Constitutional Rights in Prison: The Standard of Review in California

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Constitutional Rights in Prison: The Standard of Review in California

The rights retained by prison inmates as well as the judicial role in interpreting those rights have developed significantly in recent years. The traditional approach of the courts in interpreting the rights of inmates, termed the "civil death" doctrine, entirely suspended the civil rights of the imprisoned.1 The civil death doctrine was codified in California Penal Code section 2600.2 Statutory rights, however, were given to state prisoners in 1975 following the repeal of the civil death doctrine and the subsequent reenactment of California Penal Code section 2600.3 The present version of section 2600 provides that prisoners retain those rights that are not inconsistent with their status as prisoners.4 The amended provision does not limit application to civil rights, but considers rights in general.5 This change in terminology from "civil rights" to "rights" has been interpreted by the California Supreme Court to include all the rights of free persons.6

Prisoners have encountered substantial difficulty enforcing constitutional rights. As discussed above,7 constitutional rights are included in those rights protected by Penal Code section 2600. Although constitutional rights are in addition to statutory rights, the reenactment of Penal Code section 2600 in practice offered prisoners greater protection of their constitutional rights.8

As late as 1962, the United States Supreme Court refused to extend fourth amendment protections to prisoners.9 Katz v. United States,10 a watershed case involving the right to privacy, opened the door to application of the fourth amendment to claims brought by prisoners by holding that the fourth amendment protects persons not places.11 For the most part, courts have been unsuccessful in apply-

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2. Id.
3. CAL. PENAL CODE §2600.
4. Id.
5. Id.
7. See supra notes 5-6 and accompanying text.
8. See infra notes 123-25 and accompanying text.
11. Id. at 351.
ing Katz when a right to privacy claim is brought by a prisoner.\textsuperscript{12} Courts have ruled that prisoners do not have a reasonable expectation of privacy in prison.\textsuperscript{13} This determination effectively precludes a prisoner from prevailing in a cause of action based upon a violation of the right to privacy.

The nature of prisoner rights remains uncertain due to conflict regarding the proper scope of judicial review of decisions made by prison officials. Recently, California correctional officials have proposed installation of sound monitoring devices in the chapels of California Youth Authority facilities.\textsuperscript{14} This action borders on an impermissible infringement of a prisoner's constitutional rights. Traditionally, courts have deferred to administrative findings and judgments when faced with prisoner complaints.\textsuperscript{15} Moreover, the judiciary exercised a policy of abstention that has been termed the "hands-off" approach.\textsuperscript{16} This approach calls for a minimal level of review by the court.\textsuperscript{17} Advocates of the hands-off approach believe that the judiciary is not competent to review prison administrative decisions.\textsuperscript{18} Rather, the proper course for courts, according to this approach, is to give great deference to officials who are experts in the correctional field.\textsuperscript{19} Application of the hands-off approach to prison cases prevented review by the court and led to the validation of virtually all correctional regulations.\textsuperscript{20} Although many courts have begun to engage in a more active analysis,\textsuperscript{21} several courts continue to defer to prison authorities.\textsuperscript{22} In the case of In re Arias,\textsuperscript{23} the installation of sound monitoring devices in prison chapels has been challenged and upheld by the California Third District Court of Appeals.\textsuperscript{24} The propriety of that judgment has been questioned in regard to both the nature of the rights retained by prisoners.

\begin{itemize}
  \item \textsuperscript{13} Hudson v. Palmer, 52 U.S.L.W. 5052, 5054 (1984).
  \item \textsuperscript{14} In re Arias, 160 Cal. App. 3d 804, 808, 206 Cal. Rptr. 806, 808 (1984).
  \item \textsuperscript{15} \textit{See infra} notes 16-20 and accompanying text.
  \item \textsuperscript{17} Id. at 507-08.
  \item \textsuperscript{18} Id. at 508-09.
  \item \textsuperscript{19} \textit{In re Jordan}, 7 Cal. 3d 930, 934, 500 P.2d 873, 875, 103 Cal. Rptr. 849, 851 (1972).
  \item \textsuperscript{20} \textit{See Note, supra} note 16, at 506-09, 528-29; \textit{see also} J. Choper, Y. Kamisar & L. Tribe, \textit{The Supreme Court: Trends And Developments} 2 (1983).
  \item \textsuperscript{22} \textit{See, e.g.}, Bell v. Wolfish, 441 U.S. 520, 547 (1979); \textit{see infra} notes 163-69 and accompanying text.
  \item \textsuperscript{23} 160 Cal. App. 3d 804, 206 Cal. Rptr. 806 (1984).
  \item \textsuperscript{24} Id. at 814-15, 206 Cal. Rptr. at 813.
\end{itemize}
and the proper role of the court in determining those rights.25

