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## The Uniform Law Commissioners' Model Sentencing and Corrections Act: An Overview

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# The Uniform Law Commissioners' Model Sentencing and Corrections Act: An Overview<sup>1</sup>

## I. INTRODUCTION

In 1978, after three years of deliberation, the National Conference of Commissioners on Uniform State Laws approved the Uniform Law Commissioners' Model Sentencing and Corrections Act.<sup>2</sup> The Model Act provisions govern the organization of those agencies of state government charged with correctional activities, the process of sentencing criminal offenders, and the treatment of sen-

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1. UNIFORM LAW COMMISSIONERS' MODEL SENTENCING AND CORRECTIONS ACT, NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE (1979) [hereinafter cited as MSCA]. The authors were reporters for the Model Act and Professor Potuto also served as project director. Richard Singer, Professor of Law, Rutgers University-Newark, participated as a reporter from 1975 to 1977. This article is based on the prefatory notes and comments to the Model Act and on a report written by the authors and submitted to the Law Enforcement Assistance Administration upon completion of the Model Sentencing and Corrections Act drafting project. See H. Perlman & J. Potuto, Staff Report to the Law Enforcement Assistance Administration on Uniform Law Commissioners' Model Sentencing and Corrections Act (Sept. 1, 1978). Since the authors were responsible for the language in the prefatory notes and comments to the Act, they have made no attempt to indicate where, in this article, portions of those texts have been used verbatim.
2. The Model Act was developed pursuant to Grant Number 76 NI-99-0022 from the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice. In 1974 the National Conference of Commissioners on Uniform State Laws adopted and published its proposed Uniform Rules of Criminal Procedure. The Uniform Rules established the procedure governing the criminal justice system from prior arrest to sentencing. In a few instances, rules regulating the process of sentencing were also included, but the basis for sentencing criminal offenders and the nature of correctional programs were not addressed. In 1973 a committee of the National Conference was formed to examine the possibility of carrying the work, begun with the Uniform Rules, forward through the sentencing and correctional phases. In 1974, LEAA provided the necessary funds for the project to proceed.

tenced offenders and persons confined prior to trial. In addition, provisions governing the collateral consequences of conviction and programs for the assistance of victims are proposed. The processes of the juvenile courts, including the system of corrections applied to juvenile offenders, are excluded from the coverage of the Model Act.

The drafting project began at a propitious time. A year earlier the National Advisory Commission on Criminal Justice Standards and Goals (National Advisory Commission) had published its report on Corrections<sup>3</sup> offering a wide-ranging set of recommendations for reform, one of which was the call for wholesale reform of the correctional laws of the fifty states. The Special Committee to Draft the Model Act (Special Committee)<sup>4</sup> relied heavily on this pioneering work.

The fundamental bases for sentencing criminal offenders were also undergoing a major re-examination. The traditional approach to sentencing, adopted by the National Advisory Commission and earlier by the American Bar Association in its Criminal Justice Standards,<sup>5</sup> consisted of a system of judicial sentencing designed to tailor the sentence in each particular case to the needs of the offender and of society. Although there were recommendations to reduce or to structure the discretion of the sentencing court, the system proposed in these reports remained primarily discretionary. Parole was also a critical element of the envisioned system, although here again, recommendations were offered to structure the discretion of paroling authorities.

As the Special Committee began its work, a series of proposals from a variety of different study groups suggested abandoning the traditional practices.<sup>6</sup> The universal feature of these proposals was the recognition that individualized sentencing had failed and should be replaced by a system that provided less disparity of

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3. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS (1973) [hereinafter cited as NAC].

4. This was the committee of Uniform Law Commissioners with primary responsibility for drafting the Act. For more detailed information as to the composition and work of the Special Committee see text accompanying notes 136-39 *infra*.

5. ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (Final Draft, 1968) [hereinafter cited as ABA SENTENCING STANDARDS].

6. See, e.g., D. FOGEL, WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS (1975); M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972); W. GAYLIN, PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING (1974); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); A. VON HIRSCH, DOING JUSTICE (1976); NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE (1970); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976) [hereinafter cited as TWENTIETH CENTURY FUND].

sentences among sentenced defendants. The indeterminate sentence with parole was to be replaced by a flat, determinate sentence.<sup>7</sup> The discretion to select a particular sentence was to be severely restricted, either by legislative mandate or by other devices. Sentences were no longer to reflect the rehabilitative potential of the defendant or an official prediction of the dangerousness of the defendant but were to insure a punishment justly deserved for the offense committed.

In the late 1960's the courts abandoned what had become known as the "hands off" doctrine under which courts refused to intervene to review the decisions of correctional administrators or the conditions of correctional programs.<sup>8</sup> Instead, courts began to measure correctional practices against constitutional principles and in many instances the existing practices fell short.<sup>9</sup> Since these early beginnings, nearly every aspect of correctional programs has been evaluated by courts. Although in some cases, dramatic change was ordered, it became clear that significant progress would not come easily through judicial decrees. Often, lack of funds prevented prisons from meeting minimum standards even where those in charge of the institution desired to make a change. In a few cases federal courts actually took over the operation of a prison in order to correct unconstitutional conditions and practices.<sup>10</sup> The National Advisory Commission recognized that a comprehensive legislative codification of the rights of persons subject to correctional authority was needed to avoid "the slow, painful, and expensive process of . . . case-by-case litigation."<sup>11</sup>

The National Advisory Commission also examined and evaluated existing legislative proposals relating to sentencing and corrections.<sup>12</sup> Most of the available proposed codifications were developed before the courts had begun to impose constitutional standards on correctional programs. Other proposed legislation addressed relatively specific problems and did not provide a com-

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7. For a general discussion of these terms, see Singer, *In Favor of "Presumptive Sentences" Set by a Sentencing Commission*, 24 CRIME AND DELINQUENCY 401 (1978).

8. For a discussion of the hands-off doctrine, see, e.g., Cruz v. Beto, 405 U.S. 319, 321-22 (1972) (per curiam); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 503-04 (1971). See also Champagne & Haas, *The Impact of Johnson v. Avery on Prison Administration*, 43 TENN. L. REV. 275 (1976).

9. See, e.g., Bounds v. Smith, 430 U.S. 817 (1977); Wolff v. McDonnell, 418 U.S. 539 (1974); Cruz v. Beto, 405 U.S. 319 (1972); Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971).

10. See, e.g., Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd*, 559 F.2d 283 (5th Cir. 1977), cert. denied, 438 U.S. 915 (1978).

11. NAC, *supra* note 3, at 558.

12. *Id.* at 549-52.

prehensive or coordinated statutory framework for correctional reform. Although many of these earlier proposals, including the Model Penal Code<sup>13</sup> and the Study Draft of a New Federal Criminal Code,<sup>14</sup> provided a starting point for committee deliberation, the Model Sentencing and Corrections Act goes far beyond earlier attempts to define statutorily the treatment of offenders. Also, the sentencing provisions of the Model Act are based on different premises than these earlier proposals.

The purpose of this article is to describe the development of the Model Act and to provide an overview of its provisions. This article also discusses the major policy decisions which serve as the foundation for the provisions of the Act. These policy decisions were based on the perception of the "state of the art" of corrections initially held by the authors and subsequently accepted or modified, in whole or in part, by the Special Committee to Draft the Model Act.<sup>15</sup> Several of the major themes of the Act are discussed with some examples of how these themes were incorporated into the statutory provisions. The article also describes the process by which the Act was drafted and the nature of the outside advice and consultation that was available to the Special Committee.

## II. GENERAL APPROACHES

If one observation emerges from the events of recent years and the recommendations of those groups that have studied sentencing and corrections, it is that these systems are in need of immediate, pervasive and, in some instances, drastic reform.<sup>16</sup> The prevalent sentencing and corrections systems have few defenders, and it is widely recognized that society is incurring substantial human and material costs by delaying change. The unanimity on the need for change is not, however, matched by universal agreement on the direction which change should take.

The sentencing process utilized by most states is characterized by largely unfettered judicial discretion. In each of these states

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13. MODEL PENAL CODE (Proposed Official Draft 1962).

14. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, *supra* note 6.

15. This article reflects the views of the authors with respect to the drafting process and the underlying policies governing the final provisions of the Model Act. This article has not been formally approved by the Commissioners on Uniform State Laws nor does it necessarily reflect the views of the Commissioners, the Special Committee to Draft the Act, the Review Committee to the Act, or any of those individuals or groups acting as advisors in the drafting of the Act.

16. See, e.g., ABA JOINT COMM. ON THE LEGAL STATUS OF PRISONERS, STANDARDS RELATING TO THE LEGAL STATUS OF PRISONERS, *reprinted in* 14 AM. CRIM. L. REV. 375 (1977) [hereinafter cited as ABA JOINT COMM.]; NAC, *supra* note 3, at 141-47; note 6 *supra*.

the legislature has established a broad range of permissible penalties for each offense and the sentencing court is authorized to select some sentence within the range, the selection to be based on a mixture of traditional policies regarding rehabilitation, deterrence, punishment and incapacitation. Limited appellate review of the sentencing judge's decision is available,<sup>17</sup> and the court's sentencing decision is, in many cases, subservient to subsequent parole board decisions. The result is a system that produces substantial disparities in sentencing, both within the sentences imposed by a single judge and between judges in a given jurisdiction.

The corrections system is largely hidden from public view except in unusual circumstances such as a prison riot, an escape, or a subsequent offense by a person released from confinement. In more recent years the courts have brought to public view the harsh and inhumane conditions that exist in many correctional institutions. Against this background three general observations governed the nature of the reform proposals contained in the Model Sentencing and Corrections Act.

#### A. The Need for Legislative Leadership and Responsibility

Most proposals for sentencing and correctional reform have recognized the need for legislative leadership if meaningful reform is to take place.<sup>18</sup> State legislative codes governing these critical functions of state government are in many cases sorely outdated. Many provide little authority to the correctional staff to take progressive action; on the other hand, they provide few restraints on administrative power, restraints necessary to protect persons subject to correctional programs. In sentencing, legislatures have largely abandoned to the courts and boards of parole not only the responsibility to impose the appropriate sentence in individual cases but also to adopt principles for sentencing generally.

This abdication of legislative leadership has had undesirable results throughout the criminal justice system. The failure to articulate through the political system the purposes and principles of sentencing has resulted in a lack of public confidence in the sen-

17. In 1968 the American Bar Association found that twenty-one states authorized appellate sentencing review. ABA SENTENCING STANDARDS, *supra* note 5, at 13. It was concluded, however, that in only fifteen states was it realistically available in all cases. *Id.* Moreover, indeterminate sentencing schemes by their nature vest wide discretion in the sentencing court. Singer, *supra* note 7. Appellate review is thus made difficult because there is no standard against which to measure the exercise of discretion by the sentencing judge. See, e.g., Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975, 1051-52 (1978).

18. See, e.g., NAC, *supra* note 3, at 143; ABA JOINT COMM., *supra* note 16, at 588.

tencing process. The wide disparities in sentences, the lack of articulated premises and the apparent ineffectiveness of sentencing practices are difficult to explain to the body politic. The failure to maintain a sentencing system that can be rationalized to the general public has forced the public to respond to the perceived "crisis" in crime on an emotional level. Calls for harsher, longer or mandatory sentences for certain serious offenses are symptomatic of this lack of confidence.

