CONTROLLING DISCRETIONARY POWER IN PRISON ORGANIZATIONS: A REVIEW OF THE MODEL ACT

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A Model Act for the Protection of Rights of Prisoners[1] (*Model Act*) is designed to establish law where presently there is little. Many states have only scanty prison legislation, limited to ensuring that prison administrators provide food, clothing, and medical care for prisoners.[2] For the most part, legislators have, by inaction, conceded virtually unlimited discretion to prison personnel to establish policies and make decisions. Judicial law-making has been similarly sparse; courts have been unwilling and, until recently, unasked to establish law which would affect the administration of prisons. Consequently, there is little formal law imposed from without prisons that controls what is done within. And prison administrators, by and large, have not established effective internal controls, although there has been some movement in this direction.[3] As a result of these failures decision-makers, including lower-level staff, within prison organizations have an abundance of unregulated discretionary power. Law has been abandoned, in effect, in an area where it is greatly needed.[4] Legislation is an essential first step in gaining control, but by itself cannot be fully effective in accomplishing that important objective.

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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. *E.g.*, ALA. CODE tit. 45, §§ 45, 125 (1959); CAL. PENAL CODE § 2084 (Deering 1961); MO. REV. STAT. §§ 221.040, 221.120, 221.320 (1969). *But see* Illinois Unified Code of Corrections, ILL. ANN. STAT. ch. 38, §§ 1001-1-1 to 1008-6-1 (Smith-Hurd 1973).

3. This movement is exemplified by the issuance of "Policy Statements" by the United States Bureau of Prisons. The Statements are issued by the Washington office of the Bureau in the name of the Director and are binding on all federal institutions. Local institutions may promulgate additional policy statements, consistent with the Bureau's, which adapt policies to local circumstances.

4. *See* Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952).

I. AN APPROACH TO EVALUATING THE MODEL ACT

It has long been understood that legislation can and should limit the decision-making authority of administrators. The doctrine that power cannot be delegated to administrative agencies without meaningful standards was one of the dominant themes of both judicial and scholarly writing during the growth of the agencies.[5] What has been much less understood, at least until recently, is that legislation can effect only limited control over administrative decision-making. Professor Davis, in his recent work, *Discretionary Justice: A Preliminary Inquiry*,[6] has greatly increased our understanding of the nature and scope of administrative action—and inaction—that is little influenced by legislation. Agency decision-makers often possess extremely broad discretion because the legislation which established the agency is worded so broadly that it does not effectively limit conceivable choices. This broad discretionary power can be harmful. The decision-maker frequently has such unrestricted latitude that even obviously unwise choices are open to him. Persons similarly situated may be treated unequally for improper reasons. Further, the failure to develop principles announced in advance leaves those affected by the agency unable to gauge what is required of them.

An apparent solution to this problem is enactment of more comprehensive and detailed legislation. The *Model Act*, of course, is intended to encourage more legislative regulation of prison practices. But experience demonstrates that there are some rather sharp limitations on the extent to which legislators are willing or able to control the actions of an administrative agency by developing a detailed legislative scheme. Even in those agencies which have received substantially more legislative attention than prisons, much discretionary power remains in the hands of the agencies.[7] Davis suggests a number of reasons for this, all of which are likely to have a bearing on any effort to control prison organizations through legislation.[8] First, legislators are not experts in many areas and often wisely refrain, when establishing an agency, from doing more than setting forth broad policy outlines. Secondly, some

5. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.01 *et seq.* (1958).

6. K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969) [hereinafter cited as DAVIS]. For a discussion of some of Professor Davis' ideas, see *Symposium—Administrative Discretion*, 37 LAW & CONTEMP. PROB. 1 (1972).

7. *See* DAVIS 70, 78.

8. *Id.* at 38-39.

problems of policy may be beyond the capacity of even the experts, so that it is better to develop more limited answers by focusing on concrete cases as they arise. Thirdly, some questions which should be resolved by legislators are not, either because of poor draftsmanship, or because an inability to agree leads to compromise which leaves the matter to administrators. And lastly, it is, of course, desirable that some discretionary power be granted so that the decision-maker has sufficient latitude to take into account relevant factors in specific cases.

There is certainly no consensus about the objectives of prisons; differing views will always make it hard for legislators to reach agreement concerning specific questions of policy. Even assuming a consensus on objectives, there is a lack of knowledge among experts about how these objectives can be accomplished.[9] Often there is little justification for establishing, at least in a form which is as permanent as legislation, prison policies so detailed that they would substantially reduce discretionary power. Some room is needed to experiment with various approaches to determine which are sound. And, of course, much discretionary power is inevitably exercised in applying generally applicable standards to specific cases.

All this is not to suggest that legislation is unimportant in limiting, or "confining,"[10] discretionary power which can adversely affect prisoners. Legislation can begin to confine discretion by drawing boundary lines and keeping choices within them. In some instances, the lines may be broadly drawn, consisting of little more than a statement of general principles. In other instances, the lines may be drawn quite narrowly, severely limiting administrative choices. The initial task for the legislature is to determine just how much discretionary power it wishes to delegate to prison organizations. The power should be sufficiently broad to prevent injustice as a result of an administrator's inability to take into account relevant considerations which are likely to be apparent only when the matter arises. On the other hand, the power should not be so broad as to facilitate arbitrariness or allow the decision-maker to make a choice which the legislators can agree

9. *See* D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964); Cressey, *The Nature and Effectiveness of Correctional Techniques*, 23 LAW & CONTEMP. PROB. 754 (1958); Logan, *Evaluation Research in Crime and Delinquency: A Reappraisal*, 63 J. CRIM. L.C. & P.S. 378 (1972); Robison & Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQUENCY 67 (1971).

10. *See* DAVIS 55. I shall use Professor Davis' terminology.

they do not want. It is clear that even with considered and well-drafted legislation, much discretionary power necessarily will be granted to prison administrators. Legislative activity must be supplemented by other methods of control if excessive discretionary power is to be avoided.

Professor Davis has given us a prescription for the further controlling of discretionary power beyond that accomplished by legislation. Administrative rules can do much the same thing as legislation and can often be developed more effectively.[11] Rules serve to limit the exercise of discretionary power because, like legislation, they mark out the area within which choices can be made, putting beyond reach certain otherwise available courses of action. As with legislation, the degree to which discretionary power is narrowed will depend upon the precision with which the rules are drafted. Prison administrators have not done much to effectively confine the discretionary power granted to them by the legislature. To the contrary, it has been observed that "[prison] administrators, finding it difficult to harmonize treatment and custody goals, have tended to generalize policy to such an extent that subordinate staff are relatively free to decide many significant questions of action and procedure."[12] This practice results in leaving difficult value choices to those at the lower end of the organizational hierarchy—the persons least competent to make them.[13]

In spite of the admitted difficulty of harmonizing conflicting objectives, administrators have sufficient familiarity with prison problems to establish a detailed set of administrative rules.[14] Often, although the legislature may wisely refrain from mandating a particular solution in handling a given problem, it is nonetheless essential that *some* specific rules be developed, lest administrative staff be left to make wholly uncontrolled decisions. The legislature, therefore, when it is unwilling itself to provide detailed guidance, should at least require that administrators develop rules to govern the matter.[15]

11. The term "rules" in this context includes policy statements, standards, and regulations.

12. Lovell & Nelson, *Correctional Management and Changing Goals of Correction*, in PROBLEMS OF CRIMINAL JUSTICE ADMINISTRATION 82 (N. Cohn ed. 1969).

13. *See* G. KASSEBAUM, D. WARD & D. WILNER, PRISON TREATMENT AND PAROLE SURVIVAL: AN EMPIRICAL ASSESSMENT 10 (1971); Cressey, *Contradictory Directives in Complex Organizations: The Case of the Prison*, 4 AD. SCI. Q. 1 (1959).

14. Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW & CONTEMP. PROB. 500 (1971).

15. Prison administrators have issued rules (sometimes called "policy statements"

Both legislation and administrative rules, then, can serve to confine discretionary power.[16] It is significant, of course, that rules are developed by the administrators themselves, typically without participation by others, although that need not be the case.[17] The increasing intervention of courts in prison administration, and proposals for legislation such as the *Model Act*, reflect a view that prisoners have been denied basic human rights—that prison administrators have been making, or at least permitting, decisions which place a greater value on coercive methods of maintaining security and institutional order than on the quality of the lives of their prisoners.

To the extent that there is a dissonance between the priorities of administrators and of legislators (or perhaps more accurately, the priorities of those drafting model legislation), the answer must be to enact legislation which incorporates the priorities of legislators. Implicit in granting discretionary power to administrators is an assumption that any choice within the range of permitted alternatives is not contrary to legislative desires. If the legislature desires a particular change in present practice, it must make its wish explicit.

It may be that legislators are not in substantial conflict with prison administrators. The experience in Illinois suggests that they are not.

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and thought of only as departmental directives) based either upon statutory authority, *see, e.g.*, CAL. PENAL CODE § 5058 (Deering 1961), or inherent authority. Courts have sometimes required prison administrators to promulgate rules. *See, e.g.*, Rhem v. McGrath, 326 F. Supp. 681 (S.D.N.Y. 1971). Prison rules have been judicially reviewed on the assumption that they are authoritative expressions of government policy, although the validity of this assumption is a complex question. *See, e.g.*, McCarty v. Woodson, 465 F.2d 822 (10th Cir. 1972); Wilson v. Prasse, 463 F.2d 109 (3d Cir. 1972). At the least, administrators are required to comply with their own rules until such time as they are judicially invalidated. It is likely they would be given substantial weight by the courts. In any event, it is clear that much more can be done to improve the scope and quality of rulemaking without waiting for definitive judicial treatment of prison administrative rules. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 5.01-.11, 6.01-.12 (1958); Caplan, *supra* note 14; McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 684 (1972).

16. Whether such rules should or must be promulgated in accordance with the various administrative procedure acts is not entirely clear. *Compare* American Friends Serv. Comm. v. Procunier, 1 PRISON L. REP. 249 (Super. Ct. Sacramento, Cal. 1972), *rev'd*, 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (1973), *with* Paolo v. Cupp, — Ore. App. —, 500 P.2d 739 (1972).

17. The Boston University Center for Criminal Justice was consulted by the Massachusetts Department of Corrections to aid in developing administrative rules for that system. The recommendations of the Center have been published as BOSTON UNIVERSITY CENTER FOR CRIMINAL JUSTICE, MODEL RULES AND REGULATIONS ON PRISONERS' RIGHTS AND RESPONSIBILITIES (1973).

There, a legislative proposal developed by a largely independent group of knowledgeable persons was altered in a number of sections, always so as to grant greater discretionary power to prison administrators than had been initially proposed.[18] Here, as elsewhere, legislatures will frequently choose to grant much latitude to agencies, so that administrative rule-making will be an essential method of confining the power granted.

Even with the establishment of legislation and administrative rules, much discretion will remain in deciding concrete cases. Drawing boundary lines can help clarify what the agency cannot do, but it is of little help in determining the appropriate disposition among alternatives that are within the permissible scope of decision. It is essential to "structure"[19] decision-making by establishing in advance those factors which are relevant to the decision. The decision-maker is told in effect that he may choose from available alternatives in dealing with the problem at hand, but that he must first consider certain enunciated factors. At first blush, structuring complex decisions seems a futile task. But it has been done, even in dealing with a matter as difficult as sentencing convicted persons; the *Model Sentencing Act*,[20] developed by the National Council on Crime and Delinquency (NCCD) and the American Law Institute (ALI), is an excellent example of what can be done. The legislature can confine a judge's discretion by permitting him to sentence an offender to a term of from two to twenty years. In addition, it can tell him that in exercising that discretion he must take into account those factors which the legislature deems relevant. Discretion can be structured both by the legislature and by prison administrators through careful articulation of those factors which must be considered in reaching a decision.

