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## **Contraband Control and the Use of X-Rays in the Prison Environment**

A prison contains serious security dangers.<sup>1</sup> The security problems have become aggravated in recent years with the advent of determinate sentencing laws<sup>2</sup> that have caused the prison population to expand in California at a rate of approximately 100 persons per week.<sup>3</sup> One major challenge facing prisons over the next decade will be to cope successfully with the rising prison population and commensurate security needs.<sup>4</sup>

One serious breach of prison security is the smuggling of contraband into the facility by inmates<sup>5</sup> and visitors.<sup>6</sup> The most common method of smuggling prohibited articles into a prison is the concealment of contraband in body cavities.<sup>7</sup> Current measures to curb the introduction of contraband into the prison environment have proved inadequate.<sup>8</sup> Walk-through and hand-held metal detectors are unable

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1. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); *Block v. Rutherford*, 52 U.S.L.W. 5067, 5070 (U.S. June 26, 1984). One of the many concerns of prison security is the introduction of drugs, weapons, or other contraband into the detention facility. *Bell*, 441 U.S. at 598.

2. A determinate sentence is a sentence of confinement for a fixed period as specified by statute. The sentence of imprisonment is fixed and the court has no discretion to alter the duration of imprisonment. BLACK'S LAW DICTIONARY 404 (5th ed. 1979).

3. *California Corrections: The Slippery Slope*, A Report by the Staff of the Assembly Criminal Justice Committee, 1 (1981). From 1977 to 1981, the prison population in California increased by over 7000 prisoners (20,629 to 27,651). *Id.* The California Department of Corrections is projecting that the prison population will accelerate to 39,787 by 1984-85, and may reach 46,564 during 1989-90. *Id.* at 1.

4. *Id.* at 20.

5. As used in this comment, the term "inmate" or "prisoner" refers to a person convicted of a crime and sentenced to a period of confinement. By contrast, a "pretrial detainee" is an individual who has not been convicted but who has been committed to a detention facility pending trial. The term "arrestee" refers to a person who has been arrested and temporarily confined by the police, and who is awaiting release on bail. This comment will focus on X-ray searches of prisoners and detainees. Therefore, the analysis will be inapplicable to arrestees.

6. *Bell*, 441 U.S. at 559.

7. *Id.*

8. *Id.* at 559 n.40.

to disclose the presence of contraband items like plastics, paper, synthetics, and narcotics.<sup>9</sup> The introduction of contraband into the prison environment threatens the security of prison guards and other inmates.<sup>10</sup> The problem necessarily becomes one of finding a functional and effective system to disclose and deter the passage of contraband into the secured premises.<sup>11</sup>

This author will consider the legal issues arising from the use of low-level radiation upon the human body as an alternative to present methods of controlling the flow of contraband into detention facilities. First, current X-ray technology will be evaluated to determine whether modern machines can deliver medically safe doses of radiation to prisoners on a routine basis. This author then will evaluate the constitutional challenges likely to be encountered by those seeking to implement X-ray searches in prisons. The fourth amendment, which offers broad protection to prisoners, will be emphasized. Drawing upon fourth amendment doctrines developed in cases involving searches at United States borders, in airports, and in prison by means other than by X-ray, this author will conclude that the use of low level radiation to search prisoners and their contact visitors is constitutional. Prior to analyzing the constitutional concerns, the first order of discussion will focus on the modern advancements in radiation.

#### RADIATION SYSTEMS—THE CURRENT STATE OF THE ART

Since the first use of X-rays by researchers and radiologists in the early years of this century, scientists have been aware that radiation can be both harmful and beneficial.<sup>12</sup> Soon after the discovery of X-rays and radioactivity, scientists discovered that exposure to radiation could have a detrimental effect on biological systems.<sup>13</sup> Recognizing this risk, the California Legislature has established maximum exposure levels considered to be medically safe.<sup>14</sup>

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9. *Id.*

10. *Block*, 52 U.S.L.W. at 5070.

11. *Bell*, 441 U.S. at 559.

12. *Radiation Protection Guide For Hospital Staff*, STANFORD UNIVERSITY HOSPITAL, Bulletin #1 at page 6; REPORT OF THE INTERAGENCY TASK FORCE ON THE HEALTH EFFECTS OF IONIZING RADIATION, June 1979, at page 1.

13. *Radiation Protection Guide For Hospital Staff*, STANFORD UNIVERSITY HOSPITAL, Bulletin #1 at page 6; REPORT OF THE INTERAGENCY TASK FORCE ON THE HEALTH EFFECTS OF IONIZING RADIATION, June 1979, at page 1.

14. The production of an image is dependent upon the absorption of radiation by the individual, or more precisely, the selective absorption of radiation throughout the irradiated tissue of the patient. See *Syllabus on Diagnostic X-ray Radiation Protection For Certified X-ray Supervisors and Operators*, DEPARTMENT OF HEALTH SERVICES, Radiologic Health Section, January 1982, at 54. Unfortunately, the absorption of energy from the X-ray beam can have deleterious effects on tissue. *Id.* For purposes of evaluating the hazards of radiation, various units of radiation exposure and dose have been introduced to account for the several methods of measuring

A complete discussion of the history and ethics of radiation technology is beyond the scope of this comment. This author will focus instead on whether modern technology has advanced to a level that would allow a prisoner to submit to a daily X-ray screening device and still receive a yearly dosage of radiation that would fall within established medical safety standards. The American Justice Institute recently evaluated this question in a report prepared for the California Department of Corrections.<sup>15</sup> The report included an evaluation of present day contraband control technology.<sup>16</sup> Included in this report was an evaluation of a radiography system that delivers unprecedented low doses of radiation. Although the system was originally designed for medical procedures, adaption for use in a prison security system would be accomplished easily.<sup>17</sup> This system can X-Ray prisoners and

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and assessing the effects of different types of radiation. The only dose measurements that need to be defined for the purposes of this comment are the "rem" and the "rad." In the California Radiation Control Regulations, 17 CAL. ADMIN. CODE section 30265, a Radiation Absorbed Dose or "rad" is the special unit of absorbed dose. Absorbed dose is the amount of energy absorbed by the substance at the radiated point. See *Syllabus on Diagnostic X-ray Radiation Protection For Certified X-ray Supervisors and Operators*, DEPARTMENT OF HEALTH SERVICES, Radiologic Health Section, January 1982, at 55. "Rem" was devised to allow for the fact that the same absorbed dose in rads delivered by different kinds of radiation does not produce the same degree of biologic effect since some radiations are biologically more effective than others. *Id.* "Rem" is a unit of dose of any radiation to body tissue in terms of its estimated biological effects relative to an exposure in "rads". *Id.* The permissible dose equivalent of radiation is specified in rems. *Id.* The California Radiation Control Regulations, 17 CAL. ADMIN. CODE section 30265, 30268, establish a maximum whole-body dose equivalent of five rems per year for individuals over 18. Individuals under 18 may receive a whole-body dose equivalent to 10% of the maximum permissible for adults. *Id.* Limits recommended by the National Council on Radiation Protection are as follows: (1) 15,000 mrem/yr (not to exceed 5,000 mrem/quarter); and (2) 500 mrems to a fetus during the gestation period. See *Radiation Protection Guide for Hospital Staff*, STANFORD UNIVERSITY HOSPITAL, Bulletin #1, at page 3.