The failure of legislation to deal with the conditions in correctional facilities left the courts little choice but to intervene. But judicial intervention, while necessary and appropriate, resulted in disruption and uncertainty in correctional administration. As the National Advisory Commission recognized, reform by court decree is often disruptive, expensive and only partially effective.<sup>19</sup> The articulation of a code of conduct relating to the treatment of those convicted of crime by the legislature would reassert the leadership essential for substantial and wide-scale improvement in correctional practices. The Model Sentencing and Corrections Act is based on the assumption that legislative leadership in this area is necessary if true reform is to take place.

## B. The Need for Specificity

A legislative framework for corrections should differ from traditional legislation establishing other administrative agencies. In many instances a lack of knowledge about human behavior requires that correctional decision-makers take risks and the public is less than sympathetic when those risks turn into realities. Indeed, programs for criminal offenders attract little sympathy from the public-at-large and are often perceived to be instances of "coddling criminals." Since the function of corrections is particularly controversial, correctional administrators have understandably been reluctant to implement programs of any far-reaching significance without specific legislative approval.

Legislation dealing with correctional reform must also take into account the unsavory side of the history of corrections in which there was a systematic denial of the rights and interests of confined persons.<sup>20</sup> The courts have found that conditions within prisons may constitute cruel and unusual punishment, and various practices have been held to violate other constitutional require-

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19. NAC, *supra* note 3, at 588.

20. See, e.g., *Weems v. United States*, 217 U.S. 349 (1910); NAC, *supra* note 3, at 18. For examples of legislative responses to the exploitation of prisoner labor, see LA. REV. STAT. ANN. § 15:862 (West 1967); ME. REV. STAT. ANN. tit. 34, § 555 (West 1978). See generally G. RUSCHE & O. KIRCKHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 42, 65 (1939).

ments.<sup>21</sup>

Both the need of correctional administrators for specific legislative support for programs and the need of convicted persons for legislative protection against excessive administrative power resulted in the Model Act being considerably more specific than most codifications. A legislative framework for correctional programs should be as specific as possible to support the correctional administrator in implementation and to assure the public that appropriate safeguards are provided for the public safety. A code of rights for convicted persons requires specificity since details cannot be left to administrative discretion when the provision is directed toward alleviating abuses or potential abuses of that very discretion. Thus, the Model Act contains many provisions that have considerable detail.

### C. The Need for the Rule of Law in Sentencing and Corrections

The major approach of the Model Sentencing and Corrections Act is its attempt to impose the rule of law on the existing systems of sentencing and corrections. That attempt focuses primarily on the control and structuring of the discretion exercised by sentencing courts and correctional officials.<sup>22</sup> As indicated above, the traditional legal framework for sentencing and corrections left most decisions to the discretion of the decision-maker. Sentencing courts were free within only nominal boundaries to impose any sentence they thought appropriate. In a similar manner, correctional administrators were largely free from controls.

Much of the Model Act is based on the simple premise that there ought to be no outpost of lawlessness in a free society. The law is, in large measure, designed to protect the individual citizen from actual or *potential* governmental abuse. The Act is premised on the notion that there is nothing inherent in the processes of sentencing or corrections that ought to exempt either from that principle. It should be understood that this premise is not based on a perception that sentencing judges or correctional administrators systematically abuse their powers. Rather, the Act reflects the

21. *E.g.*, *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974); *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). See generally Alexander, *The Captive Patient: The Treatment of Health Problems in American Prisons*, 6 CLEARINGHOUSE REV. 16 (1972); Hirschkop and Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969).

22. Many of the provisions of the Act are derived from long standing techniques utilized to regulate administrative discretion. See NAC, *supra* note 3, at 555 (Standard 16.2); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY*, at 179-81 (1967). See generally K. DAVIS, *DISCRETIONARY JUSTICE* (1969).



perception that legal constraints on governmental power are important to guard against potential abuse as well as to remedy instances of actual abuse.

Application of the rule of law to sentencing and corrections requires a careful balance in order to insure that the governmental functions can be effectively conducted while at the same time subjecting official power to carefully drawn limits. It is to this balance that many of the provisions of the Model Act are addressed.

The discretion of sentencing courts is restrained by the establishment of legislative principles and purposes, and the enactment of sentencing guidelines which provide the court with a presumptively correct sentence. Although the court remains free to impose a sentence other than the presumptively correct one, it must then articulate its reasons for doing so, and its decision is subject to appellate review. The "protected interests" of confined persons in the correctional area are specifically announced, and the authority of the correctional administrator to limit or restrict the realization of these interests is limited to those situations in which a particular and compelling governmental interest is at stake.<sup>23</sup> In addition, techniques traditionally imposed on administrative agencies such as notice-and-comment rule making<sup>24</sup> and judicial review of decisions<sup>25</sup> are imposed on correctional agencies. All of these techniques have been used successfully with agencies dealing with citizens in the free world and should be equally available to convicted persons.

The imposition of the rule of law to sentencing and corrections was adopted as a basic premise of the Model Act primarily because a society that truly values liberty and individual rights can do no less. Secondly, but nonetheless importantly, there is sufficient evidence to suggest that fairness within these systems will also make them more effective in performing their prescribed functions. An offender who believes himself to be the victim of an unprincipled sentencing system is unlikely to be receptive to correctional or rehabilitative programs. An offender who is treated unfairly or is forced to live in squalid and inhumane conditions is unlikely to develop the healthy respect for law and society that is

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23. See text accompanying notes 77-78 *infra*.

24. MSCA § 1-103 [Adoption of Rules; Procedures]. This section was patterned after the MODEL STATE ADMINISTRATIVE PROCEDURES ACT (1961), also promulgated by the Uniform Law Commissioners.

25. MSCA § 1-104 [Judicial Review of Contested Cases]. This section was patterned after section 15 of the MODEL STATE ADMINISTRATIVE PROCEDURES ACT (1961). It permits judicial review on the administrative record and reversal of an administrative decision if it violates constitutional, statutory or administrative provisions or is in excess of departmental authority or is clearly erroneous or arbitrary and capricious.

required to live a crime-free life upon release. Adjustment to the free world upon release from confinement is likely to be effective only if the offender has learned, while confined, to accept the responsibilities and limits of living in a free society.

Thus, while it might be argued that individual provisions of the Model Act may make the administration of correctional programs more difficult or more costly, it is the belief of the authors that in its totality the Model Act establishes a regime that is more compatible both with our traditional notions of justice and with an effective governmental response to criminal conduct.

### III. MAJOR UNDERLYING THEMES

The Prefatory Note to the Model Act lists the following underlying themes of the Act:

—The Act unifies the various elements of the correctional system into one department of corrections in order to coordinate the deployment of scarce correctional resources and to make correctional programs consistent and effective.

—The Act implements the legislative responsibility for determining basic correctional purposes and policies and, in several sections, legislatively established criteria and goals for decision-making are announced.

—The Act seeks to reduce the unfairness and ineffectiveness occasioned by sentencing disparity. Rehabilitation is eliminated as a goal of sentencing. Sentences, based on the punishment deserved for the offense, are determined by courts in accordance with statutory and administrative guidelines. Appellate review of sentences is authorized. Parole is abolished.

—Although rehabilitation is no longer a factor in determining sentences, within the sentence imposed the Act seeks to enhance the rehabilitative potential of correctional environments by authorizing a wide variety of programs and giving offenders a greater voice in, and accordingly a greater incentive for, their own self-improvement.

—The Act also seeks to recognize the interests of victims in the sentencing and correctional process.

—Most importantly, the Act strives to bring justice and the rule of law to the correctional process.<sup>26</sup>

In addition to these basic policy approaches each major Article of the Model Act was built on one or two major themes. The Act consists of six articles. Article 1 includes general provisions and rule-making procedures.<sup>27</sup> Article 2, providing for creation of a

26. MSCA at 5-6.

27. In many instances throughout the Act the director is obligated to exercise his discretion through formally adopted rules. The procedure for adopting rules allows participation by persons subject to the rules. The existence of rules will facilitate uniform application of policies throughout the department and provide a measure of protection against arbitrary action by subordinates. The public nature of the rules will assist in creating a greater public awareness of the operation of the department.

state-wide Department of Corrections, establishes general organizational provisions designed to leave maximum opportunity for administrative flexibility in fashioning a detailed organizational structure to implement the substantive provisions of the Act. Article 3 describes the fundamental policies behind the sentencing provisions and sets forth the available sentencing alternatives and procedures designed to effectuate these policies. Article 4 provides a code of treatment of offenders, including an articulation of the protected interests of confined persons. Article 5 establishes procedures to assist victims of criminal offenses. Article 6 governs the transition from prior law to the provisions of the Act.

#### A. Establishment and Unification of Correctional Systems—Article 2

The provisions of Article 2 of the Model Act relate to the organization of the correctional system and the allocation and regulation of administrative authority. The thrust of the Article is to improve correctional programs, services and facilities. Although it is recognized that statutory provisions alone cannot insure effective corrections, a sound legislative framework is a prerequisite to the administrative development of a workable program.

The major policy position implemented in the Act with respect to organization is the unification of all adult correctional programs under one department of corrections. Historically, correctional agencies and, thereby, correctional programs, have been fragmented within a jurisdiction with no overall direction.<sup>28</sup> Until recently, in many states each correctional facility operated as an independent governmental agency subject only to general supervision by a board of corrections. In many states community-based programs such as probation and parole are administered separately from the facility-based correctional agency. In most states misdemeanor and pretrial detention facilities are operated by local law enforcement agencies. Consistent with most national studies of correctional systems, Article 2 and other provisions of this Act seek to bring all adult correctional programs within one agency—a unified department of corrections.<sup>29</sup>

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28. This situation is changing. In fact, several legislative formulations proposing various levels of unification served as models for the development of some of Article 2. See Unified Code of Corrections, ILL. ANN. STAT., ch. 38, §§ 1001-1-1 to 1008-5-1 (Smith-Hurd 1973); Nebraska Treatment and Corrections Act, NEB. REV. STAT. §§ 83-170 to -1,135 (Reissue 1976); Advisory Comm'n on Intergovernmental Relations, State Dep't of Correction Act (1971); MODEL PENAL CODE § 401; NATIONAL COUNCIL ON CRIME AND DELINQUENCY STANDARD ACT FOR STATE CORRECTIONAL SERVICES (1966).

29. See NAC, *supra* note 3, at 560 (Standard 16.4). See also ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM 55 (1971) (unification of all programs except local jails);

At present twenty-two states have placed administrative authority over adult probation, parole and correctional institutions in one state agency, although some retain overlapping local probation systems.<sup>30</sup> Four states place these three programs in three separate agencies.<sup>31</sup> The breakdown between state and local responsibility for various aspects of the correctional system is shown in the following table:

Number of Jurisdictions with Indicated Responsibilities<sup>32</sup>  
(Fifty States, D.C., Canal Zone & Puerto Rico)

Program	Local Resp.	State Resp.	State/Local Resp.
Juvenile detention	43	8	2
Juvenile probation	26	8	19
Juvenile institutions	0	50	0
Juvenile aftercare	4	47	2
Misdemeanant probation	13	19	9
Adult probation	9	32	12
Jails	43	9	1
Adult institutions	0	53	0
Adult parole	0	53	0

The arguments in favor of unification are based on notions of effectiveness and efficiency. Correctional programming should be consistent and coordinate, particularly when the same individual often is subject to more than one element of the correctional system. An offender subject at relatively short intervals to pretrial detention, probation and confinement should not confront inconsistent philosophies or expectations. His gradual reintegration into the free society may require an overall program that builds on past experience.

