

IN SEARCH OF A MODEL ACT FOR PRISONERS' RIGHTS

FRED COHEN*

I. OVERVIEW

A first reading of *A Model Act for the Protection of Rights of Prisoners*¹ (*Model Act*) is a melancholy experience. Regrettably, additional study and reflection only intensify the original mood. The *Model Act* comes too late in the movement for prison reform to serve as a catalyst for basic change. In its scope and content it is so limited, so ambiguously expressed, so content with leaving undisturbed the basic power arrangements between the inmate and the administration, 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. Indeed, the *Model Act* lacks even the "menace of liberal reform."²

The *Model Act* is brief, containing only seven sections, and I find only two provisions in it which may be regarded as innovative. First, in section 3(d) the *Model Act* prohibits the use of a solitary cell for punishment. Solitary confinement is to be used only under conditions of emergency, and even then under rather strict rules of substance and procedure during the continuance of the emergency. The term "emergency" relates to the protection of the inmate, prison personnel, or other prisoners. While section 3 is fairly explicit on the conditions of solitary confinement, rights of communication, duration of confinement, post-confinement approval, and record keeping, it is silent concerning the specific criteria and procedures for determining whether an "emergency" exists, and does not indicate who has the authority to make this determination.³ How one might distinguish solitary con-

* Professor of Law and Criminal Justice, School of Criminal Justice, State University of New York at Albany. B.S., 1957, LL.B., 1960, Temple University; LL.M., 1961, Yale University. Part of the research for this article was financed by the National Science Foundation, Grant No. 20-477G.

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 Mitford, Book Review, *N.Y. REV.*, March 9, 1972, at 29.

3. The "danger to self or others" formulation is scarcely adequate except as a general guide. This type of formulation is characteristic of civil commitment laws

finement from "administrative segregation," except for the euphemism employed, also is unclear.

Thus, the *Model Act* fails to address some basic issues, and in opting either for silence or for ambiguity leaves the inmate in very much the same situation he is in without the proposed legislation. Should the *Model Act*, or section 3 alone, be adopted anywhere, I predict that although the operative language will be changed—by substituting "emergency" for "punishment" or "discipline"—and although the basic conditions of solitary confinement might improve, the frequency of such confinement, and the characteristics of those confined, would not.

Secondly, section 5, "Grievance Procedure," may be read as a progressive step. The director of the state department of correction is required under this section to establish a grievance procedure to which all prisoners will have access. Any grievance, whether or not in violation of the *Model Act*, is to be investigated "by a person or agency outside of the department," which then must submit a written report to the department and the prisoner. This is, of course, a thinly disguised and well-diluted attempt to create a correctional ombudsman.

Stipulating for the moment the desirability of such an ombudsman, there are important issues concerning his function that the *Model Act* does not resolve: the measures to be taken to assure his independence; the jurisdiction of his responsibilities; his power to investigate, to inspect, and to affect administrative decisions; his qualifications; his confidentiality; and his relationship to the judiciary.⁴ Section 5 not only fails to address these issues but, in a most cynical fashion, places on agency officials only the burden to establish the procedure and to *receive*—not to act on—a "report of findings." Indeed, since the director of the department of correction is to devise the procedure as well as select a person or agency to perform the investigative function, it would be difficult for the director to resist the temptation to establish only a simulated process. He could create the appearance of change, and of being responsive to the claims of inmates, as well as establish the groundwork for rather attractive answers for an inquisitive attorney or court—all at practically no cost in power or time.

(which also typically add a "need for treatment" requirement), and such laws have allowed psychiatrists and institutional personnel the widest latitude in arriving at commitment and retention decisions. See N. KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY* 65-79 (1971).

4. See T. FITZHARRIS, *THE DESIRABILITY OF A CORRECTIONAL OMBUDSMAN* 43-50 (1973).

The architecture of the *Model Act* is fairly simple; its content other than the two sections just discussed represents a response to an unexplained, idiosyncratic selection of issues brought to light through prisoners' rights litigation. The *Model Act* claims as its central principle a reiteration of the well-worn dictum of *Coffin v. Reichard*.⁵ A prisoner "shall retain all rights of an ordinary citizen, except those expressly or by necessary implication taken by law."⁶ Specific examples are given of the rights of prisoners which, in their totality, express little more than the ancient principle that prison authorities are under a duty to maintain the minimal conditions necessary to sustain the life and health of prisoners.⁷

In section 2 the *Model Act*, consistent with prevailing case law,⁸ proscribes the use of physical force against prisoners except for defensive or preventive purposes. In the same section it also condemns, as "inhumane treatment," the following: sexual assaults; punitive or restrictive measures as retaliation for the assertion of rights; degradation of prisoners; and discriminatory treatment based on race, religion, nationality, or political belief.

Section 4, "Disciplinary Procedure," is one of the most curious provisions in the *Model Act*. In the first place, the section attempts to deal with both procedure and substance under a single, and obviously misleading, heading. Secondly, it places the responsibility on prison administrators to develop a fair and orderly disciplinary procedure, and thus opts to maximize administrative discretion. Thirdly, the only operative principle the section announces concerning procedure is that a hearing, with a right to counsel or "some other person" selected by the prisoner, will be provided when the punishment which may be imposed affects the prisoner's sentence or eligibility for parole. Finally, in addition to its indefensible merger of substance and pro-

5. 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).

6. MODEL ACT § 1(a).

7. See F. COHEN, THE LEGAL CHALLENGE TO CORRECTIONS 66 n.14 (1969), and cases cited therein. Compare MODEL ACT § 1, with FOURTH UNITED NATIONS CONGRESS ON PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS pt. 1, §§ 8-25 (1955). For example, while the *Model Act* provides for "nutritious food in adequate quantities," the *Standard Minimum Rules* provides for "food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served."