15. *Technology Transfer*, A Report prepared for the California Department of Corrections by the American Justice Department, January 1984.

16. *Id.* at 13.

17. American Science and Engineering, a company based in Cambridge, Massachusetts, has patented a system called MICRO-DOSE Digital Medical Radiography System. See *American Science and Engineering Promotional Material* [hereinafter cited as *Promotional Material*] (copy on file at *Pacific Law Journal*). MICRO-DOSE requires only a small exposure of X-rays that are used so efficiently that only nominal exposure is needed in order to create the desired images. *Id.* In order to fully understand the significance of the MICRO-DOSE process, a new unit of measurement must be explained. A "rem", defined earlier, is the equivalent of one thousand "millirems" [hereinafter cited mR]. To exceed the established safety standards in the State of California, the subject must have a yearly exposure that is greater than 5,000 mR. *Id.* The MICRO-DOSE system delivers, on the average, a dose that is slightly less than 2 mR per exposure. *Id.* The average yearly dose, assuming that an X-ray is given every day, would amount to roughly 730 mR per year. This is approximately 15% of the maximum amount permissible under the law. A person could be X-rayed six times a day, every day of the year, and still be below the established safety standards established for individuals over the age of eighteen. A person under 18, who is allowed a maximum yearly exposure equivalent to 500 mR or 10% of the adult standard, could be subjected to an X-ray 250 days of each year. The same standard would apply to fetal exposure. *Id.* The dose limits established by law are in addition to the natural radiation exposure caused by the environment. See REPORT OF THE INTERAGENCY TASK FORCE ON THE HEALTH EFFECTS OF IONIZING RADIATION [hereinafter cited

their contact visitors for contraband effectively without exposing the party to harmful doses of radiation.<sup>18</sup> In light of this new technology, the medical risks are diminished sufficiently to proceed to a discussion of the legal issues presented.

#### JUDICIAL REVIEW OF PRISON ADMINISTRATION

The very nature of lawful incarceration "brings about the necessary withdrawal or limitation of many privileges and rights."<sup>19</sup> The judiciary formerly adopted a "hands off" approach to the problems of prison administration, deferring to the particular knowledge and experience of prison administrators.<sup>20</sup> Recently, courts have discarded this approach in favor of judicial review on a case-by-case basis.<sup>21</sup> Thus, significant deference is given to prison policies designed to maintain institutional security.<sup>22</sup> Prisoners are not stripped of all constitutional protections upon their imprisonment.<sup>23</sup> The United States Supreme Court has held that courts have a duty to ensure that prison regulations and practices do not offend any fundamental constitutional

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as HEALTH EFFECTS], June 1979, at 10. Radiation in the environment from natural sources is the major source of radiation exposure to man. *Id.* The magnitude of radiation exposure from ubiquitous sources of background radiation, including cosmic rays and terrestrial radioactivity, varies from place to place, according to altitude, diet, and soil content. *Id.* Environmental radiation averages approximately 130 mR per person per year in the United States. *Id.* A person living in Los Angeles receives a yearly exposure of 125 mR per year. *See Summary of Common Radiation Exposures in Milliroentgens*, State of California, DEPARTMENT OF HEALTH SERVICES/RADIOLOGIC HEALTH SECTION. An individual living in Denver receives a yearly dosage of 400 mR. *Id.* Flying in a 747 to New York from Los Angeles exposes the whole body to 5 mR. *See Stanford University Hospital, Radiation Protection Guide For Hospital Staff and the State of California*, Department of Health Services/Radiologic Health Branch. the MICRO-DOSE system delivers a dosage that is approximately 40% of the radiation exposure from a transcontinental flight. A person moving from Los Angeles to Denver would be increasing his yearly exposure to an amount equivalent to 135 MICRO-DOSE exposures.

18. *See supra* note 17 and accompanying text.

19. *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Wolff v. McDonnell*, 418 U.S. 539, 555 (1973). "But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff*, 418 U.S. at 555-56; *Price v. Johnston*, 334 U.S. 266, 285 (1948). "Lawful incarceration brings about the necessary withdrawal or limitation of privileges and rights, a retraction justified by the considerations underlying our penal system." *Price*, 334 U.S. at 285.

20. *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974). The hands-off policy is the product of various limitations on the scope of federal judicial review of conditions in state penal institutions. *Id.* Prison administrators are responsible for maintaining internal order and discipline. *Id.* This is a complex responsibility that requires the expertise and knowledgeable planning and resources peculiarly within the province of the legislative and executive branches of government. *Id.* The judiciary is ill equipped to deal with the increasingly urgent problems of prison administration and reform. *Id.*

21. *See Bell v. Wolfish*, 441 U.S. 520 (1979); *DeLancie v. Superior Court*, 31 Cal. 3d 865, 647 P. 2d 142, 183 Cal. Rptr. 866 (1982).

22. *Bell*, 441 U.S. at 547. *See also Sims v. Brierton*, 500 F. Supp. 813, 816 (N.D. Ill. 1980).

23. *Wolff*, 418 U.S. at 555.

guarantee.<sup>24</sup>

California Penal Code section 2600 is consistent with modern cases, recognizing that prisoners are not wholly deprived of their constitutional rights upon imprisonment. The Penal Code states 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.”<sup>25</sup> Courts, however, remain firm in their belief that no undue interference in the administration of state prisons will be tolerated, unless federal constitutional violations and deprivations are *clearly evident*.<sup>26</sup> A mutual accommodation and understanding must exist between institutional needs and objectives and the provisions of the Constitution that are of general application.<sup>27</sup>

The most recent pronouncements by the Supreme Court clearly support, if not strengthen, the degree of deference given to prison administrators. In *Block v. Rutherford*<sup>28</sup> and *Hudson v. Palmer*,<sup>29</sup> the Court cited with approval the landmark case of *Bell v. Wolfish*,<sup>30</sup> which established the policy of deference to the security needs of prisons. In *Block*, for example, the Court reaffirmed the holding that the informed discretion of prison administrators is to be afforded great latitude.<sup>31</sup>

The deference given to prison administrators is strongest when the particular security system instituted by prison management is one in a series of reasonable systems available.<sup>32</sup> When several constitutionally reasonable alternatives are available to further an institutional need,

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24. *Procunier*, 416 U.S. at 405-06. “But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.” *Id.* See also *Johnson v. Avery*, 393 U.S. 483, 486 (1969).

