ON BEING MEDIUM NICE TO PRISONERS

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A Model Act for the Protection of Rights of Prisoners[1] (*Model Act*) is a curious collection of correctional miscellanea, ranging from the necessity to prevent suicide to the necessity to permit "any other citizen" to wander about the warden's turf with impunity. Like most committee productions, the *Model Act* follows a cautious middle road that will make no one either very happy or very unhappy.

The correctional conservative will be angry with—but will survive—the provisions reducing his power to manage the prison as he sees fit. The liberal will be dismayed at the minimal rights granted the prisoners. The prison reformer on the far left will find this document quaintly obsolete in view of his conviction that not only prisons, but parole and most treatment programs, should be abolished forthwith. The much abused, sometimes murdered, and always underpaid correctional officer will wonder where his rights are listed, and what distinguished committee cares about the quality of his life. The professional prisoner and the jailhouse lawyer will scrutinize the *Model Act* to determine how it will improve the quality of incarceration, while the average prisoner will pay it little notice once he has determined that it will have negligible impact on the length of his sentence.

I. GENERAL OBSERVATIONS

Among the many general observations possible, I have selected three for comment. First, the *Model Act* will not bring about the liberal's dream of a "nice prison" where everyone speaks politely to each other and rioting is simply unthinkable. The naive expectation of many liberals, including some in the prison business, that if only the guards could be made to talk nicely to convicts, prison problems would disappear and the rehabilitation rate would rise remarkably, is not about to be fulfilled by this *Model Act* or by any other such set of standards.

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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].

Even diligent implementation of the *Model Act* will not materially improve conditions of confinement. Minimal adherence to these minimal standards will make any change nearly imperceptible.

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. Correctional history is replete with instances of serious disturbance in the best of institutions. California's state prisons exceed in practice, and in rule,[2] nearly every provision of the *Model Act*, yet continue to have both major and minor disturbances. Simply being nice to disturbed and destructive people does not eliminate their propensity for acting-out in dangerous ways. Furthermore, the *Model Act* does not cover the actions of parole authorities—a major grievance area for California prisoners and the probable root-cause of several prison disturbances in the past few years.

Secondly, the *Model Act* is a pre-revolutionary document that cannot cope with the "Tupamaro thinking" of many young radicals. It is obviously the product of men who have not encountered first-hand the young radical's "Kamikaze approach" to social change, including prison reform. Certain of these young people verbalize their dream that the vanguard of the revolution will pour out of the prisons, bombs and firebrands in hands, to accomplish those ruthless acts deemed necessary to bring about a Marxist Utopia—actions most young student radicals cannot bring themselves to perform. Those who view prisons and prisoners from this perspective accept liberalization of prison rules as an opportunity to further their aims.

Provisions of the *Model Act*, particularly section 7, lend themselves to exploitation by doctrinaire revolutionaries. California has had tragic

2. For California administrative analogues to § 2 of the *Model Act*, see California Department of Corrections, Director's Rule 4516 (1967) (use of force) [hereinafter cited as Director's Rules]; Director's Rule 4517 (mechanical restraint); Director's Rule 4518 (corporal punishment); Director's Rule 4211 (training for employees who supervise inmates); Director's Rule 1206 (immoral acts). For analogues to § 3, see Director's Rule 4508 (custodial and medical supervision of inmates confined in isolation cells); Director's Rule 4509 (isolation diet); Director's Rule 4507 (reporting procedures). For analogues to § 4, see Director's Rules 4501 to 4518 (inmate discipline), *revised by* California Department of Corrections, Administrative Bulletin No. 72/5 (March 7, 1972) [hereinafter cited as Administrative Bulletin], *and* Administrative Bulletin No. 72/5 (Supp. I, May 11, 1972). For an analogue to § 5, see California State Prison at San Quentin, Institution Order No. 119 (June 5, 1972) (ombudsman). For analogues to § 7, see California State Prison at San Quentin, Mail and Visiting Procedures (Nov. 1972), *supplementing* Director's Rules 2401 *et seq.* (mail), 2701 *et seq.* (visiting).

experience with the implementation of the right of a confidential attorney-client relationship. Further tragedy can be expected when American radicals begin to emulate the exploits of the Tupamaros.[3]

Lastly, the *Model Act* is a fairly realistic codification of good current correctional practice, in the sense that it has a chance of enactment in most states—something that would not be possible with a more radical set of provisions. The *Model Act* provides a badly needed set of guidelines for the more medieval state prison systems, for nearly all local jails, and for those penurious legislatures everywhere which refuse to spend the money required to bring their states' facilities up to a minimum standard of decency. Even a modicum of compliance with the *Model Act* will reduce prisoner discontent somewhat, and will establish the prisoner's right to treatment as a human being. It will also create that well-known condition of rising expectations that has led to disturbances in many other settings.