The purpose of this comment is to review the development of prisoner rights and the role of the judiciary in the analysis and enforcement of those rights. Arias will be discussed to illustrate the confusion courts have experienced in reconciling the role of the judiciary in interpreting and protecting constitutional rights with the role of prison officials in maintaining institutional security. This confusion has prevented California courts from adhering to a uniform standard for reviewing prisoner complaints. Since the validity of any regulation is a function of the level of judicial review under which the regulation is analyzed,26 the scope of rights retained by prisoners and the proper role of the court in determining those rights are inextricably intertwined. In deciding the scope of prisoner rights, the court must determine the nature of the alleged right. The court then can determine the extent to which the retained rights may be infringed upon in the interest of institutional security. This author proposes that once fundamental constitutional rights have been implicated, the court should use a least restrictive means test27 to decide the validity of the disputed prison regulation. To provide a framework for the analysis and proposal, the facts of Arias will be discussed first.

In Re Arias: FACTUAL BACKDROP

In Re Arias28 presents a recent example of the problems courts face in determining the extent of constitutional rights retained by prisoners.29 Arias additionally poses the question of the proper role of the court in reviewing correctional regulations that impact upon those prisoner rights.30 The court in Arias examined the constitutionality of installing an electronic sound monitoring security system in the chapel of a juvenile detention center run by the California Youth Authority (CYA).31 The petitioner claimed that installation of the system would violate rights of both freedom of religious expression and privacy.32 As proposed, the monitoring system was to operate throughout the prison, but Arias only challenged the use of the system in the chapel.33

25. The California Supreme Court, on January 22, 1985, granted petitioners rehearing.
27. See infra notes 159-60 and accompanying text.
29. Id. at 808, 206 Cal. Rptr. at 809.
30. Id. at 808-09, 206 Cal. Rptr. at 809.
31. Id. at 808, 206 Cal. Rptr. at 809.
32. Id.
33. Id. at 808-09, 206 Cal. Rptr. at 809.
The CYA intended to place a single microphone in the chapel. The chapel consisted of three rooms, a vestibule, a sanctuary, and a chaplain’s office. The microphone was to be located in the vestibule and was designed to enable security personnel in the control center to monitor sound in the vestibule and in the sanctuary when the doors between the two rooms were open.

Although capable of being used as an information gathering device, the sound monitoring system was intended to function primarily as an alarm system. As an alarm, the system would be activated if a preselected decibel level was reached. The decibel level could be adjusted at the control center to accommodate the noise level normally accompanying the particular activity taking place in the chapel at any given time. Whenever the actual noise level exceeded the preselected decibel level, a warning light would activate in the control center. If the warning signal persisted, or recurred within a short period of time, a microphone would be activated allowing security personnel to hear sounds within range of the microphone.

The system left important operational aspects to the discretion of control center personnel. For example, no guidelines were promulgated to determine how often the decibel level would be adjusted in response to changing activities. Additionally, the question of who would decide, and on what criteria, to turn the microphone off in response to the chaplain’s request was unclear.

The California Court of Appeal held that the interest of the prison administration in maintaining institutional security was a proper penological objective. The proper role of the court, according to Arias, was to defer to the expert judgment of the CYA authorities in the absence of substantial evidence that the judgment was unreasonable. Although the court held that the petitioner’s constitutional rights may have been violated, any violation was deemed to be reasonable in light of the petitioner’s status as a prisoner.