25. CAL. PENAL CODE §2600; see *DeLancie*, 31 Cal. 3d 865, 870, 647 P.2d 142, 145, 183 Cal. Rptr. 866, 869 (1982).

26. *Frazier v. Ward*, 528 F. Supp. 80, 82 (N.D.N.Y. 1981); *Bell*, 441 U.S. at 547. “Such considerations are peculiarly within the province and professional expertise of correction officials, and, in the absence of substantial evidence in the record to indicate that officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgement in such matters.” *Bell*, 441 U.S. at 547-48 (quoting *Pell v. Procunier*, 417 U.S. at 827).

27. *Wolff*, 418 U.S. at 556.

28. 52 U.S.L.W. 5067 (U.S. June 26, 1984).

29. *Id.* at 5052.

30. 441 U.S. 520 (1979).

31. *Block*, 52 U.S.L.W. at 5071.

32. *Bell*, 441 U.S. at 559. The court later suggested in a footnote that the existence of less intrusive alternatives may not even be relevant to the determination of the reasonableness of the particular method at issue. *Id.* Each choice of options must be shown to be irrational or unreasonable without regard to alternatives. *Id.*

such as security, the choice must be made by officials outside of the judicial branch of government.<sup>33</sup> Prison administrators should be afforded wide-ranging deference in the adoption and execution of policies that maintain internal order and strengthen security.<sup>34</sup>

Judicial deference to the policies of the prison administration and the accompanying burden of proof placed on inmates who argue for the implementation of an effective but less burdensome alternative to the use of an X-ray search, provide the foundation for most of the following discussion. Unless the record indicates that the administration "exaggerated their response"<sup>35</sup> with the implementation of an X-ray security system, the courts will not second-guess the prison administration.<sup>36</sup> This tolerance is not absolute, however, and each prison policy still must be assessed in light of the constitutional challenges likely to be encountered.

#### THE REASONABLE SEARCH REQUIREMENT

The fourth amendment search and seizure clause of the United States Constitution guarantees the right of individuals to conduct their affairs in private by prohibiting unreasonable searches and seizures by the government.<sup>37</sup> Although courts have differed on whether prisoners retain fourth amendment rights upon their commitment to a detention facility,<sup>38</sup> the decision by the Supreme Court in *Bell v. Wolfish* was based in part on the assumption that prisoners retain some fourth amendment rights after incarceration.<sup>39</sup> Indeed, in a decision prior to *Bell*, Chief Justice Burger recognized that inmates retain a fundamental right of privacy.<sup>40</sup> The Supreme Court, however, has indicated that the warrant and probable cause protections of the fourth

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33. *Id.* at 562.

34. *Id.* at 547; *See also* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 128 (1977).

35. *Bell*, 441 U.S. at 548.

36. *Id.* at 544.

37. "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." U.S. CONST. amend. IV.

38. *See, e.g.*, Bonner v. Coughlin, 517 F.2d 1311, 1317 (7th Cir. 1975); United States v. Hitchcock, 467 F.2d 1107, 1108 (9th Cir. 1972).

39. *Bell*, 441 U.S. at 558.

40. *Houchins v. KQED, Inc.* 438 U.S. 1 (1978). Chief Justice Burger argued in a footnote that "[i]t is true that inmates lose many rights when they are lawfully confined, but they do not lose all civil rights....Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others." *Id.* at 5 n.2.

amendment are not applicable in the prison environment because prisoners have a diminished reasonable expectation of privacy in a detention facility.<sup>41</sup>

Although a prisoner has a low expectation of privacy in prison, the government still retains the burden of demonstrating that the search is reasonable under the fourth amendment. The Court in *Bell* stated:

[t]he test of reasonableness under the fourth amendment is not capable of precise definition or mechanical application. In each case it requires 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.<sup>42</sup>

Under this test, a search may be unreasonable if it lacks sufficient justification or if the manner in which the particular search is conducted is improper.<sup>43</sup> The discussion that follows will analyze the reasonableness of subjecting prisoners and their contact visitors to a search by means of an X-ray.

#### A. General Principles

The judiciary has yet to determine whether the use of X-rays to search inmates for contraband is a violation of the fourth amendment right against unreasonable searches. The use of X-rays to search prisoners would be subject to the fourth amendment "reasonableness" test of *Bell*.<sup>44</sup> Whether a search or seizure is reasonable under the fourth amendment is determined by a two-step analysis.<sup>45</sup> First, the search in question must have intruded upon a reasonable expectation of privacy.<sup>46</sup> The border search cases assume without analysis that an X-ray scan is a search under the fourth amendment.<sup>47</sup> Second, the significance of the intrusion must be balanced against the justification offered by the government for conducting the search.<sup>48</sup> A court must weigh the asserted governmental interests against the particular

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41. *Hudson*, 52 U.S.L.W. at 5055; *United States v. Lilly*, 576 F.2d 1240, 1244 (5th Cir. 1978).

42. *Bell*, 441 U.S. at 559.

43. *Id.*

44. In *Block v. Rutherford*, the Supreme Court once again announced that the "principles articulated in *Wolfish* govern resolution of this case." *Block*, 52 U.S.L.W. at 5070.

45. See Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 381 (1974).

46. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); *Hudson*, 52 U.S.L.W. at 5054.

47. See *infra* note 89 and accompanying text.

48. *Terry v. Ohio*, 392 U.S. 1, 17-18, n.15 (1968); *Hudson*, 52 U.S.L.W. at 5057 (O'Connor, J., concurring).



invasion of the privacy and possessory interests of an individual as established by the facts of each case.<sup>49</sup> The interest of the prisoner, of course, already is limited by the exigencies of confinement.<sup>50</sup> As indicated above, the very nature of lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights.<sup>51</sup> The discussion that follows initially will focus on whether an inmate may be required to submit to an X-ray search upon returning from a contact visit. Second, whether a prisoner can be searched by X-ray when moving within the confines of the prison, even absent a contact visit with someone outside of the prison, will be discussed.

## B. Search of Prisoners Returning from a Contact Visit

### 1. Balancing the Various Interests

Case law reflects a balancing by the courts of the interests of the government against the interests of the individual prisoner.<sup>52</sup> To explore how these interests might be balanced in the context of an X-ray search, the institutional concerns of the government first must be examined. With regard to operating penal institutions, the United States Supreme Court in *Procunier v. Martinez*<sup>53</sup> stated that the governmental interests are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and rehabilitation of prisoners.<sup>54</sup> The strength of the particular governmental interest in searching a prisoner is dependent upon the relationship of the search to a legitimate penal institution objective.<sup>55</sup> Certainly a search for contraband is related to all three objectives mentioned by the *Procunier* court. The interests of the government

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49. *Terry*, 392 U.S. at 17-18, n.15; *Hudson*, 52 U.S.L.W. at 5057 (O'Connor, J., concurring).