Consolidated authority over correctional programs will also allow the efficient utilization and allocation of scarce resources. In many instances professional counselors can assist confined persons as well as persons on supervision in the community. Consolidation also provides economies of scale which allow greater

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AMERICAN CORRECTIONAL ASS'N, MANUAL OF CORRECTIONAL STANDARDS 151-170 (3d ed. 1966).

30. AMERICAN CORRECTIONAL ASS'N DIRECTORY (Juvenile and Adult Correctional Departments, Institutions, Agencies and Paroling Authorities) (1975-76) at 250-57.

31. *Id.* at 257.

32. *Id.* See also California Bd. of Corrections, Coordinated California Corrections: The System (1971); Final Report of the Prison Study Comm., A Unified System of Correction (Conn. 1957). Many states report plans for further unifying correctional activities. Law Enforcement Assistance Administration, Recent Criminal Justice Unification, Consolidation and Coordination Efforts (Jan. 1976).

flexibility in providing programs and services. Finally, unification facilitates long-range planning, the development of training and personnel programs, and the research and evaluation of past efforts.

In keeping with the nature of a model law designed for implementation in fifty states, the organizational structure of the department was kept flexible. The Act creates four divisions within the department of corrections and two independent offices. The program-based divisions—division of facility-based services,<sup>33</sup> division of community-based services,<sup>34</sup> and division of jail administration<sup>35</sup>—are created primarily as legal devices to regulate sentencing practices. Article 3 requires that offenders be sentenced to a particular division within the department. The director is, however, authorized to appoint a single person as associate director of more than one division and to otherwise coordinate the activities of the division.<sup>36</sup> This may be particularly appropriate in small states.

The fourth division, the division of medical services,<sup>37</sup> which provides medical services to persons in the custody of the department, is created as a separate division for substantive reasons. Delivery of medical care to confined persons often comes into conflict with the security and administrative needs of facilities. The separate division provides medical personnel with some independence from facility administrators while at the same time retaining departmental control and responsibility for medical services.

The effectiveness of the office of correctional legal services,<sup>38</sup> which provides legal services for persons in the custody of the department, depends on its independence from direct supervision by the department of corrections. The office staff may have to contest

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33. MSCA §§ 2-301 to -303. This division administers programs, services and facilities primarily for felony offenders sentenced to continuous confinement. MSCA § 2-301.

34. MSCA §§ 2-201 to -204. This division administers programs, services, and facilities for persons sentenced or transferred to its custody, pretrial releases and victims. MSCA § 2-201.

35. MSCA §§ 2-401 to -405. This division administers programs, services and facilities primarily for misdemeanants sentenced to continuous confinement and pretrial detainees. MSCA § 2-401.

36. MSCA § 2-106(2).

37. MSCA §§ 2-501 to -503. The right of a confined person to receive medical care is a protected interest. MSCA § 4-105 [Medical Care]. *See also* MSCA §§ 4-106 [Right to Healthful Environment] and 4-107 [Physical Exercise].

38. MSCA §§ 2-601 to -603. The right of a confined person to receive legal assistance is a protected interest. MSCA § 4-108 [Legal Assistance]. *See also* MSCA §§ 4-109 [Participating in the Legal Process] and 4-110 [Access to Legal Materials]. The other independent office created by the Act is that of Correctional Mediation. MSCA §§ 4-201 to -207.

actions of departmental personnel; yet, they must retain the confidence of the correctional administration as well as that of persons in the custody of the department. The effectiveness of the office requires an independence from—and the confidence of—both employees and confined persons.

Beyond these provisions, the director is given full authority to organize the department and to create additional divisions. Larger systems, for example, may develop separate divisions for research, planning, purchasing, administration or other activities.

The second major purpose of Article 2 is to allocate and regulate correctional authority. Historically, the legislative delegation of authority to correctional administrators has been framed in relatively broad language. Indeed, in some jurisdictions facilities or agencies are created and their operation left to administrative discretion without further guidance. This type of statutory foundation can have adverse effects. First, left without legislative guidance or support, some correctional administrators may be hesitant to attempt to implement new and promising ideas for fear of public or legislative discontent or from doubt as to the limits of their authority. Second, without legislative direction, the thrust of correctional programming over time will be erratic, and each new change in administration will bring its own method of operation based on its own perception of public policy. Third, legislative restraint on administrative discretion is necessary to insure that persons in the custody of the department are treated fairly.

Article 2 contains provisions to confine, structure and check administrative discretion without unduly interfering with the flexibility and authority needed to administer correctional facilities and programs effectively. In some provisions, goals are legislatively established and relevant considerations and factors for decision-making are stated.<sup>39</sup>

### *1. Overview of Article 2*

Part 1 of Article 2 establishes the centralized department of corrections and provides for its authority and responsibilities. Provisions in this part have general application throughout the programs of the department. Parts 2, 3 and 4 create the operational divisions of the department. The division of facility-based services has responsibility for major correctional facilities including prisons and other long-term confinement institutions. The division of community-based services provides a cluster of programs and services that have a general community orientation. It is this division that has custody over persons sentenced to community super-

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39. MSCA §§ 2-701 to -706 [Facility Design and Construction].

vision. It might also have administrative responsibility for half-way houses and other facilities not used for continuous confinement. The jail administration division would govern those facilities traditionally thought of as local jails, including pretrial detention facilities and misdemeanor confinement institutions. Part 5 establishes a division of medical services responsible for all aspects of medical services in departmental facilities. Part 6 establishes an independent office of correctional legal services to provide legal assistance to confined persons. The office is authorized to provide both legal counsel and paralegal assistance. Part 7 provides legislative direction for the planning and design of new correctional facilities.

### B. Sentencing—Article 3

Article 3 contains provisions relating to the selection, imposition, and execution of sentences for violation of criminal laws. The major policy decisions reflected in the Article are: 1) the recognition of just deserts rather than rehabilitation or individual predictions of dangerousness as the major factor in sentencing and release decisions;<sup>40</sup> 2) the reduction and structuring of judicial sentencing discretion by establishment of a presumptively appropriate sentence to be imposed unless there is good cause not to do so;<sup>41</sup> and 3) the adoption of a flat sentencing system for sentences to confinement by abolition of parole.<sup>42</sup>

For many years the American system of sentencing has sought to achieve four goals: deterrence, rehabilitation, incapacitation, and retribution. Both the American Bar Association and the American Law Institute have proposed that all of these goals are legitimate considerations in appropriate cases.<sup>43</sup> This multi-goal system of sentencing has resulted in variations on one basic model within the states—judicial imposition of an indeterminate sentence and discretionary release by a parole board. This model sought to promote individualized treatment of offenders ("let the punishment fit the criminal not the crime"), to limit the coercive power of the state by requiring a utilitarian rather than a retributive end and to protect society by applying just the right amount of

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40. MSCA at 89.

41. *Id.*

42. *Id.*

43. ABA SENTENCING STANDARDS, *supra* note 5, § 2.2; MODEL PENAL CODE § 305.9. See also NAC, *supra* note 3, at 150 (Standard 5.2); NAT'L COUNCIL ON CRIME & DELINQUENCY, MODEL SENTENCING ACT (2d ed. 1972). The American Bar Association recently moved in the direction of the Model Act. ABA SENTENCING STANDARDS (SECOND), § 2.2 (tent. draft 1979) (approved at the 1979 Annual Meeting).

coercion and cure to produce law-abiding citizens and to deter others from criminal behavior.

The model also had practical advantages in administering correctional institutions. The parole release discretion provided a safety valve for overcrowded prisons. The system also allowed sentencing courts to impart relatively long sentences to satisfy public opinion while allowing the parole board to award early release to keep sentences within reasonable limits.

Recent examinations of the results of the sentencing system have called into question both its practical effectiveness and its theoretical justification.<sup>44</sup> The thrust of the criticisms has been three-fold: 1) the current system does not allow effective use of deterrence principles and yet it neither rehabilitates offenders nor isolates offenders likely to commit future crimes;<sup>45</sup> 2) the current system results in large scale disparity in sentences creating frustrations, tensions, and disrespect for the system in both the offenders and the public-at-large;<sup>46</sup> and 3) the current system is philosophically unjust in that it oftentimes severs the relationship between the punishment imposed and the offense committed.<sup>47</sup>

The provisions of Article 3 reflect the use of "just deserts" as the overriding philosophy justifying the imposition of criminal sanctions. This philosophy requires that the nature and severity of the sanction imposed be deserved on the basis of the offense committed and certain limited mitigating and aggravating factors relating to the offense and the offender. This seeks to avoid the injustice that results from utilizing the other traditional purposes of punishment.

The use of rehabilitation as a relevant factor in sentencing has been accused of causing substantial disparity in sentencing:

[I]f rehabilitation is the goal, and persons differ in their capacity to be rehabilitated, then two persons who have committed precisely the same crime under precisely the same circumstances might receive very different sentences, thereby violating the offenders' and our sense of justice. . . . Rigorously applied on the basis of existing evidence about what

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44. For arguments and proposals for change reflecting the primary theoretical basis for the philosophy embodied in Article 3, see AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE* (1971); CITIZENS' INQUIRY ON PAROLE AND CRIMINAL JUSTICE, *PRISONS WITHOUT WALLS* (1975); D. Fogel, *supra* note 6; M. FRANKEL, *supra* note 6; D. LIPTON, R. MARTINSON & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT* (1975); N. MORRIS, *supra* note 6; TWENTIETH CENTURY FUND, *supra* note 6; A. VON HIRSCH, *supra* note 6; Harris, *Disquisition on the Need for a New Model for Criminal Sanctioning Systems*, 77 W. VA. L. REV. 263 (1975); McGee, *A New Look at Sentencing* (pts. 1-2), FED. PROBATION, June 1974, at 3 and Sept. 1974, at 3.

45. MSCA at 90.

46. *Id.*

47. *Id.*



factors are associated with recidivism, this theory would mean that if two persons together rob a liquor store, the one who is a young black male from a broken family, with little education and a record of drug abuse, will be kept in prison indefinitely, while an older white male from an intact family, with a high school diploma and no drug experience, will be released almost immediately. Not only the young black male, but most fair-minded observers, would regard that outcome as profoundly unjust.<sup>48</sup>

Recent studies have also called into question the effectiveness of coerced rehabilitation programs.<sup>49</sup> Moreover, the rigidly structured environment of a prison does not provide a suitable educational experience for learning how to exist in a free society.<sup>50</sup> And even if rehabilitation worked, the justification for extending a sentence for rehabilitative purposes, beyond what was "deserved" for the offense committed, breaks the tie between offense and sanction, thus removing the offense as the justification for intervention into the life of the offender. The full implication of governmental intervention into the lives of its citizens unrelated to commission of a criminal offense runs counter to the traditional and related values of individual freedom and limited governmental power.

The abandonment of rehabilitation as a factor in determining the nature or length of a sentence *does not* abandon rehabilitation as a goal of the correctional system. Rather, within the just-deserts sentence imposed, the Act requires that offenders be provided with programs and services to better themselves.<sup>51</sup> Thus, the Act permits offenders to choose whether and in what programs they will participate.

