Electronic Surveillance in California Prisons After Delancie v. Superior Court: Civil Liberty or Civil Death Fourth Amendment

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I. INTRODUCTION

Courts traditionally have been reluctant to interfere with the administration of prisons and jails. For years, prison officials enjoyed relative autonomy in formulating and implementing prison policy, and all but the most grievous prisoner complaints were denied judicial review. Consequently, prison reform and recognition of prisoner's rights have been agonizingly slow. By the late 1960's, however, courts began to scrutinize practices which had deprived prisoners of their basic human rights. As a result, the scope of constitutional protections accorded prisoners has dramatically expanded in the past decade.

Nonetheless, vestiges of judicial restraint remain, particularly in areas where individual rights clash with governmental interests associated with the maintenance and security of prisons. One such area includes the various administrative

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1. This policy of judicial restraint arose from the belief that the "power to supervise prison administration or to interfere with the ordinary prison rules or regulations" is entrusted to prison administrators. Banning v. Looney, 213 F.2d 771 (10th Cir. 1954), cert. denied, 348 U.S. 859 (1954). See also Williams v. Steele, 194 F.2d 32, 34 (8th Cir.) cert. denied, 344 U.S. 822 (1952).
3. As one commentator notes:
   Courts have recognized that inmates are entitled to due process of law in disciplinary proceedings. Prisoner litigants successfully have attacked regulations and practices that impinge upon freedom of speech, freedom of religion, the right of association, and the right to receive medical care. Furthermore, courts have extended established rights such as access to the courts, equal protection of the laws, and freedom from cruel and unusual punishment.
4. The United States Supreme Court has identified some of these governmental interests as: "The preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of prisoners." Procunier v. Martinez, 416 U.S. 396, 412 (1974).
searches routinely conducted by prison authorities. While most of these searches are now subject to some degree of constitutional restraint, the practice of electronically monitoring and recording prisoners' private conversations has been viewed as such a valuable security measure that it has survived numerous constitutional and statutory challenges. Thus, routine electronic surveillance continues unquestioned and unhampered by conventional constraints.

This comment examines the judiciary's traditional approach to the practice of electronic prison surveillance and suggests that this approach may no longer be valid in light of the recent development of prisoner's constitutional and civil rights. This analysis is particularly relevant to California courts which are faced with the task of restructuring their search and seizure law in the wake of the passage of Proposition 8.

II. THE TRADITIONAL APPROACH

Constitutional challenges to prison surveillance have primarily centered around the fourth amendment.

A. The Right of Privacy and the Fourth Amendment

The fourth amendment search and seizure clause guarantees the individual's right to conduct his affairs in private by prohibiting "unreasonable searches and seizures." While the

5. Administrative searches generally include body searches, cell searches, mail inspection, and electronic surveillance.


7. See United States v. Hearst, 563 F.2d 1331, 1345 (9th Cir. 1977), cert. denied; North v. Superior Court, 8 Cal. 3d 301, 308-09, 502 P.2d 1305, 1309, 104 Cal. Rptr. 833, 837 (1972).

8. Although challenges to the practice of prison surveillance based on other constitutional guarantees have been raised, discussion of such challenges are beyond the scope of this comment.

9. The fourth amendment in its entirety provides:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
United States Supreme Court has held that electronic surveillance in a free society must be afforded fourth amendment coverage,\(^{10}\) analogous protection in the prison setting has been limited to “privileged communications.”\(^{11}\) The constitutional justifications for denying fourth amendment coverage to electronic surveillance in prisons rests on two theories: That prisons are not protected areas, and that prisoners do not have a reasonable expectation of privacy.\(^{12}\)

The “constitutionally protected area” concept was articulated by the United States Supreme Court in *Lanza v. New York*\(^{13}\) involving the recording of a conversation between two brothers in a jail visiting room. While relying on state grounds in upholding the petitioner’s conviction for his refusal to answer a legislative committee inquiry, the Court commented on the constitutionality of such recordings. The majority found it to be “obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room.”\(^{14}\) The Court concluded that prison surveillance had “traditionally been the order of the day.”\(^{15}\)

The “reasonable expectation of privacy” analysis was developed in *Katz v. United States*,\(^{16}\) which held that a recording of a conversation made in a public telephone booth had violated the privacy upon which the petitioner had “justifiably relied.”\(^{17}\) In his concurring opinion, Justice Harlan enunciated a two-prong test which affords fourth amendment protection whenever (1) the individual exhibits “an actual (subjective) expectation of privacy” and (2) the expectation is

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\text{U.S. Const. amend. IV.}
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\(^{11.}\) Judicially and statutorily recognized “privileged communications” generally include conversations between prisoners and professionals which traditionally have been deemed confidential. See, e.g., People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963), cert. denied, 375 U.S. 994 (1964) (recognizing the inmate’s right of privacy with respect to consultation with his attorney); CAL. PEN. CODE § 630 (West Supp. 1981). California Penal Code § 630 makes it a felony to eavesdrop or record a conversation between a prisoner and “such person’s attorney, religious advisors, or licensed physician.” See also North v. Superior Court, 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972).


\(^{13.}\) 370 U.S. 139 (1962).

\(^{14.}\) *Id.* at 143.

\(^{15.}\) *Id.*

\(^{16.}\) 389 U.S. 347 (1967).