50. A prisoner has no reasonable expectation of privacy in his prison cell. *Hudson*, 52 U.S.L.W. at 5054-55. "We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security." *Id.* at 5055. In *Bell*, 441 U.S. at 537, the Court held that the "[l]oss of freedom of choice and privacy are inherent incidents of confinement." *Id.* Even though the loss of privacy is absolute when applied to a prisoner's cell, the Court has not squarely held that the individual prisoner is deprived of all fourth amendment rights. *Bell* applied a "reasonableness" test that requires a balancing approach. *Id.* at 559. Therefore, even though the fourth amendment rights of prisoners are tempered both by the fact of confinement and the legitimate needs of penal administration, some degree of balancing is required. *Id.* at 559.

51. *Pell*, 417 U.S. at 822; *Price*, 334 U.S. at 285.

52. In some contexts, however, the Court has rejected the case-by-case approach to the "reasonableness" inquiry in favor of an approach that determines the reasonableness of contested practices in a categorical fashion. See *United States v. Robinson*, 414 U.S. 218, 285 (1973) (searches incident to lawful arrest).

53. 416 U.S. 396, 412 (1974).

54. *Id.*

55. *Block*, 52 U.S.L.W. at 5070.

are balanced by the courts against the retained privacy interests of the prisoner.<sup>56</sup> The scope of the privacy interest of a prisoner in the context of an X-ray search is best considered in light of the judicial authority of *Bell*, which established the right to conduct full body cavity searches in prison.<sup>57</sup> Another analogous setting is the use of X-ray search techniques by the government to control the illegal importation of drugs into the country. Consistent with case law stemming from prisoner body cavity searches, the border search cases apply a balancing test that is useful here for comparative analysis.<sup>58</sup>

## 2. *The Use of Strip Searches and Cavity Inspections in Detention Facilities*

No reasonable argument can be made that the search of a body does not entail a significant invasion of privacy. To have someone physically probe one's body may be both physically uncomfortable and psychologically embarrassing.<sup>59</sup> The psychological embarrassment is significantly enhanced in the case of body cavity searches and even more so if performed in the presence of other convicts and guards.<sup>60</sup>

In *Bell*, the Supreme Court considered the constitutionality of a jail practice that required pretrial detainees<sup>61</sup> to expose their body cavities<sup>62</sup> for visual inspection following contact visits with outsiders.<sup>63</sup> Although the Court acknowledged that this type of search was a very serious intrusion upon the privacy interests of the prisoners, the Court determined that these privacy interests were outweighed by the legitimate interest of the institution in security.<sup>64</sup> First, the Court held

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56. See *supra* notes 48-51 and accompanying text.

57. See *infra* notes 59-74 and accompanying text.

58. See *infra* notes 75-104 and accompanying text.

59. *United States ex rel. Wolfish v. Levi*, 439 F. Supp. 114, 147 (S.D.N.Y. 1977), *aff'd sub nom. Wolfish v. Levi*, 573 F.2d 118 (2d Cir. 1978), *rev'd sub nom. Bell v. Wolfish*, 441 U.S. 520 (1979). The district court in *Bell* noted that intrusive body searches engender feelings of "deep degradation" and "terror" and the psychological reactions of persons undergoing such procedures can be likened to those of rape victims. *Levi*, 439 F. Supp. at 147. Expert testimony was given before the Supreme Court that visual body cavity examinations engender "psychological sadism" by prison guards and "fear of sexual assault" by inmates. *Bell*, 441 U.S. at 577 n.17 (Marshall, J., dissenting).

60. *Bell*, 441 U.S. at 577 n.17 (Marshall, J., dissenting); *Levi*, 439 F. Supp. at 147.

61. See *supra* note 5 and accompanying text.

62. See *Bell v. Wolfish*, 441 U.S. 520, 558 n.39 (1979). "Visual body cavity" examinations, for a male inmate, involve the additional step of bending over, lifting the genitals, and spreading the buttocks to allow a visual inspection of the anus. *Id.* Females must follow a similar procedure, including a visual vagina inspection. *Id.*

63. 441 U.S. at 558.

64. *Id.* at 560.

that jail officials do not require probable cause to believe that a particular inmate was engaged in smuggling contraband.<sup>65</sup> Second, even a less intrusive procedure, like close observation of inmate visits, was not sufficient to ban the use of strip searches.<sup>66</sup> The Court stated that to avoid disrupting the confidential and intimate nature of the visit, implementing a visual inspection procedure was a reasonable alternative to close and constant supervision during the visit.<sup>67</sup> That choice has not been shown to be irrational or unreasonable.<sup>68</sup> The Court upheld the practice despite the discovery of only one instance of smuggling after utilizing the strip search technique.<sup>69</sup> The single instance of smuggling was attributable to the deterrent effect of the strip search employed.<sup>70</sup> Since the method employed by the facility was reasonable, the Court refused the request of the plaintiffs to require that a detention facility implement the least intrusive search method available.<sup>71</sup>

In rejecting the need for the least intrusive method and any requirement of a factual showing of smuggling incidents, the Supreme Court has indicated that significant deference is to be accorded institutional security.<sup>72</sup> The Court in *Bell* approved of a very intrusive search technique, but failed to clarify whether the term "intrusive" is determined by looking at the *extensiveness*<sup>73</sup> of the search or, alternatively, by the *indignity* sustained. The border search cases address this issue.<sup>74</sup>

### 3. *The Use of X-Rays to Search Travelers Entering at the Border*

One court has recognized that the border search cases provide a useful precedent for constructing an analytical framework for prison searches.<sup>75</sup> Like prison searches, border inspections involve the governmental interest in detecting contraband.<sup>76</sup> In recent months, a number

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65. *Id.* at 558-60.

66. *Id.* at 559 n.40.

67. *Id.*

68. *Id.*

69. *Id.* at 559.

70. *Id.*

71. *Id.* at 559 n.40.

72. *Id.* at 599.

73. A term that describes the extent of human anatomy revealed.

74. See *infra* notes 75-104 and accompanying text.

75. *Hodges v. Klein*, 412 F. Supp. 896, 902 (D.N.J. 1976).