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34. *Id.* at 808, 206 Cal. Rptr. at 808.
35. *Id.*
36. *Id.*
37. *Arias*, 160 Cal. App. 3d at 808, 206 Cal. Rptr. at 808.
38. *Id.*
39. *Id.*
40. *Id.* at 808, 206 Cal. Rptr. at 808-09.
41. *Id.* at 808, 206 Cal. Rptr. at 809.
42. *Id.*
43. *Id.* at 811, 206 Cal. Rptr. at 810.
44. *Id.* at 811, 206 Cal. Rptr. at 811.
45. *Id.* at 812, 206 Cal. Rptr. at 811.
court concluded that correctional officials were not unreasonable in judging that the sound system was necessary to maintain institutional security. 46 The standard of review applied by the court in Arias, however, is inconsistent with the weight of California authority. 47 When deciding issues involving possible violations of constitutional rights, California courts should not routinely defer to the judgment of prison officials. Rather, courts should conduct an independent inquiry and require strong state interests and close relationships between the goals sought and the means employed. 48 Although prison officials have statutory authority to infringe upon the constitutional rights of inmates, this authority only protects infringements to the extent they are necessary to promote institutional security. 49

CONSTITUTIONAL RIGHTS RETAINED BY PRISONERS

Persons confined in correctional institutions do not forfeit all constitutional protections. 50 Although prisoners retain both state and federal constitutional rights, these rights are subject to limitations consistent with their status as inmates. 51 The extent of protection offered by the California Constitution differs from that offered by the United States Constitution. 52 Petitioners in Arias brought suit charging that their state and federal rights to both freedom of religious expression and privacy were being violated. 53

A. Right to Religious Freedom

Prisoners are entitled to exercise their religious beliefs freely under the guarantees of the first and fourteenth amendments to the United States Constitution. 54 Section 1705 of the California Welfare and Institutions Code specifically extends reasonable opportunities to exercise religious freedom to those in CYA custody. 55 Still, the needs of the institution, particularly the need to preserve institutional security, must be balanced against the rights of the individual prisoner. 56

46. Id.
47. See infra notes 233-45 and accompanying text.
48. See infra notes 199-210 and accompanying text.
49. CAL. PENAL CODE §2600; see infra notes 116-20 and accompanying text.
50. Bell, 441 U.S. at 545.
52. See infra notes 97-100 and accompanying text.
55. CAL. WELF. & INST. CODE §1705.
A prisoner does not have the absolute right to practice religion in any chosen manner. Prison officials may not deny completely the right to preach or disseminate religious views. Prisoners may not be denied access to spiritual leaders. The prison administration, however, may regulate a prisoner's exercise of religion to promote institutional security without unduly infringing upon the protected freedom.

Prisoner claims of violations of religious rights primarily have been upheld when prison officials have completely prohibited certain aspects of religious exercise. In situations in which regulations of prison officials merely infringe upon these rights, the prison administration is required to show that the ban is reasonably necessary to promote a compelling state interest. The orderly administration of a prison population is indisputably a compelling state interest. Thus, in the absence of a complete ban, prisoners will have a difficult task overcoming the state's showing of a compelling state interest. The infringements on religious expression also implicate the constitutional right to privacy.

B. The Right to Privacy

The right to privacy is guaranteed under both the United States and California Constitutions. The California Constitution affords greater protection for the individual right of privacy than the federal counterpart. Private communications within a religious chapel or with a religious advisor are included in the right to privacy.

1. Right to Privacy Under the United States Constitution

Although the right to privacy is not specifically enumerated in the United States Constitution, courts long have recognized that the right

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60. Id.
61. Jihaad, 645 F.2d at 564.
63. Id.
64. Id.
65. CAL. CONST. art. I, §1; see infra notes 68-74, 97-100 and accompanying text.
to privacy is a fundamental right. In *Griswold v. Connecticut*, the United States Supreme Court held that a constitutionally protected right to privacy exists, emanating from certain provisions of the Bill of Rights. *Griswold* reviewed the conviction of a doctor under a Connecticut statute which prohibited counselling on contraception. The Court stated that decisions regarding contraception were within a zone of privacy created by the penumbra of specific guarantees in the Bill of Rights. The cases following *Griswold* that addressed family decisions based the right to privacy upon the liberty concept of the fourteenth amendment. Other cases have based the right to privacy upon the fourth amendment.