Another traditional goal of punishment has been to restrain or incapacitate those offenders predicted as likely to commit future crimes. This goal has been implemented for the most part through the parole system in which the parole board is authorized to release offenders from confinement when they are no longer dangerous or have been rehabilitated. In addition many systems provide enhanced sentences for those predicted to be dangerous. Although the theory of the system is plausible, in practice attempts to predict dangerousness have not been successful. The knowledge necessary to predict who will commit future crimes is undeveloped. As Professor von Hirsch noted: "With a predictive instrument of so little discernment and a target population so small, the forecaster will be able to spot a significant percentage of the actual violators *only if a large number of false positives is also included.*"<sup>52</sup> This results in the unnecessary confinement of many

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48. J. WILSON, THINKING ABOUT CRIME 171 (1975).

49. E.g., D. LIPTON, R. MARTINSON & J. WILKS, *supra* note 44.

50. See D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964).

51. See text accompanying notes 75-76, 106 *infra*.

52. A. VON HIRSCH, *supra* note 6, at 22 (emphasis in original).

offenders in order to isolate a few who are dangerous. The unreliability of our methods of prediction and the tendency to greatly overpredict likely recidivism suggests that predictive restraint should not be used to determine the nature or severity of the sanction imposed.

Within the limitations of the deserved punishment, deterrence of others is an appropriate goal to pursue. The present system largely relies for deterrent effect on the existence of an undifferentiated criminal sanction. Our knowledge and ability to fine tune the sentencing system for deterrence purposes is not well developed.<sup>53</sup> In part, this results from the individualized treatment model which prevents any informed knowledge of criminal sanctions from being imparted to the public. The deterrence impact of a legislative increase in a sentence for a particular offense is largely muted by the discretionary sentencing practices of courts and parole boards.

Discretionary release systems like parole also have counterproductive effects on the lives and attitudes of offenders. Persons subject to a parole board's discretion inevitably participate in a "con game" to convince the board they are ready for release. In addition, the uncertain nature of the sentence prohibits careful planning for release. Perhaps more important, however, the parole system intensifies disparity in sentences. This, in turn, creates tension and hostility within correctional institutions and thus makes actual rehabilitation more difficult.

Perhaps the major indictment of the current system is that it has lost public confidence. The sentencing system purports to do more than it can deliver—it claims to rehabilitate, isolate, and deter and thus attracts the blame for publicized crimes by ex-offenders and for the perceived increase in crime generally. The provisions of Article 3 attempt to speak to the concerns expressed with current sentencing provisions.<sup>54</sup> They are directed by the

53. F. ZIMRING & G. HAWKINS, *DETERRENCE* (1973).

54. The acceptance of the need for basic systematic change in criminal sentencing is reflected in current legislative responses. Indiana and Maine have enacted flat sentencing systems by eliminating parole in most instances. IND. CODE ANN. §§ 35-50-2-4 to -7 (Burns 1977); ME. REV. STAT. ANN. tit. 17-A, §§ 1253, 1254. California has both enacted a presumptive sentencing system and abolished discretionary release. CAL. PENAL CODE §§ 1170 to 1170.6 (West Supp. 1979). The Federal Parole Commission and Reorganization Act of 1976, 18 U.S.C. §§ 4201-4218 (1976), made mandatory an earlier administrative decision to establish presumptive parole dates for federal prisoners. Further, state legislatures are considering various forms of presumptive and flat sentencing proposals in, among others, Minnesota, Illinois, Ohio, Alaska and New Jersey. In addition to such legislative responses, several courts are experimenting with sentencing guidelines. See L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN & A. GELMAN, *SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION* (1976).

overriding attempt to reduce injustice and to implement a modest, attainable system of sentencing criminal offenders.<sup>55</sup>

### 1. Overview of Article 3

Part 1 of Article 3 establishes the general framework for sentencing. The purposes and principles of sentencing are articulated in sections 3-101<sup>56</sup> and 3-102<sup>57</sup> of the Act. Section

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55. This goal is also reflected in the modified flat sentencing plan approved by the ABA Joint Committee on the Legal Status of Prisoners. ABA JOINT COMM., *supra* note 16, § 9.1.

56. MSCA § 3-101 [Purposes].

The purposes of the Article are to:

(1) punish a criminal defendant by assuring the imposition of a sentence he deserves in relation to the seriousness of his offense;

(2) assure the fair treatment of all defendants by eliminating unjustified disparity in sentences, providing fair warning of the nature of the sentence to be imposed, and establishing fair procedures for the imposition of sentences; and

(3) prevent crime and promote respect for law by,

(i) providing an effective deterrent to others likely to commit similar offenses;

(ii) restraining defendants with a long history of criminal conduct; and

(iii) promoting correctional programs that elicit the voluntary cooperation and participation of offenders.

57. MSCA § 3-102 [Principles of Sentencing].

To implement the purposes of this Article the following principles apply:

(1) The sentence imposed should be no greater than that deserved for the offense committed.

(2) Inequalities in sentences that are unrelated to a purpose of this Article should be avoided.

(3) The sentence imposed should be the least severe measure necessary to achieve the purpose for which the sentence is imposed.

(4) Sentences not involving confinement should be preferred unless:

(i) confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(ii) confinement is necessary to avoid depreciating the seriousness of the offense or justly to punish the defendant;

(iii) confinement is particularly suited to provide an effective deterrent to others likely to commit similar offenses;

(iv) measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant; or

(v) the purposes of this Article would be fulfilled only by a sentence involving confinement.

(5) The potential or lack of potential for the rehabilitation or treatment of the defendant should not be considered in determining the sentence alternative or length of term to be imposed, but the length of a term of community supervision may reflect the length of a treatment or rehabilitation program in which participation is a condition of the sentence.

(6) The prediction of the potential for future criminality by a particular defendant, unless based on prior criminal conduct or acts

3-103<sup>58</sup> describes the sentencing alternatives, and the maximum possible sentences for categories of offenses are established in Section 3-104.

A Sentencing Commission is created<sup>59</sup> to develop sentencing guidelines.<sup>60</sup> Once created, these guidelines will provide the presumptively appropriate sentence to be imposed in each case based on statutorily authorized factors relating to the offender and the severity of the offense.<sup>61</sup> The guidelines will indicate the appropriate type of sentence, *i.e.*, fine, community supervision, periodic confinement, continuous confinement, as well as the length or magnitude of the sentence to be imposed.<sup>62</sup>

Part 2 of the Article establishes the procedures for imposing sentences. A presentence report is required in all felony cases,<sup>63</sup> but the court may order a shortened report where there are no con-

designated as a crime under the law, should not be considered in determining his sentence alternative or the length of term to be imposed.

58. MSCA § 3-103 [Sentencing Alternatives].

(a) A person convicted of a felony or a misdemeanor in this State must be sentenced in accordance with this Act.

(b) The following sentencing alternatives are authorized:

(1) payment of a fine either alone or in addition to any other sentence authorized by this subsection;

(2) service of a term of community supervision;

(3) service of a split sentence of confinement followed by a term of community supervision;

(4) service of a term of periodic confinement;

(5) service of a term of continuous confinement;

(6) making restitution alone or in addition to any other sentence authorized by this subsection.

(c) This Article does not deprive a court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose costs and other monetary obligations if specifically authorized by law.

[(d) This Article does not prevent a court from imposing a sentence of death specifically authorized by law.]

59. MSCA § 3-110 [Sentencing Commission; Creation]. Locating in an administrative agency the obligation to develop presumptive sentences provides greater flexibility in the development and modification of sentences and assures continuing examination of sentencing practices.

60. MSCA § 3-112 [Duties of Sentencing Commission].

61. MSCA § 3-115 [Sentencing Guideline; Requirements]. The guidelines must be consistent with the purposes (MSCA § 3-101) and principles (MSCA § 3-102) of sentencing.

62. MSCA §§ 3-113 [Sentencing Guidelines; Non-Monetary Sentencing Alternatives] and 3-114 [Monetary and Non-Monetary Conditions of Sentencing Guidelines].

63. MSCA § 3-203 [Presentence Investigation and Report]. The court may order preparation of a presentence report in misdemeanor cases and, with the defendant's agreement, a presentence investigation may begin before adjudication of guilt. The report includes any victim's statement with respect to sentencing.

tested issues of mitigation or aggravation.<sup>64</sup> A sentencing hearing is required.<sup>65</sup> The sentencing court is obligated to impose the guideline sentence unless it finds that some other sentence would better serve the purposes and principles of sentencing.<sup>66</sup> If the court departs from the guidelines it must also enter on the record its reasons for so departing.<sup>67</sup> Finally, appellate review of sentences is authorized.<sup>68</sup>

Parts 3 through 6 of the Article provide statutory detail for the various types of sentences authorized by the Act. Part 3 implements sentences to community supervision. The Act uses the term "community supervision" as a substitute for what has traditionally been called "probation" and which refers to supervision in the community under conditions imposed by the court. Part 4 relates to fines.

Part 5 provides for the elements of a sentence to confinement. Three sentences involving confinement are authorized: split sentences, periodic confinement, and continuous confinement. Split sentences involve confinement for not more than 180 days followed by a term of community supervision.<sup>69</sup> Periodic confinement involves confinement only during specified days or parts of days and supervision in the community at other times.<sup>70</sup> A sentence for continuous confinement requires the offender to serve his entire sentence in a facility. There is no parole or other discretionary release, but each offender earns one day of good time for each day he serves in confinement without violating prison rules.<sup>71</sup> Good time credits are awarded neither for program participation nor on the basis of official judgments regarding rehabilitative progress; their forfeiture may be assessed as punishment in a disciplinary proceeding.<sup>72</sup> No supervision is provided after release from

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64. MSCA § 3-204 [Requirements of Presentence Reports].

65. MSCA § 3-206 [Sentencing Hearing]. The victim is afforded the opportunity to be heard at the hearing.

66. MSCA § 3-207 [Imposition of Sentence]. The requirement that the court show a sentence that deviates from the guidelines is *better*, not just appropriate, places a substantial burden on the sentencing judge if he does not impose the guideline sentence.

67. *Id.* An articulation of reasons makes appellate review more practical.

68. MSCA § 3-208 [Appellate Review of Sentences]. Appellate review may be sought by either the defendant or prosecutor and the appellate court may increase as well as reduce the sentence imposed.

69. MSCA § 3-503 [Split Sentence]. Split sentences are subject to good time reductions. *Id.* § 3-501(c). Thus, the 180-day maximum reflects a 90-day maximum of "real" time. *Id.* § 3-501(b).

70. MSCA § 3-504 [Periodic Confinement; Effect].

71. MSCA § 3-501 [Sentences to Confinement; Good Time Reductions].

72. MSCA § 4-502 [Punishments for Disciplinary Infractions]. Good time reductions of the sentence imposed are common in statutory schemes. *E.g.*, NEB. REV. STAT. § 83-1,107 (Reissue 1976). In many jurisdictions good time is auto-

confinement, but the department is authorized to provide services and assistance to released offenders on a voluntary basis and to make funds available to them conditioned on their participation in post-release programs.<sup>73</sup> Part 6 authorizes the grant of restitution to victims.

### C. Treatment of Offenders and Judicial Oversight—Article 4

Article 4 of the Model Act for the most part governs the treatment of those persons convicted of and sentenced for criminal conduct. It describes a system that protects the interests of confined persons, one in which such individuals are allowed to learn to accept the responsibilities of life in free society by being subjected to the same system of incentives and burdens experienced by free citizens. The article is built upon the basic premise that persons in the custody of the department have the right to be treated fairly. In part, support for the premise is philosophical—that the greatness of a society can be measured by the way it treats criminal offenders. In part, support for the premise is utilitarian—that fair treatment is a prerequisite for rehabilitation. In part, support for the premise is legal—that offenders are entitled under the Constitution to basic elements of fair treatment. Finally, in part, support for the premise is traditional—that governmental power should always be restrained, not necessarily because of proven abuse but because of the potential for abuse.