\(^{17.}\) *Id.* at 353.
“one that society is prepared to recognize as ‘reasonable.’”18
In most instances, the subjective prong proves fatal to an inmate’s case, especially when the defendant knew or even suspected that his conversation was being recorded.19 Even under the objective prong of the Katz test, however, most courts are unwilling to declare an expectation of privacy in jail as reasonable.20

Regardless of the theory relied upon by a particular court, the result is usually the same: Once the government advances a security rationale for a “tap,” “the fourth amendment question is essentially resolved in its favor.”21

18. Id. at 361.
19. For example, in People v. Califano, 5 Cal. App. 3d 476, 85 Cal. Rptr. 292 (1970) where a tape recording began: “They [the police] are probably listening right now. [Laughter]” Id. at 480. The court found the suspect’s remarks “clearly provided a sufficient basis for a reasonable finding that neither participant in the conversation entertained any subjective expectation of privacy.” Id. at 482. In People v. Estrada, 93 Cal. App. 3d 76, 155 Cal. Rptr. 731 (1979), the defendant told his sister at the beginning of a visit that their conversations were being recorded and the two proceeded to speak in Spanish and “Pig-Latin Spanish.” The court found the defendant failed to show that he “had reason to believe his communications were confidential and would remain private.” Id. at 99.
20. In People v. Finchum, 33 Cal. App. 3d 787, 109 Cal. Rptr. 319 (1973), two suspects were placed alone together in an interview room and told to “get their stories straight.” The court found that “[h]ope [of privacy] would be the most that anyone in such a situation could have had, and hope falls short of what the law recognizes as a reasonable expectation.” Id. at 791. In People v. Blehm, 44 Colo. App. 472, 623 P.2d 411 (1980), a pre-trial detainee spoke with his wife over a telephone intercom system. The court held there was no justifiable expectation that the conversations were private.
21. United States v. Hearst, 563 F.2d 1331, 1346 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978). But see North v. Superior Court, 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972). In North a detective left a pre-trial detainee and his wife alone in the detective’s office. The court found that the prisoner and his wife were “lulled into believing that the conversation would be confidential.” Id. at 311. In reaching the conclusion that the Katz standard had been satisfied, the court relied heavily on the fact that the detective had deliberately created a sense of privacy and that the conversation between spouses is usually deemed confidential. In Robinson v. Superior Court, 164 Cal. Rptr. 389, hearing granted, June 25, 1980 (Cal. No. S.F. 24185), the court found North controlling where husband and wife booked into jail were placed in an interview room together and had their conversations recorded. The court was apparently swayed by the fact that the couple had initially been placed in two adjoining interview rooms and they had tried to communicate with each other through the wall. After trying unsuccessfully to monitor and tape their conversation, the officers placed the wife in the husband’s interview room. People v. Harrell, 87 A.D.2d 21, 450 N.Y.S.2d 501 (1982), however, involved a conversation between a teenage suspect and his mother in a jail cell. A police detective stood by the cell for “security reasons” and overheard incriminating statements. The court found that the conversation should have been suppressed at trial because of the confidential nature of parent-child communications.
B. Title III: The Anti-Surveillance Statute

Most statutory challenges to electronic surveillance in prison are based on Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Title III establishes procedural safeguards for authorized surveillance and prohibits the unauthorized use of electronic devices to intercept wire or oral communications. The Act defines "wire communication" as any communication transmitted over a common carrier, while "oral communication" is defined as any utterance "by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectations."

Where a prisoner challenges a "wiretap" involving an internally operated communication system which is independent from any public system, the intercepted communication is not entitled to Title III protection because it was not transmitted over a common carrier. The application of Title III to oral communication within prisons has been equally limited because Title III, like Katz, defines "oral communication" with respect to the speaker's expectation of privacy. Courts are in disagreement, however, as to whether the Act's prohibitions extend to public telephones installed in a prison. Some courts find telephone conversations are protected because a public telephone is a "common carrier" within the meaning of Title III. Recently, however, a few courts, relying on a spe-

23. Id. at § 802. The entire definition of wire communication reads:
"Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

Id.
27. See, e.g., Nauton v. Craven, 521 F.2d 876 (9th Cir. 1975) (court of appeals' dictum followed Halpin); Halpin v. Superior Court, 6 Cal. 3d 885, 495 P.2d 1285, 101 Cal. Rptr. 375, cert. denied, 409 U.S. 982 (1972) (contents of conversation between
specific exclusionary provision in the Act, have held otherwise. 28

Although Title III preempts analogous state legislation, states are free to adopt more stringent standards than those required by Title III. 29 As a general rule, however, challenges to prison surveillance on state statutory grounds have also proved unsuccessful. 30

C. Criticism of the Traditional Approach

The theory that a jail is not a "constitutionally protected area" has been repeatedly criticized by numerous commentators. 31 These experts point out that the "area" analysis as enunciated in Lanza was dicta in an opinion adopted by only four Justices over the strong objection of three dissenting Justices. 32 Moreover, the "area" analysis of fourth amendment re-

pre-trial detainee and wife inadmissible because the conversation was intercepted without judicial authorization). See also, Campiti v. Walonis, 611 F.2d 387 (1st Cir. 1979); People v. Tebo, 37 Mich. App. 141, 194 N.W. 2d 517 (1971).

