2.25

Model Correctional Rules and Regulations:

CORRESPONDENCE

DISCIPLINARY PROCEDURES

GROOMING AND ATTIRE

SEARCH AND SEIZURE

USE OF FORCE

VISITATION

Correctional Law Project
American Correctional Association

Model Correctional Rules and Regulations:

CORRESPONDENCE

DISCIPLINARY PROCEDURES

GROOMING AND ATTIRE

SEARCH AND SEIZURE

USE OF FORCE

VISITATION

by

MICHAEL WEISZ
RICHARD CRANE
JEFFREY CURTIS

August, 1977

This project was supported by Grant No. 73-ED-99-0027 awarded to the American Correctional Association by the Law Enforcement Assistance Administration through the National Institute of Corrections, U. S. Department of Justice. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official positions or policies of the U. S. Department of Justice.

While this publication was prepared by the Correctional Law Project of the American Correctional Association, its viewpoint is solely that of the authors and does not represent the official position of the American Correctional Association.

This publication may be ordered from:

American Correctional Association
4321 Hartwick Road, Suite L-208
College Park, Maryland 20740
(301) 864-1070

CORRECTIONAL LAW PROJECT

Staff

Richard Crane
Director

Michael Weisz
Assistant Director

Jeffrey Curtis
Assistant Director

Debbi Depew-Smith
Project Secretary

Advisory Board

Mel Axilbund, Esquire
Staff Director, Corrections Commission
American Bar Association
Washington, D. C.

James N. Bradford, Esquire
Assistant Attorney General
Minneapolis, Minnesota

William B. Eldridge, Esquire
Director of Research
Federal Judicial Center
Washington, D. C.

William D. Leeke, Commissioner
South Carolina Department of
Corrections
Columbia, South Carolina

John J. Moran, Director
Department of Corrections
Phoenix, Arizona

Margery Evans Reifler
Assistant Attorney General
New York, New York

THE AMERICAN CORRECTIONAL ASSOCIATION

William D. Leeke
President

Anthony P. Travisono
Executive Director

Raymond S. Olsen
Associate Executive Director

ACKNOWLEDGMENTS

We would like to express our sincere thanks to those state departments of correction who shared their rules and regulations with us. Their kindness and the quality of their submissions made our task much easier.

We would also like to thank the Correctional Law Workshop participants for reviewing the drafts of various models and providing us with suggestions for their improvement. We are also appreciative of the suggestions received from Eugene Barkin, Alan Chaset, Robert Fosen, John Moran, Ernest Reimer, Margery Reifler, Dudley Spiller and Anthony Travisono.

CONTENTS

INTRODUCTION

As everyone even remotely connected with corrections knows, the evolution of correctional law in the past few years has had a tremendous impact on the daily operation of penal facilities. As the constitutional rights of prisoners have been more clearly defined by the courts, the revision of outdated regulations has become more and more difficult.

The model rules and regulations contained in this booklet attempt to provide correctional officials with up-to-date, constitutional procedures which can be implemented without fear of legal attack. In order to insure their continuing legal viability and avoid needless litigation, they also take into account possible future judicial trends. In addition, they were drafted with concern for both institutional security and inmate fairness.

It is hoped that these models will be used in two ways. First, as a basis for comparison with existing regulations which may not be constitutionally sound and, second, as a basic framework for those who need to put "traditional practices" into a more formal context.

This document consists of six individual models covering the areas of correspondence, discipline, inmate grooming and attire, search and seizure, use of force and visiting. It is in no way an exhaustive study of all necessary inmate regulations. It has been limited to these few areas because it was felt they were the most crucial, either because of their previous neglect or their impact upon the inmate population. Hopefully, in time, additional regulations can be added.

Following each model is a commentary which explains the regulation and supports its provisions with case law, correctional standards, state statutes, individual state practices or other authority. Where pertinent, a brief discussion of the law is also given.

CORRESPONDENCE

Model

I. PRIVILEGED CORRESPONDENCE

A. Privileged correspondence is mail between an inmate and any one of the following:
   1. Attorneys.
   2. Judges and clerks of federal, state and local courts.
   3. The Director of the Department of Corrections and his staff.
   4. The President, Vice-President and Attorney General of the United States.
   5. Any member of the United States Congress.
   6. The Governor, Lieutenant Governor and Attorney General of any state.
   7. Any member of any state legislature.
   8. Any parole board member.

B. Outgoing Mail
   1. Outgoing mail to any of the above is not to be opened, inspected or censored in any manner.
   2. Outgoing privileged mail initiated by an indigent inmate shall be mailed without charge to the inmate. This shall extend only to first class postage for all legal mail and shall not include registered, certified or insured mail.

C. Incoming Mail
   1. Incoming mail from any of the above shall be treated as privileged only if the name and official status of the sender appears on the envelope.
   2. All incoming privileged correspondence may be opened and examined for cash, checks, money orders or contraband, but only in the presence of the inmate to whom the communication is addressed.
   3. In cases where cash, checks or money orders are found, they shall be removed and credited to the inmate's account.
   4. Where contraband is found, it shall also be removed. Only illegal items and items which threaten the security of the institution shall be considered contraband.
   5. In no case shall the letter be read or censored.

D. Packages
   1. Incoming packages from privileged correspondents shall be inspected for contraband in the same manner as any other items of privileged correspondence.

II. GENERAL CORRESPONDENCE

A. General correspondence is mail between an inmate and someone other than those approved for privileged correspondence.

B. Outgoing Mail
   1. Inmates shall be allowed to send letters to whomever they wish, including inmates at other institutions. The number of letters sent shall not be limited.
   2. Outgoing mail is not to be opened, inspected or censored in any manner.
   3. Indigent inmates shall receive postage and stationery sufficient to send at least three letters of general correspondence per week.

C. Incoming Mail

1. There shall be no limit on the amount of incoming mail an inmate is allowed to receive.
2. All incoming general correspondence may be opened and examined for cash, checks, money orders or contraband.
3. In cases where cash, checks or money orders are found, they shall be removed and credited to the inmate's account.
4. Where contraband is found, it shall also be removed. Only illegal items and items which threaten the security of the institution shall be considered contraband.
5. In no cash shall the letter be read or censored unless there is evidence that the correspondence contains one or more of the following:
   a. Plans for sending contraband in or out of the institution.
   b. Plans for criminal activity, including escape.
   c. Information which, if communicated, would create a clear and present danger to the security of the institution.
6. If any of the above is discovered, the letter may be read and censored. A written and signed notice stating the reason the letter was read and/or censored shall be given to the sender.
   a. The sender may appeal this decision to the warden or his designated representative who shall not be the person who originally rejected the correspondence.
7. In each case where it is deemed necessary to read an inmate's mail, a written record shall be made which shall include the following:
   a. The inmate's name and number.
   b. A description of the mail read.
   c. The reason it was necessary to read the mail.
   d. The signature of the officer who read the mail.
8. The written records shall be reviewed each month by the Director of the Department of Corrections or his designee. Such review will be made to determine if:
   a. There were sufficient grounds for reading the mail.
   b. The reasons for reading the mail were related to the legitimate institutional interests of security, order and rehabilitation.
   c. The inspections and reading were no more extensive than necessary to further these interests.

D. Packages

1. Each warden shall prepare and make available to the inmate population a list of items which may be received in packages.
2. Any person may purchase and send such approved items to any inmate.
3. All incoming packages shall be inspected for contraband.
4. Any item which is not on the approved list shall be returned to the sender.

E. Publications

1. Books, magazines, newspapers and other printed matter shall be approved for inmates unless deemed to constitute an immediate threat to the security of the institution or determined to be obscene under the current laws and court decisions on obscenity.
2. If the publication is found to be unacceptable under the above standards, the material shall be returned to the sender.

III. PROCEDURES FOLLOWING REMOVAL OF ITEMS FROM INCOMING MAIL

A. In each case where it is deemed necessary to remove any item from incoming mail, a written record shall be made of such action.

B. Such record shall include:
   1. The inmate's name and number.
   2. A description of the mail in question.
   3. A description of the action taken and the reason for such action.
   4. The disposition of the item involved.
   5. The signature of the acting officer.
   6. A copy of the record shall be given to the inmate and to the sender of the mail.

IV. COLLECTION AND DISTRIBUTION

A. The mail shall be collected from the inmates by a correctional employee at least once every day, except Sundays and postal holidays.
   1. At no time shall the mail be collected by an inmate.
   2. A regular set schedule of mail collection shall be initiated.

B. Incoming mail shall be held only so long as is necessary for inspection or for reading where there is a sufficiently compelling reason to do so, in accordance with Section II C-5. In no case shall it be held longer than 24 hours.

C. Distribution of incoming mail shall be done by a correctional employee directly to the receiving inmate's hand.
   1. At no time shall the mail be distributed by an inmate.
   2. Nor shall mail be dropped on a table or other convenient place for each inmate to come and look for his own.

Commentary

Perhaps no other area in the correctional law field has attracted as much litigation as prisoner correspondence. This is probably due to the fact that the correspondence involves not only the inmate, but also the free person who writes and receives mail from the inmate and who is still protected by the First Amendment and all of its judicial gloss. As Justice Powell said in *Procunier v. Martinez*, 416 U.S. 396 (1974) ". . . the interests of the parties are inextricably meshed" at (409). Add to this that inmates quite often correspond with those for whom other privileges exist, such as lawyers, ministers and the press, and the complexity of constitutional issues becomes evident.

For these and other reasons, it is important to tread very carefully when writing a correspondence regulation.

PRIVILEGED CORRESPONDENCE

The model lists a number of persons and classifies them as privileged correspondents. This is in keeping with past court decisions (See generally *Wolff v. McDonnell*, 418 U.S. 578 (1974); *Sostre v. McGinnis*, 442 F.2d 178 (2nd Cir. 1971). Correspondence between these persons and inmates are treated differently than general correspondence in compliance with and anticipation of future judicial action.

A. Outgoing Mail

There seems to be no compelling reason to either inspect, open, read or censor any privileged outgoing mail. This is emphasized by the National Sheriffs' Association's *Standards for Inmates' Legal Rights* which says, "Outgoing mail

should be left sealed and untouched." (§19 (1974)). Therefore, to prevent any hint of impropriety and to limit inmate complaints regarding denial of access to court or counsel, the model prohibits any interference with outgoing privileged mail. To assist an institution in determining what mail is being sent to privileged correspondents, especially attorneys, the institution may wish to contact the local and state bars for a list of members of the bar.

The model further requires that privileged correspondence sent by indigent inmates be mailed without charge to that inmate. This will allow these inmates the opportunity to keep in touch with their attorney, the court, etc. as well as defuse any equal protection complaints that may arise. (See *Tentative Draft of Standards Relating to the Legal Status of Prisoners*, American Bar Association, §6.1(b) (1977). See also, *Bach v. Coughlin*, 508 F2d 303, 308 (7th Cir. 1974); and *Illinois Prison Postal Regulations*).