The withdrawal of liberty inherent in imprisonment or other less intrusive criminal sanctions is punishment. The provisions of the Model Act, particularly those of Article 4, reflect a refusal to add to the magnitude of that punishment by creating or maintaining harsh or insensitive correctional facilities or programs.<sup>74</sup> Rather, the Act creates a correctional environment approximating life outside the prison, with confined persons treated with dignity and as functioning adults capable of making and accepting responsibility for their own decisions. Reducing the pervasiveness of administrative control over the lives of confined persons is not wholly

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matically credited and may be forfeited only upon the commission of a disciplinary infraction. *Id.* Under the Model Act good time forfeiture may be imposed only if the disciplinary infraction is a felony or seriously jeopardizes safety or the confined person is a frequent rule violator. MSCA § 4-502. Generally a forfeiture of 90 days good time is the maximum that may be imposed for any one disciplinary infraction. *Id.*

73. MSCA §§ 3-507 [Pre-release and Post-release Programs]; 3-508 [Release of Confined Persons]; and 3-509 [Released Offender Loan Fund].

74. See generally ABA JOINT COMM., *supra* note 16; S. KRANZ, R. BELL, J. BRANT & M. MAGRUDER, MODEL RULES AND REGULATIONS ON PRISONERS' RIGHTS AND RESPONSIBILITIES 1-4 (1973) [hereinafter cited as MODEL RULES]; NAC, *supra* note 3, at 17-21.

an act of mercy; it is also a calculated act of self-protection that may be the most reasonable and efficient means to decrease recidivism,<sup>75</sup> since:

[v]irtually all prisoners will some day be released to a society in which . . . they will daily be required to make choices and exercise self-restraint. If our institutions of confinement do not replace self-restraint for compelled restraint, and encourage choice rather than rote obedience, released prisoners will continue to be unable to deal with the "real" world.<sup>76</sup>

Article 4 represents a detailed codification of those interests of confined persons which ought to be protected. At the same time these "protected interests" are balanced against the legitimate interest of the public in assuring that the correctional system is administered in an orderly fashion, providing adequate security and safety to the public. This balancing is performed in two ways. First, a general provision stipulates the extent to which any "protected interest" of a confined person may be justifiably limited. Second, the details of each protected interest are specifically established, as reproduced below:

Section 4-102<sup>77</sup>

(a) Whenever this Act specifically provides a confined person with a "protected interest," the director shall take appropriate measures to preserve and facilitate the full realization of that interest.

(b) The director may suspend or limit the realization of a protected interest otherwise provided by this Act during an emergency in a facility or part of a facility if the director finds that unusual conditions exist in a facility that imminently jeopardize the safety of the public or the security or safety within a facility and that extreme measures are necessary. The director shall rescind the suspension as soon as the emergency is over and, within 30 days after the emergency is over, submit to the Governor a written report describing the nature of the emergency and the measures taken.

(c) Consistent with the provisions of this Part that specifically require or prohibit the performance of an act by the director, the director may adopt measures that:

(1) limit the full realization of a protected interest if the measures are designed to protect the safety of the public or the security or safety within a facility; and

(2) regulate the time, place, and manner of the realization of a protected interest if the measures are designed to assure the orderly administration of a facility.

(d) Whenever the director adopts measures pursuant to subsection (c), they must be:

(1) designed to create no greater restriction on the protected interest than reasonably necessary to accomplish the purpose for which they were adopted; and

(2) adopted in accordance with the procedures established for the adoption of rules.

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75. *E.g.*, ABA JOINT COMM., *supra* note 16, at 417-20.

76. *Id.* at 418-19.

77. MSCA § 4-102 [Protected Interests; General Provisions].

Subsection (a) of the section establishes an obligation on the Director of Corrections to take affirmative steps to assist confined persons to realize their protected interests. This reflects a recognition of the realities of prison life, where all control initially rests with the administration. Subsection (b) authorizes the suspension of protected interests during an emergency. Subsection (c) provides the major balancing of interests. Protected interests, specifically delineated in later sections of Article 4, can be limited if necessary "to protect the safety of the public or the security or safety within a facility"—a phrase used throughout the Act. The interest in orderly administration of a facility is not as imperative as security and safety and thus does not serve to justify limiting realization of protected interests except as to time, place and manner. The director's authority under this subsection is further circumscribed by specific directives and prohibitions contained in those sections establishing the protected interests.

Underlying the delineation of protected interests of confined persons is the philosophy adopted in several cases that "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."<sup>78</sup> The Special Committee recognized, on the other hand, that facility administrators must retain some discretion, particularly regarding matters of detail that do not raise significant issues of fair treat-

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78. *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944) (per curiam). *Accord*, *Morales v. Schmidt*, 340 F. Supp. 544, 553-54 (W.D. Wis. 1972). See CAL. PENAL CODE § 2601 (West Supp. 1979).

To the extent the test described in the Model Act imposes the burden on correctional officials to justify their acts or regulations it has been rejected as a constitutional requirement by the United States Supreme Court in a case involving pretrial detainees. *Bell v. Wolfish*, 99 S. Ct. 1861 (1979), *rev'g*, *Wolfish v. Levi*, 573 F.2d 118 (2d Cir. 1978), *rev'g in part*, *United States ex rel. Wolfish v. Levi*, 439 F. Supp. 114 (S.D.N.Y. 1977). Both the district court and the Second Circuit had adopted a test, similar to that of the Model Act, that required a showing that deprivations imposed on pretrial detainees were justified by "compelling necessities of jail administration." 573 F.2d at 124 (quoting *Rhem v. Malcolm*, 507 F.2d 333, 336 (2d Cir. 1974)). The Supreme Court adopted instead a requirement that the offender show by substantial evidence that the challenged administrative practice was excessive or arbitrary.

*Wolfish* was decided after adoption of the Model Act. However, as with other provisions in the Act, the National Conference of Commissioners on Uniform State Laws viewed constitutional requirements as minima and not necessarily as limiting the legislative prerogative to direct the extent to which a correctional system might appropriately concern itself with administrative fairness. *Cf. Jones v. North Carolina Prisoners' Labor Union Inc.*, 433 U.S. 119, 136-37 (1977) (Burger, C.J., concurring) (federal courts should not second guess the decisions of legislators and prison officials. Instead, the needed reforms must come from those with the most experience in the field, i.e., prison administrators).



ment. Each protected interest was described in order to: (1) assure minimum standards of fair treatment for offenders, (2) facilitate operation of facilities in a way that would afford confined persons protection beyond minimum standards, and (3) guard against the potential of administrative abuse. Each articulation of a protected interest was evaluated by asking two questions: (1) does it provide the specificity necessary to establish clear guidelines for operation; and (2) does it allow room for the administrator to take account of other legitimate institutional needs? Of course the interests of security and safety are always considered paramount institutional needs if it is demonstrated that they are legitimately involved.

The most significant rights specified in Article 4 are those reflecting the basic needs of medical care,<sup>79</sup> legal assistance,<sup>80</sup> healthy and safe living conditions,<sup>81</sup> and those relating to the communications rights of confined persons.<sup>82</sup> Medical care and a safe living environment are fundamental rights of the human condition; their specification is necessary because of the unfortunate history of many of our correctional institutions, a history that has compelled courts to close facilities because living conditions were found to be cruel and unusual punishment under the eighth amendment.<sup>83</sup> The communication rights, as exemplified in mail and visitation rights, permit a confined person to keep in touch with the outside world. This is important because it leads to the confined person's better adjustment to prison life as well as to his better readjustment to life outside.<sup>84</sup> Keeping in touch and thus maintaining ties with the outside world is thought to be an extremely important factor in preventing recidivism.<sup>85</sup> The right to legal assistance is basic to assure that other rights specified in the act are protected.

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79. MSCA § 4-105 [Medical Care].

80. MSCA § 4-108 [Legal Assistance]. See MSCA §§ 4-109 [Participating in the Legal Process] and 4-110 [Access to Legal Materials]. See also Potuto, *The Right of Prisoner Access: Does Bounds Have Bounds?*, 53 IND. L.J. 207 (1978).

81. MSCA §§ 4-104 [Physical Security] and 4-106 [Right to Healthful Environment]. See MSCA § 4-107 [Physical exercise].

82. Communication rights include communication by whatever manner—mail, telephone, face-to-face through visitation, etc., as well as the ability to be kept apprised of the outside world through books, magazines and television. See MSCA §§ 4-114 [Communications], 4-115 [Visitation], 4-123 [Lending Library; Reading Material; Radio and Television], and 4-124 [Facility News Medium].

83. See, e.g., *Puch v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976). See also note 21 *supra*.

84. ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS, POLICY GUIDELINES (1972); Fox, *The First Amendment Rights of Prisoners*, 63 J. CRIM. L.C. & P.S., 162, 173-74 (1972).

85. See, e.g., N. HOLT & D. MILLER, EXPLORATIONS IN INMATE—FAMILY RELATIONSHIPS (1972); N. MORRIS, *supra* note 6.

A careful analysis of Section 4-114 (dealing with oral and written communications) and its relationship to other sections, may help clarify the way in which a balance is struck between the exercise by a confined person of a right specifically afforded him under the Act, in this instance, communications, and the interests of security, safety, and orderly administration, which are also preserved.

Section 4-114<sup>86</sup>

(a) A confined person has a protected interest in communicating privately with other persons by means of oral and written communication.

(b) The director shall:

(1) provide, at the department's expense, to each confined person a reasonable amount of stationary and writing implements;

(2) promptly transmit, at the department's expense,

(i) all written communications from a confined person to his attorney, the director, the correctional mediator, or any federal or state court having jurisdiction over a legal matter in which he is involved;

(ii) a reasonable number of written communications from a confined person to the Governor and members of the [Legislature];

(iii) up to 5 additional one-ounce written communications per week from the confined person to other persons; and

(iv) all written communications delivered to the facility and addressed to the confined person; and

(3) provide confined persons with access to telephones and permit a confined person to place and receive emergency telephone calls and those to or from his attorney.

(c) The director may not:

(1) limit the number of written communications that may be sent by a confined person at his own expense or received by him;

(2) limit the persons with whom a confined person exchanges written communications except pursuant to section 4-118; or

(3) limit to less than 2 the number of 3-minute nonemergency telephone calls a confined person may place weekly at his own expense.

(d) Notwithstanding subsection (c), if a confined person sends more than 10 written communications per week beyond those sent at the department's expense or a confined person receives more than 10 written communications per week in response to any act of the confined person designed to result in a large number of written correspondence, the director may require the confined person to pay the costs of processing the additional correspondence.<sup>87</sup>

Pursuant to this section, a confined person is entitled to at least two telephone calls weekly and, subject to specified limitations, may also have unlimited correspondence at his own expense with anyone with whom he chooses to communicate; "approved" correspondents lists are, therefore, rejected.<sup>88</sup> The confined person is

86. MSCA § 4-114 [Communications].

87. *Id.*

88. Several authorities recommend providing a right to send and receive letters from or to any person. *E.g.*, AMERICAN CORRECTIONAL ASSOCIATION COMMISSION ON ACCREDITATION STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS 4305, 4341 (1977) [hereinafter cited as ACA STD.]; ABA JOINT COMM., *supra*

also assured correspondence at public expense both to guarantee him [(b) (2) (iii)] some access to the outside world<sup>89</sup> and to guarantee him access for particularly important purposes<sup>90</sup> [(b) (2) (i) and (ii)]. The thrust of the section is, therefore, far-reaching. On the other hand, the specification of "reasonable" as to the amount of stationery to be provided<sup>91</sup> [(b) (1)] and as to written communications to the Governor and members of the legislature<sup>92</sup> [(b) (2) (ii)], as well as the inclusion of subsection (d) in its entirety, were thought necessary to assure orderly administration of the facility. These provisions, in other words, permit correctional administrators to protect against abuse of communication rights by confined persons.