28. United States v. Paul, 614 F.2d 115 (6th Cir.), cert. denied, 446 U.S. 974 (1980); Crooker v. United States Dep’t of Justice, 497 F. Supp. 500 (D. Conn. 1980). These courts found sections 2510 (5)(a)(i) and (ii) of Title III does not proscribe interceptions of communication over equipment used by police in ordinary course of business. Section 2510(5)(a) excludes from the statutory definition of “electronic, mechanical or other device” any telephone “(i) furnished to the subscriber . . . in the ordinary course of its business” or “(ii) being used . . . by an investigative or law enforcement officer in the ordinary course of his duties.” 18 U.S.C. §§ 2510 (5)(a)(i), 2510 (5)(a)(ii). The First Circuit has specifically rejected the exception carved out by the Crocker and Paul courts. In Campiti v. Walonis, 611 F.2d 387 (1st Cir. 1979), the First Circuit affirmed a district court ruling which held prison officials liable to plaintiff prisoners in a 42 U.S.C. § 1983 civil rights action.


32. Only seven Justices took part in the decision. The plurality opinion was written by Justice Stewart with Justice Harlan and Justice Frankfurter writing separate concurring opinions. Dissenting opinions were written by Chief Justice Warren,
view was purportedly rejected in *Katz* which declared that the fourth amendment "protects people, not places." In recognition of these facts, many courts have implicitly rejected the "area" analysis by extending the protection of the fourth amendment to prisoners. A few courts have explicitly rejected *Lanza* as authority.

In addition to finding the *Lanza* approach questionable, many commentators criticize the routine use of the subjective prong of *Katz*’s "reasonable expectation of privacy" test to reject prisoners’ claims of privacy. These commentators fear that subjective expectations may be defeated by state announcements that it intends to conduct comprehensive electronic surveillance. They argue that to be consistent with the spirit of *Katz*, the expectation of privacy should be measured under an objective balancing test which carefully considers the facts and circumstances of each case.

The United States Supreme Court appears to have taken heed of these criticisms. In *Bell v. Wolfish* a pretrial detainee alleged that certain cell and body searches violated his fourth amendment right of privacy. Writing for the majority, Justice Rehnquist first pointed out that if a detainee has any expectation of privacy, it "necessarily would be of a diminished scope." Justice Rehnquist, however, assumed arguendo that the petitioner had an expectation of privacy, and pro-

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Justice Brennan, with Justice Douglas concurring in both opinions. See 370 U.S. 139, 147-53.

33. 389 U.S. at 351.


35. United States v. Hinkley, 672 F.2d 115, 128 n.98 (D.C. Cir. 1982); United States v. Ready, 574 F.2d 1009, 1013 (10th Cir. 1978); Bonner v. Coughlin, 517 F.2d 1311, 1316-17 (7th Cir. 1975), cert. denied, 435 U.S. 932 (1978) (majority opinion by Stevens, J., as circuit judge).


38. Justice Powell concurred in part but dissented from the majority holding that strip searches could be conducted on less than probable cause. Justice Powell felt that "at least some level of cause such as reasonable suspicion" should be required. Id. at 563. Justice Marshall filed a separate dissenting opinion in which he agreed with the lower courts' ruling that strip searches could only be concluded on a showing of probable cause. Justice Brennan joined Justice Stevens' dissent. Id.

39. Id. at 557.
ceeded to uphold the searches based on their "reasonableness." This approach suggests that the Court may prefer to avoid the Katz and Lanza analyses altogether.

Aside from its questionable theoretical foundation, the traditional approach may also be criticized for the inequities which often result from its application. In their overzealous deference to administrative expertise, courts have blindly accepted any security rationale, regardless of factual circumstances which suggest that security concerns did not motivate the surveillance. For example, in several cases, suspects were placed together in rooms wired for sound and encouraged to talk. Even practices which would ordinarily invalidate a search can survive traditional analysis. In one case, a California court of appeal upheld the admissibility of a jailhouse "tap" despite the fact that the conversation had been recorded by a district attorney for the purpose of investigating an underlying murder charge. Cases such as these exemplify the injustices which can result from the mechanical application of the traditional approach.

III. CALIFORNIA'S DILEMMA

Until recently, California courts followed the traditional approach by finding that there was no right of privacy or reasonable expectation of privacy in prisons. Since 1979, however, the California Supreme Court has granted hearings in several cases which had questioned routine electronic sur-

40. See, e.g., Williams v. Nelson, 457 F.2d 376 (9th Cir. 1972); People v. Finchum, 33 Cal. App. 3d 787, 109 Cal. Rptr. 319 (1973). See also W. LaFAve, supra note 6, at 420.
PRISON SURVEILLANCE

Surveillance in prisons. The court decided one of these cases, *DeLancie v. Superior Court*, in 1982.

A. *DeLancie v. Superior Court*

1. The decision

In *DeLancie*, several taxpayers and a pretrial detainee brought an individual and class action to challenge the legality of the surveillance practices in the San Mateo County jail. Seeking injunctive and declaratory relief, the plaintiffs claimed that the surveillance violated a number of constitutional rights because it was undertaken for the purpose of gathering incriminating evidence. The jail officials allegedly monitored and recorded conversations in visiting areas and prison cells. These surveillance practices were conducted routinely at the discretion of the officials.