The fourth amendment protects individuals against certain governmental intrusions. Traditionally, to bring a successful claim of a violation of the right to privacy under the fourth amendment, the petitioner had to show the intrusion related to a constitutionally protected area. Fourth amendment protection usually was limited to private property. Additionally, courts held that surveillance without any trespass was outside the reach of the fourth amendment. In *Lanza v. New York*, the United States Supreme Court refused to find a violation of the fourth amendment when petitioner alleged that a private conversation between himself and his brother in a jail had been intercepted electronically. The Court held that a public jail was not a protected area under the fourth amendment. Until 1967, courts continued to view the fourth amendment as a basis for protecting specific places.

In 1967, the United States Supreme Court rejected the traditional notion that only private property could be protected by the fourth

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69. *Id.* at 484.
70. *Id.* at 480.
71. *Id.* at 485. "The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 143.
73. 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE §3.2 (1984).
76. *Id.*
78. *Id.* at 139 (1962).
79. *Id.* at 139-45.
80. *Id.* at 143.
81. "But to say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects is at best a novel argument." *Id.* at 143.
amendment.\textsuperscript{82} In \textit{Katz v. United States},\textsuperscript{83} FBI agents placed electronic eavesdropping equipment on the outside of a public telephone booth from which Katz conducted his business.\textsuperscript{84} The traditional application of fourth amendment analysis would have provided Katz no relief due to the fact that he made his phone calls on public property and that FBI agents did not commit trespass by installing the device.\textsuperscript{85} The Court pointed out that the fourth amendment protects persons and not places.\textsuperscript{86} Justice Harlan, in a concurrence, stated a two-pronged test for determining whether a person is entitled to fourth amendment protection.\textsuperscript{87} Under the first prong of Harlan’s test, the court decides whether the person alleging the violation had an actual, subjective expectation of privacy.\textsuperscript{88} Under the second prong, the court decides whether society would recognize that expectation as reasonable.\textsuperscript{89} Although the majority opinion does not contain the term “expectation,” subsequent decisions frequently have followed Harlan’s analysis as if the expectation requirement had been part of the majority opinion.\textsuperscript{90}

In \textit{Bell v. Wolfish},\textsuperscript{91} the United States Supreme Court questioned whether a prisoner ever could have a reasonable expectation of privacy.\textsuperscript{92} Petitioners in \textit{Bell} brought suit challenging numerous conditions of confinement.\textsuperscript{93} The Supreme Court concluded that if a prisoner could have a reasonable expectation of privacy, that expectation would be of a vastly diminished scope in comparison to non-confined persons.\textsuperscript{94} In the most recent prisoner rights decision by the Supreme Court, a prisoner was found to have no legitimate expectation of privacy in his prison cell.\textsuperscript{95} No cases, however, have addressed directly the question whether a prisoner has an actual, subjective expectation of privacy in his prison chapel or whether society would

\textsuperscript{82} \textit{Katz}, 389 U.S. at 347.
\textsuperscript{83} 389 U.S. 347 (1967).
\textsuperscript{84} \textit{Id.} at 348.
\textsuperscript{85} \textit{Id.} at 348-49.
\textsuperscript{86} \textit{Id.} at 351.
\textsuperscript{87} \textit{Id.} at 351.
\textsuperscript{88} \textit{Id.}.
\textsuperscript{89} \textit{Id.}
\textsuperscript{90} Amsterdam, Perspectives On The Fourth Amendment, 58 MINN. L. REV. 349, 384 (1974); see also Hudson v. Palmer, 52 U.S.L.W. 5052, 5054 (1984).
\textsuperscript{91} 441 U.S. 520 (1979).
\textsuperscript{92} \textit{Id.} at 557.
\textsuperscript{93} Petitioners challenged the practice of regulations requiring strip and body cavity searches after contact visits, the practice of double bunking, and the rule that books could only be sent to the prison by a publisher. \textit{Id.} at 529-30.
\textsuperscript{94} \textit{Bell}, 441 U.S. at 557.
\textsuperscript{95} \textit{Hudson}, 52 U.S.L.W. at 5054.
find such an expectation reasonable. Under the analysis of the United States Supreme Court, prisoners have little chance of prevailing on a claim against prison officials based upon the right to privacy. California courts, however, have allowed several exceptions to the requirement of finding a reasonable expectation of privacy.96