8. See *Gonzales v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968); *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).

cedure, the *Model Act* admonishes administrators to maintain "a high standard of fairness and equity," and to prescribe—presumably in advance of their application—offenses and punishments.

An important point about section 4 is that it does not create a disciplinary procedure; it invites the prison administration to do so. And it does not create a prison penal code; it invites the administration to do so. On both the substantive and procedural issues of section 4 (with one important exception—the right to counsel) the *Model Act* does not even go as far as the leading cases in the area.⁹

In providing for counsel at a disciplinary hearing which may affect the prisoner's sentence or eligibility for parole, the *Model Act* does take a step beyond existing statutory and case law.¹⁰ But it makes no provision for legal assistance for prisoner litigation; the draftsmen indicate in the *Introduction* to the *Model Act* that this is because "the drafters of model legislation for public defender services have failed to include the obligation to assist prisoners."¹¹ Given this position on suits involving legal challenges to conviction and, presumably, to conditions of confinement, it seems paradoxical to create an affirmative right to counsel at disciplinary hearings.

Whether the *Model Act* intends to limit participation to counsel who either are retained or volunteer is not indicated.¹² What is clear

9. For a general discussion of these cases, as well as the limits of seeking change through procedural devices, see Cohen, *The Discovery of Prison Reform*, 21 BUFFALO L. REV. 855 (1972).

10. In *Clutchette v. Procnier*, 328 F. Supp. 767 (N.D. Cal. 1971), for example, the court required that counsel be afforded prisoners accused of an offense which could result in criminal penalties. In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), *aff'g in part and rev'g in part* *Gunsolus v. Gagnon*, 454 F.2d 416 (7th Cir. 1971), the Supreme Court extended the rule of *Morrissey v. Brewer*, 408 U.S. 471 (1972), which established the right to a hearing for revocation of parole, to revocation of probation. The Court held, however, that the right to appointed counsel at revocation of probation and parole hearings is to be decided on a case-by-case basis, thus reversing the Seventh Circuit Court of Appeals, which had established a *per se* constitutional right to appointed counsel. 454 F.2d at 421-23.

In conducting research in California prisons during the summer of 1972, I was led to believe that if a criminal proceeding was contemplated, the prisoner was placed in segregation and the matter referred to the local prosecutor. In observing disciplinary hearings at the prison in San Quentin, including one involving a homicide suspect whom the district attorney refused to prosecute, only counsel "substitutes" (guards) were provided.

11. *The Need for a Statute*, in MODEL ACT 9, 14 [hereinafter referred to and cited as *Introduction*].

12. The equal protection question obviously lurks in the background. See Earnest

is that nothing is said about the matter and, thus, if a right to have counsel appointed were intended (and that seems doubtful) the *Model Act* can hardly be characterized as having provided a powerful inducement or rationale for such a step. More basically, simply pasting in a right to be represented by counsel, and surrounding it with a vague mixture of substantive and procedural items and the need to maintain disciplinary records,¹³ is representative of the *Model Act's* architectural and substantive failures.

Section 6, "Judicial Relief," reiterates judicial remedies that already are available to prisoners who allege abuses, but, for no apparent reason, fails to mention the possibility of recovering money damages in a civil suit.¹⁴ That the federal law concerning the recovery of money damages is clearer and better developed than the law in most states only dramatizes the need to address the issue in model legislation which is presumably directed to the states.

The same section permits the appropriate court to issue injunctions, prohibit further commitments, or even close an institution (subject to a stay not to exceed six months) if extensive and persistent abuses are found.¹⁵ Closing an institution, or even prohibiting further commitments, is, of course, a drastic remedy whether it be based on constitutional or statutory provisions. It should be clear that state courts, even with an authorizing statute, will be most reluctant to consider such a remedy and lawyers would be well-advised to continue to use

v. Willingham, 406 F.2d 681 (10th Cir. 1969) (if retained counsel is permitted by statute to appear at hearings for revocation of mandatory early release, impoverished inmates must be provided with appointed counsel); Sands v. Wainwright, 357 F. Supp. 1062 (M.D. Fla. 1973) (inmates must be allowed to retain counsel, or to have the assistance of a voluntary counsel substitute, in a prison disciplinary proceeding). See also Landman v. Royster, 333 F. Supp. 621, 654 (E.D. Va. 1971), *modified*, 354 F. Supp. 1292 (E.D. Va.), *supplemented*, 354 F. Supp. 1302 (E.D. Va. 1973).

13. See generally Harvard Center for Criminal Justice, *Judicial Intervention in Prison Discipline*, 63 J. CRIM. L.C. & P.S. 200, 208-09 (1972).

14. See Hellerstein, *Remedies in Prisoners' Rights Litigation*, in NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, SUMMARY OF PROCEEDINGS OF THE 50TH ANNUAL CONFERENCE 34, 38-40 (1972) (list of eighteen cases dealing with ordinary tort damages, as well as punitive, compensatory, and nominal damages).