B. Incoming Mail

In order for any incoming mail to be classified as privileged, the envelope must indicate that the mail is being sent by one entitled to the privilege. This is in keeping with the United States Supreme Court's decision in *Wolff v. McDonnell*, where they said, "We think it entirely appropriate that the State require any such communications to be specifically marked. . . if they are to receive special treatment." (*Wolff v. McDonnell*, supra at 576.)

Once the privileged mail is identified as such, it may be opened and examined for cash, checks, money orders or contraband. (See Commission on Accreditation for Corrections, *Proposed Standards for Adult Long-Term Institutions*, §3367 (1977); *National Advisory Commission on Criminal Justice Standards and Goals, Corrections*, §2.17 (1973); *Response of the American Correctional Association to Correctional Standards* of the *National Advisory Commission*, §2.17 (1976); *Manual of Correctional Standards*, American Correctional Association, 546 (1966).) This, however, must be done in the presence of the inmate to whom the mail is addressed. (See *Wolff v. McDonnell*, supra.)

The model explicitly states that in no case shall incoming privileged mail be read or censored. It would appear that any regulation which authorized the censorship or reading of incoming privileged mail would be greater than is necessary to protect legitimate governmental interests and would be found to violate First Amendment rights. (See *Procunier v. Martinez*, 416 U.S. 396 (1974); and *Wolff v. McDonnell*, supra.)

C. Packages

Since most packages sent by privileged correspondents will consist of published material, they will fall under the protection of the First Amendment. Therefore, they should be inspected only in the presence of the receiving inmate and only in the same manner as described above.

GENERAL CORRESPONDENCE

A. Outgoing Mail

The recommendation that inmates be allowed to send letters to whomever they wish, including inmates at other institutions may go beyond the present state of the law. (See *Peterson v. Davis*, 415 F.Supp. 198 (E.D. Va. 1976); and *Lawrence v. Davis*, 401 F.Supp. 1203 (W.D. Va. 1975). However, "correspondence with members of an inmate's family, close friends, associates and organizations is beneficial to the morale of all confined persons and may form the basis for good adjustment in the institution and in the community." (*Association of State Correctional Administrators – Policy Guidelines* (1972).) With these goals possibly attainable, it seems both senseless and destructive to curtail correspondence by restricting either the number of letters an inmate may send or to whom he may send them. The lifting of these restrictions has also been incorporated in various other correctional standards. (See *Tentative Draft of Standards Relating to the Legal Status of Prisoners*, American Bar Association, §6.1 (1977); *National Advisory Commission on Criminal Justice Standards and Goals, Corrections*, §2.17 (1973); *Response of the American Correctional Association to Correctional Standards*, §2.17 (1976).

The prohibition against opening or inspecting privileged outgoing mail also applies to outgoing general correspondence. What is sent out of an institution through the mail appears to be a minor risk to the security of the prison and should not be examined for fear of involving the institution in needless legal action.

The model requires that all indigent inmates be given a postage and stationery allowance so that they can send at least three personal letters per week. The reasons behind this are: 1) that institutions should develop affirmative programs to help inmates maintain their community ties (*National Advisory Commission Standard*, supra at 68), and 2) that "no one should be prevented from writing merely because he is without funds" (ACA, *Manual of Correctional Standards*, supra at 546)).

B. Incoming Mail

"Correctional authorities should not limit the volume of mail to . . . a person under supervision." (*National Advisory Commission Standard*, supra §2.17; see also *Response of the ACA*, supra). By allowing unlimited correspondence, inmate hostility and resentment is minimized.

The procedure for examining incoming general correspondence should be similar to that examining incoming privileged correspondence. All contraband and money should be removed prior to delivering the letter to the inmate. In the area of general correspondence, however, the courts have not required that the letter be inspected in the presence of the inmate, the model thus omits that step.

The model permits the reading or censoring of incoming general correspondence only under certain limited circumstances, generally when the security of the institution is involved. This is in compliance with the language in *Procunier v. Martinez*, supra which requires that the limitation on First Amendment freedoms be "no greater than is necessary or essential to the protection of the particular governmental interest involved" (at 413). If under these circumstances the mail is read, certain procedural safeguards must be implemented. First, a written notice of the reason the letter was read or censored must be given to the sender. Second, the sender has a right to appeal the decision. (See *Procunier v. Martinez*, supra. But see, *Wolfish v. U.S.*, 428 F.Supp. 333 (S.D.N.Y. 1977) which also requires that the letter be read in the inmate's presence.)

Central to any strategy to avoid litigation when reading and censoring mail is a constant monitoring of the institution's mail inspection program. The model requires a written record of all mail which is read; it also provides review by the Director of the Department of Corrections, or his designee, of all instances when mail has been read as a sufficient monitoring program. Administrators should pay particular attention to instances when mail has been read without reason to believe that a security interest of the institution was at stake.

C. Packages

The model allows for inmates to receive items from the outside community. A list of all items which can be received by inmates should be given to all prisoners. This will minimize the risk of unwelcomed items entering the institution through the mail, as well as lessen misunderstandings as to what items are acceptable. These packages may all be opened and examined for contraband.

D. Publications

A number of cases have held that the Supreme Court's decision in *Procunier v. Martinez* applies to the censorship of published materials. Therefore, if the state wishes to censor all or a portion of a publication, it must show that it furthers one or more of the institutional concerns of security, order or rehabilitation. (See *Aikens v. Jenkins*, 534 F.2d 751 (7th Cir. 1976); *Gray v. Creamer*, 376 F.Supp. 675 (W.D. Pa. 1974).) The model takes this into account and requires that all publications should be approved unless found to be a threat to the institution's security or to be obscene.

The "publishers only" rule whereby inmates could only receive books directly from the publisher is presently being reconsidered by some courts. (See *Cruz v. Hauck*, 515 F.2d 322 (5th Cir. 1975); *Rhem v. Malcolm*, 317 F.Supp. 594

(S.D.N.Y. 1974), aff'd. 507 F.2d 333 (2nd Cir. 1974); *Burke v. Levi*, 391 F.Supp. 186 (E.D. Va. 1975).) The model takes note of this trend by omitting that requirement.

PROCEDURES FOLLOWING REMOVAL OF ITEMS FROM INCOMING MAIL

Whenever it is necessary to remove any item from incoming mail, (as described elsewhere in the model) a written report should be made of the action. This report can serve a twofold purpose. First, it will serve to notify both the inmate and the sender that the item has been received and intercepted, thus reducing the chance that either of these two parties will file a grievance complaining that the institution has been stealing items from the mail. Second, it can put the institution on notice as to what persons are abusing the mail and require their correspondences to be more closely scrutinized.

COLLECTION AND DISTRIBUTION

"Every effort should be made to expedite the handling of both incoming and outgoing mail." (ACA, *Manual of Correctional Standards*, supra at 546). To accomplish this goal, the model requires: 1) that the mail be collected once daily, except Sundays and postal holidays, and 2) that incoming mail be held no longer than twenty-four hours before distribution.

The model also attempts to curtail abuses in mail collection and delivery by prohibiting inmates from processing

DISCIPLINARY PROCEDURES

Model

I. RULEBOOK

A. A copy of the rulebook containing a list of all chargeable offenses shall be made available and explained, where necessary, to all inmates upon their entry into the institution.

B. The rulebook shall contain a list of possible sanctions that may be invoked for each specific offense. Such sanctions shall include:
1. Reprimand.
2. Loss of one or more privileges for a maximum of 30 days.
3. Confinement to assigned quarters for a maximum of 30 days.
4. Placement in more secure housing unit for a maximum of 90 days.
5. Restitution.
6. Isolated confinement for a maximum of 15 days.
7. Transfer to a greater level of institutional custody.
8. Loss of good time.

II. PROCEDURES FOLLOWING A MINOR OFFENSE

A. A minor offense is one in which the extent of sanctions to be imposed are restricted to:
1. Reprimand.
2. Loss of one or more privileges.

B. Upon the reasonable belief of an institutional staff member that such an offense has been committed, he shall file a written disciplinary report of the incident with the shift supervisor. Such report shall include:
1. The specific rule violated.
2. The facts surrounding the incident.
3. The names of witnesses to the incident, if any.
4. The disposition of any evidence involved.
5. Any immediate action taken.
6. The date and time of the offense.
7. The signature of the reporting officer.

C. Upon the reporting of the alleged minor offense, the following steps will be undertaken:
1. Notice
   a. A copy of the disciplinary report, as a notification of the charges, shall be given to the inmate at least 24 hours prior to a hearing on the matter, unless such notice is waived by the inmate.
   b. The inmate shall be advised of his right to consult with counsel or counsel substitute prior to the hearing.
   c. The inmate shall be advised of his right to waive the hearing and plead guilty to the charges.
2. Hearing
   a. The inmate shall be present at all phases of the hearing, unless excluded for reasons of institutional security; such reason to be stated in writing.
   b. The inmate shall be allowed to make a statement and present any reasonable evidence in his behalf.

c. The hearing officer, who shall be a high ranking officer not having direct knowledge of the incident, shall allow any other evidence that may aid in his decision.

3. Record of findings
   a. Following the hearing, the hearing officer shall state in writing his findings, the evidence relied on and the sanctions imposed, if any.
   b. A copy of this record shall be given to the inmate.
4. Appeal
   a. The inmate shall be advised of his right to appeal the decision to the disciplinary board.
   b. He must notify the hearing officer of his intention to appeal the decision immediately following the hearing; failure to do so will waive such right to appeal.
5. Expungement from the inmate's record
   a. If the hearing officer finds the inmate innocent of the charges, all reference to the offense shall be removed from his file.

III. PROCEDURES FOLLOWING A MAJOR OFFENSE

A. A major offense is a rules violation in which a stricter sanction may be imposed than that permitted following a minor offense.

B. Upon the reasonable belief of an institutional staff member that such an offense has been committed, he shall file a written disciplinary report of the incident with the shift supervisor. Such report shall include:
   1. The specific rule violated.
   2. The facts surrounding the incident.
   3. The names of witnesses to the incident, if any.
   4. The disposition of any evidence involved.
   5. Any immediate action taken.
   6. The date and time of the offense.
   7. The signature of the reporting officer.

C. Upon the reporting of the alleged major offense, the following steps will be undertaken:
   1. Notice
      a. A copy of the disciplinary report, as a notification of the charges, shall be given to the inmate at least 24 hours prior to a hearing on the matter unless such notice is waived by the inmate.
      b. The inmate shall be advised of his right to consult with counsel or counsel substitute prior to the hearing.
      c. The inmate shall be advised of his right to waive the hearing and plead guilty to the charges.
   2. Pre-hearing detention
      a. Until the hearing, the inmate is entitled to remain in his existing status, unless he constitutes a threat to other inmates, staff members, or himself which demands pre-hearing detention.
      b. If pre-hearing detention is ordered by the shift supervisor, such order must be reviewed by the warden or his designee within 24 hours. Failure to do so shall return the inmate to his previous status.
      c. Any time spent in pre-hearing detention shall be credited against any subsequent sentence imposed.
   3. Hearing
      a. All hearings for major offenses shall be before the disciplinary board composed of an impartial three member panel. Any panel member shall be disqualified in every case in which:
         1. He has filed the complaint or witnessed the incident.
         2. He has participated as an investigating officer.