How do we know whether the decision-maker has based his decision on the requisite factors? We cannot, unless we require that he tell us, preferably in writing, why he decided as he did. Requiring written

18. *E.g.*, Illinois Unified Code of Corrections § 335-7 (Tent. Final Draft, 1971) (minimum cell size); *id.* § 335-14 (telephone calls); *id.* § 335-15 (requiring that person charging prisoner with disciplinary infraction be called at the hearing, and permitting prisoner to call witnesses), were eliminated or altered when the law was enacted. Act of July 26, 1972, no. 77-2097, §§ 1-1-1 to 8-6-1, [1972] Ill. Laws Spec. Sess. — (codified at ILL. ANN. STAT. ch. 38, §§ 1001-1-1 to 1008-6-1 (Smith-Hurd (1973)).

19. *See* DAVIS 97-141.

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

decisions discourages arbitrariness. And written decisions are even more effective when they are open to inspection both by the affected parties and staff members. Those affected are then able to point to any error they see in the decision. The decision-makers will thus be aware of the need to render decisions which are consistent with prior practice. These practices can apply to specific kinds of decisions made within prisons.

Confining discretionary power initially and then structuring that which remains will go a long way in gaining control over the exercise of authority in prisons. The essential last step is to ensure that adequate checks are made so that we know there is compliance with the established controls.[21] Review of decisions reached by others helps eliminate arbitrariness, both by altering it when it occurs, and by making the decision-makers more conscious of the need to be fair.

Review of administrative decision-making can be accomplished in a variety of ways. The primary method should be a provision for formal or informal review by superior officers within the administrative hierarchy. Superior officers, who are close to the decision-making process, can best provide day-to-day review. Additional methods include review by the courts and by other persons outside the prison system. External review is important because review by superiors, especially in a prison hierarchy, is influenced by the need to maintain organizational relationships, a factor which may not always facilitate fair and impartial review.

The *Model Act* can be judged, at least in part, by its success in meeting these objectives. Examining its provisions in some detail will help determine whether they adequately confine the discretion of prison administrators. It is also important to determine the extent to which the *Model Act* requires administrators to supplement legislative provisions with administrative rules. It is not enough simply to grant discretionary power and hope it will be effectively controlled; it is not even enough to specifically authorize rule-making. In a variety of instances, the legislature ought to compel administrators to develop a body of written rules adequate to confine, structure, and check discretionary power.

Developing effective methods of protecting prisoners from unjust treatment is not an easy task. It is not at all clear what kind of prison

21. *See* DAVIS 97-141.

regime produces the most beneficial results, either for society or for the prisoners.[22] The ultimate objective—reducing crime—remains to be accomplished.[23] Still, it is apparent that steps must be taken to assert control over prison organizations. Legal scholarship can contribute to this effort by gathering facts, analyzing and defining the issues, and proposing some answers, both in the form of legislation[24] and administrative rules.[25] With these considerations in mind, let us turn to the *Model Act.*

II. THE MODEL ACT

A. *Central Principle*

The *Model Act* establishes as its central principle the statement that "[prisoners] shall retain all rights of an ordinary citizen, except those expressly or by necessary implication taken by law."[26] The draftsmen adopted this principle from a judicial remark made in 1944,[27] a time when most courts were taking a much narrower view of prisoners' rights. The purpose of the provision is to enable prison administrators to impose restrictions or requirements only when necessary or desirable in achieving permitted objectives. Too often in the past administrators have taken action, but when challenged were not required to provide an adequate explanation.[28] The language of the *Model Act* has the virtue of demanding at least some explanation.[29]

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22. *See* note 9 *supra* and accompanying text.

23. *See* N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 111-44 (1970).

24. *See* Wechsler, *Legal Scholarship and Criminal Law*, 9 J. LEGAL ED. 18, 28 (1956).

25. *See* note 16 *supra* and accompanying text.

26. MODEL ACT § 1(a).

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

28. *See, e.g.*, Adams v. Pate, 445 F.2d 105 (7th Cir. 1971) (cells "inhumane, filthy and foul"); Tabor v. Hardwick, 224 F.2d 526, 529 (5th Cir. 1955); United States *ex rel.* Wagner v. Ragen, 213 F.2d 294 (7th Cir.), *cert. denied*, 348 U.S. 846 (1954); Adams v. Ellis, 197 F.2d 483, 485 (5th Cir. 1952); Stroud v. Swope, 187 F.2d 850 (9th Cir.), *cert. denied*, 342 U.S. 829 (1951); Rhinehart v. Rhay, 314 F. Supp. 81, 84 (W.D. Wash. 1970) (mail to attorney withheld); Prewitt v. Arizona *ex rel.* Eyman, 315 F. Supp. 793, 794 (D. Ariz.), *aff'd*, 418 F.2d 572 (9th Cir. 1969), *cert. denied*, 397 U.S. 1054 (1970) (incoming mail denied); Green v. Maine, 113 F. Supp. 253 (D. Me. 1953) (mail to and from attorney opened).

29. A variety of abuses has been recognized as justiciable. *See, e.g.*, Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966) (intentional deprivation of medical care);

The principle is desirable not only because it serves to confine the discretion of prison administrators within broad boundaries, but also because it is flexible and capable of adaptation. Those restrictions considered necessary today may some day be regarded as outmoded convention. The *Model Act*'s basic principle is suited to the period of change we can anticipate, a period which may result in very different kinds of institutions for confining people.

B. *Basic Prisoner Needs*

Immediately following the declaration of general principle, the *Model Act* contains a detailed statement of certain minimal guarantees designed to maintain prisoners' physical and mental health. The rights to have adequate food, medical care, sanitation, ventilation, light, and a generally healthful environment are spelled out.[30] Regrettably, the necessity for such provisions has been demonstrated by recent litigation.[31] Inadequate living conditions are particularly prevalent in local facilities.[32] Especially useful is the provision which requires "no less

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Fulwood v. Clemmer, 295 F.2d 171 (D.C. Cir. 1961) (placement in solitary confinement after complaining of treatment); Coffin v. Reichard, 143 F.2d 443, 444 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945) (subjection to assault, cruelty, and indignity); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966) (placement in solitary confinement under conditions of extreme deprivation); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965) (forced field work when physically ill and infirm). *See also* Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), *on remand*, 321 F. Supp. 127 (N.D.N.Y. 1970), *aff'd in part and rev'd in part*, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972); Howard v. Smyth, 365 F.2d 428 (4th Cir.), *cert. denied*, 385 U.S. 988 (1966); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio), *supplemented*, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); 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).

30. MODEL ACT § 1(b).

31. *E.g.*, Novak v. Beto, 453 F.2d 661 (5th Cir. 1971); Sinclair v. Henderson, 435 F.2d 125 (5th Cir. 1970), *on remand*, 441 F. Supp. 1123 (E.D. La. 1971); Ford v. Board of Managers, 407 F.2d 937 (3d Cir. 1969); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), *on remand*, 321 F. Supp. 127 (N.D.N.Y. 1970), *aff'd in part and rev'd in part*, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972); 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); Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970), *order issued sub nom.* Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

32. Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio), *supplemented*, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Hamilton v. Love,

than fifty square feet of floor space in any confined sleeping area."[33] The provision is an example of the value of confining the discretion of prison administrators severely when it is clear what is wanted. No prison administrator can reasonably interpret this provision to permit a cell which is smaller than the specified size.

The draftsmen did not include similar detail regarding the other health requirements. Perhaps they could not say with precision what was needed, preferring instead to leave that to administrators. When detail is not included in the statute, administrative rules are essential to spell out what is required. Rules can further specify, for example, what constitutes nutritious food in adequate quantities. More than enough is known about daily food requirements to have detailed specifications. The value of rules which detail daily food requirements is at least threefold: they make concrete exactly what is required to implement the statute; they aid in ensuring that staff members treat the prisoners consistently; and they facilitate review of administrative compliance with the statute. The legislature ought to demand that administrators promulgate rules concerning diet. Similarly, rules are essential to implement adequately the statutory requirements concerning sanitation, ventilation, light, and medical care.

This section also mandates "reasonable opportunities for physical exercise and recreational activities."[34] Judicial law-making is unlikely to provide for adequate exercise and recreation;[35] therefore, legislative establishment of these opportunities is especially desirable. Again, the *Model Act* ought to require that prison administrators develop rules spelling out the details of when and how these mandates are to be met. Rules can help ensure that each prisoner in fact receives sufficient time for exercise and recreation and has adequate access to facilities. Granting staff personnel the discretion to decide when and for whom exercise will be allowed can easily result in failure to pro-

328 F. Supp. 1182 (E.D. Ark. 1971); Johnson v. Lark, 1 PRISON L. REP. 225 (E.D. Mo. 1972); 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). *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 73 (1967) [hereinafter cited as TASK FORCE REPORT: CORRECTIONS]; *Hawaiian Jail "Not Fit for Human Habitation," Is Closed*, 1 PRISON L. REP. 11 (1971).

33. MODEL ACT § 1(b).

34. *Id.*

35. Courts have generally been reluctant to conclude that recreation is constitutionally required. *See, e.g.*, United States v. Wyandotte County, 343 F. Supp. 1189, 1211 (D. Kan. 1972).

vide adequate time for all and unequal treatment among those for whom the opportunity is provided.

The most novel provisions of the *Model Act* are those which establish the right to "protection against any . . . psychological abuse or unnecessary indignity,"[36] and the prohibition against "any measure intended to degrade the prisoner, including insults and verbal abuse."[37] Imprisonment is inherently a degrading experience; descriptions of prison life have demonstrated this dramatically.[38] To live in a cage with an open front into which all can see is degrading; to be stripped naked and searched is degrading; to have one's personal letters opened, read, and censored is degrading.[39] It may be that this dimension of prison life cannot be eradicated completely. Nonetheless, provisions which attempt to do so are desirable. It has been thought, and still may be, that a prison milieu which is degrading is not only unavoidable but desirable. The provisions of the *Model Act* make clear that prison life is not to be made more degrading than it need be.

The discretion of prison administrators is confined only very broadly by these provisions. The draftsmen were apparently unable to go much beyond stating general principles. It is likely that they disagreed among themselves whether certain prison practices are intentionally degrading—for example, shearing hair, providing only spoons for eating, and calling prisoners by their first names while demanding that they address the staff formally. Each draftsman was able to vote for the general principle without having to come to grips with exactly what it would do. Because of differences of opinion, that may be all that a legislature would want to do at the moment. As knowledge about the effectiveness of penal techniques grows, there will be increasing agreement that some practices are more destructive than useful. For the moment we can only ask that administrators be required continuously to develop rules which recognize and prohibit practices which are degrading and no longer necessary. It is apparent that what may be necessary in a system containing the most difficult prisoners is not necessary in a juvenile facility. These differences can be recognized and spelled out by local rule.

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36. MODEL ACT § 1(b).

37. *Id.* § 2(e).

38. *See* TASK FORCE REPORT: CORRECTIONS 46.

39. *See* Singer, *Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons*, 21 BUFFALO L. REV. 669 (1972).

Section 1 contains three additional subsections, each of which asserts a general principle. Section 1(c) prohibits "inhumane treatment," which is further defined in section 2. The draftsmen have wisely spelled out those inhumane practices of which they were aware and wanted to ban. The clauses in section 2 prohibiting physical punishment and the use of force except to prevent assault, escape, or riot are excellent, for they add some meat to the bare bones of principle, thereby helping to make clear what is prohibited. Similarly, the provisions prohibiting sexual assault and retaliatory punishment further clarify what the draftsmen intended to proscribe.