15. Section 6 would also permit the discharge of some prisoners, if they have no history of serious assaultive behavior. There is no explicit reference to holding an administrator in contempt for failure to "keep and hold safely" the prisoner. See *State v. Brant*, 99 R.I. 583, 589, 209 A.2d 455, 458 (1965). Section 6(b) does, however, allow for "any other appropriate remedy in law or equity," and it may have been intended that the more exotic remedies would be covered by this catch-all language.

federal law and "cruel and unusual punishment" claims to rectify such abuses.¹⁶

The final provision of the *Model Act*, "Visits to Prisoners and Institutions," designates three categories of visitors: (1) attorneys of record, relatives, and friends, who are to be governed by administrative rules permitting visits and private talks "at reasonable times and under reasonable limitations;" (2) state legislators, judges of criminal and appellate courts, the attorney general, and the governor, any of whom may visit the institution "at any time;"¹⁷ and (3) all other citizens, who may visit if they establish "a legitimate reason,"¹⁸ if their visit is "not inconsistent with the public welfare and the safety and security of the institution," and if the director is not of the view that "the visit or any aspect thereof would be disruptive to the program of the institution."¹⁹ One who is denied a visit may apply for a judicial order, which is to be granted if it is found that: (1) the applicant is "a representative of a public concern regarding the conditions of the prison;" (2) he is not "a mere curiosity seeker;" and (3) the head of the institution has not established that "the visit, or any aspect of it, would disrupt the program of the institution."²⁰

16. See, e.g., *Jones v. Wittenberg*, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom. Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972). For state cases, see *Wayne County Jail Inmates v. Wayne County Bd. Comm'rs*, 1 PRISON L. REP. 51 (Cir. Ct. Wayne County, Mich. 1971), *supplemented*, 1 PRISON L. REP. 186 (Cir. Ct. Wayne County, Mich. 1972); *Commonwealth ex rel. Bryant v. Hendrick*, 444 Pa. 83, 280 A.2d 110 (1971). In a recent case, the Supreme Court held that prisoners who lose "good time credits" as a result of a disciplinary hearing have their sole remedy under the federal habeas corpus statute, 28 U.S.C. § 2254 (1970), and that equitable relief under 42 U.S.C. § 1983 (1970) is not available. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). The practical result of the decision is that a prisoner who claims that his sentence has been unconstitutionally lengthened must exhaust his state remedies before petitioning a federal court for relief. See generally Plotkin, *Rotten to the "Core of Habeas Corpus": The Supreme Court and the Limitations of a Prisoner's Right to Sue*; Preiser v. Rodriguez, 9 CRIM. L. BULL. 518 (1973).

17. Prosecutors may be displeased at their exclusion, but there probably is some good, albeit undisclosed, reason for their omission from the list.

18. There are no criteria provided by the *Model Act* for establishing "a legitimate reason."

19. MODEL ACT § 7.

20. *Id.* The use of the phrases "public concern" and "mere curiosity seeker" without any attempt at definition or criteria simply stretches the limits of my credulity. To base such an important right on undefined colloquialisms represents either gross negligence or a cynical device designed to exclude anyone who does not meet the prison administration's notions of acceptability. If the idea was to negate the blanket prohibition against visits by persons with a criminal record and yet not open the institution for "trip to the zoo" visits, surely more precise language was available.

Again, there is so much that is wrong with what is included in this section, and so much that is vital which is omitted, that one scarcely knows where to begin.²¹ I view visiting rights as a bilateral situation, and as a part of the larger issue of maintaining and even expanding contact with the outside world. As such, how—and the extent to which—one opens the institution is intimately related both to improving the current condition of the inmates and to bringing basic reform to the prison. This area has a particularly strong claim to a statement of principle and to precise rules which reflect that principle. I would suggest, for example, the following statement of principle:

The treatment afforded prisoners should reflect the fact that their exclusion from society is temporary. All rules concerning communication and visiting must be designed to maintain, establish, and improve the prisoners' relationships and contacts with the larger society. No person may be denied the right to visit unless it is clearly established that his presence would constitute a clear and present danger to security and that no less restrictive alternative is available.²²

But legislation in this area cannot be content merely with a statement of principle and a directive to create administrative regulations. Everything we know about prison administration shows that such rights will be sparingly issued and grudgingly administered. Thus, legislation must be based on a profound distrust for prison administration and, in direct contrast to the *Model Act*, must seek to limit and contain discretion—not to expand it. There must also be the further recognition that however elegant the principle and however precise the rules, those on the front lines retain the capacity for subversion.²³

Let us stipulate that the institution could not readily function with unlimited visiting, although I believe the problems of security, administration, and program disruption in prisons are greatly exaggerated.²⁴

21. Perhaps one place to begin is with a description of how visiting was handled at New York's Attica Prison, and of how the indiscriminate recital of "security reasons" and the use of such devices as "strip searches" and needless barriers amounted to senseless harassment and dehumanization. See ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 61-63 (Bantam ed. 1972).

22. The emphasis is on principle. A much more complete statement would be required in legislation, including techniques for establishing the basis for exclusion and permissible regulation of the visit itself.

23. See generally Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12 (1972).

24. In considering the claims of persons awaiting trial, Judge Zirpoli wrote: "Although unrestricted visiting might constitute an intolerable interference with or-

If visits are as important as I believe them to be—a view shared by every inmate with whom I have talked—then only a clear and present danger, and not mere administrative convenience, could justify an exclusionary rule. Further, the right of the free person to visit, and the right of the prisoner to be visited, should be viewed as first amendment rights, and thus any demonstrable state interest should be weighed against the availability of less restrictive alternatives.²⁵ “Reasonable times” and “reasonable limitations”—the language of the *Model Act*—hardly approximates the “clear and present danger”-“least restrictive alternative” approach suggested here.²⁶

Section 7 is silent concerning the right of access to prisons by the media. Although I recognize the danger of exploiting the plight of the inmate, on balance, anyone who is concerned with prison reform must also support maximal access by the media. Admittedly, this may not be a right that is personal to any particular prisoner, but I would argue that it is a right inherent in the *class* of prisoners. That is, prisoners suffer in common the deprivations of prison, although not all will necessarily suffer from all prison conditions. Thus, the right to communicate effectively is a right arguably held by all.²⁷

II. ORIGINS

By now, it will come as no surprise to the reader that I find it nearly impossible to understand why the National Council on Crime and Delinquency (NCCD) elected to prepare and promulgate the *Model Act*. To this point I have attempted to impart my general impressions of the *Model Act* as well as an overall view of its content. In this section I will deal with issues relating to its preparation and intent.

derly jail administration [existing practice should be liberalized].” *Brennemen v. Madigan*, 343 F. Supp. 128, 141 (N.D. Cal. 1972).