3. He is the person charged with the subsequent review of the decision.
4. He has any personal interest in the outcome.

b. At the hearing, the inmate shall be entitled to the following:
1. An opportunity to be present during all phases of the hearing; except that he may be excluded during the board's deliberations and for reasons of security, such reasons to be stated in writing.
2. Representation by counsel or counsel substitute.
3. Copies of any written information which the disciplinary board may consider.
4. An opportunity to make a statement and present documentary evidence.
5. An opportunity to call witnesses on his behalf; unless doing so would be irrelevant, redundant or unduly hazardous to institutional safety; such reasons for denial to be stated in writing.
6. An opportunity to confront and cross-examine his accuser and all adverse witnesses; unless doing so would be unduly hazardous to institutional safety or would endanger the physical safety of a witness; such reasons for denial to be stated in writing.

c. At any time during the hearing the board on their own motion, or at the request of the inmate, may order an investigation into the incident, and continue the hearing at a future time.

4. Record of findings
a. At the conclusion of the hearing, the disciplinary board shall prepare a written record. This record shall contain:
1. The board's decision.
2. The sentence imposed.
3. A summary of the evidence upon which the decision and sentence were based.
4. A list of all witnesses and a summary of their testimony.
5. A statement as to whether the sentence may be stayed during an appeal and the reasons for that decision.
6. The date and time of the hearing.
7. The signatures of all board members.

b. A copy of this record shall be given to the inmate.

5. Appeal
a. The inmate shall be advised of his right to appeal and shall be presented with an appeal form for such purpose.
b. All decisions must be appealed in writing within 10 days of the disciplinary hearing, failure to do so will waive such right to appeal.
c. All appeals shall be heard by the warden who may affirm, reserve or remand the decision. He may also reduce, but may not increase the sentence imposed.

6. Expungement from the inmate's record
a. If the disciplinary board finds the inmate innocent of the charges, all reference to the offense shall be removed from his file.

IV. PROCEDURES FOLLOWING CRIMINAL MISCONDUCT

A. Upon the determination of the shift supervisor or the disciplinary board that an inmate has committed a criminal offense, the proper law enforcement authorities shall be notified.

B. Any disciplinary hearing for this alleged offense shall be conducted in accordance with Section III C-3 above and the inmate shall be advised that nothing he says during the course of the disciplinary hearing may be used against him in any subsequent criminal proceeding.

V. PROCEDURES FOLLOWING AN EMERGENCY

A. In the event of a widespread institutional disruption which requires emergency action any or all portion of this regulation may be temporarily suspended.

B. Any inmate involved in the emergency may be detained without a hearing throughout the course of the emergency.

C. Upon the restoration of order, all inmates who were detained shall be accorded all disciplinary procedures as provided for by this regulation.

Commentary

The fairness of prison discipline, not only in actuality but as perceived by the prison population, is essential in preventing unrest and maintaining harmony within an institution. Imperative to any equitable program are well defined rules of conduct, strict but not severe penalties and fairness and equality in imposition of punishment. At the forefront must be a disciplinary procedure which allows an inmate to air his side before an impartial hearing officer. An inmate "will more likely feel treated fairly if he has an opportunity to speak his piece fully before a Board or officer who he believes will hear him out, believe what he says (or at least some of it), and assign a penalty somewhere near what he can reasonably accept as appropriate." (Minnesota State Prison, *Disciplinary Due Process in Correction Institutions,* 3 (1974).

The United States Supreme Court has recognized the need for fairness in prison discipline and has required certain due process rights prior to penalizing an inmate for inappropriate behavior. In *Wolff v. McDonnell,* 418 U.S. 539 (1974), the Court spelled out what process was due in hearings that could result in the loss of good time. This was later reiterated in *Baxter v. Palmigiano,* 96 S.Ct. 1551 (1976). In both cases, the Court stopped short of requiring the full panoply of rights which are available in criminal proceedings.

Indications are, however, that these cases are not the final say on the matter. For as Justice White said in *Wolff,* "(a)s the nature of the prison disciplinary process changes in future years, circumstances may then exist that will require further consideration and reflection by this Court" (at 570). What future circumstances will arise and what direction the Court will then take remains to be seen. However, it is important to realize that the rights due inmates in disciplinary procedures are not static and may change and expand greatly in coming years.

The model has taken into consideration both the present requirements and possible future demands that are to be made on disciplinary proceedings. It has also streamlined procedures so that both justice and punishment can be meted out swiftly.

RULEBOOK

"It is the responsibility of any person or persons in charge of the management of an institution for the confinement of prisoners to develop and describe in writing a fair and orderly procedure for processing disciplinary complaints against prisoners and to establish rules, regulations and procedures to insure the maintenance of a high standard of fairness and equity. The rules

shall prescribe offenses and the punishments for them that may be imposed" (*Model Act for the Protection of Rights of Prisoners,* National Council on Crime and Delinquency, §4 (1972)). These rules should be reasonably definite so as to advise an inmate of prohibited conduct and should be distributed and explained to him upon his arrival at the institution. (See generally, *Meyers v. Alldredge,* 492 F.2d 296 (3rd Cir. 1974); *Landman v. Royster,* 354 F.Supp. 1292 (E. D. Va. 1973); *Goldsby v. Carnes,* 365 F.Supp. 395 (W.D. Mo. 1973).)

The model avoids compiling a list of all chargeable offenses, preferring to leave that in the hands of individual institutions. It does, however, delineate possible sanctions for rule violations. These sanctions are generally typical of those currently found in prison's nationwide and are self explanatory except in the following instances: 1) In no case should loss of privileges include "mail, visitation, physical exercise at least one hour per day, or access to the judicial and grievance processes." (*Tentative Draft of Standards Relating to the Legal Status of Prisoners,* American Bar Association, §3.2 (1977); 2) The maximum length of permissible solitary confinement should be 15 days. Many penologists are coming to believe that whatever positive effect isolation has on an inmate happens within ten to fifteen days of lockup. Longer periods of time have been shown to be deleterious to both his psychological well-being and his attitude towards prison life. (See Minnesota State Prison, *Sentencing Considerations,* 3 (1975); Burns, *Corrections Organization and Administration,* 386 (1975); 3) When an inmate is transferred for disciplinary reasons to a greater level of institutional custody, he should receive full due process. This proclamation may possibly be contrary to the Supreme Court's decision in *Meachum v. Fano,* 96 S.Ct. 2532 (1976). It has, however, been adopted by the *National Advisory Commission on Criminal Justice Standards and Goals,* Corrections (§2.12), *The Response of the American Correctional Association to Correctional Standards* of the *National Advisory Commission* (§2.12), and the *Tentative Draft of Standards* of the American Bar Association (§3.1).

PROCEDURES FOLLOWING A MINOR OFFENSE

Minor offenses are ones in which the penalties imposed do not cause the inmate a substantial deprivation. (See *Cousins v. Oliver,* 369 F.Supp. 553 (E.D. Va. 1974); *Newkirk v. Butler,* 364 F.Supp. 497 (S.D.N.Y. 1973), aff'd. as modified 499 F.2d 1214 (2nd Cir. 1974).) These penalties may range from a reprimand to the loss of privileges, usually restricted to loss of commissary, entertainment or recreational use for a minimal period of time (See Commission on Accreditation for Corrections, *Proposed Standards for Adult Long-Term Institutions,* §3357 (1977); *National Advisory Commission Standards,* supra; *Response of the ACA,* supra).

The good judgment of institutional staff, when uncovering some offenses can go far towards alleviating further problems. "In well run institutions line employees can prevent many infractions from becoming serious through counseling and verbal reprimands rather than involving disciplinary committees or administrators." (*Riots and Disturbances,* American Correctional Association, 31 (1975).) However, when a written report of the offense, as described in detail by the model, is to be filed by the officer certain procedures prior to imposing punishment must be followed.

The Supreme Court in both *Wolff v. McDonnell* and *Baxter v. Palmigiano* refrained from deciding what procedures are required by due process prior to punishing minor rules violations. In *Wolff* they did, however, allude to them and suggested that less extensive procedures may be permitted when imposing minor penalties than would be required when imposing major ones. "We do not suggest, however, that the procedures required by today's decision for the deprivation of good time would also be required for the imposition of lesser penalties such as the loss of privileges." (at 572 n. 19)

The model requires that an inmate be provided with notice of the charges, the right to consult with counsel or counsel substitute, a hearing at which he can make a statement in his defense, a written report of the hearing officer's

decision and an opportunity to appeal that decision. Each of these requirements has its roots in either lower court case law, correctional standards or analogy to major offense proceedings.

A. Notice

The right to be notified of the charges is fundamental to any fair system of discipline. (See *National Advisory Commission Standards* at 52.) The inmate should be given a copy of the disciplinary report at least 24 hours prior to any hearing to adequately inform him of the offense he is accused of and to allow him time to prepare a defense. Without such notification, the concept of due process would be meaningless.

B. Counsel

The right to consult with counsel or counsel substitute prior to a minor offense hearing has been espoused by the American Bar Association in their *Tentative Draft of Standards* (supra). Such consultation would allow the inmate to be informed of his rights and also the procedures to be followed at the hearing. It could also help him decide whether to waive his right to a hearing and plead quilty.

C. Hearing

The opportunity to be present at a hearing and to at least make a statement in his defense, has been granted to inmates by most authorities. As a federal district court in Nevada has indicated, a "minor infraction requires . . . an opportunity to respond before imposition of punishment." *Craig v. Hocker,* 405 F.Supp. 656, 662 (D. Nev. 1975); see also, *Avant v. Clifford,* 67 N.J. 496, 341 A.2d 629 (1975). This position has also been adopted by the Commission on Accreditation, *Proposed Standards,* §3361; the *National Advisory Commission Standards* (supra); the *Response of the ACA* (supra); the *ABA Tentative Draft of Standards* (supra) and the United Nations in their *Standard Minimum Rules for the Treatment of Prisoners,* Fourth United Nations Congress on Prevention of Crime and Treatment of Offenders, §30 (1955). To make the hearing as impartial as possible, the hearing officer should have no prior knowledge of the incident.

D. Report

Requiring a hearing officer to file a written report of his findings serves a dual purpose. First, it provides a conclusive record of the incident for the inmate's file. Second, it provides a record of the decision should the matter be appealed. This requirement has been proposed by the *Tentative Draft of Standards* of the American Bar Association, (§3.2).

E. Appeal

Finally, the model calls for each hearing officer to advise the inmate of his right to appeal the decision to the disciplinary board. This is in keeping with the *National Advisory Commission Standards'* pronouncement that "the offender should be provided with the opportunity to request a review by an impartial officer or board of the appropriateness of the staff action" (at §2.12; see also *Response of the ACA* (§2.12)).