The trial court sustained the defendants' demurrer without leave to amend, the court of appeal reversed in part. The California Supreme Court then granted a hearing.

Although the plaintiffs had not specifically alleged a violation of Penal Code sections 2600 and 2601, the supreme court chose to base its decision on these code sections rather than on constitutional grounds. Section 2600 provides that "[a] person sentenced to imprisonment in a state prison may, during any such period of confinement, be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public."[47]
Section 2601 sets out the civil rights which state prisoners are entitled to, including the right "to have personal visits, provided that the department may provide such restrictions as are necessary for the reasonable security of the institution."\(^{48}\)

The predecessor of sections 2600 and 2601 was the "civil death" statute under which the prisoner lost all civil rights and responsibilities. The DeLancie court reasoned that the abandonment of the "civil death" concept indicated that the legislature is concerned with the protection rather than evisceration of the prisoners' rights, and that pretrial detainees were entitled to no less protection. Thus, the court held that the plaintiffs had stated a cause of action for declaratory and injunctive relief under sections 2600 and 2601 because their "complaint alleged that the jail officials' monitoring practice was undertaken for the purpose of gathering evidence for use in criminal proceedings, rather than to maintain the security of the jail."\(^{49}\)

After concluding that the plaintiffs had stated a cause of action, the court rejected the argument that monitoring and recording detainee's conversations was, as a matter of law, a necessary security measure. The dicta in previous decisions was not dispositive in the present case because section 2601 had not yet been enacted.\(^{50}\) Similarly, the court rejected the proposition that prisoners have no reasonable expectation of privacy because it contradicted the policies underlying sections 2600 and 2601.

The court, however, was divided on the question of whether posting signs warning of surveillance would defeat the inmate's reasonable expectation of privacy. The majority,\(^{51}\) sharing the same concerns held by the critics of the Katz's subjective prong, held that the government could not defeat a detainee's right of privacy simply by announcing its intention to intrude in advance. Justice Mosk, however, disagreed with the majority's reasoning, by focusing on the "con-

48. CAL. PENAL CODE § 2601(d) (West 1982).
49. 31 Cal. 3d at 877, 647 P.2d at 149, 183 Cal. Rptr at 873.
50. The court was referring to dicta in North v. Superior Court which stated that the monitoring of inmates' conversations "seems reasonably necessary in order to maintain jail security. . . ." 8 Cal. 3d 301, 312, 502 P.2d 1305, 1311-12, 104 Cal. Rptr 833, 839 (1972).
51. Justice Kaus wrote a separate concurring opinion. Justice Richardson and Justice Mosk each wrote dissenting opinions.
trolled environment” of the prison and arguing that notices would only publicize what an inmate of “average intelligence” should expect. Justice Kaus, however, opined that jail officials would not find posting signs to their advantage because “secret monitoring is necessary for security purposes. . . .”

2. Analysis

DeLancie is undoubtedly a deviation from the traditional approach. While it may be argued that the court’s decision to base its holding on statutory grounds is indicative of its refusal to attack the traditional approach, a more plausible argument is that courts generally prefer statutory grounds for resolving an issue rather than constitutional ones. Moreover, DeLancie suggests that the majority of the court is of the opinion that prisoners are entitled to some protection from electronic surveillance. The fact that hearings were granted in DeLancie and its companion cases is evidence of this attitude.

DeLancie, however, is not as far-reaching as one would expect. The court simply held that detainees could obtain an injunction and declaratory relief if they could show as a matter of fact that the challenged surveillance was not conducted for security reasons. Implicit in this holding is the acceptance of the declarations in sections 2600 and 2601 that security concerns are paramount. It appears that prison officials have unlimited powers to ensure the security of the prison and its inmates.

Aside from the blind endorsement of prison security needs, DeLancie’s impact is also limited by the fact that it places the burden of proof on the detainee. As the court put it: “Plaintiffs are entitled to their day in court so that they may attempt to prove the factual allegations of their com-

52. 31 Cal. 3d at 882, 647 P.2d at 152, 183 Cal. Rptr. at 876.
53. Id. at 879. Justice Kaus concurred with the majority based upon his “understanding that the majority’s recital of the allegation in the complaint that the monitoring was ‘without probable cause to suspect that any illegal activity [was] taking place’ does not imply that monitoring for jail security purposes can only be undertaken on ‘probable cause.’” Id. at 878.
54. As the majority itself stated: “It is a well established principle that courts should avoid resolving constitutional issues if a case can be decided on statutory grounds.” Id. at 877 n.13 (citing People v. Williams, 16 Cal. 3d 663, 667, 547 P.2d 1000, 1003, 128 Cal. Rptr. 888, 891 (1976)); See People v. Gilbert, 1 Cal. 3d 475, 484-85, 462 P.2d 580, 587, 82 Cal. Rptr. 724, 731 (1969).
plaint."