C. *First Amendment Rights*

Section 2(f) prohibits discriminatory treatment based on race, religion, nationality, or political belief. A host of problems is encompassed in what appears to be a simple affirmation of fundamental principle. The draftsmen have failed to deal adequately with these matters. The general principle established is necessary and useful but it does not go far enough. Additional general principles are necessary and greater detail may be useful as well. Differences in race and religion, and in political and social belief, give rise to many problems in the prison setting.

1. *Religion*

Historically, religion of the conventional sort has been an integral part of most prison communities:[40] clergymen, typically a Catholic and a Protestant, are employed by the state to conduct religious services and otherwise serve in the prison; programs are conducted in addition to regular services; a chapel and office are provided; and prisoners are assigned to work in clergy offices. Little controversy was engendered until a substantial number of prisoners became adherents of less-accepted faiths, especially the Muslim faith.

Prison administrators typically took a dim view of Muslims and imposed numerous restrictions upon their activities. Muslims sought, sometimes successfully, to hold religious services,[41] to have spiritual

40. *See* AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 468 (3d ed. 1966) [hereinafter cited as MANUAL OF CORRECTIONAL STANDARDS].

41. X. v. Willingham, 386 F.2d 153, 154 (10th Cir. 1967) (administrative regulation formulated to permit meetings under specified conditions); Cooper v. Pate, 382 F.2d 518, 522 (7th Cir. 1967) (services must be permitted although they may be

texts and literature,[42] and to be provided with a spiritual leader.[43] The right of an individual Muslim to practice his religion in various ways has usually been judicially settled by reference to the prerogatives enjoyed by other prisoners of more conventional religious belief, a classic application of equal protection.[44] Doubtlessly, additional rights will be asserted, not only by Muslims but by prisoners claiming adherence to other religions. The *Model Act*'s provision is desirable in that it establishes as a basic principle that discrimination based upon religion is not to be tolerated. It is doubtful whether any additional detail designed to prevent discrimination can profitably be included in the *Model Act* itself. But the kinds of problems suggested by the litigated cases are likely to crop up again and again. Much can be done at the administrative level to ensure that all inmates have equal opportunity to have a place of worship, to attend services, to obtain religious literature, and to contact spiritual leaders. Administrative rules can go further and ensure that the money spent by the state to support religious activity within the prisons is spent equitably. Not every faith can have a state-paid clergyman on a full-time basis, but an equi-

regulated); Lee v. Crouse, 284 F. Supp. 541, 548 (D. Kan. 1967), *aff'd*, 396 F.2d 952 (10th Cir. 1968) (congregation may be proscribed because of fear of racial tension resulting from propagation of Muslim principles); Jones v. Willingham, 248 F. Supp. 791, 793-94 (D. Kan. 1965) (congregation banned); Banks v. Havener, 234 F. Supp. 27, 30 (E.D. Va. 1964) (inmates permitted to "practice their religion").

42. Brown v. Peyton, 437 F.2d 1228, 1231 (4th Cir. 1971) (practice of religion may be restricted only upon a convincing showing of paramount state interest); Walker v. Blackwell, 411 F.2d 23, 28-29 (5th Cir. 1969) (inmates entitled to receive *Mohammed Speaks*); Long v. Parker, 390 F.2d 816, 822 (3d Cir. 1968), *modifying* Long v. Katzenbach, 258 F. Supp. 89 (M.D. Pa. 1966) (to justify the prohibition of religious literature, prison officials must prove clear and present danger of a breach of prison discipline or security or the orderly functioning of prison); Northern v. Nelson, 315 F. Supp. 687, 688 (N.D. Cal. 1970), *aff'd*, 448 F.2d 1266 (9th Cir. 1971) (inmates entitled to subscribe to *Mohammed Speaks* and institutions must be provided with at least one copy of *The Holy Qu-ran*).

43. Northern v. Nelson, 315 F. Supp. 687, 688 (N.D. Cal. 1970), *aff'd*, 448 F.2d 1266 (9th Cir. 1971) (Muslim minister, when available, shall be paid an hourly rate comparable to Protestant, Catholic, and Jewish clergymen); Desmond v. Blackwell, 235 F. Supp. 246, 249 (M.D. Pa. 1964) (prisoner not permitted to correspond with Elijah Muhammed).

44. Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961), *on remand*, 212 F. Supp. 865 (N.D.N.Y. 1962), *aff'd per curiam*, 319 F.2d 844 (2d Cir. 1963) (prisoners held in solitary confinement allegedly because of religious beliefs); Northern v. Nelson, 315 F. Supp. 687 (N.D. Cal. 1970), *aff'd*, 448 F.2d 1266 (9th Cir. 1971); Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964); State v. Cubbage, 58 Del. 430, 210 A.2d 555 (1965) (prisoner denied opportunity to conduct services and to wear religious medals).

table portion of the money available can be spent to compensate clergy of smaller groups on an occasional basis. Further, money can be apportioned in obtaining religious literature and other materials. Administrative rules can be developed locally to deal with specific local problems.

The non-discrimination provision is useful so far as it goes, but it does not provide any affirmative protection for religious activity. Not every religious practice has its parallel in other religions. Muslims have asserted the right to be provided with the pork-free diet demanded by their religion.[45] A Jewish inmate has asserted the right to wear a beard, a religious requirement of his sect.[46] In these instances no discrimination argument can be made—the objection is that all are being treated alike. But the free exercise clause of the first amendment does not depend upon the beliefs and actions of others; each man is permitted to pursue his own religious beliefs. And the Supreme Court has made it clear that the free exercise clause applies to prisoners.[47]

Here, as elsewhere, the right to act, even in accord with one's religious convictions, is not without limit.[48] Lower court decisions have not articulated, in the prison context, a consistent delimiting standard. The most protective would require the state to show a "compelling interest to be furthered" with "only the gravest abuses, endangering paramount interests"[49] left unprotected. Another would give greater latitude to administrators, requiring only that there be a "clear and present danger to internal discipline"[50] for prohibiting religious activity.

45. Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969) (no special diet required); Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969) (remanded to determine whether state had compelling objectives which would not permit Muslims to observe dietary laws and whether those objectives could be met by less restrictive means); Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968) (no special diet necessary if nutrients can be had without pork); Jackson v. Pate, 382 F.2d 517 (7th Cir. 1967) (warden must recognize Black Muslim diet if other special religious diets are recognized); Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964) (no accommodation required).

46. *Cf.* People *ex rel.* Rockey v. Krueger, 62 Misc. 2d 135, 306 N.Y.S.2d 359 (Sup. Ct. 1969) (prison could require Muslim to shave beard although Jew may not be required to shave).

47. Cruz v. Beto, 405 U.S. 319 (1972).

48. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961).

49. Barnett v. Rodgers, 410 F.2d 995, 1000 (D.C. Cir. 1969).

50. Abernathy v. Cunningham, 393 F.2d 775, 780 (4th Cir. 1968) (Craven, J., dissenting).

Least restrictive of administrative discretion is a holding which requires that the administrative action not be "arbitrary, capricious or unlawful."[51]

What kind of legislative provision would be most useful is not clear. General standards along the lines of constitutional principles applied by the courts in first amendment cases can confine discretion within broad boundaries. A satisfactory legislative standard ought to recognize that religious activity is entitled to some deference and should not be prohibited simply because doing so furthers in some way a legitimate state purpose. Only the most insignificant practice or the feeblest rule cannot be claimed to further some state purpose in some way. Many rules which limit prisoner freedom to engage in first amendment activities are imposed not because they are thought to be rehabilitative, but because they contribute to internal security or what might be called "institutional survival."[52] It is regrettable that because of the nature of our prison organizations so much is sacrificed simply to prevent escapes and protect staff from inmates and inmates from each other. A task for the future is to develop effective correctional methods which prevent convicted persons from harming others and provide real opportunities for rehabilitation, and at the same time protect individual freedom and dignity.

A legislative standard, if it is to effectively limit impingements upon religious freedom, must demand that the state's purpose be "compelling," or at least "substantial," and that the means taken to accomplish the state's objective be the least restrictive which are feasible. Such a standard would still leave substantial discretionary power in the hands of prison officials. Presumably it would mean that a prisoner would be able to correspond with Elijah Muhammed, spiritual leader of the Muslims, even though Muhammed is an ex-convict.[53] It would also dictate that a prisoner be permitted to wear a beard if it is required by his faith.[54] Whether it would require that Muslims be provided a pork-free diet even if that entailed some additional expense and administrative inconvenience is less clear. Speculating about these questions only illustrates that the legislature can, if it wishes, consider and answer

51. Jones v. Willingham, 248 F. Supp. 791, 794 (D. Kan. 1965).

52. *See* Morales v. Schmidt, 340 F. Supp. 544 (W.D. Wis. 1972), *rev'd*, — F.2d — (7th Cir. 1973).

53. *Cf.* Long v. Katzenbach, 258 F. Supp. 89 (M.D. Pa. 1966), *modified sub nom.* Long v. Parker, 390 F.2d 816 (3d Cir. 1968).

54. *See* note 46 *supra* and accompanying text.

each of these more specific questions. Since providing additional services, such as special diets and part-time clergy, turns more on the availability of resources than anything else, the question may be appropriate for legislative decision. It is doubtful that many legislators would wish to enact legislation with such detail, however. Questions of permissible religious activity often overlap with other first amendment problems and can take a variety of forms which are most difficult to regulate at the legislative level, except by general principle.

Assuming substantial discretionary power is granted, which is always likely, administrative rules can play a significant part in confining the discretion of prison personnel in determining when to accommodate the desired religious activities of prisoners. Rules, for example, can spell out the extent to which the food service is required to alternate pork and non-pork meals so that Muslims can observe their dietary restrictions without having inadequate nutrition. Rules can be promulgated which require personnel to provide religious services for segregated prisoners. Rule-making, especially at the department or division level, ensures that policies are established, as they should be,[55] by those at the upper levels of administration, rather than on an ad hoc basis by lower-level personnel.

One additional matter deserves notice. Provision of clergy by the state is necessary if confined men are to have the opportunity to practice their religion. But the state should not encourage religious participation by providing rewards. Prison clergy sometimes submit reports to be included in a prisoner's file which comment upon his religious activities.[56] A favorable report may well enhance a prisoner's parole chances. Prisoners may thus feel compelled to participate in religious activities despite their own preferences, a result contrary to the spirit of the establishment clause. It would be better if the *Model Act* banned clergy reports, which seem to be of marginal value anyhow. At least one court has done so.[57]

2. *Political Freedom*

Section 2(f) also prohibits discriminatory treatment based on political belief. Belief, of course, is always constitutionally protected.[58]

55. *See* Caplan, *supra* note 14, at 503.

56. *See, e.g.*, Theriault v. Carlson, 339 F. Supp. 375 (N.D. Ga. 1972).

57. *Id.* at 381, 382.

58. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); Sostre v. McGinnis, 442 F.2d 178, 202 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972).