PROCEDURES FOLLOWING A MAJOR OFFENSE

The model defines major offenses and provides that a disciplinary report should be filed upon the reasonable belief of staff that such offense has been committed. This report is similar to that required following a minor offense and it is suggested that a standard report form be developed by the institution to expedite the reporting of any offense.

The Supreme Court, in *Wolff v. McDonnell,* as already mentioned, spelled out what procedures are required prior to taking away an inmate's good time. In a footnote they indicated that these same procedures were required if an inmate was to be placed in isolation as punishment. These procedures included: 1) a written notice of the charges at least 24 hours prior to a disciplinary hearing; 2) a hearing before an impartial board in which the inmate is allowed to "call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals" (at 566); and 3) a written statement by the fact-finder of the reasons for his decision. The model has required that these pro-

cedures be followed prior to imposition of any major penalty. The model also expands upon some of the procedural rights required by *Wolff* and adds others for the reasons given below.

A. Counsel Prior to a Hearing

As with minor offenses, prior to any hearing, the inmate should be allowed to consult with counsel or counsel substitute. If he consults with an attorney, it is to be at his own expense. A counsel substitute may be one of many individuals including: 1) any member of the institutional staff; 2) any member of the department of corrections; or 3) any person trained in the law by an attorney or educational institution, including an inmate. (See *Inmate 24394 v. Schoen*, 363 F.Supp. 683 (D. Minn. 1973); *Tentative Draft of Standards*, American Bar Association (§2.2).)

B. Pre-hearing Detention

The inmate may be placed in pre-hearing detention if "he constitutes a threat to other inmates, staff members or himself" (*National Advisory Commission Standards*, §2.12; see also *Response of the ACA* (§2.12)). Such detention, due to its harshness, must in all cases be reviewed by the warden or his designated representative within 24 hours of its inception. (See *Inmate 24394 v. Schoen*, supra; *Model Rules and Regulations on Prisoners' Rights and Responsibilities*, Center for Criminal Justice, Boston University School of Law (1973).) It is urged that this action be imposed no more than is absolutely necessary. (See Commission on Accreditation, *Proposed Standards*, §3343.)

C. Disciplinary Board Composition

The composition of the three man disciplinary board should include, if at all possible, at least one member who is not an institutional employee. This will help insure the impartiality of the board by providing a check against "institutional loyalties and conflict of interest in the decision-making body." (Hollen, *Emerging Prisoner's Rights*, 33 Ohio St. L.J. 1, 61-62 (1972).) A rotating group of citizens who have volunteered to serve on the disciplinary board or a list of names provided by the local bar would be ideal sources to fill this slot. (See *Model Rules and Regulations on Prisoners' Rights and Responsibilities*, (supra at 160); *Avant v. Clifford*, 67 N.J. 496, 341 A.2d 629 (1975).)

D. Counsel at the Hearing

The model calls for a counsel or counsel substitute to be present for any inmate during all stages of the hearing. Although it is realized that a disciplinary hearing is not a full scale criminal proceeding and *Wolff* did not provide for the right to counsel unless an illiterate inmate was involved or the issues involved were comp'ex ones, it is felt that, "(t)he right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel . . . counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient . . . (*Goldberg v. Kelly*, 397 U.S. 254, 270, 271 (1970). See also Palmer, *Constitutional Rights of Prisoners*, §7.4.3(1973)).

E. Written Refusal to Call Witnesses

In *Wolff* the Supreme Court declared that "it would be useful for the Committee to state its reason for refusing to call a witness," although they did not require it (at 566). The model believes, however, that presenting one's defense through the use of witnesses is both important and equitable. Therefore, a valid reason for denying this right should be stated and to allow its review, it should be done in writing. (See generally, *Workman v. Mitchell*, 502 F.2d 1201 (9th Cir. 1974); United States ex rel *Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973), cert. denied 414 U.S. 1146. See also *Tentative Draft of Standards*, American Bar Association, supra.) Also, if the situation arises in which an inmate's safety would be endangered by requiring him to testify in person, the board should either require his testimony in writing or hold a closed hearing. (See *Model Rules and Regulations on Prisoners' Rights and Responsibilities*, supra at V-7; *Inmate 24394 v. Schoen*, supra.)

F. Confrontation and Cross Examination

The inmate should be allowed to confront and cross-examine both his

accuser and other adverse witnesses. Although some courts have denied an inmate the right to confront his accuser for fear of placing the prisoner on the same level as the prison official, (See *Nolan v. Scarfati,* 306 F.Supp. 1 (D. Mass. 1969).) "(f)airness to a prisoner prior to a major change in conditions of confinement or other penalty must outweigh whatever possible effect would occur in the prisoner's attitude or the prison atmosphere." (*Tentative Draft of Standards,* American Bar Association, supra at 451.) Cross-examining adverse witnesses also is an important way of ferreting out the truth. In cases where cross-examination may prove dangerous to the witness, it may be refused, however, reasons for the refusal should be in writing. (See *Tentative Draft of Standards,* Id.)

G. Inmate Copy of All Evidence

Providing the inmate with a copy of all written information which the disciplinary board may consider allows him to prepare a full defense. This requirement has been suggested by the American Bar Association in their *Tentative Draft of Standards.*

H. Appeal

The model provides the right to appeal all disciplinary decisions to the warden within ten days. This right has been encouraged by the courts as well as by correctional standards as a way of providing an internal review of all decisions. All inmates should be made aware of its existence following the hearing. (See, e.g., *Manual of Correctional Standards,* American Correctional Association, 401 (1966); *National Advisory Commission Standards,* supra.)

I. Expungement

Finally, mention should be made of the fact that in both major and minor offenses, if the inmate is found innocent of the charges, the full record of the incident shall be expunged from his record. This provision has been adopted by the Commission on Accreditation for Corrections, in their *Proposed Standards for Adult Long-Term Institutions,* (§3356, 3363); the *National Advisory Commission Standards,* supra; and the American Correctional Association in their *Response to Correctional Standards,* (supra); and is meant to protect the inmate from possible adverse collateral consequences stemming from the incident.

PROCEDURES FOLLOWING CRIMINAL MISCONDUCT

An inmate in defending himself in front of the disciplinary board for an offense which may also be a violation of the criminal laws may find that anything he says may be used against him at the subsequent criminal proceeding. The model seeks to alleviate this problem by providing the inmate with "use immunity" protection at the criminal proceeding for anything he says at the disciplinary hearing. This protection is in line with the Supreme Court's declaration in *Baxter v. Palmigiano,* 96 S.Ct. 1551 (1976) that ". . . if inmates are compelled in those proceedings to furnish testimonial evidence that might incriminate them in later criminal proceedings, they must be offered 'whatever immunity is required to supplant the privilege' and may not be required to waive such immunity." (at 1557). (See also *Shimabuku v. Britton,* 503 F.2d 38 (10th Cir. 1974); *Avant v. Clifford,* 67 N.J. 496, 341 A.2d 629 (1975).)

PROCEDURES FOLLOWING AN EMERGENCY

When emergency situations, such as riots or major disturbances, occur in correctional institutions, it is important for the prison officials to act efficiently and effectively to control the situation. The model provides that during such occurences any or all portions of the regulation may be temporarily suspended. This is because ". . . the state's interest in decisive action clearly outweighs the inmate's interest in prior procedural safeguards" (*LaBatt v. Twomey,* 513 F.2d 641, 645 (7th Cir. 1975). Upon the termination of the emergency, however, all due process procedures must be reinstituted and the inmate must be given a disciplinary hearing. (See e.g., *Carlo v. Gunter,* 520 F.2d 1293 (1st Cir. 1975); *Morris v. Travisono;* 509 F.2d 1358 (1st Cir. 1975); *Johnson v. Anderson,* 420 F.Supp. 869 (M.D. Pa. 1976).

GROOMING AND ATTIRE

Model

I. GROOMING

A. Hair

1. Inmates shall be permitted to adopt any hair style or length, including beards and moustaches provided they are kept clean.
   a. Shampoo shall be provided for this purpose.
   b. Inmates shall also have the opportunity to shave regularly.
2. When the length or style of one's hair is found to present a health or sanitation problem, the inmate may be required to trim or cut his hair or wear a hair net or other covering to alleviate the problem.
3. Inmates performing work assignments around machinery which may reasonably be determined to be a safety hazard may be required to wear appropriate protective head coverings.
4. New identification photographs shall be taken of any inmate whose outward appearance changes or is altered as a result of a change in his hair style.

B. Bathing

1. All inmates shall be required to keep themselves clean, and they shall be provided with such water and toilet articles as are necessary for health and cleanliness.
2. All inmates shall be provided with adequate facilities to bathe or shower at least three times per week.
3. No personal hygiene needs shall be denied for punitive reasons.

II. ATTIRE

A. Clothing

1. Inmates shall be permitted to wear any personal clothing they wish unless it can be shown that such clothing may constitute a security problem.
2. If an inmate is not allowed to wear personal clothing, he shall be provided with a sufficient supply of clothing suitable for the climate and adequate to keep him in good health.
3. No clothing issued to an inmate shall be degrading or humiliating.
4. All clothing shall be laundered on a regular basis.

B. Jewelry and Medallions

1. Inmates may be required to turn in for safekeeping, or return home, valuable jewelry which could cause conflicts within the institution.
2. Non-valuable jewelry or medallions which constitute a threat to the security of the institution shall not be worn.
3. In banning a particular piece of non-valuable jewelry or a medallion as a security threat, prison officials shall look to its potential use as a weapon and not to its symbolism or "message."

Commentary

To justify restrictions on an inmate's grooming or attire, prison administrators have generally cited the need for identification, health and security. These three needs while generally regarded favorably by courts can be found wanting on close scrutiny. Therefore, the model eases some restrictions in the area of grooming and attire to avoid the possibility of lengthy and expensive court action in the future.

GROOMING

A. Hair

The model permits an inmate to wear his hair in any length or style and to grow a moustache or beard if he so desires. This will help preserve the inmate's identity, as well as enhance his self respect; two important goals in any successful rehabilitation program. The model, however, does take into account the need for health and safety precautions by requiring the cleaning and cutting of hair when health or sanitation becomes a problem. It also requires the wearing of hair nets or other protective coverings when an inmate is involved in the preparation of food or is working around heavy machinery. Further, it is recognized that by permitting an inmate to grow his hair in any length or style a change in the inmate's physical appearance may result. This change could create a security problem. To remedy any potential problem in this regard, new identification photographs should be taken when the need arises. (See *Teterad v. Burns*, 522 F.2d 357 (8th Cir. 1975).) Some states, for example, require that an inmate's I.D. card correspond to his appearance before allowing him to purchase items from the inmate canteen or enter the visiting room.