Justice Kaus in his concurring opinion pointed out the practical problem raised, noting that he had "no idea how plaintiffs propose to prove that the monitoring is being performed solely to gather evidence and not for security purposes. . . ." The difficulty of proof, together with the unlikelihood that detainees would even discover that their conversations are being monitored, severely limits DeLancie. Finally, DeLancie leaves an important question unanswered: May the evidence obtained for prosecutorial purposes be used in a criminal trial? It may be argued that evidence obtained for the prosecution of a detainee violates sections 2600 and 2601 and should therefore be excluded from trial. As the following section will explain, the answer to this question must be found in federal case law.

B. Proposition 8

On June 8, 1982, California voters approved Proposition 8 (the "Victims' Bill of Rights"). Among its provisions, Proposition 8 includes a constitutional amendment which provides for the admissibility of all "relevant evidence" in any criminal prosecution. In effect, this "truth-in-evidence" provision replaces California's exclusionary standard with that of the federal standard.

55. 31 Cal. 3d at 877, 647 P.2d at 150, 183 Cal. Rptr. at 874.
56. Id. at 878, 647 P.2d at 150, 183 Cal. Rptr. at 874.
57. For the entire text of Proposition 8, see 1982 Cal. Legis. Serv. 1164-69 (West).
58. The "truth-in-evidence" provision of Proposition 8 provides:
(d) Right to truth-in-evidence. Except as provided by statute hereafter enacted by two-thirds vote of the membership in each house of Legislature, a relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Section 353, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press. Id. at 1165.
59. The California Supreme Court recently held that Proposition 8 satisfied the constitutional requirement that voter initiatives embrace a "single subject." Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982). In addition to finding the "single subject" rule embodied in CAL. CONST., art. II, § 8(d) had not been violated, the court also held that "the failure of the initiative measure to identify the statutory provisions that were amended or repealed by implication did not render it void." Id. at 255-57, 651 P.2d at 284-86, 186 Cal. Rptr. at 40-43. Finally, the court held that Proposition 8 did not constitute an impermissible revision of the state con-
While the constitutionality of the specific provisions of Proposition 8 has yet to be examined by the court, it appears the "truth-in-evidence" provision meets the standard requirements of constitutionality. The impact of this provision on DeLancie is unclear. Although DeLancie's holding remains unaffected, the inference that evidence obtained for the purpose of prosecution in violation of sections 2600 and 2601 would be inadmissible may no longer be valid. Proposition 8, therefore, may have undermined the only meaningful aspect of DeLancie.

IV. PROSPECTS FOR CHANGE

In prison surveillance cases, the federal courts adhere to the traditional approach. As indicated previously, this approach has been heavily criticized for being analytically unsound and frequently unjust. The traditional approach is also undermined by the recent development of prisoners' constitutional rights.

A. Emergence of Prisoners' Right of Privacy and Communication

That the "right of privacy" has become increasingly more valued in modern society is evidenced by the fact that some states provide an explicit right of privacy in their constitutions, while others have enacted privacy statutes. Accordingly, courts have expanded the right of privacy to include

60. In fact, the California Court of Appeal for the Second District has recently upheld the constitutionality of the "truth-in-evidence" amendment and held that the amendment abrogates California Penal Code § 1538.5 (suppression of tainted evidence) as well as California's decisional law, which imposed a higher standard for searches and seizures than federal law. The California Supreme Court granted the defendant's petition for hearing and will review the case. Wilson v. Superior Court, 185 Cal. Rptr. 678 (1982), hearing granted, (Cal. Nov. 18, 1982) (L.A. 31668) (validity of a search for drugs in entertainer Flip Wilson's suitcase at the Los Angeles airport).

61. See, e.g., United States v. Hearst, 563 F.2d 1331, 1344-45 (9th Cir. 1977).


The Massachusetts privacy statute provides: "A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages." Mass. Ann. Laws ch. 214, § 1B (Michie/Law. Co-op 1974).
new areas and interests.68

In keeping with this trend, some courts and promulgators of model codes are accepting the view that various aspects of an individual's right of privacy survive the imposition of confinement. As a result, courts are subjecting heretofore unchallenged prison practices to constitutional scrutiny and demanding justification for official conduct which infringes upon privacy rights relating to personal dignity and property as well as liberty of choice, expression, and association. For example, several courts have extended the right of privacy to the unclothed body of an inmate.64 In one recent case, a federal district court in California held that the inmates' privacy outweighed the state's need to insure prison security through unrestricted observation.65 Similarly, many courts now recognize that prisoners have a right of privacy in "legitimate" personal possessions such as diaries, books, and clothing.66 Less tangible interests, such as the right to marry free from unreasonable restrictions are also protected.67

Consistent with the growing concern for the protection of prisoners' right of privacy is the increased protection of prisoners' communication rights.68 It was the recognition that communication in the form of visitation, telephone contact, and letters had a marked effect on the prisoners' general well-being and morale that first prompted closer examination of

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68. In addressing the right of the media to conduct face to face interviews with inmates, the United States Supreme Court held that the first amendment requires prison administrators to make sure that "reasonable and effective means of communication remain open." Pell v. Procunier, 417 U.S. 817, 826 (1974).
prison restrictions. It is now accepted that arbitrary or unnecessarily broad limitations may run afoul of several constitutional rights. 69

A growing number of courts have held that an inmate's right to communicate with friends and family may be guaranteed by the right of association of the first amendment. 70 Since in some instances the right of privacy and communication are intertwined, a few courts have suggested that visitation areas which lack sufficient privacy may effectively chill the right of free association. 71 One line of cases supports the proposition that eavesdropping or monitoring telephone calls is objectionable on first amendment grounds. 72