The difficulty is determining the extent of protection when the prisoner seeks to act upon his beliefs. Prison officials long thought it essential that a prisoner's intellectual diet be severely restricted. The stated purposes of this policy were at least twofold. First, the needs of security required that prisoners not receive material which would contribute to rebellion or escape. Secondly, the ideal of rehabilitation could not be achieved unless undesirable influences were screened out of prisoners' lives. To these ends, limits were placed upon what a prisoner would be allowed to read, hear, and say.

a. *Reading Matter*

It is a common practice to permit prisoners to receive from outside the prison only those books, magazines, and newspapers which have been approved by the prison staff.[59] There have been some complaints that these limitations have not been fairly established or fairly applied. A black prisoner asserted that he was not permitted to subscribe to the black newspapers, *The Amsterdam News* and *The Pittsburgh Courier*, as well as the black magazines, *Ebony*, *Sepia*, and *Tan*.[60] The prison had promulgated a "home town" rule which had apparently been discriminatorily applied. White publications not from a prisoner's home town were routinely allowed; black publications were not. Further, the rule itself worked in a discriminatory fashion simply because fewer black publications existed and these were located only in several large cities. Section 2(f) of the *Model Act* obviously is intended to prevent this sort of action by prison administrators, but by itself it is not likely to be effective. Evenhandedness in regulating the admission of reading matter into a prison requires careful structuring and checking of the discretionary power being exercised. Presently, the discretion to decide what may be read is broad, often resting solely in the hands of the responsible staff member, who may or may not be guided by a brief and broadly worded policy statement.[61] Decisions may be made without stating any reason; the pris-

59. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 1003-7-2(a) (Smith-Hurd 1973).

60. Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968).

61. *See, e.g.*, Oklahoma Department of Corrections, Inmate Manual of Rules and Regulations 13 (1969) (newspapers and books must be of "proper character"); Tennessee Department of Correction, Guidance Manual for Prisoners 15 (1965) (magazines, books, and newspapers must be from "approved list"). Many prison manuals contain no standards beyond providing that incoming mail may be censored. *See, e.g.*, Arizona State Prison, Inmate Rule Book (undated); Oregon State Penitentiary, Inmate's Hand-

oner is simply informed that he may not have the material.[62] These practices, if continued, will defeat the mandate of the *Model Act*. Administrators should articulate as carefully as they can the factors which determine whether a publication is acceptable. The decision-maker should be required to state his reasons in writing, at least when rejecting material.[63] He should also notify the affected inmate if the material is rejected, so that the inmate will have an opportunity to object and present reasons why the material should be allowed.[64] The written decisions, absent a compelling reason to the contrary, ought to be available to all so that both the decision-makers and the next-affected prisoner can compare the case with earlier results, an essential step in minimizing discriminatory treatment.[65] Secret decision-making breeds suspicion, in prison more than out, and it should be avoided much more than it presently is. Further, the affected prisoner should be informed that he has the right to appeal the decision to a superior officer. These decisions, usually made by individual staff members, should be open to review so that arbitrariness can be checked.

An important failure of the *Model Act* is that it only prohibits discriminatory treatment based on political or social belief; as with religious activity, it provides no affirmative protection. Prison administrators can prohibit whatever activities they wish so long as they do not discriminate. An example will illustrate the need to remedy this. In New York a prison administrator decided to bar *Fortune News*, a newsletter which contains articles about prison reform, ex-prisoner rehabilitation, and other activities of the Fortune Society.[66] The administrators pointed to no rule, regulation, or policy statement upon which they relied. The only information available to the court, upon challenge, was provided by the Executive Secretary of the Fortune Society;

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book (1971); South Dakota State Penitentiary, Inmate Rule Book (1971). Legislation has not been very precise. *See generally* Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 221-22 (1970); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 485-86 (1971).

62. *See, e.g.*, Fortune Soc'y v. McGinnis, 319 F. Supp. 901, 903 (S.D.N.Y. 1970).

63. *Cf.* Sostre v. Otis, 330 F. Supp. 941, 946 (S.D.N.Y. 1971).

64. A prisoner may conceivably have some personal difficulty which makes it inappropriate for him to read certain kinds of material, but this would probably be rare.

65. It may be that the large number of routine affirmative decisions would make it wasteful to require written decisions in these instances, but they would undoubtedly be useful.

66. Fortune Soc'y v. McGinnis, 319 F. Supp. 901, 905 (S.D.N.Y. 1970).

he had been informed that *Fortune News* was banned because it did not reflect the truth concerning conditions in prison facilities. The complaint here was not discrimination; the authorities may have been ready to ban anything which did not in their view reflect the truth, or which was critical of their performance. Legislation can help solve this difficulty only by limiting the discretion of administrators to decide what is permissible reading matter. The court concluded that no "compelling state interest" was advanced which would justify the ban. Material could be banned, the court concluded, "only upon a showing of a clear and present danger to prison discipline or security."[67] Another court repeated this test, and added "or some other substantial interference with the orderly functioning of the institution."[68] Still another court preferred a "clear and probable danger" test, since it thought the "present danger" test required an element of brinksmanship inappropriate in a prison setting.[69] Any legislatively imposed standard must, of course, meet these developing constitutional limitations upon an administrator's discretion.

Again it is a question of determining the extent to which the legislation should limit the discretion of prison administrators. Here, as before, a general principle may be all that is possible. Presently, censorship of reading matter is severe.[70] To alter this legislatively, the standard adopted would necessarily require greater justification for censoring than that it furthered, in some way, the state interests of security, institutional order, or rehabilitation. A legislative standard which requires the state to show an immediate threat to institutional order to justify excluding reading materials would put some limit on the discretion of prison administrators. The impact of the printed word is usually not so dramatic that immediate violence or disobe-

67. *Id.*

68. Long v. Parker, 390 F.2d 816 (3d Cir. 1968), *modifying* Long v. Katzenbach, 258 F. Supp. 89 (M.D. Pa. 1966) (religious material). *See also* Banks v. Havener, 234 F. Supp. 27, 30 (E.D. Va. 1964).

69. Knuckles v. Prasse, 302 F. Supp. 1036, 1057-58 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (3d Cir. 1970), *cert. denied*, 403 U.S. 936 (1971) (religious material). *See also* Rowland v. Jones, 452 F.2d 1005, 1006 (8th Cir. 1971) (newspaper with "substantially inflammatory effect" may be barred); Walker v. Blackwell, 411 F.2d 23, 29 (5th Cir. 1969). Whether the standards demanded in cases concerning religious publications govern non-religious matter is not clear.

70. *See, e.g.*, Rowland v. Jones, 452 F.2d 1005 (8th Cir. 1971); Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972); Payne v. Whitmore, 1 PRISON L. REP. 4 (N.D. Cal. 1971); *In re* Littrell, 1 PRISON L. REP. 183 (Super. Ct. San Luis Obispo County, Cal. 1972).

dience can confidently be predicted, except under unusual circumstances. At the same time, it is a shared belief of prison administrators that the climate of a prison can be much affected by the kinds of views to which prisoners are exposed.[71] Permitting prisoners, some of whom have demonstrated gross immaturity, to read provocative materials can, under this view, create a climate of dissatisfaction and unrest. What is needed is a legislative principle which would prevent censorship based only on the ground that the material contains political and social ideas at variance with those encouraged by the administration, but would still permit prison administrators to act on their fears when there is evidence that an explosive atmosphere exists which makes it necessary to prevent provocative materials from entering the prison, even if only momentarily. The proposed formulation would grant ample discretionary power to permit authorities to intercede in the event it became plain that the climate was unusually tense.[72]

A troublesome matter is the extent to which censorship should be permitted in the name of rehabilitation. Outside the prison it is a basic tenet that reading material, with the curious exception of sexual material, is not to be suppressed simply because it contains ideas which some think will harm the reader. Still, we have charged the prisons, in part at least, with the task of rehabilitating those sent there. The difficulty is that very little is known about how rehabilitation can be accomplished.[73] Prison administrators have not been eager to evaluate any of their practices designed to rehabilitate. No one knows what impact the reading of various kinds of literature has on prisoners or anyone else. This may suggest that the judgment should be left to the discretion of prison administrators. But because it is not clear what should be done, the opportunity for arbitrary decision-making is great. It seems to me that, on balance, censorship in the name of rehabilitation ought to be limited to those instances in which there is some consensus of informed opinion that the material is damaging. Articulating

71. *See* Seattle-Tacoma Newspaper Guild v. Parker, 1 PRISON L. REP. 229, 231 (W.D. Wash. 1972), *aff'd*, 480 F.2d 1062 (9th Cir. 1973) (testimony of the Director of Prisons of the State of California).

72. *See* Rowland v. Jones, 452 F.2d 1005 (8th Cir. 1971); Walker v. Blackwell, 411 F.2d 23, 29 (5th Cir. 1969).

73. *See* Robison & Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQUENCY 67 (1971); Ward, *Evaluations of Correctional Treatment: Some Implications of Negative Findings*, in LAW ENFORCEMENT SCIENCE AND TECHNOLOGY 201 (S. Yefsky ed. 1967).

a limiting legislative standard in this area is not an easy task. Obscene materials can, of course, be constitutionally banned, but even the Supreme Court has had difficulty in developing an understandable definition of obscenity. It may be reasonable to ban materials which present criminal activity in a favorable light; interpretations of a statute which attempted to do so, however, could vary significantly. Whatever the difficulty of finding adequate statutory language, what is needed is some guarantee of access to materials presenting a variety of political and social views. Until there are clear demonstrations to the contrary, we ought to apply our basic belief that exposure to such materials benefits, rather than harms, the reader.

Whatever legislative protection is provided is likely to be stated as a general principle. The usual prescription for the development of rules which set forth special criteria of nonacceptability is applicable here. Equally as important, rules must provide for prompt notice to the addressee in the event of rejection, together with written reasons and an opportunity to appeal an adverse decision to a higher authority within the administrative hierarchy. The written decisions should be available both to other decision-makers and to other prisoners so that consistency may be furthered.[74]

b. *Prisoner Correspondence*

It was disappointing to discover that the *Model Act* contains nothing about prisoner correspondence. Correspondence has always been closely monitored by administrators, and this practice has been a bone of contention between them and prisoners. In recent years the conflict has spilled over into the courts. A look at some of the problems will make clear the need for both legislation and administrative rulemaking to regulate this practice.

A troublesome restriction is that which prevents prisoners from writing to the news media. Such correspondence, almost always unflattering to prison authorities, has been prevented on several grounds: it would present a false picture of prison life; it would create unrest within the prison; and it would require administrative time to respond to queries engendered by the correspondence.[75] None of these reasons

74. *See* Taylor v. Perini, 1 PRISON L. REP. 268 (N.D. Ohio 1972).

75. *See* Nolan v. Fitzpatrick, 326 F. Supp. 209 (D. Mass.), *rev'd*, 451 F.2d 545 (1st Cir. 1971); Fortune Soc'y v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970).

seems adequate. Prison administrators, as public officials, must expect and accept criticism, even though the criticism may at times be distorted and inaccurate.

Professor Ohlin of the Harvard Law School, in an affidavit submitted on behalf of a Massachusetts inmate, stated:

> When prisoners riot or go on strike one of their demands is almost always access to reporters. Prisoners often feel that, in ordinary circumstances, they have no effective way of bringing their grievances to public attention. Costly and destructive prison riots are primarily designed to call public attention to felt abuses rather than bring about escape.[76]

Professor Ohlin therefore speculated that permitting letters to the news media might aid in maintaining, rather than destroying, discipline.

Certainly some administrative time is required to respond to public criticism, and, occasionally, a prisoner may feel he has bested authorities in a public debate. Still, on balance, the value of such criticism, not only to the prisoners but to the community, seems clearly to outweigh the disadvantages. Letters which are so inflammatory that they may cause trouble upon return to the prison in printed form can be dealt with at that time under the standards appropriate for other printed material. The feasibility of Professor Ohlin's suggestion is demonstrated by the United States Bureau of Prisons' policy of permitting unfettered correspondence to the media through its "Prisoners' Mail Box."[77]

We have at least one judicial pronouncement on the subject; Judge Wyzanski concluded that a prisoner ought to be entitled to correspond with the media unless authorities have "reasonable ground (not necessarily probable cause)" to believe that the letters present a risk to security, discipline, or rehabilitation.[78] I would prefer a stiffer standard, one which ensures that a prisoner may correspond with the media unless some immediate threat to state interests would result. The desire to suppress criticism, understandable in all men, is not absent among prison administrators. Administrators readily believe that refusing to

76. Nolan v. Fitzpatrick, 326 F. Supp. 209, 212 (D. Mass.), *rev'd*, 451 F.2d 545 (1st Cir. 1971). For a similar view of prison riots, see G. SYKES, THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON 8 (1958).