25. There have been very few judicial considerations of a constitutional right to visit, and they do not support the views expressed here. See SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, *THE EMERGING RIGHTS OF THE CONFINED* 76, 77 (1972).

26. A major concern of prison officials is the smuggling of contraband. When I visited California’s San Quentin Prison in July 1972, I was forced to pass through an electronic device so sensitive to metal that an alarm sounded in response to the metal foil wrapper in my package of cigarettes. This is a very effective, yet less restrictive, alternative.

27. Although this may be regarded as either a flawed or exotic first amendment argument, depending on one’s point of view, in the enterprise of drafting and promulgating a code it is the correctness of the policy, not constitutional disputation, which matters.

The composition of the committee which prepared the *Model Act* provides some clue to its scope and content; it is heavily weighted with persons connected with prison management.²⁸ Indeed, Norman Carlson, Director of the United States Bureau of Prisons and a member of the drafting committee, recently was held in contempt for disobeying a court order that members of the Church of the New Song be accorded the right of free exercise of their religion in prison.²⁹ On the other hand, Sol Rubin, who shortly will retire as Counsel for NCCD, operated as staff representative to the committee and brought years of experience and commitment to prison reform to the task. Without having any inside information concerning what occurred, I suspect that Rubin was simply overruled by other members of the committee on key issues.

For example, on the issue of censorship Rubin wrote, in October 1971: "Is it really necessary to exercise the control over correspondence and reading that is typical in institutions?"³⁰ He cited with approval an article³¹ which takes the view that restriction on expression requires not only a valid social purpose, but also the absence of a reasonable alternative which is less destructive of free expression. On the specific question of control over correspondence and reading matter in prison, Rubin indicated that "a statute could help."³² Yet, although

28. The Committee for a Model Act for the Protection of Rights of Prisoners [hereinafter referred to as the committee] was composed of the following members:

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. Revelle, Superior Court, Seattle, Washington
10. Sol Rubin, Counsel, NCCD

29. *Therault v. Carlson*, 353 F. Supp. 1061 (N.D. Ga. 1973).

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

31. Note, *The Right of Expression in Prison*, 40 S. CAL. L. REV. 407, 408-11 (1967).

32. Rubin, *supra* note 30, at 402.

there is discussion of censorship in the *Introduction*,³³ there is no mention in the *Model Act* itself of censorship of mail or access to publications. Why this is so, particularly since the *Introduction* makes some strong statements against censorship,³⁴ is not apparent.

There are two possible explanations for this omission, other than the committee's possible disposition against expanding prisoners' rights. First, the *Introduction* states: "Briefly this act states the most onerous abuses occurring in prisons and specifies the courts' powers to deal with them."³⁵ An inference can be drawn that the committee, despite its strong prefatory statements in opposition to most censorship, was of the view that censorship was simply not among these "most onerous abuses," and therefore was not worthy of proscription in the *Model Act*. This inference renders the *Introduction* utterly inconsistent with the draft, but at least it enables one to obtain a feel for the committee's priorities. Secondly, another, perhaps more reasonable, possibility is that in pursuit of the principle of parsimony, the committee meant to encompass censorship issues under the central principle that prisoners retain all rights "except those expressly or by necessary implication taken by law."³⁶ If this is the case, consistency of the *Introduction* with the *Model Act* is achieved at a dear price. Since the same section lists, by way of example, some of the rights intended to be expressed by the central principle, the doctrine of *expressio unius est exclusio alterius* is needlessly confronted if the *Model Act* was intended to encompass censorship.

The absence of a provision on censorship is particularly significant since the law on first amendment rights concerning the mail, books, and periodicals of prisoners is in a state of flux.³⁷ Surely the committee realized this. If a "model act" does not take a position on an issue that all would agree is vital and relevant, particularly when that issue is being debated at the levels of both principle and detail, it is at least misleading for such an act to adopt the appellation "model."

In the area of asserted first amendment rights of prisoners, courts have begun to articulate a standard to be applied in assessing censor-

33. *Introduction* 10.

34. *E.g., id.*: "[C]ensorship, often needless and degrading, as well as burdensome to the institution"

35. *Id.* at 11.

36. MODEL ACT § 1(a).

37. Compare *Brown v. Peyton*, 437 F.2d 1228, 1231 (4th Cir. 1971), with *Fortune Soc'y v. McGinnis*, 319 F. Supp. 901 (S.D.N.Y. 1970).

ship: To be upheld, a regulation must be required by a demonstrable, compelling state interest, and the method of censorship selected must be the least drastic alternative available to effectuate that interest.³⁸ Occasionally, a "clear and present danger" test is stated as an alternative to the "compelling state interest" test.³⁹ Quite recently, however, in *Morales v. Schmidt*⁴⁰ the Seventh Circuit Court of Appeals took aim at this liberalizing trend and reversed, both on doctrine and result, one of the most enlightened decisions on point ever reached by any court. The court stated: "We hold that the Constitution does not require a State to show a compelling interest when it seeks to restrict a prisoner's or parolee's associations or written communications with persons who are not judges, lawyers, or governmental officials."⁴¹ Instead, the court substituted a far less onerous standard: whether the action contemplated bears a "reasonable relationship to" or is "reasonably necessary for" the advancement of a justifiable purpose of the state.⁴²

These competing principles on the issue of censorship are mentioned here not in a spirit of debate on the merits, but to give more concrete expression to my wholesale criticism of the *Model Act*. In sum, I can find no reasonable explanation for its failure to take a position on a matter as vital as censorship,⁴³ and on other vital issues.⁴⁴ It appears either that the conservative element of the committee overruled Rubin, or that, faced with an inability to resolve basic differences on key issues, the committee simply left out provisions dealing with them.