2. The Right to Privacy in California

Unlike the United States Constitution, the California Constitution specifically provides a right to privacy.97 In 1972, California voters amended article I, section 1 of the state constitution to include the right to privacy among the various inalienable rights of all people.98 This amendment was designed to respond to concerns that privacy was not guaranteed by the original state constitution.99 Courts interpreting the amendment viewed the express addition as an expansion of the right to privacy.100

Private communications within a religious chapel are impliedly included within the right to privacy protected by article I, section 1 of the California Constitution.101 The principal objectives of the amendment were explained in the election brochure published by the state.102 As stated in the brochure, the right to privacy protects “our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose.”103 Religious communication specifically falls under the area of communion104 and, arguably, the areas of emotions and expressions.105 Religious expression, therefore, is protected by the constitutionally based right to privacy.

96. See infra notes 106-10 and accompanying text.
98. Article I, section 1 as reworded by constitutional amendment in 1974 now reads: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy.” CAL. CONST. art. I, §1; see also White, 13 Cal. 3d at 773, 533 P.2d at 233, 120 Cal. Rptr. at 105.
99. Porten, 64 Cal. App. 3d at 829, 134 Cal. Rptr. at 841-42.
100. Id.
101. See infra notes 102-05 and accompanying text.
102. White, 13 Cal. 3d at 774 n.11, 533 P.2d at 234 n.11, 120 Cal. Rptr. at 106 n.11. “California decisions long have recognized the propriety of resorting to such election brochure arguments as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people.” Id.
103. Id. at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105.
104. Communion is defined as “intimate... interchange of ideas and feelings especially dealing with matters innermost and spiritual.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 460 (1976).
105. Emotion is defined as a state or expression of strong feeling. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 742 (1976). Expression is defined as an indication or depiction of mood or sentiment. Id. at 803.
California courts have taken a more liberal approach than the United States Supreme Court in analyzing a prisoner's reasonable expectation of privacy. Although California cases uniformly have held that a prisoner ordinarily has no reasonable expectation of privacy while in prison, several exceptions exist. These exceptions focus upon the special relationship, if any, between the parties to the communication.

The California Evidence Code provides special protection for penitent-clergy communications. Notwithstanding judicial recognition that official surveillance is a necessary part of prison life, courts have held that the relationships endowed with particularized confidentiality must continue to receive unceasing protection. To deny that prisoners could ever have a reasonable expectation of privacy would be to deny them any cause of action based upon a privacy right. Under Harlan's two-pronged test, a finding of a reasonable expectation of privacy, both subjective and objective, is required.

Constitutional law clearly indicates that government activity which even indirectly inhibits the exercise of protected activity may run afoul of constitutional proscriptions. Constitutional freedoms are protected not only against frontal attack but also from being stifled by more subtle governmental interference. The rationale for this is that governmental action which falls short of prohibiting a certain activity still may have a chilling effect on the exercise of that activity. Therefore, petitioners need not allege a total deprivation of a constitutionally protected right provided they do allege a significant impairment of their ability to exercise that right. In addition to constitutional rights, prisoners also enjoy statutory protection.

C. Sections 2600 and 636 of the California Penal Code

California Penal Code section 2600 addresses the civil rights of prisoners. Section 2600 provides that an incarcerated person may