Communication rights appear to take on an added dimension where the inmate is a pretrial detainee. While both detainees and prisoners have a right of visitation which may be limited by reasonable security requirements, some courts are less willing to defer to the "reasonableness" of a given security measure in the case of pretrial detainees. As a result, these courts have struck down absolute prohibitions on visitation when less drastic measures such as denying visits to high risk detainees can be taken. 73 A few courts have even found that detainees have a constitutional right to contact visitations. 74


74. Marcera v. Chinlund, 595 F.2d 1231, 1237 (2d Cir.), cert. granted, vacated,
Promulgators of model prison codes have also become more concerned with the protection of communication and privacy rights. Consequently, some modern codes find that a prisoner should be allowed private visitations. Moreover, the most recently published Federal Standard for Prisons states that there is no need to monitor inmate-visitor conversations. Another model code maintains that the right of privacy protects all inmates conversations. This code provides that electronic surveillance "of an inmate's room shall not occur unless proper authorization has been obtained by a court of law."

While the California Department of Corrections has not formulated a rule with respect to electronic surveillance, it has adopted a policy of visitation which is consistent with the spirit of Penal Code sections 2600 and 2601(d). Specifically, section 3170 of the California Administrative Code provides that the privacy of a visit shall not be "imposed upon except . . . for the identification of persons, and to maintain order and acceptable conduct, and to prevent the introduction of items . . . which inmates are not permitted to possess." The California Supreme Court relied partly on this provision in framing the DeLancie holding.


76. Federal Standards for Prisons and Jails Rule 12.12 (United States Department of Justice 1980). Although the American Bar Association recently adopted prison standards which allow for electronic surveillance, it suggests that such surveillance is only justifiable where prison authorities obtain "reliable information that a particular communication may jeopardize the safety of the public or the security or safety within a correctional institution, or is being used in furtherance of illegal activity." Standards for Criminal Justice Standard 23-6.1 (2d ed. 1981).

77. Model Rules and Regulations on Prisoners' Rights and Responsibilities Rule ID-6 (Boston University Center for Criminal Justice 1973).


79. 31 Cal. 3d 865, 874-75, 847 F.2d 142, 147-48, 183 Cal. Rptr. 866, 871-72 (1982).
These courts and legislatures have realized that it is possible to preserve basic human rights and simultaneously accomplish the goals of our penal institutions. It is time that the courts following the traditional approach adopt this enlightened view.

B. The Prisoners' Right of Privacy and the Fourth Amendment

The majority's antiquated approach to electronic surveillance is even more unsettling in light of the emerging view that fourth amendment protections "do not lapse at the jailhouse door." Although the scope of these protections in the prison setting is not yet clear, the list of cases providing at least limited protection continues to grow. In marked contrast to the electronic surveillance cases, those cases which have invalidated other administrative searches on fourth amendment grounds are thoughtful and well-reasoned. In addressing the challenged search, these courts have adopted a balancing test which objectively weighs the government's interest in conducting the search against the individual's fourth amendment interest, in light of all the relevant facts.

In addition, the burden of proving the reasonableness of a search is placed on the party best able to bear it—the government. In assessing the reasonableness of a search, these courts are scrutinizing the alleged purpose of the search and the scope of the actual intrusion. Generally, a search is unreasonable if it is conducted arbitrarily or if its scope is overbroad. The following survey will illustrate the application of this analysis to various types of prison searches.

1. Strip Searches

Because of the belief that strip searches are an effective means of detecting and deterring the introduction of contraband into prisons, the courts afford prison authorities a great deal of deference in strip search cases. In *Bell v. Wolfish*, pretrial detainees challenged the practice of routine strip

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searches which were conducted after every contact visit. The Court upheld the search as reasonable and concluded that each search could be conducted on less than probable cause because of the "significant and legitimate interest" they served. The Court stated that the test of reasonableness under the fourth amendment is not mechanical but rather "a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it and the place in which it is conducted." This balancing test, however, should afford prison administrators "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed . . . to maintain institutional security."

The lower courts which have interpreted Wolfish generally agree that body searches are not "per se unreasonable under the Fourth Amendment," and find that Wolfish requires a balancing of interests in each case. Courts look closely for a demonstrated need for the search and weigh that need against the degradation caused by the search. Expert testimony often plays a key role in this determination. Moreover, some courts have held that Wolfish requires prison officials to conduct strip searches pursuant to established procedure and in a nonabusive manner. Accordingly, when the circumstances warrant, courts have found that some searches

82. The Court described the search procedure as follows: "If the inmate is a male, he must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates are also inspected. The inmate is not touched by security personnel at any time during the visual search procedure." Id. at 558 n.39 (citing Wolfish v. Levi, 573 F.2d 118, 131 (2d Cir. 1978); Brief for Petitioners at 70, 74 n.56, Bell v. Wolfish, 441 U.S. 520).
83. 441 U.S. at 558-60.
84. Id. at 559.
85. Id. at 547.
are unreasonable. 90