Subsection (d) also illustrates another approach used throughout the act. Under current practices it is widely perceived that many confined persons abuse the rights accorded them. Providing legal assistance or access to courts will result in frivolous as well as meretorious law suits. This results from the fact that the exercise of their rights often costs confined persons nothing since their opportunity for alternative activities is virtually nonexistent. As long as they are deprived of sources of income, a policy of direct monetary charges comparable to free world conditions is unsuitable. Thus, the Model Act attempts to provide to each confined person a realistic opportunity to earn money in order to duplicate, to the extent possible, real-world conditions within facilities. Confined persons are then obligated to pay for the exercise of interests that go beyond those minimum standards to which each confined person is entitled.

The section also provides<sup>93</sup> [(c) (2)] that there may be no limitation on the persons with whom a confined person may correspond except pursuant to Section 4-118. Section 4-118 permits such limitation when the correspondent knowingly violates institutional correspondence rules and interceptions of communications are not feasible.<sup>94</sup>

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note 16, § 6.1; MODEL RULES, *supra* note 74, at 46 (Rule IC-1); NAC, *supra* note 3, at 66-69 (Standard 2.17). Several departments of corrections have adopted such a policy. *E.g.*, ILL. ANN. STAT. ch. 38 § 1003-7-2(d) (Smith-Hurd 1973); Ill. Correc. Ad. Reg., Adult Div'n, § 823 (1975).

89. Several departments of corrections presently provide free mailing. *E.g.*, Manual for Alaska St. Adult Corrections Inst., § 705 (1972); Ad. Plan Manual, N.J. Div. of Corrections and Parole Standards 291.277 (1975); Pennsylvania Bureau of Corrections Ad. Directive BC-ADM 803 (1972).

90. MSCA § 4-114, Comment.

91. *Id.*

92. *Id.*

93. *Id.*

94. MSCA § 4-118 [Limiting Visitors and Correspondents].

(a) The director may issue an order that:

Another example of the attention paid to the safety and security factors in the delineation of communication interests is Section 4-117 (Searches and Interception of Communications).<sup>95</sup>

Section 4-117<sup>96</sup>

(a) The director may authorize the opening and search for contraband or prohibited material of an envelope, package, or container sent to or by a confined person. This subsection does not authorize the interception of written communications.

(b) The director may permit the interception of communications:

(1) upon reliable information that a particular communication may jeopardize the safety of the public or security or safety within a facility;

(2) in pursuance of a plan formulated by the chief executive officer of each facility for conducting random interception of communications by or to confined persons which plan must be approved by the director as providing the least intrusive invasion of privacy necessary to the safety of the public and security and safety within a facility; or

(3) when otherwise authorized by law.

(c) Notwithstanding subsection (b), a communication may not be intercepted except pursuant to a court order or unless authorized by law if the communication is one which reasonably should be anticipated to be:

(1) a privileged communication between a confined person and his attorney, clergyman, or physician; or

(2) between a confined person and the Governor, Attorney-Gen-

(1) prevents a specific person from communicating with a confined person if,

(i) the person seeking to communicate with a confined person knowingly has violated the rules relating to communication with confined persons, and

(ii) less restrictive measures, such as intercepting communications between the person and confined persons, are not feasible.

(2) prevents a specific person from entering facilities or visiting confined persons if,

(i) the person has in the past knowingly violated the rules of a facility relating to visitation; or

(ii) the director has reliable information that if admitted to the facility, the person is likely to advocate unlawful acts or rule violations that jeopardize the safety of the public or security or safety within a facility.

(b) A person against whom an order is issued is entitled to a written statement of the basis for the order, an opportunity to contest the order at a hearing before the director or his delegate, and judicial review.

(c) A confined person affected by an order issued pursuant to this section must be informed in writing of the order, the person against whom it is issued, and the specific reason for the order.

(d) An order pursuant to this section may not continue for more than 180 days without further evaluation.

95. MSCA § 4-117. Searches of correspondence are treated separately from searches of persons and physical facilities. For provisions governing the latter, see MSCA § 4-119 [Searches]. For a provision requiring notice and disclosure of all searches, see MSCA § 4-120 [Searches and Interceptions; Notice and Disclosure].

96. MSCA § 4-117 [Searches and Interceptions of Communications].

eral, members of the [Legislature], a member of the state judiciary, a member of the advisory committee, or a member of the sentencing commission.

(d) Whenever the director is authorized by this Act to prevent a person from communicating with a confined person, the director, in lieu thereof, may authorize communications between the persons to be intercepted if both parties agree to the interception.

(e) The chief executive officer shall designate specifically employees authorized to intercept communications.

(f) If a written communication is intercepted, it thereafter shall be transmitted promptly to its addressee unless to do so would jeopardize the safety of the public or the security or safety within a facility. Only that part of the communication which jeopardizes the safety of the public or the security or safety within the facility may be excised.

(g) The director shall maintain a record of each interception or excision of a communication which includes the date of its occurrence, the content thereof, the person authorizing the interception or excision and the factual basis for his doing so, and the name of the confined person involved.<sup>97</sup>

As in Section 4-114, this section strikes a balance between institutional security and the confined person's interest in the privacy of his communications.<sup>98</sup> The balance struck in this section protects communication rights beyond a constitutional minimum.<sup>99</sup> This is, of course, consistent with the Act's general approach to the treatment of confined persons, *i.e.*, to restrict the exercise of their rights and responsibilities as free citizens only when a provable conflict exists between the exercise of these rights and legitimate institutional interests. Furthermore, these restrictions are authorized only to the extent necessary to protect legitimate institutional interests.

Recognition and acceptance of the Act's general philosophy however, did not always guarantee uniform Committee sentiment with respect to the embodiment of this philosophy in specific draft language. Section 4-117, for example, while admittedly describing a standard beyond the constitutional minimum, does not go as far as several authorities recommend. These authorities believe that a confined person may exercise a much broader right than that afforded in this section without unduly affecting institutional secur-

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97. *Id.*

98. *See* *Procunier v. Martinez*, 416 U.S. 396, 413 (1974) ("the limitation of First Amendment freedoms [while incarcerated] must be no greater than is necessary or essential to the protection of the particular governmental interest involved.").

99. *See, e.g., Procunier v. Martinez*, 416 U.S. 396 (1974); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (state conceded it could not *read* attorney mail); *Denson v. United States*, 424 F.2d 329 (10th Cir. 1970) (*per curiam*), *cert. denied*, 400 U.S. 844 (1970); *Jones v. Wittenberg*, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.*, *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972).

ity interests.<sup>100</sup> The Special Committee was aware of this position and discussed the particular provisions of this section and their relationship to the Act's general philosophy. There was doubt expressed as to whether outgoing communications could ever sufficiently implicate security or safety within the facility. There was also discussion as to whether, even if in isolated circumstances outgoing communications could affect security and safety, intercepting these outgoing communications represented a proper balance between security and safety interests when measured against: (1) the invasion of privacy inherent in intercepting communications; (2) the potential interference with the benefits derived by society and confined persons when confined persons keep in touch with family and friends in the free community; and (3) the administrative costs of a policy of intercepting outgoing communications.

An administrative decision to intercept outgoing communications requires the commitment of employee time and departmental funds. In fact, one explanation for the traditional limit by correctional authorities on the amount of prisoner correspondence is that the number of employee hours necessary to intercept all communications proved too expensive unless the number of communications were limited. The Special Committee ultimately decided that, since the Model Act expressly prohibits limitations on the number of communications (with the exception of the situation delineated in Section 4-114(d)) the proper balance between security needs and the interests of privacy would best be left to administrative discretion.

A review of the substantive provisions discussed with reference to Section 4-114 demonstrates a common approach taken throughout Article 4. In order to secure the fullest exercise of rights consistent with security and safety, the provisions are drafted to grant the right, or protected interest, in broad terms (*e.g.*, Section 4-114) and then to specify the standard by which a restriction of the right is authorized (*e.g.*, Section 4-118).<sup>101</sup> This approach places the burden on correctional administrators to justify restrictions of protected interests as necessary to assure security, safety, or orderly administration. It also requires them to show that the action taken is the least restrictive of the protected interest involved. Such a burden is appropriately placed on administrators given the significance of protected interests to confined persons, the potential con-

100. *E.g.*, ACA STD., *supra* note 88, at 4343; ABA JOINT COMM., *supra* note 16, § 6.1; MODEL RULES, *supra* note 74, at 46-47 (Rule IC-1 to -2).

101. This approach can also be seen within each section. For example, Section 4-114, as indicated, grants a broad right of communication to confined persons. Yet it also contains internal limitations on that right.

stitutional imperatives underlying many of the interests protected, and the access of correctional authority to the information necessary to prove the justification for restricting protected interests.

The structure of the Act facilitates meaningful judicial review of administrative action since it provides an articulated standard by which a court may evaluate administrative acts and decisions. It permits the rule of law to enter the closed door of the facility and assure itself that a fair and just system operates therein. Judicial review was provided not because it was felt that, otherwise, facilities would be administered poorly, evilly, or corruptly, but because, as was said in a related context, "to exclude any particular police activity from [judicial] coverage is essentially to exclude it from judicial control and from the command of reasonableness, whereas to include it is to do no more than say that it must be conducted in a reasonable manner."<sup>102</sup>

In order to achieve the goal of making prison life an approximation of life outside the walls, confined persons should be involved in decision-making processes concerning them. Thus, the Act provides a voucher program designed to allow confined persons to assume responsibility for selecting rehabilitative or educational programs for themselves.<sup>103</sup> It establishes grievance committees consisting of equal numbers of correctional employees and persons in the custody of the department.<sup>104</sup> It also protects a confined person's right to refuse to participate in educational, rehabilitative, recreational, or other "treatment" programs.<sup>105</sup> The policy choices reflected throughout the Act are to provide ample opportunities for confined-person self-improvement and to permit confined persons to decide for themselves in what programs, if any, they will participate. The attempt is to construct monetary or other free world incentives for participation in work and training rather than to force participation.<sup>106</sup> This policy choice is by no means a denigration of the positive benefits of participation in work, training, or other rehabilitative programs. It reflects, rather, the belief that forced rehabilitation creates resentment and is rarely productive of long-lasting results.<sup>107</sup>

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102. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 363-64 (1974).

103. MSCA §§ 4-701 to -706.

104. MSCA § 4-302 [Grievance Committees; Creation]. Requiring an equal number of employees and confined persons prevents participants from merely relying on power voting. These committees are one alternative grievance mechanism; the director is authorized to create others. MSCA §§ 4-301 to -307.

105. MSCA § 4-126.

106. MSCA §§ 4-801 to -816.

107. *E.g.*, D. LEPTON, R. MARTINSON & J. WILKS, *supra* note 44.

The major exception to this approach is found in Section 4-808 (Required Work).

Section 4-808<sup>108</sup>

(a) A confined person may be required to keep his own living quarters clean and orderly.