76. *Carroll v. United States*, 267 U.S. 132, 154 (1925).

of decisions have addressed the use of X-rays to search travelers crossing U.S. borders.<sup>77</sup> These decisions create a conflict between two federal circuit courts over the applicable standard to be used when evaluating the propriety of X-ray searches.<sup>78</sup>

a. *The Eleventh Circuit Position*

The Eleventh Circuit, in a series of cases released on the same day, established the applicable standard in deciding the constitutionality of X-ray searches to detect whether persons entering the United States are carrying contraband in their bodies.<sup>79</sup> The court adopted a reasonableness standard by applying a flexible test in which the level of suspicion required for a particular search was adjusted to match the intrusiveness of the search.<sup>80</sup> When the degree of intrusiveness increases, the amount of suspicion necessary to justify the search correspondingly increases.<sup>81</sup> The Eleventh Circuit effectively balances the privacy interests of the international traveler against the governmental interest in controlling the flow of contraband.<sup>82</sup>

To determine whether a search is intrusive, the Eleventh Circuit standard focuses on the *indignity* of the search rather than the *extensiveness* of the search.<sup>83</sup> The court stated in *United States v. Vega-Barvo*<sup>84</sup> that the primary purpose of the fourth amendment is the protection of personal privacy and dignity against unwarranted intrusions by the government.<sup>85</sup> Accordingly, the court set forth a test in which the following three factors were held dispositive of the level of indignity endured by the person searched: (1) physical contact between the searcher and the person searched; (2) exposure of intimate body parts; and (3) use of force.<sup>86</sup>

In *Vega-Barvo*, the first factor was analyzed by comparing an X-ray

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77. *United States v. Vega-Barvo*, 729 F.2d 1341 (11th Cir. 1984); *United States v. Mosquera-Ramirez*, 729 F.2d 1352 (11th Cir. 1984); *United States v. Padilla*, 729 F.2d 1367 (11th Cir. 1984); *United States v. Henao-Castano*, 729 F.2d 1364 (11th Cir. 1984); *United States v. Castaneda-Castaneda*, 729 F.2d 1360 (11th Cir. 1984); *United States v. De Montoya*, 729 F.2d 1369 (11th Cir. 1984).

78. See *Vega-Barvo*, 729 F.2d at 1348 (11th Cir. 1982); *United States v. Ek*, 676 F.2d 379 (9th Cir. 1982).

79. *Vega-Barvo*, 729 F.2d at 1341; *Mosquera-Ramirez*, 729 F.2d at 1352; *Padilla*, 729 F.2d at 1367; *Henao-Castano*, 729 F.2d at 1364; *Castaneda-Castaneda*, 729 F.2d at 1360; *De Montoya*, 729 F.2d at 1369.

80. *Vega-Barvo*, 729 F.2d at 1344.

81. *Id.*

82. *Id.*

83. *Id.* at 1346.

84. *Id.*

85. “[P]ersonal indignity suffered by the individual searched controls the level of suspicion required to make the search reasonable.” *Id.* at 1346.

86. *Id.*

screening system to walk-through magnetometers<sup>87</sup> used at airports to screen boarding passengers.<sup>88</sup> The use of X-rays was deemed a fourth amendment search. The X-ray search, however, was held less intrusive than an officer performing a pat-down or personally examining the luggage of a boarding passenger.<sup>89</sup> The court stressed that the embarrassment caused by the second factor, the exposure of intimate body parts, is often controlling in determining the constitutionality of a border search.<sup>90</sup> Finally, the third factor was held to recognize that the use of physical force to search a person often results in considerable indignity.<sup>91</sup> The *Vega-Barvo* court also addressed the medical concerns relating to X-ray searches. The court concluded by conceding without analysis that as risk of medical harm resulting from the search procedure increases, the reasons for conducting the search also must increase.<sup>92</sup> After discussing the aforementioned factors, the court held that an X-ray search is relatively unintrusive.<sup>93</sup> An X-ray does not require physical contact, nor does it expose intimate body parts.<sup>94</sup> Like the metal detector, an X-ray can be administered to subjects while they are fully clothed and with a minimum of effort and cooperation from the party being searched.<sup>95</sup>

*b. The Ninth Circuit Position*

In contrast to the Eleventh Circuit, the Ninth Circuit Court of Appeal in *United States v. Ek*,<sup>96</sup> applied a more stringent standard in evaluating the constitutionality of X-ray border searches.<sup>97</sup> The standard of the Ninth Circuit requires an increased level of suspicion as the search becomes more intrusive in scope.<sup>98</sup> Although neither a warrant nor probable cause is needed to search a person or things crossing the border, this circuit has fashioned rules requiring cause for certain kinds of more intrusive border searches.<sup>99</sup> When conducting

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87. A magnetometer is a device that is able to detect the presence of ferrous metal by sensing the deflections that the metal causes in the magnetic field on earth. The magnetometer is a passive device that emits no rays or signals but merely reacts to the effect of nearby metal in the magnetic field. *United States v. Lopez*, 328 F. Supp. 1077, 1085 (E.D.N.Y. 1971).

88. *Vega-Barvo*, 729 F.2d at 1346.

89. *Id.*

90. *Id.* at 1347.

91. *Id.*

92. *Id.* at 1348.

93. *Id.* at 1349.

94. *Id.* at 1348.

95. See *infra* notes 148-54 and accompanying text.

96. 676 F.2d 379 (9th Cir. 1982).

97. *Ek*, 676 F.2d at 382; *United States v. Shreve*, 697 F.2d 873, 874 (9th Cir. 1983).

98. *Ek*, 676 F.2d at 382.

99. *Id.*

a strip search, the authorities must possess "real suspicion"<sup>100</sup> that the person is smuggling contraband.<sup>101</sup> The court then considered the appropriate standard to apply in an X-ray search. In *Ek*, the strict standard required for a body cavity search was held applicable to an X-ray search. The *Ek* court held that an X-ray search, although perhaps not as humiliating as a strip search, nevertheless is more intrusive since the search is potentially harmful to the health of the suspect.<sup>102</sup> A search by X-ray goes beyond the passive inspection of body surfaces.<sup>103</sup> Therefore, the use of an X-ray is restricted to situations when a clear indication is present that a suspect is concealing contraband in a body cavity.<sup>104</sup> Moreover, the Ninth Circuit requires a greater degree of suspicion in X-ray searches because of the extensiveness of the exposure involved. By contrast, courts of the Eleventh Circuit lower the required level of suspicion because an X-ray search causes the traveler only a slight degree of personal indignity.

4. *The Appropriate Fourth Amendment Standard to Apply to X-Ray Searches of Prisoners Returning from Contact Visits*

The Ninth and Eleventh Circuit Courts allow a low level of suspicion, less than probable cause, when a search occurs at the border.<sup>105</sup> To apply the same fourth amendment standard when evaluating the constitutionality of a prison search would place international travelers, normally afforded full constitutional protection, on a parity with those incarcerated for a crime. A traveler should be accorded greater fourth amendment protection than those individuals imprisoned for committing a crime.<sup>106</sup> When considering a search in prison or at the border, the courts strike a balance between the asserted governmental interests and the interest of the party being searched.<sup>107</sup> The governmental interests are notably similar in prison and border searches

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100. Real suspicion is the standard adopted by the Ninth Circuit in border search cases. The standard appears equivalent to the stop test in *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Subjective suspicion supported by objective, articulable facts would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross the border is concealing something on his body for the purpose of transporting it into the United States contrary to the law. *Id.* See *United States v. Gadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970).

101. *Ek*, 676 F.2d at 382.

102. *Id.*

103. *Id.*

104. *Id.*

105. See *supra* notes 79-104 and accompanying text.

106. *Hudson*, 52 U.S.L.W. at 5055. A border search still requires some degree of suspicion before a search can take place. *Vega-Barvo*, 729 F.2d at 1344.