This part of the model has taken much of its language from the *Wisconsin Resident Grooming Code* (1976). However, it also reflects the view of many other standards and regulations (See, e.g., *Tentative Draft of Standard Relating to the Legal Status of Prisoners*, American Bar Association §6.7 (1977); *Federal Prison Service Policy Statement* 7300.64A (1975); *Illinois Prison Regulation).* It also should be mentioned that while the model may go further than most jurisdictions in allowing inmate freedom in regard to hair style and length, it is done with the hope of minimizing the vast amount of litigation that has occurred on this subject. (See generally, *Hill v. Estelle*, 537 F.2d 214 (5th Cir. 1976); *Burgin v. Henderson*, 536 F.2d 501 (2nd Cir. 1976); *Jihead v. Carlson*, 410 F.Supp. 1132 (E.D. Mich. 1976).)

B. Bathing

"Prisoners have a right to a healthful environment, to include: . . . provisions for personal hygiene, toilet articles, and an opportunity to bathe frequently. . ." (*Standards for Inmates' Legal Rights*, National Sheriffs Association, §3 (1974). This attitude has been adopted in the model which calls for providing inmates with adequate water and toilet articles, as well as bath or shower privileges at least three times a week. These requirements have been recommended by the Omnibus Penal Reform Act, H.R. 341, 95th Congress, 1st Sess. (1977); see also, *Standard Minimum Rules for the Treatment of Prisoners*, Fourth United Nations Congress on Prevention of Crime and Treatment of Offenders, §15,16,17 (1955) and *Sweet v. South Carolina Department of Corrections*, 529 F.2d 834 (4th Cir. 1975) which requires revision of limited shower privileges to assure healthfulness. But see, Commission on Accreditation for Corrections, *Proposed Standards for Adult Long-Term Institutions*, §3287 (1977).

The need for personal hygiene has also been found to be so essential that it should not be denied as a means of punishment. (See *Omnibus Penal Reform Act*, supra.)

ATTIRE

A. Clothing

In matters of dress, inmates should be allowed to wear personal clothing. (See e.g., *Tentative Draft of Standards*, American Bar Association, supra.) The only times when personal clothing may be prohibited is where: 1) it may contribute to an escape attempt by disguising or confusing the identity of the inmate or 2) it may cause a threat to the order of the institution by pointing out economic or social differences between inmates. Where the inmates are allowed to wear personal clothing, reasonable regulations to prevent confusion between inmates and security personnel should be promulgated.

When it becomes necessary for an institution to supply an inmate with clothing, such clothing should be "climatically suitable, durable, economical, easily laundered and repaired, and presentable." (Commission on Accreditation, *Proposed Standards*, §3281; see also *Manual of Correctional Standards*, American Correctional Association, 462 (1966); United Nations, *Standard Minimum Rules*, supra.) They also should not degrade or humiliate the inmate in any way. (See *Model Penal Code – Part III on Treatment and Correction*, §304.5(2), American Law Institute (1962).)

B. Jewelry and Medallions

Conflicts may arise between inmates over possession of valuable jewelry. For this reason, the model permits institutions to ban this type of jewelry. Other jewelry may also be banned at the discretion of the institution if it can be shown that the jewelry could be used as a weapon (See *Rowland v. Jones*, 452 F.2d 1006 (1971)). However, courts have been willing to find an abuse of discretion if the jewelry was banned solely because it expressed a message or belief that was unpopular to the institution. (See generally, *Sezerbaty v. Oswald*, 341 F.Supp. 571 (S.D.N.Y. 1972).) Therefore, the model distinguishes between "weapon" jewelry and "message" jewelry allowing the former, but not the latter, to be precluded from inmates' use.

SEARCH AND SEIZURE

Model

I. INSPECTION AND SEARCH OF PRISONER ROOMS AND CELLS

A. Routine room or cell inspection
1. A routine room or cell inspection is an outside visual examination of an inmate's room or cell and its contents.
2. It may be done by members of the institutional staff at any time without specific cause.
3. It may be conducted without the prior authorization of a shift supervisor.
4. Information gained through this inspection may be used in applying for authorization for a room search.

B. Room or cell search
1. A room or cell search is a thorough inspection of the room or cell of a particular inmate.
2. It may be done by members of the institutional staff only upon a reasonable belief that the search will reveal evidence of illegal activity or contraband.
3. It may be conducted only on authorization of the shift supervisor, unless circumstances are such that an immediate search is necessary for fear of destruction or disposal of the evidence.
4. Where circumstances require a search without prior authorization, immediately after the search the officer shall file a written report with the shift supervisor explaining why time did not allow for prior authorization. A copy of this report shall be given to the inmate.

II. NON-INTENSIVE SENSOR, PERSONAL AND BODY SEARCHES

A. Non-intensive sensor and scanning device searches
1. A non-intensive sensor or scanning device search is a method by which a search is conducted using a mechanical device.
2. This type of search may be done by members of the institutional staff at any time without specific cause.
3. It may be conducted without the prior authorization of the shift supervisor.

B. Personal searches
1. A personal search is a search of the inmate's person including, the frisking of his body and the examination of his pockets, shoes and cap. It does not include the removal or opening of any of his clothing, except for those articles mentioned above.
2. It may be done by members of the institutional staff of the same sex as the inmate at any time upon a reasonable belief that the inmate is carrying weapons or contraband.
3. It may be conducted without the prior authorization of the shift supervisor.
4. It may further be conducted:
   a. Prior to entering the visiting room.
   b. After a visit between the inmate and a visitor in which close physical contact provided the opportunity for contraband to be passed.
   c. Prior to the departure of the inmate from any prison area where the inmate has access to dangerous or valuable items (e.g. kitchen implements or shop tools) provided such areas have previously been declared searchable and prior notice to that effect has been posted.

C. Body searches
1. Strip search
a. A strip search is a search in which the inmate is required to remove all his clothes.
b. It may be conducted only under the following conditions:
1. With prior authorization from the shift supervisor, where there is a reasonable belief that the inmate is carrying contraband.
2. Without prior authorization from the shift supervisor, where there is a reasonable belief that an inmate is carrying contraband and an immediate search is necessary to prevent destruction or disposal of the evidence. After the search, the officer shall file a written report with the shift supervisor explaining why time did not allow for prior authorization. A copy of this report shall be given to the inmate.
3. After a visit between the inmate and a visitor in which close physical contact provided the opportunity for contraband to be passed.
4. Prior to the departure of the inmate from any prison area where the inmate has access to dangerous or valuable items (e.g. kitchen implements or shop tools) provided such areas have previously been declared searchable and prior notice to that effect has been posted.
5. All strip searches shall be conducted by institutional staff of the same sex as the inmate in a private place, out of the view of others.
2. Body cavity searches
a. A body cavity search is a visual or manual inspection of an inmate's anal or vaginal cavity.
b. It shall be conducted only under the following conditions:
1. With prior authorization from the shift supervisor, when there is probable cause to believe that an inmate is carrying contraband there.
2. By a medically trained person other than another inmate, in the prison hospital or other private place, out of the view of others.

III. GENERAL SEARCHES

A. A general search is a shakedown of any person or place in the institution. It is aimed at the general prison population as a whole rather than at a specific inmate.

B. It may be done only upon the authorization of the warden or his designated representative, who upon ordering a general search shall specify which areas of the prison are to be searched and what type of body searches are to be performed.

C. A general search may be ordered at any time without specific cause, except:
1. If a general search includes a strip search, it shall only be conducted in accordance with the provisions of Section II C-1.
2. If a general search includes a body cavity search, it shall only be conducted in accordance with the provisions of Section II C-2.

D. Following a general search, the warden or his designated representative shall file a written report to the Director of the Department of Corrections describing the scope of the search undertaken, and the results of the search, including a list of all items of contraband seized.

IV. PROCEDURES FOR OBTAINING AUTHORIZATION TO SEARCH

A. Applying for authorization to search
1. In each instance when an authorization to search is required (e.g. room

or cell search, body search) and circumstances are not such that an immediate search is necessary for fear of destruction or disposal of the evidence, the searching officer shall file an authorization form with the shift supervisor prior to the search.

2. This authorization form shall contain:
   a. The name of the inmate to be searched.
   b. The type of contraband expected to be seized.
   c. The reason to believe that the inmate is involved in illegal activity or that contraband will be found in his possession. Such belief to be based on:
      1. The personal observation of the officer and/or
      2. The incriminating information of a third party who is believed to be reliable, and/or
      3. Other incriminating evidence.
   d. The time, date and signature of the searching officer.

B. Authorization granted by shift supervisor
   1. Upon receiving the form for authorization to search, the shift supervisor shall determine whether there is enough information to establish the degree of cause necessary for the type of search requested.
   2. If the shift supervisor finds the requisite degree of cause, he shall authorize the search by signing the authorization form.
   3. One copy of this form shall then be kept by the shift supervisor. Two other copies shall be returned to the searching officer.
   4. Prior to conducting the search, the searching officer shall present a copy of the authorization form to the inmate. If information for a search was provided by an inmate-informant, his name may be omitted from the inmate's copy.

V. PRESERVATION OF EVIDENCE

A. If as a result of any search, contraband or evidence of illegal activity are found, the searching officer shall tag the evidence for identification and turn it in to the shift supervisor.

B. The searching officer shall also submit a written report of the incident to the shift supervisor, such report to include:
   1. The time and date the search was conducted,
   2. The person or places searched,
   3. The items seized,
   4. Any force used to effectuate the search,
   5. Any property damaged by the search,
   6. Any witnesses to the search, and
   7. The signature of the searching officer.

C. The contraband or evidence of illegal activity plus a copy of the report shall ultimately be turned over to the disciplinary committee for their consideration.

D. In the event criminal charges are to be filed, a copy of the report shall be turned over to the proper law enforcement authorities.

Commentary

The Fourth Amendment protection against unreasonable search and seizure has been found by some jurisdictions to survive to some extent during incarceration. For example, in *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), the Seventh Circuit Court of Appeals declared through Judge (now Justice) Stevens that,

> "Unquestionably, entry into a controlled environment entails a dramatic loss of privacy. Moreover, the justifiable reasons for invading an inmate's privacy are both obvious and easily established. We are persuaded, however, that the surrender of privacy is not total and that some residuum meriting the protection of the Fourteenth Amendment survives the transfer into custody." (at 1316) (But see, *Christman v. Skinner*, 468 F.2d 723 (2nd Cir. 1972); *United States v. Hitchcock*, 467 F.2d 1107 (9th Cir. 1972) cert. denied 410 U.S. 916.)

What residuum of privacy survives and what standards of reasonableness and probable cause an institution is held to prior to infringing on that privacy is still developing. Indications are, however, that the courts may examine search and seizure policies more closely than in the past, and if the administration of an institution cannot justify their policy or if it can be shown that there is a less intrusive means of controlling the flow of contraband, the policy will not be upheld.

The model has been written with this possible trend in mind. It also has been written to provide the institution with a sufficiently free hand to allow them to maintain a high level of security.