77. United States Bureau of Prisons, Policy Statement No. 1220.1A (Feb. 11, 1972), *reprinted in* 1 PRISON L. REP. 99, 100 (1972).

78. Nolan v. Fitzpatrick, 326 F. Supp. 209, 212 (D. Mass.), *rev'd*, 451 F.2d 545 (1st Cir. 1971).

permit a critical letter is for the good of the prison, not a product of selfish motives. Only a clear pronouncement by the legislature that, absent unusual circumstances, such criticism is to be allowed is likely to be effective in giving prisoners an opportunity to publicly air their grievances.[79]

We need here, as elsewhere, not only a legislative standard but the full panoply of administrative procedures geared to exercising fairly the discretionary power granted. It is important that prison administrators articulate, in advance, those factors which are relevant to deciding whether particular correspondence to the news media is permissible. And when a decision is made, at least a negative one, a brief written record should be made of the reasons, notice to the prisoner should be required, and opportunity to appeal provided.

The Constitution requires that prisoners be permitted to correspond freely and confidentially with judges and other public officials.[80] It is fundamental that persons kept by others in the name of the state must be allowed reasonable opportunity to communicate, uninterrupted, with public officials to prevent the abuse of state authority. The *Model Act* ought to include a provision which makes this explicit.

Prisoners should be entitled to correspond freely with lawyers as well. A lawyer is often essential in dealing effectively with the state. There has been some suggestion that at least a few lawyers cannot be trusted not to traffic in contraband, plan escapes, impede rehabilitation, or otherwise aid the prisoner in avoiding prison regulations.[81] Although this is possible, it must be weighed against the substantial interest in permitting unfettered correspondence. Whether confidential correspondence with a lawyer is constitutionally required is not yet clear,[82]

79. The United States Bureau of Prisons has admirably solved the problem by not examining letters to the media at all. Policy Statement No. 1220.1A, *supra* note 77, at § 4b.

80. This is the practice of the United States Bureau of Prisons. *Id.*

81. Carothers v. Follette, 314 F. Supp. 1014, 1022 (S.D.N.Y. 1970); Note, *Prison Mail Censorship and the First Amendment*, 81 YALE L.J. 87, 99 (1971).

82. *See* Sostre v. McGinnis, 442 F.2d 178, 200-01 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972), *noted in* 1972 WASH. U.L.Q. 347 (reading permitted); Sinclair v. Henderson, 331 F. Supp. 1123, 1127 (E.D. La. 1971), *remanded from* 435 F.2d 125 (5th Cir. 1970) (same); Marsh v. Moore, 325 F. Supp. 392, 394-95 (D. Mass. 1971) (may physically examine, not read); Peoples v. Wainwright, 325 F. Supp. 402 (M.D. Fla. 1971) (same); Palmigiano v. Travisono, 317 F. Supp. 776, 788-89 (D.R.I. 1970). Packages could be prohibited as a security precaution; prison authorities can physically manipulate letters to ensure that they contain no contraband. Perhaps the authorities

but it ought to be provided for by legislation. The likelihood of serious harm occurring seems to be so outweighed by the need to maintain unimpaired communication with counsel that legislative direction ought to put this matter beyond the discretion of prison administrators.

The principal restrictions upon mail concern not correspondence with the news media, public officials, courts, or lawyers, but rather mine-run correspondence with friends and relatives. Letters, both outgoing and incoming, are read to determine their content. Sometimes they are selectively censored to delete that which is thought undesirable; other times they may be withheld entirely. The permissible subject matter of correspondence is severely limited. Typically, it may contain only information of a personal nature to the prisoner and his correspondent and may not discuss other inmates, prison events, or prison policies. Slanderous, obscene, or vulgar language is not permitted. One prison system went so far as to provide that letters should be "cheerful in content."[83] Furthermore, prisoners have been limited to corresponding with persons whose names appear on a list previously approved by staff members.

Prison administrators assert that legitimate governmental interests dictate these restrictions. The prison is kept secure by the detection of escape plots, the interception of contraband such as weapons and drugs, and the censorship of inflammatory writings. The prisoner is rehabilitated by limiting his contacts to persons thought to have a beneficial influence upon him. But these steps, questions of effectiveness aside, are not without cost. The privacy of intimate thoughts and feelings has long been regarded as essential to human dignity. Knowing that one's letters are read by a staff member has a dampening effect on correspondence. Nor is the time and effort spent in censoring mail negligible.

It is not entirely clear what ought to be done. At the least, we

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could be allowed to open letters to make a closer inspection for contraband only in the presence of the prisoner-recipient. In extreme instances, if authorities had reason to believe the correspondence contained illegal matter, a search warrant could be obtained to open and read it.

83. Arizona State Prison, Inmate Rule Book 14-16 (undated). *See* Lebanon [Ohio] Correctional Institution, Inmate Instruction Manual 24-25 (1970); Minnesota Correctional Institution for Women, Inmate Rules 10-11 (1969); Tennessee Department of Correction, Guidance Manual for Prisoners 13-16 (1965). *See also* Palmigiano v. Travisono, 317 F. Supp. 776, 782 (D.R.I. 1970); Carothers v. Follette, 314 F. Supp. 1014, 1024-25 (S.D.N.Y. 1970).

should require prison administrators to articulate, in writing, those factors considered relevant in determining what is to be censored. Again, specific criteria for nonacceptability should be articulated. One criterion, for example, is whether the letter encourages the recipient to engage in criminal activity. A factor which ought not be relevant is whether the letter is critical of prisons or those who run them. There seems to be even less reason to stop critical letters home than there is to stop critical correspondence with the news media. An argument can be made that this kind of complaining is inconsistent with the prisoner's rehabilitation, but this contention seems rather thin. At least one court has flatly held that withholding a letter which criticized the prison, addressed to the prisoner's parents, was unconstitutional.[84] Prisoners ought to be given a good deal of latitude in determining what they wish to write about. There is little reason to believe that you can improve a person's attitude by not permitting him to say what is on his mind. There may be somewhat more room for limiting what is read in personal correspondence than there is in the case of printed material. Whatever the influence of the written word, it is plausible to suppose that personal letters have a greater impact than impersonal matter such as books and magazines. Still, censorship is a tenuous business at best, and administrative rules should be developed which put some firm limits upon the discretion of those who do the censoring.

Because personal relationships can have an impact upon the development of personality, there may be something to be said for regulating with *whom* prisoners may correspond. Factors relevant in determining whether a person may be placed on an approved correspondence list ought to be carefully spelled out. Each time a decision is made, a brief written statement of the reasons should be given. An interesting idea, judicially adopted in one instance,[85] is to permit all correspondence from persons on an approved list to be opened but not read. This practice has much to recommend it. It enables prison administrators to be certain that nothing is sent in with the letters, and at the same time permits prisoners to correspond privately with at least

84. Carothers v. Follette, 314 F. Supp. 1014, 1025 (S.D.N.Y. 1970). The letter said: "The prison system in New York State stinks . . . . The people in charge are not qualified . . . . Hanky panky with U.S. mail . . . . Anything to obstruct legal work." *Id.* at 1021. *See also* Palmigiano v. Travisono, 317 F. Supp. 776, 790 (D.R.I. 1970); Note, *Prison Mail Censorship and the First Amendment*, 81 YALE L.J. 87, 97 (1971).

85. Palmigiano v. Travisono, 317 F. Supp. 776, 791 (D.R.I. 1970).

their most intimate friends and relatives. A related idea is to permit prisoners to correspond with persons not on an approved list but to permit censoring of that mail. Surely not everything written between the prisoner and his correspondent will be harmful.[86] The time presently spent in censoring correspondence with those on the list could be eliminated and would, I think, more than cover the time needed to read correspondence with those off the list.

The Department of Corrections of the State of Washington does not open outgoing mail.[87] Other systems have experimented with spot censorship with successful results.[88] The threat to security may not be as significant as has been widely assumed.[89] Because corresponding is an important activity, prison authorities ought to be required to accomplish their ends by the least restrictive means.[90]

Whether meaningful legislative limits can be developed, in light of the conflicting policy considerations, is problematic. There may be some value in establishing, as a general principle, that correspondence with people outside the prison is beneficial and is to be permitted unless it is a threat to security and institutional order or is detrimental to the rehabilitation of the prisoner. Obviously, this would confine discretion only very broadly, leaving the critical policy decisions to administrators. The legislature could go further and provide a stiffer standard, one which demanded an immediate threat to security or order. It could limit censorship grounded upon rehabilitation to writings which encourage future criminality. Or, if it wished, it could completely eliminate the discretion to censor, permitting only that incoming correspondence be opened to detect physical contraband. The draftsmen ought to assess the merits of the various security, institutional order, and rehabilitation arguments and recommend legislation accordingly. The matter is too important to ignore.[91]

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86. Note, *Prison Mail Censorship and the First Amendment,* 81 YALE L.J. 87 (1971).

87. *See* MANUAL OF CORRECTIONAL STANDARDS 546.

88. *Id.*

89. It has been suggested statistically that escape is not a primary problem in prisons. It should be noted that the statistics relied upon are rather old. The draftsmen should examine recent statistics to aid in forming their judgment. *See* Singer, *Censorship of Prisoners' Mail and the Constitution,* 56 A.B.A.J. 1051 (1970).

90. *See* Note, *Prison Mail Censorship and the First Amendment,* 81 YALE L.J. 87, 109 (1971).

91. *See* Morales v. Schmidt, 340 F. Supp. 544, 555 (E.D. Wis. 1972), *rev'd,* — F.2d — (7th Cir. 1973).

c. *Communication Among Prisoners and With Staff*

Not surprisingly, the *Model Act* establishes no affirmative right of communication among the prisoners themselves. There has as yet been no judicial holding that prisoners have a constitutional right to speak and associate with one another. It is clear, however, that prisoners have no right to assemble and petition for redress of grievances.[92] In fact, prisoners have been encouraged, both formally and informally, not to act as a group, but rather to "do their own time."[93]

This policy has been justified as a further step in insulating the offender from undesirable influences, initially by removing him from the community and subsequently by minimizing his association with other prisoners. Clearly, however, prison security and order are factors at least as important in the decision to pursue such a policy. It is thought that limiting communications between prisoners and forbidding most assemblies will discourage the kind of group-mindedness that may lead to threatening group action.[94] The courts have supported these policies. A speech denigrating whites, made in the prison yard within earshot of a crowd watching a ball game, was stopped.[95] Circulation of a letter discussing prison reform and urging the airing of grievances was not allowed.[96] Neither was circulated material which advocated a sit-down strike.[97] It is commonly believed that

> attempts to speak in a milieu where such speech may incite an insurrection against the authorities must be tempered. Prison authorities cannot be expected to permit such conditions in the name of free speech. In a prison environment where the climate tends to be more volatile

92. *See* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 537 (1963).

93. Idaho State Board of Correction, Rules and Regulations Governing the Inmates of Idaho State Penitentiary 25 (1962): "Do not permit any person to get you into trouble . . . . Do not attempt to be a front or spokesman for other inmates. You may be accused of interfering with their individual rights or attempting to cause trouble. DO YOUR OWN TIME!"