III. ARCHITECTURE

On a point more basic than the inclusion or exclusion of particular issues, Sol Rubin has written that "a correctional statute cannot be called modern unless it *does* control discretion, unless there *is* super-

38. See, e.g., *Rowland v. Jones*, 452 F.2d 1005 (8th Cir.), *aff'g* *Rowland v. Sigler*, 327 F. Supp. 821 (D. Neb. 1971).

39. See *Fortune Soc'y v. McGinnis*, 319 F. Supp. 901, 904 (S.D.N.Y. 1970).

40. — F.2d — (7th Cir. 1973), *rev'g* 340 F. Supp. 544 (W.D. Wis. 1972).

41. *Id.* at —.

42. *Id.*

43. That the area falls within the boundaries of the United States Constitution obviously is no reason for the exclusion, particularly since most of the *Model Act* deals with matters of constitutional magnitude, for example, cruel and unusual punishment, procedural due process, and freedom of religion.

44. See notes 53-83 *infra* and accompanying text.

vision of the quality of the work done."⁴⁵ Measured by that standard alone, the *Model Act* should not commend itself to anyone. The conclusion is inescapable that the architecture of the *Model Act* is such that administrative discretion is to be maximized. Indeed, it seems fair to say that the *Model Act* evidences a desire to win back some of the discretion lost in recent prisoners' rights litigation.

The issue of discretion illustrates the difficulty the *Model Act* has in striking a balance between the general and the particular. Although the *Model Act* is reasonably clear on some specific issues, these issues appear to have been idiosyncratically selected from among the many important questions which have reached the courts. And the *Model Act* articulates some abstract principles; one can, for example, locate the "rights not lost" principle, the effort to link procedural requirements in disciplinary hearings to the seriousness of the possible sanction, and the requirement that prison administrators draft a prison penal code and in so doing pursue "fairness and equity"—but that is all.

Anyone who has attempted to prepare a code has encountered this problem of how to obtain a proper mix between the general and the particular. Policymakers and draftsmen typically are advised to "take care to avoid, on the one hand, that degree of generality which makes for vagueness and uncertainty and, on the other, that degree of particularity which overcomplicates the text and strait-jackets the administrator"⁴⁶ Preparation of a model act raises the question of generality versus particularity, but in a somewhat different fashion than the preparation of legislation designed for immediate adoption in a particular jurisdiction.

It is theoretically possible to draft a model act on prisoners' rights that stated only abstract principles from which basic provisions could be deduced. This, despite its shortcomings, would be considerably more valuable than the present *Model Act*. The abstract principle approach might include provisions such as the following: no rights shall be lost except those inherent in the condition of confinement (namely, restrictions on physical movement); no rights shall be restricted or modified except in pursuit of a valid penal objective or state interest, and such objective or interest must be specific, immediate, and reasonable; the least drastic alternative must be employed to

45. Rubin, *supra* note 30, at 394 (emphasis original).

46. R. DICKERSON, LEGISLATIVE DRAFTING § 1.4 (1954).

achieve any such objective or interest; the specific provisions adopted in pursuance of these principles must reflect the fact that incarceration is itself the legally imposed sanction and any additional deprivation or restraint is not favored; and autonomy and responsibility shall inhere in each prisoner, and any general rule or regulation, or specific application thereof, affecting his autonomy or responsibility shall be subject to special rules (to be enacted) governing such exceptions to the general rule.⁴⁷

A second design for a model code—the one usually adopted, and perhaps best exemplified by the highly influential *Model Penal Code*⁴⁸—is an integration of principles, doctrines, and rules. Clearly, the *Model Act* does not opt for this approach. The *Introduction* indicates that the *Model Act* has only a limited purpose: it does not prescribe treatment programs; it does not deal with inspection and possible closure by administrators; it does not detail procedures for litigation brought by inmates; and it does not deal with inmate legal assistance.⁴⁹ Also, in referring to other NCCD proposals the *Introduction* states: “These statutes are the proper locale for a direct statement of practices that are prohibited (e.g., corporal punishment forbidden in the Standard Act for Correctional Services) and practices that must be regulated (e.g., solitary confinement—specifically, the conditions governing its use).”⁵⁰

What the *Model Act* has done is to articulate a few principles, and surround them with specific provisions which either prohibit or regulate a limited number of practices which occur in prison. Thus, in terms of architecture the *Model Act* is neither an exhaustive set of principles nor an integration of abstractions and logically connected specifics. Measured by its own terms—or more accurately, by inferences derived from the *Introduction*—it sets out to articulate only “the most onerous abuses occurring in prisons and specifies the courts’ powers to deal with them.”⁵¹

47. I trust it is clear that my suggested principles are intended neither to be exhaustive nor comprehensive, and that I believe such an approach has real value only when linked to specific provisions.

48. MODEL PENAL CODE (Proposed Official Draft, 1962).

49. *Introduction* 13-14. Why it was thought necessary to indicate the exclusion of judicial procedure without explaining the failure to deal in detail with institutional procedure is another subtlety which eludes me.

50. *Id.*

51. *Id.* at 11.

Thus, as I have suggested previously, any principle or specific provision which is omitted raises both a serious question concerning the intent of the draftsmen, and an implication of rejection. Since the area of prisoners' rights is an expanding and explosive one, we are not entirely in the dark concerning the nature of the issues.⁵² Given the composition of the committee and that the staff included Sol Rubin (who clearly knows the case law in the area), it is unreasonable to assume that the omissions occurred from ignorance.