Since the writ does substitute for the riot on occasion, however, the *Model Act* must certainly reduce prison violence, since it provides the jailhouse lawyer with a veritable smorgasbord of habeas corpus possibilities. The vagueness of the *Model Act* will provide both prisoner-attorneys and impoverished law communes around the country with gainful employment for years, and will ensure that prison wardens will be in court continually, as the process of refining prisoners' rights takes its leisurely pace through the courts. Not that a continuing dialogue in the courts is necessarily bad—it beats burning down prisons, for example. Power over peoples' lives does demand legislative restraint. The *Model Act* and similar provisions for due process and prisoner rights will change the nature of correctional administration by inevitably involving attorneys for both the state and the prisoner in the operation of institutions.

Parenthetically, the penalogically uninformed reader should be aware that a vast gulf exists between the rights and facilities available in most state-level prisons, and in city, county, or parish jails. The *Model Act* will have little to say to modern prison systems that have long ago adopted most of its provisions, but it will have much to say to local jails where most major abuses of humanity occur. The introduction to the *Model Act* should have stressed this distinction; and it should have noted

3. *See, e.g.*, N.Y. Times, May 25, 1972, at 16, col. 1 (Massachusetts prisoner killed by bomb explosion); *id.*, Feb. 4, 1972, at 1, col. 1 (Black Liberation Army reported responsible for murder of New York City policemen).

that the rights of the pre-convicted in court must be protected by similar acts addressed to the process of prosecution.

II. SECTION-BY-SECTION COMMENTS

A. *Section 1: Declaration of Purpose and Intent*

There can be little quarrel with the humane, benevolent intent of the *Model Act*, as stated in this section. Mighty court battles have been fought, and will continue to be waged, over the concept that prisoners should "retain all the rights of an ordinary citizen, except those expressly or by necessary implication taken by law."[4] Almost the entire thrust of responsible prison reform has concerned the degree to which deprivation of particular rights is necessary. Most of the prison administrator's resistance to the assignment of additional rights to prisoners has been due to his belief that withdrawal of certain rights is necessary if the institution is to be safe and secure.

The *Model Act*'s mandate against suicide[5] places a more onerous burden upon the prison warden than is placed upon any other public official, and serves as an excellent example of how a well-intentioned law might lead to disastrous results. The fact is that no one can prevent a determined suicide. If a legal mandate such as this leads to judgments against prison officials for failing to prevent suicides, the officials will be tempted to apply draconian measures in an effort to minimize the possibility of such deaths. These measures might include use of the padded cell or, if this is proscribed, its modern psychiatric equivalent—massive doses of medication.

In a similar vein, the seemingly innocuous mandate to prevent the theft of a prisoner's property[6]—presumably by other inmates—can be most easily complied with by placing severe restrictions on the amounts of personal property permitted. In large prisons such as San Quentin, where men are allowed the equivalent of several orange crates of personal items, handling prisoner allegations of theft or loss has posed a major, nearly insoluble problem.

B. *Section 2: Inhumane Treatment Prohibited*

This section reads much like the rules and regulations of a well-managed prison, with some significant additions. The slanderous im-

4. MODEL ACT § 1(a).
5. *Id.* § 1(d).
6. *Id.* § 1(e).

plication that prison management is characteristically punitive and retaliatory whenever prisoners assert their rights[7] is a non-constructive approach to this problem. There are many kinds of actions in which prisoners have engaged—allegedly to gain their "rights"—some of which are totally unacceptable to the larger society. If the *Model Act* finds its way into state codes, this area must be defined more closely, or the unfortunate warden will be forever the recipient of adverse judgments because he suppressed a demonstration in a manner later deemed to be "punitive" or "retaliatory."

It is probable that most courts would find burning down the prison an unacceptable method of asserting rights. It is less clear, however, how they would view sit-down strikes, passive resistance, or the capture of areas of a prison. It is unfair to the warden—if not a violation of his rights—to require that he play a continual guessing game with the courts. A statutory definition of the limits of dissent in a prison would transfer the burden from the warden to the legislature, an important shift in a day when wardens may be held financially liable for their actions.