94. *E.g.*, North Carolina State Department of Correction, Rules and Policies § 2-213 (1969): "Inmates shall not agitate, unduly complain, or magnify grievances."

95. Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

96. McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964); Urbano v. McCorkle, 334 F. Supp. 161 (D.N.J. 1971), *supplemented*, 346 F. Supp. 51 (D.N.J. 1972). *See also* Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966), *cert. denied*, 388 U.S. 920 (1967).

97. Roberts v. Pepersack, 256 F. Supp. 415, 429 (D. Md.), *cert. denied*, 389 U.S. 877 (1966).

than in the streets, strong restraints and heavy penalties are in order.[98]

Obviously, some limits on speech and action are essential. The approach followed in the past, however, has been less successful in maintaining order than might be expected. Inmates do not live in a vacuum; despite efforts to keep them apart, an inmate society does exist.[99] The prisoners interact with each other and with the prison staff. Powerful and prison-wise leaders often enter into a kind of informal bargaining with staff members, especially those at a lower level.[100] This sort of bargaining occurs because administrators cannot control an institution through authority alone;[101] they lack the personnel. As in any society, some voluntary cooperation of the governed is essential if order is to be maintained, which, of course, is a primary goal of administrators. This essential cooperation cannot be obtained without offering something in return. Prison guards offer relaxation of some rules to a limited number of inmates who, through influence or force, are able to control other inmates.[102] In exchange for some minor rule-breaking and advantage-taking on the part of a few inmates, the officers are given assurances that other inmates will stay in line. The lower-level officer has a strong motive to enter into this arrangement, since he is judged by his capacity to maintain order without constantly writing disciplinary reports.[103]

A fault of this system, it is argued,[104] is that "illicit" behavior is rewarded, thereby confirming in the powerful their belief in force and coercion and confirming in the weak their self-perception as victims of others' wrongdoing. Further, the scramble among prisoners to obtain and keep a position in the hierarchy, a natural consequence of uneven treatment, leads to constant tension and suspicion among in-

98. *Id.* at 429-30.

99. *See* McCleery, *The Governmental Process and Informal Social Control*, in THE PRISON: STUDIES IN INSTITUTIONAL ORGANIZATION AND CHANGE 149, 163 (D. Cressey ed. 1961) [hereinafter cited as McCleery].

100. *See generally* TASK FORCE REPORT: CORRECTIONS 46-47; Note, *Bargaining in Correctional Institutions: Restructuring the Relation Between the Inmate and the Prison Authority*, 81 YALE L.J. 726 (1972).

101. McCleery 164.

102. *Id.* at 161.

103. *E.g.*, Oklahoma State Reformatory, Officer's Hand Book 87 (3d ed. 1965): "While discipline is the first and highest consideration in a reformatory, the employee who maintains it in his department with the lowest number of punishments or reports of rule infractions deserves the most credit."

104. Note, *Bargaining in Correctional Institutions: Restructuring the Relation Between the Inmate and the Prison Authority*, 81 YALE L.J. 726, 751-56 (1972).

mates, rather than to a stable society. The result can be violence, both covertly among inmates and overtly against staff members.

Permitting more open communication can serve to reduce the status and authority of this inmate elite.[105] It has been suggested that permitting inmates to negotiate collectively with administrators would be a superior method of utilizing inmate leadership to accomplish social control.[106] Whether this can be accomplished without substantial disruption is uncertain.[107] Nonetheless, limited self-government based upon honest and well-supervised elections may be superior to present practice. Inmate councils have been authorized in Sweden which permit "inmate participation in the operations and decision-making processes of the institution."[108] Significantly, prisoners there are permitted greater latitude in "speaking with others, reading freely, and being politically active without intimidation or reprisal."[109] The Federal Bureau of Prisons has also experimented with an inmate council, although on a more limited scale.[110]

A virtue of this altered kind of prison organization is that it may induce reasoned negotiation and compromise, rewarding participation and responsibility instead of coercion and brute force.[111] Further, open bargaining will result in all prisoners receiving the benefits flowing from mutual cooperation, which ought to leave prisoners feeling more fairly treated. Something of the sort of bargaining envisioned is currently being undertaken by the Center for Correctional Justice in Washington, D.C.[112] A variety of non-judicial methods is being used to settle disputes and resolve grievances, with the aid of that outside group. Perhaps the most obvious beginning for bargaining is in the prison industries, where much the same issues arise which concern labor unions generally.[113]

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105. McCleery 168-88.

106. Fox, *Why Prisoners Riot*, 35 FED. PROBATION 9 (1971).

107. McCleery 168-88.

108. Ward, *Inmate Rights and Prison Reform in Sweden and Denmark*, 63 J. CRIM. L.C. & P.S. 240, 241 (1972). *See also Manual of Comparative Correctional Systems: United States and Sweden*, 8 AM. L. BULL. 748, 757 (1972).

109. Ward, *supra* note 108, at 241.

110. *See* Fox, *supra* note 106, at 13.

111. *See* Note, *Bargaining in Correctional Institutions: Restructuring the Relation Between the Inmate and the Prison Authority*, 81 YALE L.J. 726, 752 (1972).

112. Note, *Labor Unions for Prison Inmates: An Analysis of a Recent Proposal for the Organization of Inmate Labor*, 21 BUFFALO L. REV. 963, 976 (1972).

113. *Id.* at 965-73.

Whether American prisons ought to be moving in these directions is a matter which obviously requires much thought and discussion. We do not know the extent to which the draftsmen of the *Model Act* considered these matters. It may be that it is too early to enact any legislation, but it is certainly not too early to consider the impact which law can have upon the nature of prisoner-staff relationships. The draftsmen should, and doubtless do, consider their model as only a beginning. What can and ought to be done in this area certainly warrants further consideration.

3. *Visiting*

The *Model Act* contains a section[114] providing for visits with prisoners by attorneys of record, relatives, and friends. The section requires that rules and regulations be developed which permit visits at reasonable times and under reasonable limitations. The section illustrates well what has been suggested in other contexts. A general principle is established, with the details left to be worked out by each department, but under a requirement that rules be developed. Local rules ought to include provisions determining not only when visits are to be allowed, but also what factors are relevant in deciding who is to be permitted to visit.[115] Those who decide who may visit will make the decisions more fairly if they are guided by stated criteria and if they must justify at least negative decisions in writing. The written decision need not be more than a few sentences indicating the facts thought to warrant a refusal. This structure also facilitates both internal and judicial review.

The balance of this section is both heartening and disappointing. It recognizes the principle that prisons are public institutions and that citizens should have the right to visit and speak with prisoners. It falters badly, however, in establishing adequate language to accomplish that objective. A prospective visitor must "establish a legitimate reason for such a visit" simply to make an application. The visit must not be "inconsistent with the public welfare and the safety and security of the institution." A visit may still be denied if the director concludes that the "visit or any aspect of it would be disruptive to the pro-

114. MODEL ACT § 7.

115. Prison administrators have customarily maintained approved visitor lists, believing that those thought to be undesirable influences should not be permitted to maintain contact with prisoners.

gram of the institution."[116] The vagueness of this language would be troublesome enough if it were to be applied only to friends and relatives of prisoners; unfortunately, the section is apparently intended to apply to news reporters as well.

Prison officials claim that permitting reporters personal interviews causes an undue strain upon the facilities of most prisons.[117] The argument seems more make-weight than real. But given the language of the *Model Act*, an interview could presumably be denied because it would be necessary to have a staff member escort the prisoner to an interview room, thereby "disrupting the program of the institution." A more serious objection is that interviews are likely to focus attention on a few inmates, thereby inflating their importance and enabling them in some instances to use the medium of the press to foster revolt within the prison.[118] This difficulty can be met in a less restrictive way, however, by censoring any news article based upon an interview, should the article prove to be so inflammatory that this is essential.[119]

The public has a substantial interest in ensuring that the news media are allowed to fully examine and report events which occur within the prison system. Personal interviews are essential because "there is a need to observe demeanor, to probe by questioning and to overcome the barrier of semi-illiteracy and suspicion that may inhibit inmates when they write."[120] Whether the draftsmen intended to open the prisons to newsmen is unclear. In light of past resistance from prison administrators, the language of the *Model Act* seems unlikely to accomplish

116. MODEL ACT § 7.

117. *See* Washington Post Co. v. Kleindienst, 357 F. Supp. 770, 773-74 (D.D.C.), *judgment stayed pending appeal*, 406 U.S. 912, *remanded per curiam*, 477 F.2d 1168 (D.C. Cir.), *on remand*, 357 F. Supp. 779 (D.D.C. 1972); Smith v. Bounds, 1 PRISON L. REP. 144 (E.D.N.C. 1972), *aff'd without opinion*, 473 F.2d 909 (7th Cir. 1973) (problems of deterring newsmen from smuggling contraband, arranging an interview room, and providing security were too much to handle, according to administrators); Seattle-Tacoma Newspaper Guild v. Parker, 1 PRISON L. REP. 99, 101 (W.D. Wash. 1971), *dismissed*, 1 PRISON L. REP. 229 (W.D. Wash. 1972), *aff'd*, 480 F.2d 1062 (9th Cir. 1973) (affidavit of the Director of the Federal Bureau of Prisons).

118. Washington Post Co. v. Kleindienst, 357 F. Supp. 770, 774 (D.D.C.), *judgment stayed pending appeal*, 406 U.S. 912, *remanded per curiam*, 477 F.2d 1168 (D.C. Cir.), *on remand*, 357 F. Supp. 779 (D.D.C. 1972).

119. The standards applied should be the same as those governing printed matter generally. *See* notes 59-74 *supra* and accompanying text.

120. Washington Post Co. v. Kleindienst, 357 F. Supp. 770, 773 (D.D.C.), *judgment stayed pending appeal*, 406 U.S. 912, *remanded per curiam*, 477 F.2d 1168 (D.C. Cir.), *on remand*, 357 F. Supp. 779 (D.D.C. 1972).

that end. Permission to interview, it has been held, should be denied "only where demonstrable administrative or disciplinary considerations dominate."[121] This language is somewhat more restrictive of administrative discretion than that of the *Model Act*, which would permit a denial should the department responsible for operating the prison feel that the interview would be "inconsistent with the public welfare."[122] Obviously, a prison administrator could easily convince himself that an interview likely to produce a story not in harmony with the department's version of events would be "inconsistent with the public welfare." The section should be redrafted to provide a statement of principle which makes explicit that, except in limited circumstances, interviews by news reporters are to be permitted. Further, rules should be promulgated which detail the factors which must be considered in deciding whether a visit is to be permitted, require the relevant factors to be incorporated in a written decision, and provide for notice and an opportunity to appeal within the administrative hierarchy.

Some protection against rigid interpretation of the language of the second paragraph of this section is obtained by the provision that a court of general jurisdiction may review the denial of an application to visit. Written administrative decisions would facilitate judicial review. The court, in addition to reviewing whether the visit would "disrupt the program of the institution,"[123] must also find that the "person is a representative of a public concern regarding the conditions of the prison," and "not a mere curiosity seeker."[124] Judicial review, of course, can help ensure that reporter interviews are not denied for petty reasons. The legislature can do better at the outset, however, by providing an adequate standard.

D. *Discipline*

Section 3 of the *Model Act* provides that certain minimal conditions must be met in solitary confinement cells. The cells must be of regular size, must be lighted during the day, must be kept within normal temperatures, and must include a toilet and bedding. Prisoners are to be

121. *Id.* at 775. Interestingly, the court cited the *Model* Act approvingly as permitting interviews, but then established a better standard. *Id.* at 774-76.

122. MODEL ACT § 7.

123. This is poor drafting since the substantive criteria established for judicial review are different from those the administrator is to apply in the first instance.