107. See *supra* notes 52-58 and accompanying text.

because both involve governmental attempts to curtail the smuggling of contraband into a particular area. In a prison search context, however, the interests of the government are balanced against the rights of individuals not similarly situated for purposes of analogy to individuals subject to border searches. To place the respective parties on an equal constitutional footing seems inappropriate. Given this conclusion, if the level of suspicion required at the border is slight or insignificant, then a prison search for contraband only requires minimal suspicion or no suspicion at all.<sup>108</sup>

The Ninth and Eleventh Circuit Courts have reached opposite conclusions as to the degree of "intrusiveness" involved in a search performed by X-ray,<sup>109</sup> but the positions of the two circuits are not as conflicting as they first appear. The Ninth Circuit holding in *Ek* was based on an evaluation of the medical risks involved whenever radiation is used.<sup>110</sup> The decision heightened the level of suspicion primarily because of the medical harm that is caused by an X-ray.<sup>111</sup> Research has shown, however, that modern X-ray technology no longer poses a medical risk;<sup>112</sup> therefore, the Ninth Circuit position may be outdated. Consequently, the position of the Eleventh Circuit in *Vega-Barvo*, that an X-ray search is a very unintrusive method of searching a person for contraband,<sup>113</sup> should be adopted.

a. *Comparing the Intrusiveness of the Search Permitted in Bell v. Wolfish to a Search by X-Ray*

The full body cavity search is considered a very intrusive method of searching for contraband.<sup>114</sup> In *Bell v. Wolfish*, however, the United States Supreme Court upheld the routine practice of using visual body cavity strip searches following contact visits of pretrial detainees.<sup>115</sup> If the Supreme Court does not find the full body cavity search of a mere detainee constitutionally objectionable, then the conclusion that someone already convicted of a crime will be afforded less constitutional protection than a detainee is not unreasonable.<sup>116</sup> By com-

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108. This is particularly appropriate in light of the recent Supreme Court opinion of *Hudson v. Palmer*, in which the court held that a prisoner has no reasonable expectation of privacy in his prison cell entitling him to the protection against unreasonable searches guaranteed by the fourth amendment. 52 U.S.L.W. at 5052.

109. See *supra* notes 79-104 and accompanying text.

110. *Ek*, 676 F.2d at 382.

111. *Id.*

112. See *supra* note 17 and accompanying text.

113. See *supra* notes 79-95 and accompanying text.

114. *Bell*, 441 U.S. at 559.

115. See *supra* notes 59-74 and accompanying text.

116. The Court, however, suggested that there may be no difference in the extent to which officials may search pretrial detainees and convicted prisoners. See *Bell*, 441 U.S. at 558.

parison, a search conducted by X-ray is far less intrusive if the reasoning of the Eleventh Circuit is applied.<sup>117</sup> Like the metal detector, an X-ray can be administered to subjects while they are fully clothed with a minimum of effort and cooperation from the parties being searched. The personal indignity attendant to an X-ray search is minimal in comparison to the embarrassment suffered when prisoners are subjected to a full body cavity search.

*b. X-Ray Search of Prisoners as a Matter of Course Following a Contact Visit*

Based on current case law, scientific evidence, and the foregoing discussion, ample support exists for the conclusion that prison officials may routinely X-ray prisoners returning from a contact visit without requiring any form of suspicion. This position is supported by the following points: (1) since international travelers are afforded minimal fourth amendment protection when they return to this country, prisoners deserve even less protection because of the obvious disparity in their respective societal status; (2) an X-ray search is one of the least intrusive methods of searching for contraband and can be administered using medically safe doses of radiation; and (3) the Supreme Court, by previously sanctioning the routine use of highly intrusive body-cavity searches, should approve of a method that reduces the personal indignity suffered by the prisoner being searched. A court employing the test espoused in *Bell v. Wolfish* could find that the use of full-body X-rays, when conducted in a reasonable manner and at a level of radiation within legislative safety standards, would not abridge the right or privilege of an inmate to be free from unreasonable searches. The need for institutional security outweighs the slight degree of intrusion caused by an X-ray search. Thus, an X-ray search of a prisoner after a contact visit would not amount to an unreasonable search under the fourth amendment.

*C. The Use of X-Rays to Search Prisoners Moving Within the Confines of the Prison*

The movement of prisoners within prison confines presents the problem of transfer of contraband within the institution. The governmental interest in curtailing this activity, however, may not be viewed by some lower courts as significant enough to justify extreme intrusions

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117. See *supra* notes 79-95 and accompanying text.



into the privacy of a prisoner.<sup>118</sup> When prison authorities conduct intra-prison searches, introduction of contraband into the prison is not curtailed.<sup>119</sup> The purpose of an internal search is merely to defer and detect circulation of contraband.<sup>120</sup> When balancing the governmental interest in deterring the intra-prison movement of contraband against the retained fourth amendment rights of prisoners, courts have considered various factors. These factors include the following: (1) the type of prisoner the particular institution houses;<sup>121</sup> (2) whether the inmate is confined in a segregated unit of the facility or is a member of the general population;<sup>122</sup> and (3) the availability of viable, less intrusive alternatives to control entry of contraband into the facility.<sup>123</sup>

The reasoning that supports the use of X-ray searches following contact visits<sup>124</sup> is equally applicable to the use of X-rays during intra-prison searches. Arguably, the security risks are not as great in the intra-prison setting.<sup>125</sup> In the recent United States Supreme Court cases of *Hudson v. Palmer*<sup>126</sup> and *Block v. Rutherford*,<sup>127</sup> however, the Court

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118. *Hodges v. Klein*, 412 F. Supp. 896, 900-01 (D.N.J. 1976). Courts often have been unwilling to defer to security justifications in cases involving internal prison transfers. *Id.* See *Hurley v. Ward*, 584 F.2d 609, 612 (2d Cir. 1978) (Lumbard, J., concurring); *Bono v. Saxbe*, 620 F.2d 609, 617 (7th Cir. 1980).

119. *Hodges*, 412 F. Supp. at 901.

120. *Hudson*, 52 U.S.L.W. at 5054.

121. *Arruda v. Fair*, 710 F.2d 886, 887 (1st Cir. 1983). The court found that the interest of a maximum security prison in preventing contraband from entering the special security unit that contained the most dangerous inmates was so pervasive as to make reasonable the strip search of prisoners leaving or entering the unit for any reason despite continuous escort and observation. *Id.*

122. *Id.*

123. *Hodges*, 412 F. Supp. at 900. The district court did not find the danger of contraband acquisition or movement sufficient to justify rectal inspection, but held that the use of less intrusive metal detectors would be justified. *Id.*

124. See *supra* section 4b and accompanying text.

125. See *supra* notes 118-119 and accompanying text. The security risks are diminished when extensive measures are implemented for the purpose of curtailing the initial introduction of contraband by outsiders.