IV. THE SINS OF OMISSION

In an earlier article I set out to explore the limitations of litigation in bringing about basic prison reform.⁵³ There, I suggested that *tactics* of reform could easily become confused with *objectives*, and that litigators might frame questions in such a way that while the answers were clear, the possibility of achieving desirable change might remain problematic.⁵⁴ It seemed important then—and it seems no less important now—to insist on the clarification of goals, along with greater definitional precision and a separation of goals from tactics.⁵⁵

Similar questions must be raised about legislation, particularly legislation that cloaks itself with the appellation "model." If the *Model Act* undertakes to do any more than bring a modicum of humanity through civilized standards to uncivilized institutions, the effort is so far disguised as to escape my attention. Indeed, as I have suggested, it scarcely goes beyond existing case law in its particulars, and is regressive in its omissions.

This limitation in scope is critical in light of the advances produced by litigation. In the area of prisoners' rights we have witnessed the virtual end of the restrictive "hands off" doctrine,⁵⁶ and from the

52. The total number of state and federal prisoner complaints filed in the lower federal courts in 1971 was 16,266. Indeed, the growth has been so rapid that one group, the so-called Freund Committee, has recommended establishing a non-judicial body whose members would investigate and report on both collateral attacks on convictions and complaints of mistreatment in prison. This procedure is to be available *before* the filing of a petition in federal court, and presumably to be subject to an "exhaustion" rule. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT 13, 47 (1972).

53. Cohen, *The Discovery of Prison Reform*, 21 BUFFALO L. REV. 855 (1972).

54. *Id.* at 856.

55. *Id.* at 883.

56. See Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

earliest lines of cases the issues—access to the courts, cruel and unusual punishments, and freedom of religion—have expanded and have been somewhat clarified. But it seems axiomatic that litigation is inherently more limited than legislation; in the movement for prisoners' rights and prison reform the time would appear to be right for model legislation which carries forward the *objectives* of reform established by litigation.

Yet, even assuming that the *Model Act* silently draws a distinction between prison reform and prisoners' rights, and opts for a limited coverage of the latter, a number of issues have been excluded that in my mind are among "the most onerous abuses occurring in the prisons."⁵⁷ I have previously discussed the failure of the *Model Act* to deal with first amendment issues; here, I wish only to reiterate the point with respect to other significant omissions.

A. *Disciplinary Proceedings*

The early decisions involving prisoners' rights (with the notable exception of the right of access to the courts) were almost exclusively concerned with humanizing the conditions of confinement.⁵⁸ More recently, the courts have been most responsive to prisoners' claims to fair procedure in disciplinary proceedings.⁵⁹ The appeal for legal ceremony in disciplinary proceedings is powerful, and the analogical precedents handy: something of value is subject to be taken away; there is a charge, an effort to present facts, and then an effort to arrive at a suitable disposition. With analogues like *Goldberg v. Kelly*⁶⁰ in welfare law, and *Morrissey v. Brewer*⁶¹ on parole revocation, emphasizing, respectively, "grievous loss" and "loss of liberty," the potential deprivations involved in a disciplinary proceeding arguably require due process. Indeed, the formula which emerges from the cases is this: The more serious the possible loss, the greater the claim to procedural safeguards. It must be noted, however, that procedural safeguards can do no more than regularize, and perhaps humanize, the inside operation of the prison.

57. *Introduction* 11.

58. See F. COHEN, *supra* note 7, at 64-77.

59. See cases discussed in SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, *supra* note 25, at 101-13.

60. 397 U.S. 254 (1970).

61. 408 U.S. 471 (1972).

A number of courts have come to grips with the problem of linking a procedural format to the nature of the conduct involved and the possible sanctions which may be imposed. In the development of a procedural format the courts have specified the rights to notice of the charges, to a hearing, to cross-examination, to a decision based on evidence presented at the hearing, to some form of representation, and to an impartial tribunal.⁶²

Maintaining an impartial tribunal is one of the most vexing problems encountered in the effort to bring a modicum of fairness to disciplinary proceedings.⁶³ Impartiality typically is to be achieved by the elimination from the tribunal of anyone—certainly including the reporting officer—with personal knowledge of any material fact, and anyone charged with subsequent review of any decision.⁶⁴ However laudable the intention of the courts imposing such a rule, so long as members of a disciplinary tribunal are selected either from the treatment or custodial staff, the closed nature of the prison world makes it inevitable that they will have knowledge either of the event or the inmate. A vigorous defense can easily result in reprisals. Bias and the need to support colleagues are inherent in the process.⁶⁵

It must be clear that unless there is a fair opportunity to persuade an impartial decision-maker, any hearing is merely ceremonial. Hearings and procedures are designed to achieve rationality, visibility, participation accuracy in fact-findings, and a logical nexus between the facts found, the applicable norm, and the conclusions reached. Ultimately, the parties involved—particularly the one proceeded against—must have a fair chance to influence the result. This, I suggest, can never be the case when institutional personnel sit in judgment one moment and drink coffee with the accusers the next.⁶⁶

I do not mean to suggest that it is a simple matter to devise and

62. See, e.g., *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972) (jail case); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971), *modified*, 354 F. Supp. 1292 (E.D. Va.), *supplemented*, 354 F. Supp. 1302 (E.D. Va. 1973); *Clutchette v. Procnier*, 328 F. Supp. 767 (N.D. Cal. 1971); *Morris v. Travisono*, 310 F. Supp. 857 (D.R.I. 1970).

63. Harvard Center for Criminal Justice, *supra* note 13, at 210.

64. *Clutchette v. Procnier*, 328 F. Supp. 767, 784 (N.D. Cal. 1971); see *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972) (revocation of parole).