124. MODEL ACT § 7.

provided clothing, adequate food, and water for drinking and washing. It is a good statute, for it provides the kind of detail which is possible when the legislature knows what it wants. It is also, regrettably, a much needed one.[125] Extreme deprivation has been used far too often in dealing with prisoners.

1. *Varieties of Disciplinary Confinement*

The *Model Act* specifically provides that solitary confinement may not be used as punishment. At first blush this seems most unusual. To appreciate this provision it is necessary to define the term "solitary" and note a new trend in prison discipline. A solitary cell is one with a closed front made of solid metal as distinct from the usual grilled type. The closed front is intended to prevent any conversation or contact between the occupant and others. Hence, the occupant is in "solitary." This can be a very destructive experience, especially when prolonged. Recognizing this, some systems have confined its use to very limited purposes. The Federal Bureau of Prisons, for example, has provided that solitary confinement may not be used for punishment but only for the purpose of isolating a prisoner who is "demonstrating exceptionally destructive or threatening behavior or overt emotional actions."[126] He may be physically abusing another prisoner or staff member, destroying property, or simply shouting abuse. The prisoner is placed in solitary confinement so that he cannot affect others while he is emotionally out of control. The prisoner is to be removed from solitary confinement as soon as he is calm enough not to repeat his earlier behavior.

The *Model Act* has apparently adopted this approach. The prisoner "may be so confined only under conditions of emergency for his own protection and that of personnel or other prisoners. Confinement under such circumstances shall not be continued for longer than is neces-

125. There have been, in recent years, numerous cases concerning conditions in punishment cells. *See, e.g.*, Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), *on remand*, 321 F. Supp. 127 (N.D.N.Y. 1970), *aff'd in part and rev'd in part*, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969), *supplemented*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

126. United States Penitentiary at Marion, Policy Statement No. 7400.5B, § 18 (1970).

sary for the emergency."[127] The use of solitary is obviously intended to be exceptional; the highest ranking officer is to be informed within the hour when a prisoner is so confined. Further, to minimize physical danger, within forty-eight hours the prisoner must be examined by medical personnel.[128] The detail in this section is admirable, so far as it goes.

These limitations suggest that solitary confinement is not the only string in an administrator's bow. The decline in the use of solitary confinement as a punishment device has been paralleled by the growth of another method of dealing with difficult prisoners. Known variously as the "Adjustment Center," "Special Housing," or the "Segregation Unit,"[129] it is a designated area—a cell block, wing, or unit—where prisoners who have broken rules or are deemed otherwise unsuited for inclusion with the main population are kept. In appearance the units are similar to those housing regular prisoners, with a row of open-front cells which permit conversation among the prisoners and with the staff. Life in these units, however, is substantially different from ordinary prison life. A regular prisoner typically spends his day at a work or school assignment and his early evenings in some form of recreation. The segregated prisoner remains in his cell most of the time and always remains in the unit, except in emergencies. He earns no additional good time and seriously damages his opportunity for parole. By whatever name, this status is detrimental to the prisoner, with serious immediate and long-range consequences.

It is not clear whether the draftsmen of the *Model Act* took note of these developments. The opening clause of section 3 defines solitary confinement as "segregation in a special cell or room." Although this language alone could be construed to include what has just been described, the balance of the section precludes such a construction. As I have noted, the *Model Act* does not permit solitary confinement for punishment but only temporary isolation of those behaving in a threat-

127. MODEL ACT § 3(d).

128. *Id.* § 3(f). Section 3(g) requires that a log be kept and all unusual events be recorded. Doubtlessly, experience will suggest what kind of information will be useful. Administrative rules can aid in the development of this desirable practice.

129. In California the term "Adjustment Center" is used. In the Federal Bureau of Prisons it is called a "Segregation Unit." I have heard the term "Special Housing" suggested as an appropriate euphemism. These units are different in some respects from the "hole" as it existed in the past, although prisoners still refer to the units by that name.

ening or destructive way. It cannot be that the draftsmen intended to ban confinement as a punishment; therefore, it must be that segregation units of the sort described, which are certainly used as punishment, were not intended to be regulated by section 3.

The *Model Act* ought to include provisions which specifically regulate segregation units, whether they are considered punitive or administrative.[130] A provision similar to that in section 3 which guarantees basic living conditions should be included, although it is probably less needed here, since these units are not commonly used to deprive the prisoner physically, as solitary confinement cells often are. What is essential, however, because of the relatively long-term confinement common to these facilities, are provisions which ensure adequate opportunity for physical exercise outside the cell, adequate reading matter and other pastimes inside the cell, and periodic medical examinations to determine whether the prisoner is both physically and mentally able to endure prolonged segregation. Here, as elsewhere, detailed administrative regulations would be most useful in implementing legislative mandates.

2. *Procedural Protections*

Section 4 of the *Model Act* requires that rules and regulations be promulgated which ensure fair and equitable procedures in handling disciplinary matters. Specified procedures are required only when the prisoner's sentence or parole eligibility may be affected. In that case a hearing must be held, at which the prisoner has a right to appear with an advocate of his choice.

There are a number of flaws in this section. The language of the *Model Act* completely excludes administrative segregation, which is most unwise.[131] And the discretion it grants to administrators to develop procedures is far too broad. Specific rules are mandated only when sentence or parole eligibility is affected,[132] and therefore even the

130. Administrative segregation can be as detrimental to the prisoner as punitive segregation. *See* West v. Cunningham, 456 F.2d 1264 (4th Cir. 1972); *In re* Hutchinson, 23 Cal. App. 3d 337, 100 Cal. Rptr. 124 (1972); United States Bureau of Prisons, Policy Statement No. 7400.5B (June 6, 1972).

131. *See* note 130 *supra* and accompanying text.

132. Typically, a prisoner's fixed sentence and parole eligibility are not affected, at least directly, by confinement in segregated status. In the federal system, for example, the good time granted by statute for proper conduct, 18 U.S.C. § 4161 (1970), is computed and deducted from the prisoner's sentence. In effect, the prisoner is en-

limited protections specified for such cases are not generally applicable. Although I have urged, in numerous instances, that administrators be granted authority to develop rules guided by general legislative principles, this seems inappropriate here. Some procedural protections are so basic that they should be specifically provided for by legislation.[133]

At the least, in every instance when a prisoner is threatened with close confinement, he ought to have an opportunity to present his side of the story.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends upon fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.[134]

The *Model Act* does not meet this test; it ensures a hearing only when the punishment may affect sentence or parole eligibility. The *Model Act* would certainly not be breaking new ground by establishing this basic procedural requirement. Current procedural rules not only provide opportunity for the prisoner to present his version of events, but typically grant a hearing at which he may appear[135] whenever threatened with close confinement.[136] The Constitution requires at least an opportunity to respond to charges, and perhaps a hearing.[137]

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titled to the good time unless it is taken away. Industrial good time, on the other hand, must be earned and is credited as it is earned. A prisoner who is put in segregation is usually not in a position to earn industrial good time, but his status need not affect his conduct good time. Therefore, the parole date (which appears in his personal records) is not changed in any way. Prison authorities may decide to impose an additional penalty by taking away already credited conduct good time, which would move back the prisoner's established parole date, but this is not usually done. When it is contemplated, Policy Statement 7400.6A(4) of United States Bureau of Prisons requires that a separate hearing be conducted, at which time the prisoner may have the assistance of staff counsel. Although this is open to interpretation, it appears that the draftsmen of the *Model Act* intended to follow this model. Unlike the federal system, however, the *Model Act* does not spell out the procedures to be followed in the vast majority of cases not involving the removal of already earned good time.

133. *See* MODEL PENAL CODE § 304.7(3) (Proposed Official Draft, 1962).

134. Greene v. McElroy, 360 U.S. 474, 496-97 (1959).

135. There may be limited instances when *ex parte* hearings are warranted because of the unruliness of the prisoner.

136. *See, e.g.*, United States Bureau of Prisons, Policy Statement No. 7400.5B, § 5 (June 6, 1972).

137. *See* Wright v. McMann, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885

Certain other procedural protections seem to be desirable beyond dispute. The prisoner should be given notice of the charges against him, preferably in writing, at some time before the hearing.[138] What little pre-hearing preparation is possible in a prison setting should be facilitated by giving notice. Further, it has become the practice that disciplinary decisions are made by a committee rather than by a single individual.[139] The committee typically is composed of representatives of both the treatment and security staffs. A collective judgment is thought to be better than that of one person. It must be borne in mind that prison administrators often have had extensive dealings with those appearing before the committee and may easily have developed a fixed opinion of a given prisoner. The weight of experience, both here and elsewhere, suggests that bias can be decreased by requiring several persons to concur in a decision. The *Model Act* should include such a requirement.[140]

The decision-makers should be required to make written findings of fact and to articulate their reasons for disposing of a case as they did. This practice encourages rational decisions by requiring the decision-makers to think through their reasons.[141] Further, requiring findings of fact and reasoned dispositional statements will establish some precedent which will encourage an effort to be consistent. Lastly,

(1972) (notice, opportunity to reply, and reasonable investigation into facts required); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972), *noted in* 1972 WASH. U.L.Q. 347 (notice and opportunity to be heard required); United States *ex rel.* Neal v. Wolfe, 346 F. Supp. 569 (E.D. Pa. 1972) (hearing and right to call and cross-examine witnesses required); Banks v. Norton, 346 F. Supp. 917 (D. Conn. 1972) (hearing by impartial board required); Clutchette v. Procunier, 328 F. Supp. 767, 783-85 (N.D. Cal. 1971) (hearing, right to call and cross-examine witnesses, counsel, and written decision required); Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971) (impartial hearing required); Meola v. Fitzpatrick, 322 F. Supp. 878, 886 (D. Mass. 1971) (notice and opportunity to reply required); Kritsky v. McGinnis, 313 F. Supp. 1247 (N.D.N.Y. 1970) (hearing, impartial decision-maker, and written decision required); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970) (extensive rules negotiated).

138. *See* United States Bureau of Prisons, Policy Statement No. 7400.5B, § 5(c)(1) (June 6, 1972) (requires written notice twenty-four hours after initial placement in segregation).

139. *See* MANUAL OF CORRECTIONAL STANDARDS 410. My impression in conducting a field study of disciplinary procedures at the United States Prison at Marion, Illiinois, in the summer of 1972, was that the interaction of the members did produce a better result.

140. The *Model Penal Code* includes this requirement. MODEL PENAL CODE § 304.7(2) (Proposed Official Draft, 1962).

141. DAVIS 131.

written decisions aid the person involved in deciding whether to appeal and aid the reviewer in examining what was done.

It is not entirely clear what additional procedural steps ought to be required beyond these minimums. It has long been believed that rational fact-finding is enhanced by requiring disputants to present evidence through the testimony of witnesses and by permitting cross-examination. Prison administrators have rejected these practices. They claim that permitting testimony by witnesses only facilitates perjury, in part by encouraging aggressive inmates to coerce others to testify falsely on their behalf. Indeed, the inmate social system may well have some impact on the kind of testimony fellow prisoners are likely to provide. Administrators have similarly been reluctant to require staff witnesses to appear, fearing that this would only provide an opportunity for hostile inmates to abuse them. It may be that a substantial and impartial pre-hearing investigation would be more suitable.[142] On the other hand, there may be methods to avoid the suggested problems at a hearing. Oregon has recently adopted a rule that permits the prisoner to submit written questions to witnesses, which the committee, in its discretion, may pose.[143]

Whether counsel—lay or otherwise—ought to be required is another troublesome question, influenced to some extent by whether witnesses are required or permitted. Certainly, disciplinary committee procedures are sufficiently simple that law-trained persons are not required on that score. But an advocate may be very useful in rooting out facts and circumstances favorable to a prisoner that may not otherwise be brought to light. Further, at the hearing lay counsel may serve as a buffer between the two opposing sides, permitting a more unemotional examination of the facts. Being cross-examined by a staff member may be less offensive than being cross-examined by a prisoner. Unfortunately, we have had very little experience with these and other alternatives and even less examination of their impact.[144]

142. The United States Bureau of Prisons has adopted this approach. United States Bureau of Prisons, Policy Statement No. 7400.5B (June 6, 1972).