2. Cell Searches

As with strip searches, Wolfish is the latest Supreme Court pronouncement on prison cell searches. In Wolfish, jail inmates objected to unannounced “shakedowns” during which all inmates would be vacated while a team of guards searched each cell. The lower courts struck down the search because no “compelling necessity” had been demonstrated. The Supreme Court, however, found the search reasonable within the meaning of the fourth amendment. Deferring to the prison officials, the Court noted that the “shakedowns” were an appropriate security measure. 91

While most decisions suggest that cell searches conducted for legitimate security purposes are per se reasonable, 92 some courts have found fourth amendment violations when the scope of the search exceeded its legitimate objective. In United States v. Hinckley, 93 a correctional officer, conducting a routine contraband search of John Hinckley’s cell, confiscated Hinckley’s personal notes. The court of appeals noted that while prison officials must be accorded deference in implementing cell searches, such discretion “must be corralled by the fourth amendment’s prohibition of arbitrary invasion of privacy.” 94 Because Hinckley’s writings could not in “any real sense” jeopardize prison security, 95 and there was no es-

90. See Frazier v. Ward, 426 F. Supp. 1354 (N.D.N.Y. 1977) (denied prison officials relief from declaratory judgment which prohibited them from conducting visual cavity searches on inmates returning from contact visits after finding such searches violative of the fourth amendment); State v. Hartzog, 26 Wash. App. 576, 615 P.2d 480, 485 (1980) (found a courtroom security order which required a second probe search prior to an inmate’s entrance to the courtroom unnecessary and unreasonable). See also Bono v. Saxbe, 620 F.2d 609 (7th Cir. 1980). In Sims v. Brierton, 500 F. Supp. 813 (D.C. Ill. 1980) (court granted plaintiff prisoner’s motion for a protective order under Federal Rules of Civil Procedure 26(c). The court prohibited prison officials from requiring the plaintiff to “submit to a body cavity search before or after his deposition or before or after an attorney visit in preparation for the deposition.” Id. at 817. The court based its decision to grant the order on the prison’s failure to show a legitimate security interest as well as its failure to justify its restriction on the inmates’ access to the court, stating: “Access to the courts conditioned on submission to a degrading and unnecessary search is unduly restrictive.” Id.

92. See, e.g., Olson v. Klecker, 642 F.2d 1115 (8th Cir. 1981).
93. 672 F.2d 115 (D.C. Cir. 1982).
94. Id. at 129.
95. Id. at 132. In reaching this conclusion, the court rejected the government’s contention that the reading and subsequent seizure of Hinckley’s papers was justified
established practice or policy "that such reading was necessary to maintain institutional or inmate security . . . ," the court concluded that the search was unreasonable. 96

In addition to demanding that the cell search be non-capricious, some courts are insisting that the search be implemented in the least disruptive manner with concern for the inmate's property and privacy rights. 97 Moreover, there must be a logical nexus between the item sought and the item seized. 98 Where prison authorities fail to comply with these minimum standards, courts are finding fourth amendment violations. 99

3. Mail Inspection

In Procunier v. Martinez, 100 the Supreme Court found a prison mail censorship scheme unconstitutional on first amendment grounds because there was no showing that the censorship was necessary to further a legitimate penological

because "while sorting through papers during an authorized search for contraband [the officer] saw words that triggered an institutional need for further investigation." Id. at 131. The court agreed with the trial court's finding that the words "prison," "life sentence," and "cooperation with the Justice Department" were hardly of a nature that suggests an imminent or even remote threat to security. Id. at 132.

96. Id. at 131. See also Diguiseppe v. Ward, 514 F. Supp. 503 (S.D.N.Y. 1981) (district court found that the words "August 8" did not justify the nonconsensual reading of prisoner's diary during the course of "lockdown" following prison riot on August 8).


99. United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982). See supra text accompanying notes 92-94. Diguiseppe v. Ward, 514 F. Supp. 503 (S.D. N.Y. 1981) (district court granted plaintiff-prisoner's motion for summary judgment and awarded damages upon finding the nonconsensual reading of plaintiff's diary during a prison-wide cell search was an unreasonable invasion of the prisoner's privacy. The court reached this conclusion despite the fact that the "shakedown" was conducted two days after a prison riot in an effort to reinforce prison security); O'Connor v. Keller, 510 F. Supp. 1359 (D. M.D. 1981) (found confiscation of prisoner's books and tapes during a prison-wide search where the purpose of the search was to uncover sandpaper and prison authorities personally liable for damages). See also Clifton v. Robinson, 500 F. Supp. 30 (E.D. Pa. 1980) (district court held that prison officials were not entitled to summary judgment where prisoner's complaint alleged that personal property damaged or destroyed during the disruptive cell search could establish a fourth amendment violation); Stringer v. Thompson, 537 F. Supp. 133 (N.D. Ill. 1982) (prisoner stated a cause of action under the fourth amendment where property seized during prison-wide lockdown was neither illegal nor contraband).

objective. Although the Supreme Court has not recently addressed the issue of whether the fourth amendment provides prisoners with protection from routine reading of prison mail, many lower courts have addressed this issue.

Most lower courts have imposed some degree of procedural safeguards on mail inspection based on the first amendment. A few courts have held, however, that the fourth amendment prohibits the indiscriminate reading of mail. Specifically, the Ninth Circuit has held that a prisoner possesses a right of privacy in a sealed letter which cannot be invaded absent a "showing of some justifiable purpose of imprisonment." Courts accepting this premise agree that the reading of mail for the purpose of obtaining prosecutorial evidence is not a "justifiable purpose," and have excluded all evidence obtained from trial.