106. North, 8 Cal. 3d at 311, 502 P.2d at 1311, 104 Cal. Rptr. at 839; People v. Lopez, 60 Cal. 2d 223, 248, 384 P.2d 16, 30, 32 Cal. Rptr. 424, 438 (1963); Halpin v. Superior Court, 6 Cal. 3d 885, 900 n.21, 495 P.2d 1295, 1305 n.21, 101 Cal. Rptr. 375, 385 n.21 (1972).
107. North, 8 Cal. 3d at 310, 502 P.2d at 1310-11, 104 Cal. Rptr. at 838-39.
108. CAL. EVID. CODE §917.
109. North, 8 Cal. 3d at 310, 502 P.2d at 1310, 104 Cal. Rptr. at 838.
110. See DeLancie, 31 Cal. 3d at 876, 647 P.2d at 149, 183 Cal. Rptr. at 873.
111. White, 13 Cal. 3d at 761, 533 P.2d at 224, 120 Cal. Rptr. at 96.
113. See White, 13 Cal. 3d at 761, 533 P.2d at 224, 120 Cal. Rptr. at 96.
114. See supra notes 111-13 and accompanying text.
115. CAL. PENAL CODE §2600.
be deprived of only those rights necessary to provide for the reasonable
security of the institution and for protection of the public.116 California
courts have recognized that section 2600 does not grant absolute
rights.117 The possession of any right by a prisoner must be balanced
against the legitimate concern of the prison administration in main-
taining institutional security.118 Restrictions may not be arbitrary under
the guise of prison security;119 they must be necessary to effectuate
a permissible state interest.120 The question of necessity is addressed
only after a finding that protected rights are implicated.121

The right to privacy is a protected right under section 2600.122 The
Legislature intended to equate the rights of inmates to the rights of
non-inmates subject only to the needs of institutional security and
protection of the public.123 Therefore, denying prisoners a reasonable
expectation of privacy in prison, if unnecessary for institutional security,
would thwart the legislative purpose.124 In addition to the general pro-
tections of Penal Code section 2600, other statutes protect specific
rights.

The situation of eavesdropping on a communication between a
prisoner and his clergymen is addressed specifically in Penal Code
section 636.125 This section provides that any person who, without
permission, eavesdrops on any conversation between a prisoner and
his clergymen is guilty of a felony.126 The California Supreme Court

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116. Id.
117. These rights are not absolute because although they are retained by prisoners, these
rights may be infringed upon to promote institutional security. Calif. Penal Code §2600.
118. See, e.g., DeLancie, 31 Cal. 3d at 874 n.8, 647 P.2d at 147 n.8, 183 Cal. Rptr. at
871 n.8.
119. Id. at 874 n.9, 647 P.2d at 148 n.9, 183 Cal. Rptr. at 872 n.9.
(1979). The prison did not allow prisoners to wear union buttons. Id. at 133, 599 P.2d at
87, 157 Cal. Rptr. at 893. The court held:
[Respondent] relies solely on the fact that for security reasons he has refused to
authorize the Prisoners Union as an inmate group. Yet he does not show that the
reasons for not authorizing the Union... apply to display of a button... Therefore
the ban violates Penal Code section 2600, which, as we have seen, permits restric-
tions on rights only "as is necessary in order to provide for the reasonable security
of the institution."...

Id. at 134-35, 599 P.2d at 88, 157 Cal. Rptr. at 894.
121. See infra notes 156-57 and accompanying text.
122. DeLancie, 31 Cal. 3d at 868, 647 P.2d at 143, 183 Cal. Rptr. at 867.
123. Id. at 875-76, 647 P.2d at 149, 183 Cal. Rptr. at 873.
124. DeLancie, 31 Cal. 3d at 876, 647 P.2d at 149, 183 Cal. Rptr. at 873.
126. California Penal Code section 636 provides in pertinent part:
Every person, who, without permission from all parties to the conversation, eavesdrops
on or records by means of an electronic or other device, a conversation, or any
portion thereof, between a person who is in the physical custody of a law enforce-
ment agency or other public officer, and such person's attorney, religious advisor,
or licensed physician, is guilty of a felony...

Id.
has held that section 636 provides a prisoner with protection independent of section 2600.127 Section 636 thus codifies the notion that imprisonment does not result in the relinquishment of the right to private religious communication. The sound monitoring system proposed in *Arias* allowed control personnel to eavesdrop on communications within the chapel but nevertheless was upheld.