126. 52 U.S.L.W. 5052, 5054 (1984). "Within this volatile 'community,' prison administrators are to take all necessary steps to ensure the safety of not only the prison staff and administrative personnel, but visitors. They are under an obligation to take reasonable measures to guarantee the safety of the inmates themselves. They must be ever alert to attempts to introduce drugs and other contraband into the premises which, we can judicially notice, is one of the most perplexing problems of prisons today; they must prevent, so far as possible, the flow of illicit weapons into the prison; they must be vigilant to detect escape plots, in which drugs or weapons may be involved, before the schemes materialize." *Id.*

127. 52 U.S.L.W. 5067, 5070 (1984). The Court alluded to a scheme whereby low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits. *Id.* In order to carry out the plan, a second transfer is required. *Id.* Therefore, a search within the confines of the prison could uncover the movement of contraband during a second transfer. *Id.*

specifically addressed the ongoing security risks that are involved after the contraband is smuggled into the prison.<sup>128</sup> In *Bell v. Wolfish*, the Court expressed doubt that the existence of less intrusive surveillance procedures was a relevant factor in evaluating the reasonableness of the search.<sup>129</sup> Even assuming a need for the least intrusive method, an X-ray using safe levels of radiation is no more intrusive than a metal detector. Metal detectors have been used in prisons as an alternative to strip searches for years.<sup>130</sup> Metal detectors also are used commonly in airports to screen boarding passengers.<sup>131</sup> The relatively minor inconvenience endured by the party being screened is nearly identical to the procedures and inconvenience involved when an X-ray machine is used. If a prisoner is exposed to levels of radiation within acknowledged safety standards, no valid reason exists to distinguish between the use of an X-ray device for searches conducted when a prisoner moves within the confines of the prison and when the prisoner does not come in contact with the outside world.

#### D. The Use of X-Rays to Search Visitors

California law specifically authorizes the search of visitors entering California penal institutions.<sup>132</sup> The California Administrative Code permits a search of the visitor if there is reason to believe that the visitor is attempting to smuggle contraband into the facility.<sup>133</sup> Furthermore, prison officials may regulate prisoner communication and visitation rights.<sup>134</sup> Thus, prison administrators may restrict the manner of visitation by conditioning the privilege in ways reasonably consistent with the security needs of the facility.<sup>135</sup>

The California Administrative Code requires that a prison official have substantial reason to believe that the visitor is attempting to

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128. *Hudson*, 52 U.S.L.W. at 5054.

129. *Bell*, 441 U.S. at 559 n.40. "The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *Id.* at 599.

130. Most prisons employ some form of standing or hand-held metal detector when conducting a search. Statement by Robert Lawson, Project Director for a report entitled *Technology Transfer, A Report Prepared for the Department of Corrections by the American Justice Department*, January 1984.

131. See *infra* notes 148-55 and accompanying text.

132. 15 CAL. ADMIN. CODE §3173(e).

133. "Any person coming onto the grounds of an institution, their vehicle and articles of property in their possession are subject to inspection to whatever degree is consistent with the institution's security needs. Such inspections may include a search of a visitor's person, property and vehicle when there is substantial reason to believe the visitor is attempting to smuggle unauthorized items or substances in or out of the institution." *Id.*

134. *Block*, 52 U.S.L.W. at 5070.

135. *Id.*

smuggle contraband into the facility before a search may be conducted.<sup>136</sup> One question not addressed by the California Legislature, however, is whether suspicion is necessary when the search is accomplished by means of an X-ray. In *Hunter v. Auger*,<sup>137</sup> the Eighth Circuit Court of Appeals held that a reasonable suspicion standard governs strip searches of visitors to penal institutions.<sup>138</sup> This author has concluded that full body X-ray exposure of inmates at tolerable levels of radiation, as determined by medical, scientific, and legislative declarations, is less intrusive than strip searches and body cavity inspections.<sup>139</sup> If reasonable suspicion of possession of contraband exists, the degree of intrusiveness is lessened to a level that would justify the use of X-ray to monitor visitors and others<sup>140</sup> entering the institution.<sup>141</sup> Since the degree of intrusiveness would be at a bare minimum and the level of radiation exposure is within established safety standards, the use of full-body X-rays should be allowed as a matter of course without the need for some level of suspicion.<sup>142</sup>

#### THE FREEDOM OF ASSOCIATION ARGUMENT

Judicial interpretation of the first amendment to the United States Constitution has established that no person is to be denied the right to associate freely with others.<sup>143</sup> In recent years, a growing number of courts have held that the right of an inmate to communicate with friends and family may be guaranteed by the right of association provided by the first amendment.<sup>144</sup> Courts have consistently held, however, that the right of visitation and association in the prison environment is subject to legitimate institutional security needs.<sup>145</sup> The question of whether some degree of association is guaranteed by the constitution finally was decided by the Supreme Court in *Block v. Rutherford*.<sup>146</sup> In *Block*, the Court held that the first amendment does

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136. 15 CAL. ADMIN. CODE §3173(e).

137. 672 F.2d 668 (1982).

138. *Id.* at 674.

139. *See supra* section 4b and accompanying text.

140. *E.g.*, employees and attorneys.

141. The level of suspicion should not exceed the standard established in *Hunter v. Auger*, which involved a highly intrusive strip search. *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982).

142. *See infra* notes 143-146 and accompanying text (discussion of the freedom of association).

143. U.S. CONST. amend. I.

144. *Miller v. Carson*, 563 F.2d 741, 748-49 (5th Cir. 1977); *Hutchings v. Corum*, 501 F. Supp. 1276, 1296 (W.D. Mo. 1980); *O'Bryan v. County of Saginaw*, 437 F. Supp. 582, 598 (E.D. Mich. 1977), perm. injunction granted, 446 F. Supp. 436 (1981); *Laaman v. Helgemore*, 437 F. Supp. 269, 320-21 (D. N.H. 1977).

145. *Hamilton v. Saxbe*, 428 F. Supp. 1101, 1112 (N.D. Ga. 1976).

146. 52 U.S.L.W. at 5070.

not require that detainees be allowed contact visits if responsible, experienced administrators have determined that contact visits will jeopardize the security of the facility.<sup>147</sup> Consequently, prisoners and detainees do not have an absolute constitutional right to contact visits with friends and family.