(b) A confined offender may be required to perform general maintenance work in the facility and assist in providing other services essential to the administration of the facility such as food and laundry service.

(c) A confined offender may be required to work in a business, commercial, industrial, or agricultural enterprise operated by the department.

Gainful employment, of course, may be seen as a benefit to a confined person. Thus a right to refuse employment would be consistent with the policy choice throughout the Act that permits a confined person to refuse opportunities that benefit him. The decision to require confined persons to work, although seemingly inconsistent with this basic policy, reflects a decision reached by the Special Committee after much debate. The section was retained for two reasons. Some committee members felt that the benefits derived from employment by the confined offender and society may outweigh other interests and others felt that required work can be expected by a society<sup>109</sup> otherwise obligated to provide confined persons with the necessities of life.

The incentive for confined persons to better themselves through gainful employment is a significant underpinning to Article 4. There is a clear relationship between recidivism and the inability, upon release, to find and retain employment.<sup>110</sup> Developing adequate employment skills and habits upon release is a major priority of the Model Act and should be the goal of any correctional system.<sup>111</sup> However, in a 1974 study it was found that only four percent of all persons confined in state and federal facilities were participants in a work-release program while only eleven percent worked in prison industries.<sup>112</sup> Moreover, it has been noted that in the typical prison industry shop today "idleness, make-believe work, short work shifts, work interruptions, overmanned shops, and obsolete industrial methods, material and equipment do not enhance the job acquisition prospects of ex-inmate workers."<sup>113</sup> Part 8 of Article 4, Employment and Training of

108. MSCA § 4-808 [Required Work].

109. See Ericsson, Labor-Market Wages for Prisoners 2 (Dec. 1972).

110. See D. GLASER, *supra* note 50, at 311-61; 6 ECON, INC., ANALYSIS OF PRISON INDUSTRIES AND RECOMMENDATIONS FOR CHANGE, STUDY OF THE ECONOMIC AND REHABILITATIVE ASPECTS OF PRISON INDUSTRY (Sept. 24, 1976) [hereinafter cited as ECON, INC.]

111. *E.g.*, ABA JOINT COMM., *supra* note 16, §§ 44.1 to .4, and Commentary.

112. Levy, Abrams & LaDow, Final Report on Vocational Preparation in U.S. Correctional Institutions, iii-iv (U.S. Dep't of Labor 1975).

113. 6 ECON, INC., *supra* note 110, at 4. See, *e.g.*, NAC, *supra* note 3, at 583-84



Confined Persons, generally obligates the director to attempt to provide vocational training or realistic work experience to all confined persons as well as to assist in job placement upon release.<sup>114</sup> The general objectives reflected in this part are supported, among others, by the American Correctional Association<sup>115</sup> and reflect a decision that work provided confined persons should be: "[N]ot busy work, but productive labor with outside world efficiency, outside world wages, and outside world relevance—having as its dual objective financial self-sufficiency and success in the reintegration of ex-offenders into society."<sup>116</sup>

The gainful employment to be provided under the Act does not stop with enterprises operated by the department.<sup>117</sup> Work-release opportunities are authorized<sup>118</sup> and, more importantly, there is authorization for private industry to operate on the property of a facility and employ confined persons.<sup>119</sup> Consistent with the objectives of Article 4 to approximate life outside the facility, real-world

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(Standard 16.13 and Commentary); PRESIDENT'S TASK FORCE ON PRISONER REHABILITATION, *THE CRIMINAL OFFENDER—WHAT SHOULD BE DONE?* 10 (1970) [hereinafter cited as PRESIDENT'S TASK FORCE ON REHABILITATION]; Jensen, Mazze & Miller, *Legal Reform of Prison Industries: New Opportunities for Marketing Managers*, 12 AM. BUS. L.J. 173, 177 (1974).

114. MSCA § 4-801 [Director's Duties]. These duties include the expansion and upgrading of employment and vocational training opportunities for confined persons and assisting them in employment placement after release.

115. ACA STD., *supra* note 88, at 4386 (sufficient employment opportunities), 4387 (relevant work experience), 4388 (work day similar to free community), 4395 (educational and vocational training opportunities).

116. 6 ECON, INC., *supra* note 110, at 21. *Accord, e.g.*, ABA JOINT COMM., *supra* note 16, §§ 4.1 to .4 and Commentary; Committee on Correctional Facilities and Services, Georgia State Bar Ass'n, (1975); NAC, *supra* note 3, at 583-84 (Standard 16.13 and Commentary); PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT ON CORRECTIONS, 176 (1967) [hereinafter cited as PRESIDENT'S COMM'N ON CORRECTIONS]; PRESIDENT'S TASK FORCE ON REHABILITATION, *supra* note 113, at 12; H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 741-42 (2d ed. 1951).

117. MSCA § 4-809 [Enterprises Operated by the Department]. This section not only authorizes prison industries but permits the director to use funds generated by these industries, and other available funds, to, among other things, expand the size of the industries, increase wages to confined persons, and establish placement services.

118. MSCA § 4-803 [Employment or Training Outside Facility]. More than half of the states presently provide work-release opportunities. For a list of these states see MSCA at 387.

119. MSCA § 4-804 [Private Enterprise on Property of Facility]. This section authorizes the director to lease property to private enterprise so that the enterprise may come on the grounds to employ confined persons. In awarding leases the director must consider:

- (1) the nature of the enterprise and its compatibility with the administration of the facility;
- (2) the number of confined persons to be employed;
- (3) the nature and prevailing wage for the employment offered

working conditions and wages are mandated,<sup>120</sup> the confined person is also expected to pay room and board and other costs.<sup>121</sup> In fact, the employment provisions of the Act are among the most significant in terms of effectuating an approximation of life outside the facility.<sup>122</sup> As such, they are integral to the operation of the Act.

The purpose and effect of the employment provisions are more fully realized in Part 10 of Article 4, Collateral Consequences of Charge and Conviction. The employment sections are intended to provide a realistic work environment that instills in confined persons an appreciation for the work ethic and a sense of job responsibility. It would be a mere pyrrhic victory if this goal were accomplished and yet persons convicted of offenses were unable, through discrimination or statutory prohibitions, to obtain employment after discharge from their sentence.<sup>123</sup> The collateral consequences provisions are intended to prevent this result by providing that convicted persons do not suffer loss of civil, per-

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and the availability of similar employment opportunities for confined persons upon release;

(4) the willingness and capability of the private enterprise to train confined persons for employment in the enterprise;

(5) the financial gain to be derived by the department from the lease; and

(6) the views of appropriate civic, business, and labor organizations.

*Id.* § 4-804(c).

The director is authorized to forgive payments or make payments to a private enterprise operating on the property of a facility if the enterprise incurs costs it would not otherwise incur—costs directly related to the nature and size of the confined-person work-force or location of the facility. MSCA § 4-805 [Adjustment for Additional Costs Incurred by Private Enterprise on Property of Facility].

120. MSCA § 4-811 [Terms and Conditions of Employment]. Until such time as prison industries generate sufficient funds to support payment of prevailing wages, however, the director is authorized to base wage payments on the productivity of the prison industry employing the confined person.

121. MSCA § 4-812 [Disposition of Wages]. Room and board costs may not exceed 25 percent of the confined person's monthly gross wages less required payroll deductions. Ten percent of these wages must be deposited for the confined person and provided to him upon his release.

122. Part 9 of Article 4 also aids in creating an approximation of a free employee's life since it provides compensation for work-related injuries to confined persons.

123. For example, barbering is one of the trades often taught at correctional facilities. Yet, as of 1976, 47 states required evidence of good moral character (often read automatically to exclude offenders, or at least felons, from eligibility) and 22 states specifically required no criminal record as a prerequisite to obtaining a barber's license. ABA Clearinghouse on Offender Employment Restrictions, Removing Offender Employment Restrictions (March 1976).

sonal, and political rights<sup>124</sup> and may not be discriminated against in seeking employment, professional or occupational licenses, or vocational or professional training unless a direct relationship, as defined in the Act, exists between the underlying offense and the job, license, or educational opportunity sought.<sup>125</sup> Several states now prohibit employment discrimination solely on the basis of a criminal record.<sup>126</sup> And several authorities urge the abolition of licensing requirements that act to restrict available employment

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124. MSCA § 4-1001 [Rights Retained].

125. MSCA § 4-1005 [Discrimination; Direct Relationship].

(a) This section applies only to acts of discrimination directed at persons who have been convicted of an offense and discharged from their sentence.

(b) It is unlawful discrimination, solely by reason of a conviction:

(1) for an employer to discharge, refuse to hire, or otherwise to discriminate against a person with respect to the compensation, terms, conditions, or privileges of his employment. For purposes of this section, "employer" means this State and its political subdivisions and a private individual or organization [employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year];

(2) for a trade, vocational, or professional school to suspend, expel, refuse to admit, or otherwise discriminate against a person;

(3) for a labor organization or other organization in which membership is a condition of employment or of the practice of an occupation or profession to exclude or to expel from membership or otherwise to discriminate against a person; or

(4) for this State or any of its political subdivisions to suspend or refuse to issue or renew a license, permit, or certificate necessary to practice or engage in an occupation or profession.

(c) It is not unlawful discrimination to discriminate against a person because of a conviction if the underlying offense directly relates to the particular occupation, profession, or educational endeavor involved. In making the determination of direct relationship the following factors must be considered:

(1) whether the occupation, profession, or educational endeavor provides an opportunity for the commission of similar offenses;

(2) whether the circumstances leading to the offense will recur;

(3) whether the person has committed other offenses since conviction or his conduct since conviction makes it likely that he will commit other offenses;

(4) whether the person seeks to establish or maintain a relationship with an individual or organization with which his victim is associated or was associated at the time of the offense; and

(5) the time elapsed since release.

(d) [The State Equal Employment Opportunity Commission has jurisdiction over allegations of violations of this section in a like manner with its jurisdiction over other allegations of discrimination.]

126. *E.g.*, CONN. GEN. STAT. ANN. §§ 4-61n to -61r (West Supp. 1979); FLA. STAT. ANN. § 112.011 (West Supp. Pamphlet 1978); HAWAII REV. STAT. § 378-2 (1976); WASH. REV. CODE ANN. § 9.96A.020 (West 1977).

choices for convicted persons.<sup>127</sup> The collateral consequences provisions round out the Act's employment provisions and make the goal embodied in the Act more realistic, *i.e.*, that offenders will be discharged from sentences with attitude and skills that will make recidivism less likely.