65. Harvard Center for Criminal Justice, *supra* note 13, at 225.

66. This comment may evoke an image of defense attorney and prosecutor leaving a courtroom after a bruising day and sharing a drink and some shoptalk. Only when the judge and jury join them and also regularly share a work experience is the attempted analogue complete.

implement the workings of a truly impartial tribunal. I do mean to state emphatically that a model act is the place to confront and attempt to resolve the question. It may be that outside hearing examiners should be used, or volunteer lawyers sitting as a panel, or labor arbitrators. These are alternatives that can be most easily investigated in the preparation of a model act, where expertise and resources are available. But the *Model Act* leaves the problem within the discretion of prison officials, virtually without guidance.⁶⁷

B. *Personal Appearance*

One of the most devastating aspects of incarceration is the inmate's loss of identity or, in Goffman's words, "personal defacement."⁶⁸ On admission the inmate is stripped of his usual appearance and of the equipment and services by which he maintains the sense of personal identity he seeks to present to the world. Prisoners are viewed as fungible items; they must dress alike, keep their hair at a prescribed length, and not grow beards or mustaches. Why? Prison officials in California explained to me that individuality in dress or appearance creates a security problem: let a man grow a beard and he may shave it and require a new identification picture; a beardless prisoner might acquire a false beard and stroll out the gate unnoticed.⁶⁹ Therefore, in California's prisons there are strict rules concerning dress and hair, and guards seem to spend considerable time making certain that a prisoner's sideburns are not below his ears or that his hair is not below his collar. In walking through the California prisons one of my first and lasting impressions was the dulling sameness in the appearance of the inmates, adding to my already keen sense of unreality created by seeing thousands of men in cages enclosed by massive walls.⁷⁰

67. One might contrast the style of restatements with the style of model acts. A restatement may lay claim to no more than an accurate summary and orderly statement of what *is*. My vision of a model act is a document which attempts to go beyond the existing law as well as to resolve conflicts; in effect, it is a document designed to set a pace.

68. Goffman, *On the Characteristics of Total Institutions: The Inmate World*, in PERSPECTIVES ON CORRECTION 31, 39 (D. MacNamara & E. Sagarin eds. 1971).

69. The other stock reasons are that a weapon may be concealed in the hair (usually citing the dubious charge that George Jackson concealed a gun in his "Afro"), and that personal hygiene requires it.

70. Shortly after visiting the California prisons, I spent several days in the Maine prisons. In the only maximum security prison there, inmates were given great freedom as to their personal appearance. I saw men with closely cropped hair and

There is very little law in this area, and what does exist is almost uniformly adverse to the prisoners' interests, although with conflicting rationales. The courts have been consistently insensitive to the socio-psychological importance of individuality in personal appearance, preferring regularity and order to heterogeneity. Inmates have based their claims on constitutional grounds—the right of privacy, the right of expression, freedom of religion, and equal protection⁷¹—to no avail.⁷²

These claims have no better reception in the *Model Act*. The courts, at least, have ruled on the questions; the *Model Act* is silent.⁷³ Again, the explanation may be that the matter was intended to come within the central principle that prisoners retain all rights except those taken by law.⁷⁴ This, of course, only further avoids the issue. There must first be established a general constitutional right to particular aspects of personal appearance, and then the matter must be resolved within the particular institutional setting on a balancing-of-interests approach. Schools⁷⁵ and the military,⁷⁶ for example, have been loci for such claims.

At the risk of undue repetition, but in the hope of making the point indelible: It is inconceivable to me that the *Model Act* does not deal with such an issue. In the belief that I have noted important sins of omission and supported them adequately to this point, for the remainder of this section I will simply note other conspicuous omissions.

clean-shaven faces and men with luxuriant beards and hair which fell to the middle of their backs. No one reported any security problems. Women could wear their hair any way they desired, and the state provided a clothing allowance which enabled them to select their own clothing. The contrast with California was, of course, startling.

71. SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, *supra* note 25, at 96.

72. In *Seale v. Manson*, 326 F. Supp. 1375 (D. Conn. 1971), the court ruled that a *pre-trial* detainee had a right to wear a beard, and that the justification of a health hazard had not been established. In *Collins v. Schoonfield*, 344 F. Supp. 257, 271-72 (D. Md. 1972), the court held that while it may not be unconstitutional to require *post-trial* detainees to conform to definite and reasonable hair-style regulations, the permissible range of such regulations is far narrower for *pre-trial* detainees.

73. Indeed, in § 1(b)—the representative, but not exhaustive, listing of prisoners' rights—there is no mention of a right to adequate, let alone individualized, clothing.

74. MODEL ACT § 1(a).

75. See *Karr v. Schmidt*, 460 F.2d 609 (5th Cir.), *cert. denied*, 409 U.S. 989 (1972).

76. See *Raderman v. Kaine*, 411 F.2d 1102 (2d Cir.), *cert. denied*, 396 U.S. 976 (1969).

C. *Miscellaneous Omissions*

A model act should contain a fairly complete definitions section. Terms like "solitary confinement," "discipline," "infraction," "order," and "security" can be easily manipulated and abused. Statutory definitions obviously are no panacea, but surely they would aid an administrator who wants to follow the law, and would provide a modest amount of certainty to inmates.

Rights relating to correspondence, to the receipt and retention of literature, to visiting and to being visited, to meeting with the media, to preparing and publishing material, and to forming associations, are vital to the prison reform movement and to improving the daily life of the prisoner. They are important because they allow some of the outside world to seep into the institution, and they allow a sense of the horror of incarceration, even without access to the forbidden world of isolation cells and adjustment centers, to filter back to the outside world. There is a breach in the prison's wall of sensory deprivation and total control of information.⁷⁷ The *Model Act* has too little to say about these first amendment issues.

The issue of special diets for inmates with particular religious views or, even more clearly, with medical dietary requirements, should have been included.⁷⁸ Dietary issues have been debated and litigated to the point where a reasonable legislative provision could have been drafted.