101. In 1919, the Court held the fourth amendment did not extend to letters written by an inmate where such letters "came into the possession of officials of the penitentiary under established practice, reasonably designed to promote the discipline of the institution." Stroud v. United States, 251 U.S. 15, 21-22 (1919).

102. These safeguards include inspection by mechanical device, the opening of mail in the presence of the inmate, and scanning rather than reading the mail. For inspection purposes, mail is usually divided into four different categories; incoming, outgoing, personal, and privileged (letters to attorney, governor, etc.). As a general rule, privileged outgoing mail is given the greatest degree of protection because it constitutes the slightest threat to prison security.


104. See, e.g., Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970). It is interesting to note that while most courts are reluctant to extend explicit fourth amendment protection to mail inspections, many court orders implicitly suggest such protection by prohibiting the opening and inspection of mail unless the jail official has probable cause (or its equivalent) to believe that the communication poses a threat to security. See, e.g., supra note 104.


106. State v. Ellefson, 266 S.C. 494, 224 S.E.2d 666 (1976) (reversed a conviction for breach of trust where evidence obtained by an outside investigator had been admitted at trial); State v. Sheriff, 619 P.2d 181 (Mont. 1981) (found letters opened and photocopied by a jailor should have been excluded at trial because only opened to obtain evidence, not to maintain security and discipline).
V. Application of the Fourth Amendment to Electronic Surveillance

As we have seen, a growing number of courts have found that prisoners retain a diminished right of privacy protected by the fourth amendment. It has also become apparent that the application of the fourth amendment to the prison setting is not necessarily inconsistent with the need to maintain safe prisons. The more complex question, however, concerns the applicability of the fourth amendment's requirement of reasonable search and seizures to electronic surveillance.

In determining whether a particular search has violated an inmate's constitutional rights, the preceding survey of related case law and model codes offers some guidelines. First, courts must consider the need for the search, taking into consideration the proffered justification and the scope of the search as well as the manner and place in which it was conducted. Even though most authorities agree that security concerns are paramount, courts should nonetheless give the prisoner the opportunity to show that the challenged search was not conducted for security reasons. California courts should be mindful that the DeLancie court has held that the existence of security concerns are a question of fact.

In addition, courts must balance the need for a particular search against the nature of the individual rights intruded upon. The manner and place of the recording plays an important role in this consideration. As with mail searches, the practice of electronic surveillance has a chilling effect on the first amendment right of expression and association. Surveillance of visiting rooms in a manner which creates a false pretense of privacy should be scrutinized carefully. Conversations between a prisoner and his family and friends are extremely intimate and, absent a most compelling interest, government should not intrude on their privacy.

Courts should also be wary of the scope of a search. Many courts now require that the scope of an intrusion be closely tailored to its purpose. Admittedly, this purpose-scope limitation may not be as workable in eavesdropping cases as it is

107. See supra notes 62-108 and accompanying text.
109. See, e.g., supra notes 93-97 and accompanying text.
in other administrative searches which involve visual inspection for an item of contraband. It is virtually impossible to scan a conversation to determine if recording is necessary. Nevertheless, at times the parties to a conversation and the surrounding circumstances may be indicative of its contents. For example, it is unlikely that a prisoner would be discussing escape plans with his eighty year old grandmother or six year old child. In these cases, the government should have to show that there was probable cause to believe that prison security was threatened.

Because of the inadequacies of the purpose-scope limitation, the courts should impose a purpose-use limitation on the information obtained through monitoring. While prison officials may have broad surveillance powers to ensure the security of an institution, it does not necessarily follow that the state should be allowed to use, for prosecutorial purposes, all information obtained through electronic surveillance. A distinction should be made between information which suggests a genuine threat to security and that which does not. As such, the state would be justified in using legitimate evidence of an escape plot, but not evidence of a robbery which occurred two months earlier. Under our criminal justice system the state and the pretrial detainee are adversaries, and the state bears the burden of conviction. The courts have adopted the position that, because of the integrity of the judiciary and considerations of fair play, they will not consider evidence obtained by the state through illegal means. By the same token, the state should not be allowed to use any evidence which is obtained solely because of the defendant’s confinement. The state should not be allowed to abuse its procedural advantage of arrest and confinement to “fish” for evidence necessary for conviction. In short, evidence obtained for security reasons should be used solely for security purposes.

VI. Conclusion

The judiciary’s uncompromising deference to institutional concerns for security shields prison surveillance from fourth amendment protections. The enlightened view towards prisoners’ rights which has evolved in recent decades should signal an end to this traditional approach. The inmates’ right to private conversations should be balanced against institutional security needs. The government must substantiate its need for
electronic surveillance and should follow procedural safeguards to ensure minimal infringement of prisoners' rights. Moreover, the use of information obtained by electronic surveillance should be limited to furthering the security concerns which justified the initial intrusion.

By adopting this modern approach, inmate communication and privacy rights can realistically coexist with legitimate security practices. This important balance of state and individual interests characterizes a sensitivity toward constitutional liberties and captures the spirit of the DeLancie decision.

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