INSPECTION AND SEARCH OF PRISONER ROOMS AND CELLS

The search of a prisoner's room or cell can take two forms. First, it can be a routine room inspection in which the officer observes the area solely by visual examination. This type of inspection is a relatively minor infringement on the privacy of the inmate. It is, however, necessary for the security of the institution for such cursory inspection can lead to uncovering concealed contraband. It is also "designed to insure that a minimal standard of cleanliness and order is maintained within each room." (*Model Rules and Regulations on Prisoners' Rights and Responsibilities*, Center for Criminal Justice, Boston University School of Law, 60 (1973).) Because of the ease in which this type of inspection can be accomplished and the minor inconvenience it causes an inmate, it can be conducted at any time by an officer without supervisory approval.

The second way of detecting the concealment of contraband or the perpetration of illegal activity within an inmate's cell is by conducting a thorough search of the cell. These types of searches, "while routine, are still invasions of the only 'home' the prisoner has." (*Tentative Draft of Standards Relating to the Legal Status of Prisoners*, American Bar Association, 530 (1977).) They, therefore, should be conducted so as to avoid "undue or unnecessary force, embarrassment, or indignity to the individual" (*National Advisory Commission on Criminal Justice Standards and Goals, Corrections*, §2.7 (1973); see also *Response of the American Correctional Association to Correctional Standards of the National Advisory Commission*, §2.7 (1976).) To achieve this standard and avoid undue harrassment of an inmate, the model requires that certain conditions be met prior to conducting this type of search.

First, before any room search is permitted, there must be reasonable belief that the search will reveal evidence of illegality. This requirement of reasonable belief, although further in scope than most courts have gone (See, e.g., *U.S. v. Palmateer*, 469 F.2d 273 (9th Cir. 1972)) has been recognized by the American Bar Association as not "unduly burdensome." (*Tentative Draft of Standards*, supra at 532.) It is also in

keeping with the language of the *National Advisory Commission Standard* which has stated that while there is a need for an institution to develop policies in regard to searches and seizures, establishing this need, "does not justify carte blanche searches of inmates and their property."

The second condition required before a room search is prior approval of the shift supervisor. This requirement is supported both by the American Bar Association, *Tentative Draft of Standards*, supra; and the *Model Rules and Regulations on Prisoners' Rights and Responsibilities*, supra. Such prior approval is necessary for a variety of reasons. First, it gives substance to the requirement that reasonable belief be shown before conducting a search by taking that determination out of the hands of the searching guard and placing it in the realm of an independent overseer. Second, requiring a shift supervisor to approve a search enables the institution to keep closer tabs on searches and lessens the chance of theft or needless destruction of property by overzealous guards. Third, since some jurisdictions have ruled that prisoners do not forfeit all Fourth Amendment rights with incarceration (see *Bonner v. Coughlin*, supra) some form of procedural protection of those rights should be required before executing this type of extensive search.

The model recognizes that in various instances, the requirement of prior supervisory approval cannot be met. This is particularly true in cases where an immediate search is necessary for fear that delay might cause destruction or disposal of the evidence. In these emergency situations, the model calls for an immediate search. This, however, must be followed by a written report to the shift supervisor explaining why time did not permit prior authorization. Such written report will have the effect of curtailing abuses in emergency situations.

NON-INTENSIVE SENSOR, PERSONAL AND BODY SEARCHES

A. Non-Intensive Sensor and Scanning Device Searches

The National Advisory Commission on Criminal Justice Standards and Goals, Corrections, in calling on correctional agencies to develop a search and seizure policy suggested that the policy provide for the use of "non intensive sensors and other technological advances instead of body searches whenever feasible" (§2.7 (1973)). This has also been proposed by the American Correctional Association in their *Response to the Correctional Standards of the National Advisory Commission* (at 3 (1976)) and by the Commission on Accreditation for Corrections in their *Proposed Standards for Adult Long-Term Institutions*, §3187 (1977).

The use of these sensors and walk through scanning devices are but a minor intrusion upon the person of an inmate. They have been proven to be effective ways of uncovering the concealment of contraband in both airport and border searches and should be encouraged for use in prisons. The model, noting their efficiency and relative unobtrusiveness allows their use without prior supervisory approval and without a belief that the inmate is carrying contraband.

B. Personal Searches

The holding and transferring of contraband by inmates present very serious security problems within an institution. The model recognizes the need for staff to have a relatively free hand when attempting to curb the proliferation of these objects. It thus allows for a personal search or frisk of an inmate's outer clothing, including examining his pockets, shoes and cap, without prior supervisory approval.

The model, however, requires the institutional staff to have some reason to believe that an inmate is carrying weapons or contraband prior to conducting this type of search. The reason for this requirement is twofold. First, a personal search, unlike a non-intensive sensor search, involves the touching of an inmate's person by a correctional officer. It thereby lends itself to the greater possibility that embarrassment or harrassment of the inmate will occur. Second, the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968) concluded that there was "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing

with an armed and dangerous individual. . ." (at 27). Since a policeman is required to demonstrate a reasonable belief prior to conducting a weapons frisk, by analogy a correctional officer should also be held to the same standard. (See American Bar Association, *Tentative Draft of Standards* at 533.)

To give substance to the meaning of the phrase "reason to believe" it is suggested that a correctional officer not conduct a personal search unless such belief, that the inmate is carrying contraband, is based on 1) "The observation of facts, which may be interpreted in light of the correctional officer's experience and his knowledge of the character of the inmate, or 2) Incriminating information from a third party where there is no reason to believe the third party is motivated by the desire to harass the inmate" (*Model Rules and Regulations on Prisoners' Rights and Responsibilities*, supra at 63).

C. Body Searches

The model has defined the two types of permissible body searches, that of strip and body cavity searches. Because of the humiliation involved, certain strict requirements must be met prior to either of these searches.

A strip search requires the same showing of cause as in a personal search, that of reasonable belief. However, it can be conducted only upon the prior approval of a shift supervisor, unless time is of the essence, in that case post search approval must be received. It is felt that because of the humiliation involved in a strip search, it is necessary that a greater restriction be placed on this practice than is placed on personal searches. By requiring the correctional officer to obtain authorization from his supervisor, it is hoped that inmates will be strip searched no more than is reasonably necessary to control the flow of contraband in an institution.

The model recognizes two situations where strip searches and also personal searches can be undertaken as a matter of course. These are 1) after a visit where close personal contact was allowed, and 2) after an inmate leaves an area where he may have access to dangerous items, but only if the area has previously been declared and posted as searchable so as to give inmates prior notice and to avoid on the spot, arbitrary designations of areas as searchable. These "two situations are both ones where inmates will have greatest access to contraband" and thus reason to believe contraband may be concealed after these situations is inferred (See *Model Rules and Regulations on Prisoners' Rights and Responsibilities*, Id at 65 for further discussion; see also *Jackson v. Werner*, 394 F.Supp. 805 (W.D. Pa. 1975)).

"Strip searches shall be conducted with maximum courtesy, maximum respect for the patient's dignity, and minimum physical discomfort to the patient" (*McCray v. State*, No. 4363 (Md. Cir. Ct., Montgomery County, Nov. 17, 1971), rev'd. on other grounds, 267 Md. III, 297 A.2d 265 (1972)). In keeping with this declaration and in recognizing the indignity that may be felt by the inmate in removing his clothes for search, the model requires that all strip searches be conducted in a private place.

The other type of body search available is a body cavity search. Due to the degradation and humiliation caused by this type of search, the strictest procedures are demanded prior to conducting it. First, at all times the approval of the shift supervisor must be received. Second, such approval should be forthcoming only if the searching officer has probable cause to believe contraband is being concealed there. Third, the search shall only be conducted by medical personnel and then only in a private place, preferably in the prison hospital.

These procedures, at present, go beyond those required by the courts. (See, e.g., *Hodges v. Klein*, 412 F.Supp. 896 (D.N.J. 1976); *Daugherty v. Harris*, 476 F.2d 292 (10th Cir. 1973). However, indications are that recent correctional standards now being adopted, including the American Bar Association's *Tentative Draft of Standards*, are proposing these procedures. "Only the most severe standard of concern should allow such searches" Id at 534). Therefore, in keeping with the intention of the model to look towards the future, so as to avoid needless litigation, the model adopts the strict procedural safeguards as espoused by these standards.

GENERAL SEARCHES

This section of the model gives the warden or his designated representative the authority to order a general search of any area in the institution. This type of search is designed to uncover the concealment of contraband which is hidden in general areas of the prison. It is also designed for situations where there has been information regarding the accumulation of contraband within the institution but the exact whereabouts of the contraband is unknown.

The search may be authorized at any time without specific cause. "Prison-wide searches for contraband instituted by prison officials . . . must be deemed reasonable per se unless there is abuse or wanton conduct during the search" (*Laaman v. Helgemoe*, 20 CrL 2351 (D.N.H. 1976). The only exceptions to the "any time, without specific cause" pronouncement are that 1) these searches should be conducted "no more frequently than reasonably necessary to control contraband in the institution or to recover missing or stolen property" (*National Advisory Commission Standards*, supra §2.7, see also *Response of the ACA*, supra; and Commission on Accreditation *Proposed Standards*, supra.), and 2) if strip searches and/or body cavity searches are to be performed, they can only be done in accordance with the provisions discussed in Section II C-1 and 2 respectively. The reason for this latter exception is based upon the presumptive belief that all strip and body cavity searches, whether they be administered under general or body search classifications, inflict upon the inmate a large degree of humiliation and embarrassment. Therefore, they should be allowed only when proper cause is shown, and then only when adequate procedures for privacy have been instituted.

The requirement of submitting a written report to the Director of the Department of Corrections after each general search is to allow the Director to monitor the institution's search plan and to insure that these searches are kept reasonable in scope.

PROCEDURES FOR OBTAINING AUTHORIZATION TO SEARCH

The model calls for the searching officer to submit an authorization to search form to his shift supervisor prior to or after certain types of searches, (e.g., room or cell search, body search). "The primary function of the authorization form is to provide evidence for use in any disciplinary or grievance proceedings that might result from the search. The information required by the form should also encourage the officers to learn the standards for permissible searches" (*Model Rules and Regulations on Prisoners' Rights and Responsibilities*, supra at 62).

The details required for authorization have been kept to a minimum so that enacting a search does not become a major bureaucratic endeavor. The searching officer need only identify the inmate to be searched, the contraband to be seized, and the reason for the search, as well as the date and his signature. It is suggested that the institution develop a standard authorization form to expedite the matter even further.

When authorizing the search, the shift supervisor should be careful to determine that the requisite cause for the type of search requested is met. This can be accomplished quite easily by the use of common sense on the part of the supervisor. For example, prior to authorizing a strip search the supervisor should determine 1) whether the source of information upon which the officer is basing his determination is credible, and 2) whether the contraband to be seized is of the type or size that would not be revealed by a personal search and thereby necessitates a strip search.

PRESERVATION OF EVIDENCE

The final area to be dealt with is that regarding the procedures to be followed upon the seizure of contraband found in the possession of an inmate. The model calls for an identification tagging of the evidence and the filing of a written report of the incident with the

shift supervisor.