The prohibition of discriminatory treatment for reasons of race, religion, or political belief[8] simply restates the Constitution as it applies to free citizens.[9] A good case can be made, however, that some limitation on these rights is part of the necessary deprivation of rights suffered by prisoners. What would be a frivolous example if some courts were not taking it seriously is the "Church of the New Song,"[10] whose order of worship includes generous portions of meat and alcoholic beverage for each communicant member. The courts have already endorsed a religion whose apocalyptic dream is the death of all Caucasians,[11] but it is doubtful that they would similarly endorse a religion whose tenets included the murder of Blacks or Jews. If prison Nazis were not such abysmal dullards, they long ago would have devised a "religion" that would be immune to control by prison authorities.

All rights claimed or possessed by particular men must meet the practical test of their impact on the rights of other individuals, a test infinitely more important in the prison setting than in an open society.

7. *Id.* § 2(d).
8. *Id.* § 2(f).
9. *See* U.S. CONST. amends. XIII, XIV, XV.
10. *See* Theriault v. Carlson, 339 F. Supp. 375 (N.D. Ga. 1972).
11. *See* Long v. Parker, 390 F.2d 816 (3d Cir. 1968) (Black Muslims); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967) (same).

C. *Section 3: Isolation in Solitary Confinement*

While there can be little argument with the provisions of this section mandating a certain elemental decency in the act of closely confining a dangerous person, the terminology "solitary confinement—segregation in a special cell or room . . . ."[12] will be confusing to both the lawyer and the layman. Depending on the setting, the terms "segregation," "isolation," "quarantine," "solitary," "quiet cell," "strip cell," "isolation cell," and "oriental cell" may describe essentially similar types of cells, or they may denote much different kinds of confinement. At San Quentin, men placed on either "isolation" or "segregation" status in "B" Section are in cells identical to those of the general prison population. If they are placed on "isolation" or "segregation" status in the Adjustment Center, they are in substantially better cells than those which house general prisoners. In neither situation are the cells "solitary" in the sense that the men are cut off from conversation or visual observation through the open-barred door of the cell.

Men on "isolation" or "segregation" status who create a disturbance or who demolish their cell furnishings may be placed in a "quiet cell" where the toilet is indestructible, and a door may be closed to prevent their disturbing other prisoners. San Quentin has twenty such cells, out of a total of 2,900 cells. Of these twenty, two have oriental-type toilets, consisting of a drain hole in the floor. "Quiet cells" with the solid doors left open are frequently used because of overcrowding in the disciplinary unit, or for fearful men who want maximum protection. The use of these special cells as truly solitary quiet cells with the doors closed is very infrequent at San Quentin, and is subject to a number of procedural safeguards.

The *Model Act* evidently is concerned primarily with the use of quiet cells with closed solid doors, although the wording does not make this clear. This is a valid concern since the removal of a person from all outside sensory stimulation is an extremely punishing measure. The use of such solitary cells should be discouraged. The only possible justifiable use of closed-door quiet cells is when a prisoner is a serious danger to himself or to others.[13]

But legislation designed to limit the use of sensory-isolation techniques should clearly distinguish between this type of housing and that which is

12. MODEL ACT § 3.

13. For example, a prisoner can pose a serious hazard by throwing chunks of a smashed toilet.

used for the longer-term separation of difficult prisoners from the general prison population. This latter type of segregation also requires strict safeguards against abuse of discretionary powers, but a different type of safeguard is indicated. This section of the *Model Act* needs substantial modification before being enacted into law.

D. *Section 4: Disciplinary Procedure*

Prison disciplinary procedures have always been weighted against the inmate, and such fairness as they might have has been dependent upon the personality and integrity of the disciplinary officer. The requirement of due process in the disciplinary hearings is a necessary corrective.

The provisions of the *Model Act* are quite modest compared to court-ordered systems already in effect.[14] The "right to be represented by counsel or some other person of his choice,"[15] however, is a dangerously broad provision that could lead to a number of unfortunate circumstances. While representation by legal counsel may be welcome news to hundreds of unemployed young lawyers, it can result in an administrative nightmare in which all but the most gross forms of destructive behavior will be ignored by prison employees because of the endless litigation a charge of rule violation would entail.

California's relatively mild provision for an employee to serve as an "Investigating Officer"[16] has turned what used to be a five-minute process on minor infractions into hour-long hearings, occurring after days of delay. Under an attorney-adversary system, most men would likely be paroled before their cases were adjudicated. This, of course, would be acceptable to the radical left, which is promoting the notion that nothing a man does in prison should affect his chances for parole—a position

14. *See, e.g.*, Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971).