### 1. Overview of Article 4

Part 1 contains a delineation of the most important protected interests that are retained by confined persons. They include basic needs and those rights mandated by courts to be provided to confined persons. They extend beyond these interests, however, to include free-citizen rights whose extension to confined persons is consistent with safety and security. By creating the office of correctional mediator, Part 2 provides one method to relieve tensions and mediate disputes within facilities. Part 3 requires the adoption of grievance procedures, another method to relieve tensions and permit a dialogue for change—when change is necessary—within facilities. Part 4 deals with the assignment, classification and transfer of persons in the custody of the department. Since these decisions have a substantial impact on the lives of confined persons, this part describes procedures by which these decisions must be made. Part 5 deals with discipline within facilities. It prescribes a code of presumptive punishments proportionate to the seriousness of the disciplinary infraction and thus reflects, for disciplinary matters, the same rationale that underlies the sentencing scheme of the Act. This part also affords procedural protections to the confined person charged with a disciplinary infraction. Part 6 deals with programs putting confined persons at risk. It reflects the belief that informed, confined-person consent is possible in a correctional setting that eliminates parole, earned good time, and coerced rehabilitation, and that provides real earning capacity to confined persons so that they have sources alternative to experimentation by which to obtain funds. Part 7 provides for a voucher program. The program is intended to increase the number and effectiveness of programs offered confined persons and to encourage confined persons to take full advantage of such programs by permitting them to choose those programs in which they will participate. Part 8 provides for the employment of confined persons at "real" wages and in a realistic work environment. It encourages provision of a full panoply of employment and vocational training opportunities and, in moving towards a goal of full employment for confined persons, permits employment of con-

127. *E.g.*, ABA JOINT COMM., *supra* note 16, §§ 10.1 to .7, and Commentary; NAC, *supra* note 3, at 592-93 (Standard 16.17 and Commentary); PRESIDENT'S COMM'N ON CORRECTIONS, *supra* note 116, at 90-91.

financed persons by private enterprise and payment of competitive wages. Part 9 deals with compensation for work-related offender injuries. Part 10 deals with the collateral consequences of a conviction. It acts to restore to an ex-offender those rights abridged by conviction or confinement and to protect him from employment discrimination when the employment he seeks is not directly related to the offense for which he was convicted. The part attempts to effect a full reintegration of the ex-offender into the free community.

#### D. Interests of Victims—Article 5

The Special Committee initially decided to include victims' services within the ambit of the department of corrections and to encourage victims to participate in the sentencing process. Although victims have been described as the "real 'clients' of the criminal justice system,"<sup>128</sup> it is becoming increasingly apparent that their interests have been largely ignored by that system.<sup>129</sup> Under the Model Act the offender, once he is placed in the custody of the department and until his release, is provided with, among other things, educational opportunities, necessary medical care, legal assistance, job training and even a paying job; after release he is assisted in finding gainful employment. Victims of crime, as a direct consequence of the crime, often need similar assistance as well as counseling services, compensation for the injury suffered, assistance in claiming personal property used in evidence, information about the criminal trial process and their role in it and, perhaps most importantly, the encouragement to participate in that process.<sup>130</sup> Provisions of Article 5 of the Model Sentencing and Corrections Act were drafted in the attempt to include victims in the sentencing process and provide some assistance to them.

Article 5 implements a statewide commitment to victims by fixing centralized responsibility for victims' programs in the department of corrections while at the same time providing authority for regional implementation. A statewide department of corrections, with the community programs and facilities mandated by the Model Act, is well suited to fulfill the victims' needs. It is al-

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128. COMMISSION ON VICTIM WITNESS ASSISTANCE, NAT'L DIST. ATTORNEYS ASS'N., A PRIMER FOR MODEL VICTIM WITNESS ASSISTANCE CENTERS (Undated).

129. *E.g.*, COMMISSION ON VICTIM WITNESS ASSISTANCE, NAT'L DIST. ATTORNEYS ASS'N., HELP FOR VICTIMS AND WITNESSES (1976) [hereinafter cited as HELP FOR VICTIMS AND WITNESSES]; MARQUETTE UNIVERSITY CENTER FOR CRIMINAL JUSTICE AND SOCIAL POLICY, VICTIMS AND WITNESSES (1976).

130. See Jones, *A Cost Analysis of Federal Victim Compensation*, in SAMPLE SURVEYS OF THE VICTIMS OF CRIME 189, 196-200 (W. Skogan ed. 1976); HELP FOR VICTIMS AND WITNESSES, *supra* note 129.

ready equipped to provide any of the services needed by victims because it is providing similar service to offenders.

It could be argued that the provisions of Article 5 and other sections of the Act designed to meet victim needs,<sup>131</sup> are not sufficiently inclusive. The limited nature of the provisions is evidenced by their primary thrust which requires the department to refer victims to services rather than to provide the services within the department.<sup>132</sup> Nonetheless the Committee decided not to expand the provisions, particularly in areas in which services would be provided directly by the department, and to avoid completely the area of crime victims' reparations. The reason behind the decision to avoid dealing comprehensively with victims' compensation and services was twofold.

First, it was felt that, although there are strong policy reasons in favor of including victims' services as part of the program responsibility of a department already providing similar services to offenders, the approach was novel and needed experimentation rather than immediate legislative mandate. This was believed to be particularly true in light of the fact that comprehensive services would require considerable additional state funding.

Second, many states have already enacted, or are in the process of enacting, victims' compensation statutes. Too extensive an intertwining of victims' compensation with the Model Sentencing and Corrections Act might complicate the enactment of the Model Act.<sup>133</sup> The services provided at present in the Model Act can, in other words, mesh comfortably with almost any existing state victims' compensation scheme.

The decision to exclude compensation to crime victims has, however, led to some unfortunate distinctions between what are properly victims' services for purposes of the Model Act and what are aspects of victims' compensation and thus to be excluded from this Act whether or not presently included within the Uniform Crime Victims Reparations Act. This decision, for example, has prevented a complete interlocking of the sentencing system, which permits victim input, and the duties of a Crime Victims Reparations Board. Thus, although it may have been advisable to charge the Board with an obligation to seek restitution from offenders and to provide information to the Sentencing Commission, there was

131. *E.g.*, MSCA §§ 3-205 [Disclosure of Presentence Reports], 3-207 [Sentencing Hearing], and 3-602 [Modification or Waiver].

132. *See* MSCA § 2-203(7).

133. The Act does include, however (Section 5, Part 2), a place for states to insert the NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM CRIME VICTIMS REPARATIONS ACT (1973).

no direct way to accomplish this without drafting additional provisions with respect to crime victims reparations.

In providing the limited provisions of Article 5 it was hoped that states would use these provisions as a base and expand their victims' services as they gained experience. The Special Committee was also hopeful that states might provide additional services to assist victims.<sup>134</sup> The present provisions, then, represent a foundation upon which to develop and expand victims' services.

#### IV. THE DRAFTING PROCESS

In 1974 the Law Enforcement Assistance Administration provided funds to the National Conference of Commissioners on Uniform State Laws for the drafting of a sentencing and corrections act.<sup>135</sup> Pursuant to Conference policy two committees of commissioners were appointed to work on the Act. The Special Committee to Draft the Act<sup>136</sup> had primary drafting responsibility; a review committee was appointed to follow and comment on the work of the Special Committee.<sup>137</sup> The Special Committee met a total of seventeen times from its first meeting, November 28 to 30, 1975, to its final meeting, March 31 to April 2, 1978. In 1976 and again in 1977 it presented a tentative draft of the Act to the Conference at its annual meeting.<sup>138</sup> In August of 1978, after two prior readings, the

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134. See, e.g., CAL. PENAL CODE § 1413(b) (West Supp. 1979) (authority to photograph evidence in lieu of retention of evidence).

135. See text accompanying note 2 *supra*.

136. Wallace Rudolph, Dean of the University of Puget Sound Law College, was chairman of the Special Committee from the inception of the drafting project until September 1977 and subsequently served as a special consultant to the Special Committee. The Honorable Charles Joiner, Federal District Judge, Detroit, Michigan, served as chairman from September 1977 until completion of the drafting project. For a full list of commissioners who were members of the Special Committee, and the dates of their participation, see MSCA at ii.

137. The Honorable Richard L. Jones, Chief Justice, Alabama Supreme Court, served as chairman of the Review Committee throughout the drafting project. Members of the Review Committee were present at most of the drafting meetings of the Special Committee. For a full list of commissioners who were members of the Review Committee, and the dates of their participation, see MSCA at ii.

138. At the times of presentation of both the first and second tentative drafts the Act was referred to as the Uniform Corrections Act. The title was expanded to Sentencing and Corrections Act in order to more accurately reflect the scope of the Act. Upon final reading and formal approval the Conference voted to make the Sentencing and Corrections Act a model rather than a uniform Act. Conference criteria for uniform acts require that:

(1) There should be an obvious reason and demand for an act such that its preparation will be a practical step toward uniformity of state law or at least toward minimizing its diversity;

(2) There should be a reasonable probability that the act when approved either will be accepted and enacted into law by a substantial

Conference formally adopted the Model Act.

The Special Committee to draft the Act was comprised of members with different philosophical positions as to the proper functioning of a sentencing and correctional system and widely varying experience backgrounds that included academic, judicial (trial and appellate levels) and practitioner, both within the field of criminal law and in the private practice of law. These diverse backgrounds and viewpoints were complemented by the viewpoints and experience of the individuals and groups<sup>139</sup> who acted as advisors to the Special Committee. The drafting process reflected the extensive discussion engendered by the impacting of the various experiences and views of the participants.

## V. CONCLUSION

It is difficult to do justice to the complex and interrelated provisions of the Model Sentencing and Corrections Act in this brief and necessarily superficial overview. It may appear that the Act proposes radical and impractical suggestions since only the basic

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number of jurisdictions or, if not, will promote uniformity indirectly; and

(3) The subject of the act should be such that lack of uniformity or diversity of state law will tend to mislead, prejudice, inconvenience, or otherwise adversely affect the citizens of the states in their activities or dealings in other states or with citizens of other states or in moving from state to state.

2 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS PROCEEDINGS IN COMMITTEE OF THE WHOLE TO DISCUSS THE UNIFORM SENTENCING AND CORRECTIONS ACT, at 473-74 (1978). Criteria for uniform acts also recommend avoiding denominating as uniform an act that is "entirely novel and with regard to which neither a legislative or administrative experience is available, controversial because of disparities in social, economic or political policies, and of purely local or state concern and without substantial interstate implications." *Id.* at 474. After a consideration of these criteria the Conference voted to adopt the Sentencing and Corrections Act as a model act.

139. Advisors included the American Bar Association, the American Association of Wardens and Superintendents, the American Law-Psychology Society, the National Conferences of State Trial and Appellate Judges, the National Council on Crime and Delinquency, the National Legal Aid and Defender Association, the American Medical Association (Division of Medical Practices, Health Care in Correctional Associations), the AFL-CIO (Human Resources Division), the United States Parole Commission, and the Council of State Governments. The Committee also benefitted substantially from the participation of numerous correctional administrators and staff and from the formal participation of the American Correctional Association which had at least one representative present at all but the first six Committee meetings. The Committee met with correctional administrators from Texas, Indiana, Michigan, Idaho, Connecticut, Arizona and Illinois. Finally, the Federal Bureau of Prisons furnished significant assistance by providing a Bureau representative to attend the January 1977 and each subsequent Committee meeting. For a complete list of consultants and advisors, see MSCA at iii.



thrusts of the provisions are discussed and the careful qualifications and transition sections have often been omitted. To be sure, the Model Act is a forward-looking document; the Special Committee did not necessarily feel constrained by the existing law of prisoner's rights and often preferred to exercise the legislative prerogative of moving farther and faster than the courts in improving the conditions of prison life.

Enactment of the Model Act in its entirety will make the sentencing and correctional process in some respects more expensive and more difficult to administer. In several instances, perhaps a majority, the provisions of the Act do not represent the consensus position of correctional practitioners or sentencing judges. Yet each provision was carefully considered and arguments for many points of view were forcefully made. In every instance, the Committee had evidence or testimony that the provisions of the Act could be practically implemented if the will and the means to do so were present.

The Model Act provides the states with an integrated legislative package for sentencing and correctional reform. For less ambitious jurisdictions the separate provisions of the Act provide model language and solutions for many complex problems facing the criminal justice system.