These requirements can assist the institution in complying with the requirements of *Wolff v. McDonnell*, 418 U.S. 539 (1974). In many instances where contraband is seized disciplinary action is taken against the inmate. The Supreme Court in *Wolff* determined that prior to imposing some disiplinary penalties, an institution must provide certain due process requirements. By requiring the institution to properly handle the seized items and to record the search in detail, meeting the standard set in *Wolff* becomes easier.

Also, by requiring the institutional staff to submit a written report of the incident, to his supervisor, it may provide "a means of controlling excessive zeal on the part of employees conducting the search" (*National Advisory Commission*, supra at 39). This may help lessen liability incurred by the institution as a result of inmate suits against the guards.

The final purpose served by these procedures is that in the event the discovery of contraband leads officials to bring criminal charges against the inmate, a report of the search, plus the evidence uncovered, will be readily available to the law enforcement authorities. Such documentation will save needless investigative time for both the authorities and the institution.

USE OF FORCE

Model

I. DEADLY FORCE

A. Deadly force is force which will likely cause death or serious bodily injury.

B. It may be used only as a last resort and then only in the following instances:
   1. To prevent the commission of a felony, including escape.
   2. To prevent an act which could result in death or severe bodily injury to one's self or to another person.

C. When used, the following steps shall be undertaken:
   1. An immediate notification of its use shall be given to the warden and to the proper law enforcement authorities.
   2. A report written by the officer who used the deadly force shall be filed with the Director of the Department of Corrections, and the proper law enforcement authorities. Such report shall include:
      a. An accounting of the events leading to the use of deadly force.
      b. A precise description of the incident and the reasons for employing the deadly force.
      c. A description of the weapon and the manner in which it was used.
      d. A description of the injuries suffered, if any, and the treatment given, and
      e. A list of all participants and witnesses to the incident.

II. NON-DEADLY FORCE

A. Non-deadly force is force which normally causes neither death nor serious bodily injury. It may be in the form of physical force or chemical agents.
   1. Physical force or chemical agents may be used only in the following instances:
      a. Prior to the use of deadly force
         1. To prevent the commission of a felony, including escape.
         2. To prevent an act which could result in death or severe bodily harm to one's self or to another person.
      b. In defending one's self or others against any physical assault.
      c. To prevent commission of a misdemeanor.
      d. To prevent serious damage to property.
      e. To enforce institutional regulations.
      f. To prevent or quell a riot.

   In every case, only the minimum force necessary shall be used.
   2. Chemical Agents – Special Conditions
      a. Chemical agents may be used only by employees specifically trained in their use.
      b. Chemical agents shall not be used:
         1. Without approval of the Warden or his representative, if approval is possible under the circumstances,
         2. Repeatedly against an inmate within a short period of time.
      c. In every case, individuals affected by the agents shall be permitted to wash their face, eyes or other exposed skin areas as soon as possible after the use of the agent.

B. After the use of non-deadly force, the following steps shall be undertaken:
   1. A notification of its use shall be given to the Warden.
   2. A report written by the officer who employed the non-deadly force shall be filed with the Director of the Department of Corrections. Such report shall include:
      a. An accounting of the events leading to the use of the non-deadly force.
      b. A precise description of the incident, and the reasons for imploying the force.
      c. A description of the weapon used, if any and the manner in which it was used.
      d. A description of the injuries suffered, if any, and the treatment given, and
      e. A list of all participants and witnesses to the incident.

C. The use of any type of force for punishment or reprisal is strictly prohibited and is grounds for dismissal of the employee involved.

III. MECHANICAL RESTRAINTS

A. Mechanical restraints may be used only when reasonably necessary and only in the following instances:
   1. In transporting an inmate from place to place.
   2. When the past history and present behavior or apparent emotional state of the inmate creates the likelihood that bodily injury to any person or escape by the inmate will occur.
   3. Under medical advice, to prevent the inmate from attempting suicide or inflicting serious physical injury upon himself.

B. Mechanical restraints shall never be used:
   1. As a method of punishment,
   2. About the head or neck of the inmate, and
   3. In a way that causes undue physical discomfort, inflicts physical pain or restricts the blood circulation or breathing of the inmate.

Commentary

The force available to correctional staff is one of two types: deadly and non-deadly. Each can be used only under certain select circumstances which are well defined in the model.

DEADLY FORCE

The use of deadly force is permissible to prevent the commission of a felony (See *Beard v. Stephens,* 372 F.2d 685 (5th Cir. 1967)) or to prevent the infliction of severe bodily harm (See *In re Riddle,* 57 Cal.2d 843, 372 P.2d 304 (1962)). In both cases, however, its applicability is limited.

It is well settled that deadly force may only be used as a last resort; after all other reasonable means available have failed. (See *In re Riddle,* Id.) Unless it can be shown that deadly force was used only as a last resort, civil and/or criminal liability may result.

The model permits the use of deadly force to prevent an inmate from escaping. This is contingent upon a state statute classifying an escape attempt as a felony. While, as a general rule, an escape or an attempted escape has been classified as such (See Pa. State Ann. Title 18 §5121 (1973)); this is not always the case. Therefore, it is important to examine the applicable law in

preparing this part of the regulation. If the statute does not classify escape as a felony, then deadly force cannot be used to prevent it.

One further comment must be made in regard to the use of deadly force to stop escapes. Recently, the U.S. Court of Appeal for the Eighth Circuit found a statute which permitted the use of deadly force against fleeing felons to be overly broad. The court indicated that the "statute may authorize the use of deadly force only against suspects who (have) committed violent crime . . ." They declared it to be unconstitutional as applied to non-violent fleeing felons. (*Mattis v. Schnaar*, 547 F.2d 1007 (8th Cir. 1976).) While this ruling may curtail the utilization of deadly force on escaping inmates who have not been convicted of a violent crime, a distinction can be made because it is very difficult and impractical to distinguish between an inmate escapee, who has been convicted of a violent crime and one who has not, prior to deciding what type of force can be used. In dealing with fleeing felons, however, the police are well aware beforehand of what type of crime the suspect has allegedly committed and so can readily decide what type of force is permitted.

The applicability of *Mattis* to a correctional setting is in doubt. But, it is still important to be aware of a possible trend in regard to preventing escapes.

The use of deadly force may also be employed to prevent death or serious bodily injury to a prison employee, inmate or third person. It thus, may be used in self defense (See *In re Ferguson*, 55 Cal.2d 663, 361 P.2d 417 (1961)), but only when the "prison official is in reasonable apprehension of death or serious injury and the use of deadly force is his last resort." (Palmer, *Constitutional Rights of Prisoners*, 17 (1973)). It may also be used to prevent the death or serious injury of a third person, but again only as a last resort (See *In re Riddle*, supra.).

The requirement of filing an immediate report to the proper law enforcement authorities regarding the incident and the subsequent forwarding of a detailed account to them and to the Department of Corrections will serve a twofold purpose. It will notify the proper authorities of the matter and will provide a record for use by the department's attorney should the matter later be the subject of a lawsuit.

NON-DEADLY FORCE

Physical force or chemical agents can be used "for self defense, to prevent imminent physical attack on staff, inmates or other persons, or to prevent riot or escape (*National Advisory Commission on Criminal Justice Standards and Goals, Corrections*, 2.4 (1973)). See also, *Model Act for Protection of Rights of Prisoners*, National Council on Crime and Delinquency (1972). Further, it has been upheld by courts when used to prevent the commission of a misdemeanor (See *State v. Jones*, 211 S.C. 300, 44 S.E.2d 841 (1947)).

Physical force has also been declared an acceptable method to enforce institutional regulations. (See *In re Jones*, 57 Cal.2d 860, 372 P.2d 310 (1962).) It, however, must be used with restraint as only the minimal amount necessary to enforce the regulation will be protected.

While the model allows physical methods to enforce institutional regulations, it is hoped that the trend toward less physical control of inmates will be undertaken. As the American Correctional Association has said, "Control and management of offenders should be by sound scientific methods, stressing moral values and organized persuasion, rather than primarily dependence upon physical force." (*Declaration of Principles of the American Correctional Association*, Principle XXIX (1970)).

The use of chemical agents, tear gas, etc. does not per se constitute cruel and unusual punishment, (See *Grear v. Loving*, 391 F.Supp. 1269 (1975) and *Clemmons v. Gregg*, 509 F.Supp. 1338 (1975)). They can be an effective method in maintaining order, but they should not be used to disable a man physically who poses no threat; as such action would be cruel and unusual, (See *Landman v. Royster*, 333 F.Supp. 621 (1971)). Whenever possible, their use should be authorized by the Warden or his representative. In every case, full documentation should be made fol-

lowing their use. Also they should be used only by those officials who have been trained in their use (See *ACA Manual of Correctional Standards,* 371 (1966)).

In all cases, if excessive force is used, it will constitute cruel and unusual punishment. In determining whether that constitutional line has been crossed, "a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm." (*Johnson v. Glick,* 481 F.2d 1028 (1973).)

MECHANICAL RESTRAINTS

The three instances described in the model are the only times these restraints should be used. (See generally, Commission on Accreditation for Corrections, *Proposed Standards for Adult Long-Term Institutions,* § 3215 (1977); *Standard Minimum Rules for the Treatment of Prisoners,* (Fourth U.N. Congress on Prevention of Crime and Treatment of Offenders, §33 (1955)). They should never be used for punishment purposes, nor should they be used in a manner above or beyond their true necessity.

VISITATION
Model

I. SELECTION OF VISITORS

A. List of Approved Visitors
   1. Each inmate shall submit to the institutional staff a list of names and addresses of visitors with whom he wishes to maintain contact. From this list, the staff shall compile an approved visiting list for each inmate.
   2. The approved visiting list may contain the following persons:
      a. Members of the immediate family, including: wife or husband, children, stepchildren, parents, stepparents, foster parents, grandparents, brothers or sisters, step or half brothers and step or half sisters.
      b. Other relatives including: aunts, uncles, in-laws and cousins.
      c. Friends and business associates.
      d. Members of the clergy.
      e. Any additional person who may be regarded as having a constructive influence on the inmate.
   3. The visitors list, submitted by the inmate may be amended or deleted by him at any time.
   4. Any person on the visitors list submitted by the inmate who is considered to have a harmful affect on the inmate or is found to be a threat to the security of the institution may be excluded from the approved visitors list.
      a. A notification of the exclusion and a written statement explaining why that person was rejected shall be given to the inmate and to the person excluded.
      b. Any person excluded shall have the right to a hearing before the warden or his designated representative.
      c. A person with a criminal record shall not automatically be excluded from the approved list. The nature and extent of his record plus his history of recent criminal activity shall be weighed against the value of the relationship to determine his visitation eligibility.
   5. Upon compiling an approved visitors list, the institution shall deliver to the inmate a copy of that list. They shall also notify each person on that list of their acceptance and send to each a copy of the visitation regulations including the hours of permissible visitation.