143. *See Alternative Procedures for Corrections Division Disciplinary Actions* § IV(4), 1 PRISON L. REP. 356, 357 (1972) (action of the Governor of Oregon).

144. For a study examining the impact of Judge Pettine's extensive order in Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970), see Harvard Center for Criminal Justice, *Judicial Intervention in Prison Discipline*, 63 J. CRIM. L.C. & P.S. 200 (1972). *See also* Kraft, *Prison Disciplinary Practices and Procedures: Is Due Process Provided?*, 47 N. DAK. L. REV. 9 (1970).

The discretion of prison administrators in handling disciplinary matters is not likely to remain untouched, even without legislation. Judicial intervention has become more frequent in this aspect of prison administration than in others, perhaps because judges feel more comfortable with procedure than anything else. Legislation establishing minimal procedural requirements and further administrative experimentation may well produce more desirable results than piecemeal judicial intervention. But the initiative must be taken now, lest procedures within prisons develop along constitutional lines in the same fashion as police-field and custody procedures have, to similar disadvantage.[145]

3. *Substantive Law*

Section 4 of the *Model Act* includes a requirement that substantive rules be promulgated and the punishments for their violation be prescribed. In a sense, this provision brings us full circle. Prisons early developed extensive sets of rules which governed nearly every dimension of prison life. Every time an undesirable incident occurred, a rule was created in the hope of preventing further similar occurrences. This practice contributed to making prisons rigid, highly structured, impersonal places.[146] Doing away with this mass of rules was advocated in the name of reform. Flexibility was the byword, permitting individualized handling of each situation.[147] Prisoners were to have the opportunity to determine for themselves what was appropriate conduct so that they could develop internal checks and thereby grow in judgment and maturity. As flexibility increased, however, prisoners complained increasingly that they did not know what was expected of them. The old rules often survived, not in written form, but in the minds of correctional officers. The opportunity for inconsistent and arbitrary application of unwritten and unclear rules obviously is great. Some prisoners went so far as to yearn for the "good old days" when everything was spelled out.[148]

145. *See generally* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Neal, *Judicial Activism, Nonjudicial Passivism, and Law Reform*, 48 CHI. B. RECORD 240 (1967); Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L.C. & P.S. 238 (1966).

146. *See* TASK FORCE REPORT: CORRECTIONS 46-50.

147. *Id.*

148. A prison administrator of some experience told me that this was a fairly common complaint in a modern medium-security facility which had few written rules.

Having no written rules at all does leave substantial discretionary power unconfined and unstructured. But the answer need not be to re-enact all the old rules. The effort should be to find the optimal balance between rules and discretion. The *Model Act*'s requirement ought to be taken as an opportunity to carefully re-think all rules and regulations, written and unwritten, with an eye to developing a limited but sound body of essential rules. Rules, written or unwritten, which are picayune and only make prison life rigid and intolerable should be abolished.[149] Minor incidents can be handled by admonishing the prisoner and including the matter in the overall assessment of his behavior.[150] The United States Bureau of Prisons, in its most recent policy statement concerning discipline, has codified offenses.[151] Doubtlessly, its compilation taxed the memory of many an old Bureau hand. Included are the obvious, such as killing, assaulting another person, stealing, and attempting to escape. Also included are the less obvious, such as adulterating any food or drink, wearing a disguise or mask, giving anything of value to another inmate, and contacting the public without authorization. Experience may add more to the list. Although difficult, it is worth the effort to develop a sound body of rules, provided administrators curb the urge to include every conceivable action to which anyone has ever objected.

The second part of the *Model Act*'s provision requires that punishments be prescribed. This is not usually done at present, at least in the sense of establishing a fixed sentence for a given offense. It is thought that completely individualized handling of each offender is desirable.[152] Consequently, administrators enjoy essentially open-ended discretion to impose whatever punishment or to take whatever measures they deem appropriate. The incident which brings the prisoner before the disciplinary committee may be viewed as nothing more than a catalyst for a decision that the prisoner needs to be subjected to much closer confinement for an extended period of time.

To develop completely fixed sentences for each stated offense is more than anyone would consider desirable. On the other hand, leav-

149. *See* Glaser, *How Institution Discipline Can Best Serve Correctional Purposes,* in BEHAVIORAL SCIENCE AND MODERN PENOLOGY 237 (W. Lyle & T. Horner eds. 1973).

150. The "silent beef"—prisoner argot for the insidious practice of putting seriously damaging information in a prisoner's file without informing him—should not be a problem since only minor matters could be handled in this fashion.

151. Policy Statement No. 7400.5B, § B (June 6, 1972).

152. *See* MANUAL OF CORRECTIONAL STANDARDS 410.

ing the matter completely open seems equally undesirable. Some middle ground should be workable. It may be useful to require administrators to establish the maximum sentence which could be imposed for any given offense. It would even be an improvement simply to require that a stated outside limit be established for each offender at the time of "conviction" so that he would know the longest time he could be confined.[153] Prison administrators undoubtedly would complain that these requirements unduly limit their capacity to deal with extremely difficult prisoners. But it is unwise to grant the discretion to segregate a prisoner for an unlimited time, regardless of the nature of his offense. The *Model Penal Code* would allow confinement in a solitary cell only for serious or flagrant breaches of discipline, and for a maximum of only thirty days.[154] It is apparently contemplated that incorrigible prisoners would be dealt with by transfer to other institutions rather than by extended segregation, as is often done now.[155]

The *Model Act*, although it requires that punishments be prescribed, is sufficiently broad in language to suggest that the draftsmen may have meant only to require that the various punishments available to the decision-makers be described. Legislatures can do better. They can at least require that administrators develop a statement of criteria relevant to determining what punishments are to be imposed. This has been done with some success in the *Model Sentencing Act*,[156] which regulates a closely analogous task. When a disposition is made the committee should be required to apply those criteria and to prepare, in writing, a statement setting out briefly those factors which it thought controlling. Further, the *Model Act* ought to require, if not fixed sentences, at least a periodic review of each prisoner's status to determine whether he should remain in close confinement. Again, that review should include a written statement of the reasons for the decision.

E. *Grievance Procedures*

Section 5 mandates the establishment of a grievance procedure providing for an investigation by a "person or agency outside of the de-

153. Oregon has imposed such a requirement. *Alternative Procedures for Corrections Division Disciplinary Actions* §§ V(1)(d), (e), 1 PRISON L. REP. 356, 358 (1972) (action of the Governor of Oregon).

154. MODEL PENAL CODE § 304.7(3) (Proposed Official Draft, 1962).

155. *Id.*

156. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT §§ 5, 6 (2d ed. 1972).

partment."[157] This provision may well help meet what prisoners strongly feel is a substantial need: access to outsiders to whom they can complain. The need is not unlike that which moved many citizens to request the establishment of review boards to which they could bring complaints about the police. Some of the problems encountered in creating police review boards are similar to those involved in the establishment of inmate grievance procedures.[158]

It can be argued that outsiders do not have the expertise to assess the merits of various prison administration actions. Placing authority to make judgments in outsiders may adversely affect the morale of prison staff. Further, the creation of such an investigating agency creates the impression that prison administrators either are incompetent or cannot be trusted to discipline their own staffs. On the other hand, it may be argued that the very lack of direct involvement in prison administration is a strength in that it brings a more objective judgment to the appraisal of prison operations. Further, it has been argued that we are entitled to be skeptical of the vigor and evenhandedness likely to be brought to an investigation of wrongdoing in the investigator's own department.

Under the *Model Act*, the power to designate the investigating agency presumably rests with the director of the prison system. He could apparently appoint either a continuing body to review all complaints or appoint reviewers on an ad hoc basis. It seems unwise to permit the director to pick and choose the investigating agency he wants, especially when he can take into account the result he got last time. It may be better, if only in appearance, to have the investigator appointed by the governor or the attorney general. It may also be better to have a permanent agency in order to encourage development of competency and expertise.

This kind of agency is no substitute for administrative and judicial review. The *Model Act* provides authority only to issue a report to both the department and the prisoner. The agency has no power to implement any conclusions it may reach. Its value must lie in the acceptance of its findings by prison administrators, other governmental authorities, prisoners, and the public. Its most substantial contribu-

157. MODEL ACT § 5.

158. *See* Note, *The Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499 (1964).

tion may well be in facilitating agreed-upon solutions to particular problems before positions become so solidified that only intervention by higher authority can be effective. Provided not too much is expected, this innovation may prove a useful adjunct to other kinds of review.

F. *Judicial Review*

Section 6 establishes judicial authority to review compliance with the *Model Act* and broad power to fashion appropriate remedies. Included are the injunctive powers and "any other appropriate remedy in law or equity."[159] In addition, a court may prohibit further commitments to the institution and, in instances of "extensive and persistent" abuses, may order the institution closed after a stay of six months.[160] These powers certainly seem adequate to the task at hand.

Doubtlessly, judicial interpretation of the various provisions would do much to add specific meaning to the *Model Act*'s general principles and in this way help to confine the broad discretionary powers retained by administrators. When legislation is general in nature, a case-by-case explanation of its meaning can add the detail needed to make it effective. And I think it is preferable that this development of case law occur in the context of construing legislation rather than the Constitution. Thus, the statutory interpretation process can work alongside administrative rule-making to flesh out and make effective broad legislative directives. But the courts could do even more; they could review administrative compliance with rule-making requirements established by the legislature. With both the legislature and the judiciary pushing in the direction of more extensive rule-making, we could anticipate the development of a very substantial body of rules adequate to confine, structure, and check the exercise of discretionary power within the prison itself.[161]

III. CONCLUSION

Legislation is an essential first step in regulating the exercise of governmental power in prisons. The discretionary power granted can be broad or narrow, depending on the extent to which the legislature is willing to resolve specific policy matters. Legislators, for a number of

159. MODEL ACT § 6(b).
160. *Id.* § 6(d).
161. *See* DAVIS 220.

reasons, are seldom willing to go too far in providing detailed rules to regulate agencies they have established. Still, the *Model Act*, given its purpose, does not do enough to limit the discretionary power of prison administrators.

A few of the sections of the *Model Act* provide admirable detail, making the intent of the draftsmen quite clear. But many others employ language so generalized as to be meaningless. Furthermore, many important matters are not mentioned at all—for example, the manner in which pre-trial detainees are to be treated. It may be that the draftsmen recognized that the more explicit the language the more controversy, and, being practical people, preferred something that could be enacted. The proposed legislation, however, is a model, not a uniform act, and therefore is not likely to be adopted wholesale by many legislatures. As a model it should reflect the soundest views of what is needed, from which others can borrow in fashioning their own solutions. In this respect, I think it falls short.

There is room for difference of opinion concerning some of the value choices I would incorporate into the *Model Act*. Arguably, it is better to leave most of the difficult choices to administrators to resolve. But when that is done, it is essential that efforts be made to further confine, structure, and check the discretionary power which is granted. The legislature can require that administrators supplement its work by developing rules which limit available choices of action, guide the decision-maker in choosing among those available, and provide opportunities for review of those choices. Detailed administrative rules can do much to improve the quality of discretionary justice in prisons. The *Model Act* can be improved by requiring that administrators use their power to develop extensive rules.