15. MODEL ACT § 4.

16. Director's Rules 4503 to 4507, *revised by* Administrative Bulletin No. 72/5 (March 7, 1972), require that any act of "minor seriousness, but which involves property damage, injury to a person, conduct related to the offense for which the inmate is incarcerated or which shows a pattern of misbehavior when considered with past minor incidents," be reported to a Disciplinary Subcommittee, which must refer the matter within twenty-four hours to an Investigating Officer, selected by the Chief Disciplinary Officer from approved, volunteer employees. If the inmate objects to the selection, the Chief Disciplinary Officer "may appoint a new Investigating Officer and grant a reasonable delay for further investigation." Within four working days of selection of the Investigating Officer, the inmate meets with the Disciplinary Subcommittee, which questions witnesses, determines whether the inmate did the reported act, and makes a written disposition of the matter. Both the meeting and the Investigating Officer's investigation may be delayed "to obtain further information." *Id.*

that must be destructive, ultimately, to the safety of the ordinary citizen.

The phrase "or some other person of his choice"[17] can be extremely mischievous if construed to permit representation by fellow prisoners. The notion that prisoners will be nice to each other if only the warden would stop being oppressive is much favored by today's liberal reformers. The liberal position of yesteryear, however, that no prisoner should be allowed power over another, still seems sound to most prison administrators. Representing another prisoner in legal matters is a most coercive form of such power.

E. *Section 5: Grievance Procedure*

Prisoners in most states can write to the director of corrections, the governor, and other officials, and in some states can write sealed letters. The *Model Act* follows standard and desirable practice in this regard. The bomb in this section, however, is the mandate for an ombudsman or similar functionary who presumably will be more concerned and more honest than prison officials, courts, or governors in the pursuit of prisoners' rights. Prison and police officials sometimes wonder why no one proposes citizens' review boards or the like to monitor the actions of lawyers.

Most grievances should be settled within the prison or department of corrections framework. Those which cannot be dispensed with in this manner can be handled by the courts. There is little necessity for burdening the taxpayer with yet another agency when there are already adequate provisions for both administrative and judicial review of individual grievances.

F. *Section 6: Judicial Relief*

The *Model Act* is fairly conventional in its approach to judicial relief, except for a certain shrill insistence that courts should close unsatisfactory institutions. While this may be a welcome source of leverage for hard-pressed prison and jail administrators who spend much of their energy begging for funds, it will probably prove less than popular with taxpayer groups.

G. *Section 7: Visits to Prisoners and Institutions*

The first half of this section outlines policies generally followed by most institutions. Nearly all prisons and jails have some provision for

17. MODEL ACT § 4.

visiting by relatives, friends, lawyers, legislators, and other officials. Whether the length of visits is adequate, and whether the facilities are provided enthusiastically or grudgingly by corrections officials, are not covered by the *Model Act.*

The second part of this section, providing that "any other citizen may make application to visit,"[18] followed by suggestions as to how the citizen can litigate his way into the prison when denied entry by the warden, represents incomplete thinking about the problem of informing the public. Certainly this was not written by anyone who is in immediate contact with the actions of today's would-be revolutionaries who callously exploit the good intentions of liberal thinkers. This section essentially opens the prison doors to anyone who happens to wander by and demand entrance. Practical and tragic experiences at San Quentin demonstrate that it is nearly impossible to prove to a court that a person asking to visit is a "mere curiosity seeker." Nor is it possible to prove that visits by members of even the most virulent "liberation army" cell would disrupt the prison until they have done so, at which point it is too late for anything but regrets.

This provision of the *Model Act* will ensure that the warden will be in court continually, trying to protect his institution from the stream of malcontented, idly curious, and maliciously destructive who can demand admission. Lest there be some misunderstanding about my position on this, I would urge wardens to admit responsible citizens to view their prisons to an extent limited only by facilities and safety. But this should be the warden's choice and responsibility, not a legislative mandate.

A far better provision for opening prisons to the public eye is to safeguard the right of access to all public institutions by responsible newsmen. Where the president of the local Ladies' Aid Society can inform only the few in her group, the media can inform millions of citizens about prison programs. The media does a good job of reporting in most instances, and prison administrators should have no qualms about admitting responsible reporters to view prison activities and to interview men in these programs.

III. CONCLUSION

There can be no doubt that the *Model Act,* with all its imperfections,

18. *Id.* § 7.

represents a necessary step in the direction of greater democratization of the prison society—a step which is part, hopefully, of a larger movement toward democratization in the greater society of which prisons are a distorted reflection. The practical prison administrator can only ask that the current concern with the rights of the convicted not blind either reformers or legislators to the rights of the unconvicted, non-criminal citizen. The rights of any individual are always intricately interlocked with the rights of those around him, whether they are prison officers, prison inmates, or victims.