶ proscribing the use of physical force against prisoners except for defensive or preventive purposes, none is as specific as the provisions of the *Model Act*. He cites the "ancient" (does he mean consistently observed?) principle that

22. Park, *supra* note 18, at 608.

23. *State ex rel. Pingley v. Coiner*, — W. Va. —, 181 S.E.2d 220 (1972).

24. Cohen, *In Search of a Model Act for Prisoners' Rights*, 1973 WASH. U.L.Q. 621.

25. *Id.*

26. *See* cases cited *id.* at 623 n.8.

prison authorities are "under a duty to maintain the minimal conditions necessary to sustain the life and health of prisoners."²⁷ But if this implies that courts have enough to go on without legislation, he is sadly mistaken.

Medical care in prisons, for example, is generally not treatment but abuse, and as often as not the courts sustain the abuse.²⁸ Another example is the *Model Act's* provision for administrative responsibility to protect prisoners against sexual assault.²⁹ Hardly a prison today succeeds in providing this protection, and some judges have announced that they refused to commit prisoners for exactly this reason. If this section were enacted, and related to the provision for closing institutions or barring commitments, does Professor Cohen think it would have no significance for litigation?

The whole point of the *Model Act* is that it is a legislative approach to reform. Legislatures are notoriously supportive of the power of administrators, almost without restraint, and notoriously neglectful of the rights and care of prisoners.³⁰ What is needed is legislation like this, or better than this. Professor Cohen declares that *Coffin v. Reichard*³¹ is old hat, but even today not all courts follow it. When the Supreme Court of West Virginia handed down the decision noted above,³² rejecting prisoners' pleas for protection, it rejected *Coffin v. Reichard* and cited instead *Price v. Johnston*.³³ The *Model Act* would by statute install the principle of *Coffin v. Reichard*.

Despite his preference for litigation, Professor Cohen is severely critical of the *Model Act's* failure to recommend a legislative rather than an administrative disciplinary procedure.³⁴ None of us proposed an elaborate legislative model—and I would defend what we have done. I think a legislative disciplinary procedure would be utterly inadequate, given the past history of the state legislatures—with correction departments standing at their shoulders—on prisoners' rights. A legislative

27. *Id.* at 623.

28. See cases cited in Rubin, *Developments in Correctional Law—From Abolition of the Death Penalty to Abolition of Prisons*, 19 CRIME & DELINQUENCY 241 (1973).

29. MODEL ACT § 2(c).

30. See Rubin, *Needed—New Legislation in Corrections*, 17 CRIME & DELINQUENCY 392 (1971).

31. 143 F.2d 444 (6th Cir. 1944), cert. denied, 325 U.S. 887 (1945).

32. See note 23 *supra* and accompanying text.

33. 334 U.S. 266 (1948).

34. See Cohen, *supra* note 24, at 623-24, 635-37.

procedure would be *less* protective of prisoners' rights than one drafted by prison administrators with prisoners, their organizations, and counsel at the administrators' shoulders.

I have another basic objection to a complex disciplinary code, legislative or administrative. As I said earlier, in consultations with attorneys representing prisoners I have urged that relief *not* dwell on procedural due process for the prisoners, just as I have urged that dwelling on "treatment" resources is most unpromising. What I have urged is that relief seek recognition of substantive rights, and that when these rights are violated, prisoners be released. The *Model Act* goes along that path.

In his introductory paragraph, Professor Cohen states: "[T]he *Model Act* lacks even the 'menace of liberal reform.'"³⁵ What is the "menace of liberal reform?" Endless litigation over due process that, even if won, fails to remedy abuses? The newer demand for "rehabilitation" and "treatment" that is an endless bog? These are games for conservative correctional administrators; they do not help prisoners or reform prisons. The prisons cannot be reformed by due process, just as capital punishment was not so reformed, but had to be abolished. The *Model Act* does not attempt to reform the prisons; it opens the door to the widest possible visitation and litigation to close prisons, and to prohibit further commitments.

Professor Jablonski finds considerable merit in the *Model Act*. He acknowledges that it provides at least a beginning; he opens with the words, "The [*Model Act*] is designed to establish law where presently there is little."³⁶ He then suggests provisions that could, and perhaps should, be added. This is very thoughtful and constructive. But there is a misunderstanding. I reiterate what is stated in the *Introduction*³⁷—the *Model Act* does not undertake to regulate the operation of prisons by statute. Apparently misapprehending this, Professor Jablonski says that the *Model Act* is at fault in requiring that "a prospective visitor must 'establish a legitimate reason for such a visit' simply to make an application."³⁸ This is not so—the passage refers to visiting by the general population other than attorneys, relatives, or friends, whose visiting *must* be authorized by administrative rules that the *Model Act*

35. *Id.* at 621.

36. Jablonski, *supra* note 16, at 563.

37. *Introduction* 13-14.

38. Jablonski, *supra* note 16, at 592, quoting MODEL ACT § 7.

does not spell out.³⁹ *In addition*, others who can establish a legitimate reason—obviously including the press and many citizens' groups, as Mr. Park is well aware—*can have their right to visit mandated by a court*. There is nothing remotely resembling this in legislation today, or in judicial decisions thus far.

Finally, I defend the *Model Act* as contributing far more than the criticism, particularly that of Professor Cohen, allows. Professor Cohen writes, "I suspect that Rubin was simply overruled by other members of the committee on key issues."⁴⁰ Not a bit. When we had our wrap-up committee meeting to review the fourth or fifth draft, there was no conflict within the committee, and none between me—either in my personal views or in my representation of NCCD—and other members of the committee. I trust the foregoing explains why I am dismayed that liberal reformers, for whom Professor Cohen apparently speaks,⁴¹ fail to support a model act that if enacted would open the way to accomplishing more substantial change in the prison system than years of litigation.

39. See MODEL ACT § 7.

40. Cohen, *supra* note 24, at 629.

41. Professor Herman Schwartz, Counsel to the American Civil Liberties Union's National Prisons Project, and a member of the Board of Directors of the New York Civil Liberties Union, in a recent article similarly dwelled almost entirely on litigation as the path to prison reform. He is a defeatist on legislative reform: "Legislators and administrators will not move until forced to by the courts." Schwartz, *Whither Penal Reform?*, in CIVIL LIBERTIES IN NEW YORK 11 (1973). The statement is incorrect if it is meant to imply that legislatures move progressively in penal reform as a result of court action; but they *would* move if reform groups worked for sound legislation.