A contact visit may be denied by prison authorities whenever a visitor refuses to submit to reasonable security measures.<sup>148</sup> The use of full-body X-rays to screen prisoners and visitors may permit prison officials to deny contact visits to individuals refusing to cooperate with an X-ray search procedure. The denial of visitation between prisoners and visitors would be similar to the practice utilized by airports when employing a metal detector to screen persons entering the boarding area of an airport terminal. Entry into certain airport facilities is subject to special considerations. People seeking entry into these facilities are not entitled to proceed as a matter of right, instead, the entry is considered privileged and the granting of that privilege is subject to the reasonable security needs of the institution.<sup>149</sup> Significantly, airport security personnel are permitted<sup>150</sup> to use a magnetometer<sup>151</sup> as a routine screening device without need of any suspicion.<sup>152</sup>

The same reasoning that supports the use of airport screening systems supports the use of screening devices upon visitors to a prison facility.<sup>153</sup> Additionally, if a party refuses to yield to a reasonable security check at an airport, that person is left with the choice of

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147. *Id.* at 5071. *Cf.* *Pell v. Procunier*, 417 U.S. 817, 827 (1974), stating: “[with respect to] the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations.” *Pell*, 417 U.S. at 827. “So long as reasonable and effective means of communication remain open...we believe that, in drawing such lines, prison officials must be accorded great latitude.” *Id.*

148. The court in *Block v. Rutherford* would grant broad discretion to prison officials, allowing them to deny the visitor access when an X-ray search was requested and the party refused to submit to a search. *Block*, 52 U.S.L.W. at 5071; *cf.* *Frazier v. Ward*, 426 F. Supp. 1354 (N.D.N.Y. 1977). In *Frazier*, a rectal and testicle search was conducted before and after a contact visit. During the search, as many as twelve officers were present. The frequency of the search and the size of the audience convinced the court that the search procedures were excessive and improper. *Id.* at 1363.

149. *United States v. Epperson*, 454 F.2d 769, 771 (4th Cir. 1972), *cert. denied*, 406 U.S. 947. “We think the search for the sole purpose of discovering weapons and preventing air piracy, and not for the purpose of discovering weapons and pre-criminal events, fully justified the minimal invasion of personal privacy by magnetometer.” *United States v. Slocum*, 464 F.2d 1180 (3rd Cir. 1972).

150. *Id.*

151. *See supra* note 87 and accompanying text.

152. *Epperson*, 454 F.2d at 771; *Slocum*, 464 F.2d at 1182.

153. *See supra* notes 148-52 and accompanying text.

traveling by other means.<sup>154</sup> In prison, the refusal to submit to an equally innocuous X-ray search leaves the prisoner or his visitor with alternative modes of communication.<sup>155</sup> To require the prisoner or visitor to accept other means of communication is not unreasonable in light of the important security concerns of the prison.<sup>156</sup> The use of full-body X-rays to search prisoners and their visitors should withstand a first amendment freedom of association argument if the search is conducted using a medically safe X-ray screening device. At least one other constitutional argument may be advanced.

#### CRUEL AND UNUSUAL PUNISHMENT

The eighth amendment to the Constitution of the United States prohibits the infliction of cruel and unusual punishment upon prisoners.<sup>157</sup> Since the cruel and unusual punishment clause is the only provision in the Bill of Rights that specifically refers to the rights of prisoners,<sup>158</sup> that amendment may impose limitations on X-ray searches of prisoners. In addition to this specific constitutional amendment, many states have enacted equivalent legislation. The protection from cruel and unusual punishment is codified in California by Penal Code section 2652.<sup>159</sup>

The concept of "cruel and unusual punishment" is not limited to instances in which a particular inmate is subjected to punishment directed at him as an individual.<sup>160</sup> The amendment extends to conditions and practices that shock the conscience of civilized people.<sup>161</sup> The eighth amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."<sup>162</sup> These concepts must be used to evaluate modern penal practices. Accordingly, the courts find certain measures repugnant to the eighth amendment when the particular punishments are incompatible with "evolving standards of decency that mark the progress of a maturing society,"<sup>163</sup>

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154. *United States v. Allen*, 349 F. Supp. 749, 752 (C.D. Cal. 1972); *United States v. Meulener*, 351 F. Supp. 1284, 1289 (C.D. Cal. 1972).

155. For example, letters. *Pell*, 417 U.S. at 827.

156. *Block*, 52 U.S.L.W. at 5070. "Contact visits invite a host of security problems. They open the institution to the introduction of drugs, weapons, and other contraband. Visitors can easily conceal guns, knives, drugs, or other contraband in countless ways and pass them to an inmate unnoticed by even the most vigilant observers." *Id.*

157. U.S. CONST. amend. VIII.

158. Prisoners alone can claim eighth amendment protection. *Ingraham v. Wright*, 430 U.S. 651, 670 (1977).

159. CAL. PENAL CODE, §2652.

160. *Holt v. Sarver*, 309 F. Supp. 362, 373 (E.D. Ark. 1970).

161. *Id.*

162. *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968), quoted with approval in *Estelle*, 429 U.S. at 102.

163. *Estelle*, 429 U.S. at 123.

or that "involve the unnecessary and wanton infliction of pain."<sup>164</sup> The amendment embodies an ideal that evolves in light of changing technology and public opinion, with each advancement requiring an evaluation and rethinking of what constitutes humane justice.<sup>165</sup> A particular search may be "cruel" or "unusual" if conducted in an abusive or otherwise unreasonable manner.<sup>166</sup> As long as the conditions or practices are compatible with modern notions of decency,<sup>167</sup> the conditions or practices will be safe from federal intervention.

In the event detention facilities consider using X-ray devices, this practice must be reviewed to determine whether the practice violates the eighth amendment prohibition against cruel and unusual punishment. If the practice is necessary to further a legitimate governmental interest and if radiation exposure can be kept at a safe level, an X-ray search of prisoners would not violate the eighth amendment. On the other hand, the widespread systematic use of high level doses of radiation would violate the eighth amendment, since the practice would constitute cruel and unusual punishment. A search procedure using a level of radiation proven to be medically safe, however, should be compatible with "evolving standards of decency" in order to withstand an eighth amendment challenge.

#### CONCLUSION

A search of prisoners, visitors, and their effects within the confines of a penal institution represents an important security measure. Potential problems arise when prison officials become creative in the search techniques they employ. Each new innovation requires an evaluation to determine whether the practice violates the constitutional rights of prisoners.

The courts long have held that an instituted procedure will not be invalidated when the prison administrators have not "exaggerated their response"<sup>168</sup> to the need for institutional security. Prison administrators have "exaggerated their response" if the constitutional rights of

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164. *Id.*

165. *Weems v. United States*, 217 U.S. 349, 378 (1910).

166. *Holt*, 309 F. Supp. at 380; *Bell*, 441 U.S. at 560.

167. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

168. *Bell*, 441 U.S. at 548. One of the curious anomalies of the *Bell* opinion is that, while expressing doubt that prisoners retain fourth amendment rights, the Court applied a balancing analysis as a means of testing those rights. In theory, a balancing test is more sensitive to prisoner interests because balancing requires more than a showing of reasonable means and permissible ends by the government. Instead, the government interests must outweigh those of the individual prisoner.

prisoners outweigh the governmental interests involved. After reviewing the standards and precedents of pertinent case and statutory law, this author has demonstrated that use of X-ray devices emitting medically inoffensive low-level radiation to the X-ray subject likely would withstand a constitutional challenge. The courts should regard an X-ray search as an innovative and effective means of curtailing security problems as the prison population in this country swells beyond prison capacity. This response is reasonable in light of the concerns of the legal and medical communities; therefore, the practice should not be disturbed.

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