The *Model Act* should have been far more specific on conditions of living, and should have taken a position on the inmates' right to personal and habitational privacy.⁷⁹ Among the items that should have been included are: the right to a mattress-type bed and linen; the right to individual, non-hazardous room or cell decorations; and the right to an explicit number of showers or baths, with a special proviso for those engaged in particularly messy work.

77. STANDARD MINIMUM RULES, *supra* note 7, at pt. 1, §§ 37-39, includes a right to correspond and to receive mail and a right to be kept regularly informed of important news items by reading and by listening to the radio. See also AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS ch. 15, rule 9 (3d ed. 1966).

78. See *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969) (dealing with the Muslim prohibition against eating pork, or even vegetables seasoned with pork, and utilizing the "least restrictive alternative" approach).

79. In § 1(a) a grudging fifty square feet of floor space in any confined sleeping area is established.

The unrestricted and demeaning use of "strip searches" and periodic security shakedowns of cells is part, in a prisoner's words, of "the psychological warfare which the guards use to terrorize and harass you [T]he Fourth Amendment . . . does not apply and if you value your head in its natural state, it is best not to mention it."⁸⁰ It is unlikely that anyone will seriously move to forbid all searches for weapons or contraband in prison situations. But at the same time, with the multiplicity of deprivations already imposed by incarceration, it is clearly an appropriate time to begin to flesh out at least an outline of a right of privacy for inmates.⁸¹ There are obvious problems in stating the grounds and procedure for a lawful search but, facing a "no rights" area, the *Model Act* might have taken a hesitant step in the right direction.⁸²

Information is power, and prisons, like all incarcerating institutions, claim an exclusive right to shape and share information concerning their inmates. A prisoner's right to obtain access to his file and to shape it with his own inputs is, admittedly, a more sophisticated, although no less troublesome, issue than privacy. But an inmate is, in effect, a file; he is an object whose history is recorded in some detail. Decisions as vital as parole, classification, transfer, job assignment, and security status hinge on the state of a file that an inmate ordinarily has no right to see or to shape. The *Model Act* might well have undertaken to provide criteria and procedures for obtaining access to the file and for establishing a right of input.

The opportunity to earn and save money while in prison is a basic issue. Indeed, in terms of a possible reduction in the risk of recidivism, this may be as significant as any other item discussed in this article. Prisoners are clamoring for the legal right to a fair wage for industrial as well as institutional maintenance work.⁸³ The *Model Act*

80. Muntu, *Inside San Quentin—At the Mercy of the Merciless*, VILLAGE VOICE, Oct. 14, 1971, at 12, reprinted in *Hearings on Corrections Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., ser. 15, pt. 2, at 312, 316 (1971).

81. UNITED PRISONERS UNION, BILL OF RIGHTS art. 1, § VII, demands full protection against illegal searches and seizures and invasions of privacy during incarceration and parole.

82. In describing this as a "no rights" area, I mean to distinguish it from other areas either encompassed by, or excluded from, the *Model Act* where there is some law. A "no rights" situation in which the problem has surfaced presents a clear candidate for inclusion in a model act.

83. There is a separate problem in seeking to encourage further schooling but providing no, or very little, compensation for such activity.

should have addressed the issue and established minimal guidelines for implementing a right to fair compensation.

The *Model Act* should also have addressed the thorny questions of classification and transfer of prisoners, of a right to sexual opportunities, and of access to a law library and the conditions of its use. Also, as work-release and furlough programs continue to gain popularity, there is an obvious need for rules dealing with eligibility for and continuation in these programs. Once again, the *Model Act* is silent.

V. CONCLUSION

Having addressed questions of principle, architecture, and detail, it is obvious that I view the *Model Act* as a failure. Had it undertaken to provide guidance to correctional administrators in the adoption of standard administrative rules and procedures, I would have disagreed on principle with the notion of achieving change in that fashion.⁸⁴ But a well-conceived and comprehensive effort in that direction would have carried with it a sense of integrity, a vision of change that would at least be debatable.

I find myself thinking back to the original invitation of the *Law Quarterly* to contribute to this symposium. The invitation came and I accepted it before I saw the *Model Act*. Having much respect and affection for Sol Rubin, and knowing that he was bound to be associated with the *Model Act*, I was hardly prepared for what I encountered.⁸⁵ This is not the type of article one particularly enjoys doing. On the other hand, the *Model Act* is so devoid of any redeeming social utility that I wish it had never been prepared and published; its adoption would do nothing for the prison reform move-

84. Existing statutes delegate to the department of corrections the general authority to supervise and manage the state's correctional system, and also invite or require the enactment of rules and regulations to accomplish that end. Few states have attempted to enact administrative rules that are comprehensive even in a single area, let alone the entire area. The *Model Act* will provide no guidance to administrators anxious to maintain control through the enactment of administrative rules. For a typical statutory provision, see Mo. REV. STAT. §§ 221.040, 221.120, 221.320 (1969). For a general discussion of this topic, see W. Fitch, *Structuring Correctional Decision Making: A Traditional Proposal*, Jan. 15, 1973 (unpublished thesis on file at State University of New York at Albany, School of Criminal Justice).

85. I believe that Sol Rubin is the person most responsible for the current era of legal concern not only for the rights of prisoners but for all who are caught up in the system. As I indicated earlier, I find it difficult to believe that the *Model Act* is reflective of his thinking.

ment, and very little for the men and women in the cages we call prisons.⁸⁶

86. For a comprehensive effort to establish guidelines for prison administration, see BOSTON UNIVERSITY CENTER FOR CRIMINAL JUSTICE, MODEL RULES AND REGULATIONS ON PRISONERS' RIGHTS AND RESPONSIBILITIES (1973). The book was released after the preparation of this article, and deserves careful consideration.