B. Other Visitors
   1. Special visits by persons not on the approved visitors list, including prospective employers, sponsors and parole advisors shall be authorized as a matter of course by the Warden or his representative. These persons may offer valuable assistance to inmates and shall be allowed to visit, whenever possible.
   2. Attorneys and Attorney Representatives
      a. Attorneys and their representatives, i.e., investigators, paralegals and law students, are permitted to visit inmates in reasonable numbers during normal hours.
      b. These visitors must notify the institution twenty-four hours in advance of an intended visit, unless it can be shown that such notice was not possible.

II. CONDITIONS FOR VISITING

A. Visiting Hours
   1. Each institution shall have as many visiting hours as staff resources permit.

These hours shall be flexible enough to allow visitors with various working hours an opportunity to visit.

2. Although visiting on Saturdays, Sundays and holidays may be emphasized, weekday afternoon and evening visitation shall also be permitted, where possible.

B. Frequency of Visits
   1. Limitations on the length or frequency of visits shall be imposed only to avoid overcrowding or the inequitable allocation of visiting time or for other compelling circumstances.
   2. A reasonable number of visits or number of hours per month shall be established. Consistent with resources available, these shall include at least one visit per week for each inmate for a minimum time of at least one hour.
   3. Exceptions shall be made to any such rules where indicated by special circumstances, including but not limited to the distance the visitor must travel, the frequency of the inmate's visits or health problems of the offender.

C. Number of Visitors
   1. Limitations on the number of visitors who may visit an inmate at one time may be imposed to prevent overcrowding in the visiting room or to eliminate difficulties in supervising the visit, but these regulations shall be interpreted flexibly and opened for exceptions.

III. PROCEDURE FOR VISITING

A. Setting
   1. Each institution shall provide a visiting room for inmates and their guests.
   2. This room shall be set up with the comfort and privacy of the visitors in mind and shall be arranged so as to allow for contact visiting.
      a. It shall be furnished in an informal style wherever possible, and shall include small tables, arm chairs, settees and other less formal furnishings.
      b. It shall include no partitions of any kind between inmates and guests unless past experience has indicated that an inmate's conduct is such that a non-partitioned visit would disrupt the order of the institution.
   3. To maintain and strengthen family ties, entire families shall be encouraged to visit an inmate together.
      a. These visits shall be conducted in private surroundings apart from the general visitation room.
      b. A portion of the visiting room shall also be equipped and set up to provide a diversion for the children of these visitors where space is available.

B. Security
   1. The visiting room and procedures shall be devised so as to insure the security of the institution.
   2. Prior to the visit, all visitors shall be:
      a. Registered as guests and identified.
      b. Checked to determine that they have been approved for visitation.
      c. Advised of all visiting regulations by the placing of such rules in a conspicuous place for all to see.
      d. Searched by a scanning device or frisked. If after these methods have been used, there is still a reasonable suspicion that the person is carrying contraband, a further consensual search may be undertaken.
   3. All inmates prior to entering the visiting room shall be frisked.

4. All inmates upon leaving the visiting room shall be frisked or strip-searched to prevent the introduction of contraband into the institution.

C. Supervision
1. The institutional staff is responsible for the maintenance of order in the visiting room. This shall be accomplished while also maintaining a courteous attitude toward the inmate and his visitors.
2. The staff shall not interfere with the actions of the inmate or his visitors unless they are found to be a risk to the institution's security.
3. At no time will a conversation between inmate and visitor be eavesdropped on or monitored.

Commentary

In matters of visitation, the courts have generally granted prison administrators a wide range of discretion. The courts have, however, recognized the need for an inmate to maintain his family and community ties. Therefore, they will interfere in an institution's visitation policy when they find it unreasonably restrictive. They also will interfere when the policy is based totally on the unlimited discretion of the administrator. (See *Houston Chronicle Publishing Co. v. Kleindienst*, 364 F.Supp. 719 (S.D. Tex. 1973).)

The model seeks to avoid the pitfalls of unconstitutionality by removing some questionable restrictions. Further, it reduces the chance of lawsuits by limiting the amount of discretion available to the administrator.

SELECTION OF VISITORS

"Inmates should be encouraged to maintain close contact with members of their families and desirable friends through visiting. . ." (*ACA Manual of Correctional Standards*, 542 (1966). To achieve this goal and to properly screen prospective visitors, an inmate should be allowed to submit his own visitors list. This is in keeping with the *National Advisory Commission on Criminal Justice* standard which provides that, "(o)ffenders should have the right to communicate in person with individuals of their own choosing." (§2.17 (1973); see also *Response of the American Correctional Association to Correctional Standards of the National Advisory Commission*, §2.17 (1976)). It will also allow the institution the opportunity of doing security clearances prior to visits.

Persons eligible for visits have been listed in the model. A wide range of people have been included; the key being those who have a "constructive influence" on the inmate.

All persons on the inmate's visitors list should be approved as visitors unless it can be shown that their visit would be, "inconsistent with the public welfare and the safety and security of the institution." (*Model Act for Protection of Rights of Prisoners*, National Council on Crime and Delinquency, §7 (1972).) If for those reasons, or if it can be shown that the visitor would have a destructive influence on the inmate then a visitor may be excluded from the visitors list. In that case, both the inmate and the person excluded should be notified in writing of the exclusion and the reason behind it. The excluded person should also be given the opportunity to appeal this decision. (Indications are that the requirement of written notification and the right to appeal are supported by standards now being promulgated.)

In preparing the visitation regulations, flexibility should be maintained so as to handle the special visit which might arise from time to time. A procedure should be devised by the warden or his representative so as to speedily handle any requests for special visits.

Contact between attorneys or their representatives and inmates is a common occurrence in a correctional setting. It should be facilitated by allowing for visitation during normal institutional hours. Special consideration for after-hours visits, based on special circumstances should also be given. (See *National Advisory Commission Standards*, §2.2 (1973); and *Response of the ACA*, §2.2 (1976).)

It is also essential that there be a method by which the attorney and the inmate can exchange documents without them being read. Any inspection of these documents by institutional officers must be done in the presence of the attorney. (See *Souza v. Travisono*, 368 F.Supp. 959 (D.R.I. 1974), aff'd. 498 F.2d 1120 (5th Cir. 1974).) Further, law students are entitled to the same privileges as attorneys when they are working for a law clinic. (See *Procunier v. Martinez*, 416 U.S. 396 (1974).)

CONDITIONS FOR VISITING

The times for visitation, the frequency of the visits and the number of visitors allowed to visit an inmate at one time should be developed liberally. They should be developed to obtain optimum use of the visitation facilities, dependent in large measure upon the staff available for supervision.

The model calls for flexible visiting hours which is in keeping with its intention to encourage visits. Seven-day visiting is hoped for as it "would permit visitors to come on days when they are not employed." (*National Advisory Commission Standards*, at 68; see also, *Jones v. Wittenberg*, 330 F.Supp. 707, 717 (N.D. Ohio 1971).)

The amount of time allowed for visiting should be reasonable under the circumstances. As stated in the *ACA Manual of Correctional Standards*, "inmates should be permitted to have as frequent visits as facilities of the institution will allow and such visits should be of sufficient duration to be of value to prisoners and visitors alike. Ordinarily, a visit of less than one hour would not be regarded as adequate." (at 543); see also Commission on Accreditation for Corrections, *Proposed Standards for Adult Long-Term Institutions*, §3373 (1977)).

The number of visitors who may see an inmate at any one time, again should be dependent on the institution's visiting facilities.

PROCEDURES FOR VISITING

A. Setting

The setting of the visiting room should be arranged with the security of the institution upper-most in mind. However, it should be malleable enough so as to take into account the diverse needs of the inmates. The model leaves room for partitioned sections to control a certain type of prisoner. In most cases, however, these partitions should be eliminated. This is in keeping with the ACA standard which indicates that, "(n)o longer is it considered necessary to separate the inmates and visitors by screen or other barrier except in the maximum custody institution, and even here not all prisoners require this safeguard" (*ACA Manual*, supra at 543).

The model also leans toward the creation of more informally-comfortable visiting rooms. It reflects the language of the *National Advisory Commission Standards* which calls upon correctional authorities to provide, "appropriate rooms for visitation that allow ease and informality of communication in a natural environment as free from institutional or custodial attributes as possible" (§2.17); see also *Response of the ACA* (§2.17). It is felt that an informal setting would be more conducive to relaxed conversation and thus more beneficial to all concerned. (See *Barnes v. Government of Virgin Islands*, 415 F.Supp. 1218 (D. St. Croix 1976), and *Rhem v. Malcolm*, 371 F.Supp. 594 (S.D.N.Y. 1974), aff'd. 507 F.2d 333 (2nd Cir. 1974).)

The informal setting allows for physical contact between inmate and visitor. This privilege has been sanctioned for some inmates by certain jurisdictions and recommended in at least two national standards. (See *Rhem v. Malcolm*, supra, Commission on Accreditation, *Proposed Standards*, §3374; and *ACA Manual*, supra at 543). In *Rhem v. Malcolm*, the court held that

contact visitation was required for pretrial detainees. They cited as reason for their decision, an expert opinion that the denial of such contact is "painful and psychologically harmful to inmates and that contact visits would be beneficial" (at 604).

The model makes no mention of conjugal visitation. It should be noted, however, that such visitation has been allowed for some inmates in both Mississippi and California. On the other hand, the failure to grant conjugal visitation privileges has been found not to constitute cruel and unusual punishment, nor does it violate the "right to marital privacy." (*Lyons v. Gilligan*, 382 F.2d 198 (N.D. Ohio 1974).)

Finally, mention should be made that the model encourages visits from the inmates' entire family, including children. The setting up of a diversion area for the children will help make such family visits easier. Furlough programs, where possible, should also be considered. (See Commission on Accreditation, *Proposed Standards*, § 3375; and *National Advisory Commission Standards*, supra.

B. Security

Efficient procedures should be developed by which inmates can be searched prior to their entering the visiting room and after leaving the area. These procedures can both minimize the need to search visitors, as well as lessen the occurrence of contraband entering the institution.

Both pat-down searches and the use of metal detectors may be employed on visitors. These shall be used to the minimal amount necessary so as not to infringe unduly upon the privacy of an individual. (Indications are that the security guidelines set forth in the model are supported by standards now being promulgated.)

C. Supervision

"It is the responsibility of the staff member in charge of the visiting room to make certain that all visits are conducted in a quiet, orderly and dignified manner" (*Virginia Division Guideline*, §292.231 (1975)). This should be accomplished by the officers while presenting "a good appearance" and being "pleasant, articulate, and tactful at all times" (*ACA Manual*, supra at 544).

The supervision of the visiting room should also be achieved without monitoring or eavesdropping on any inmate-visitor conversation. This prohibition will not needlessly tie the hands of prison officials for it is felt that visual alertness will be sufficient to uncover any immediate problems which arise from the actual visit. (See *Tentative Draft of Standards Relating to the Legal Status of Prisoners*, American Bar Association §6.2(f) (1977).

END