**D. The Holding in Arias**

The petitioners in the *Arias* case asserted that their constitutional and statutory rights to religious freedom and privacy were violated by the installation of the sound surveillance system in the chapel.128 The contention of the petitioners was that the installation of an electronic sound monitoring system would chill their religious expression.129 Several clergymen also stated that their ability to communicate effectively in private with the prisoners would be impaired.130

The *Arias* court held that the infringement, if any, was inconsequential and did not violate petitioner's constitutional right to religious freedom.131 The court relied upon the fact that most activities conducted in the chapel were communal in nature.132 In discussing those religious activities that are traditionally conducted in a private setting, such as individual counselling and auricular confessions,133 the court explained that the system protected these communications by not picking up sounds from the chaplain's office when the door was closed.134 Consequently, the court stated that the petitioner did not suffer an unconstitutional violation of his right to religious expression.135

The court in *Arias* did not address the presumption of confidentiality that surrounds all communications between a penitent and his

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128. *Arias*, 160 Cal. App. 3d at 808-09, 206 Cal. Rptr. at 809.
129. *Id.* at 810, 206 Cal. Rptr. at 810; see *supra* notes 111-13 and accompanying text.
130. *Arias*, 160 Cal. App. 3d at 810, 206 Cal. Rptr. at 810. Testimony by several clergymen, including the chaplain at the juvenile center where petitioners were incarcerated, indicated that the surveillance system would seriously infringe upon their relationships with the inmates. Petitioner's Reply at 8, *In re Arias*, 160 Cal. App. 3d 804, 206 Cal. Rptr. 806. Other religious leaders, however, testified that the system as designed would not inhibit religious expression since protestant worship is traditionally a public function. Respondent's Order to Show Cause at 34, *In re Arias*, 160 Cal. App. 3d at 804, 206 Cal. Rptr. at 806.
132. *Id.* at 810, 206 Cal. Rptr. at 810.
133. *Id.* at 814, 206 Cal. Rptr. at 813.
134. *Id.*
135. *Id.* at 810, 206 Cal. Rptr. at 810.
clergyman. California evidentiary law provides that the burden of proving that a communication was not made in confidence is on the opponent of the claim of privilege. The statute addresses all communications, not merely those communications that take place behind closed doors. The court in *Arias* considered chapel communication separately from office communication although no basis exists for this distinction in the statute. No evidence was offered by the correctional officials to rebut the presumption of confidentiality. The communications, therefore, should have been deemed privileged and installation of the sound surveillance system an intrusion upon privileged and constitutionally protected religious expression. Although the court held that petitioner’s right to religious freedom would not be violated, the court did point out that these same facts implicated the right to privacy.

The petitioner in *Arias* asserted that his right to privacy would be violated by the installation of the microphone in the chapel. The appellate court summarily dismissed the right to privacy challenge, stating that the reasons for invading petitioner’s privacy were both obvious and easily established. Since the court found the system to be reasonably necessary, installation did not constitute an impermissible violation of the petitioner’s right to privacy.

While acknowledging the existence of California Penal Code sections 636 and 2600, the *Arias* court held that the statutes did not protect the petitioner from installation of the sound system. According to the court, section 2600 merely requires that any infringement on protected rights be reasonable. The decision noted that the inviolability of religious counselling was recognized by Penal Code

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136. *Cal. Evid. Code* §917 states:

> Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the ... clergyman-penitent... relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

Id.

137. *Id.*

138. *Id.*


140. *Arias*, 160 Cal. App. 3d at 808-13, 206 Cal. Rptr. at 808-11.

141. See supra notes 136-39 and accompanying text.

142. *Arias*, 160 Cal. App. 3d. at 813, 206 Cal. Rptr. at 812.

143. *Id.*

144. *Id.* at 813-14, 206 Cal. Rptr. at 812.

145. *Id.*

146. *Id.* at 814, 206 Cal. Rptr. at 813.

147. *Id.*
section 636, but concluded that correctional officials were not constitutionally bound to exempt any area of the prison from surveillance. The court gave great weight to evidence that noise from within the chaplain's office could not be detected by the microphone in the sanctuary.

The above discussion suggests that despite the outcome of the Arias case, petitioner made a sufficient showing that constitutional rights of religious freedom and privacy had been implicated by the CYA surveillance system. As codified by section 2600, rights of prisoners may be infringed upon to a certain extent. The question thus becomes whether the infringement is an impermissible violation of petitioner's rights. Determination of this issue is a direct function of the level of judicial review the court will employ. If the court merely requires the prison officials to demonstrate that the proposed system is reasonable, the court will defer to the judgment of prison administrators on the validity of the system. In essence, the court will return to the traditional hands-off approach with the result that prison regulations rarely will be struck down. If, however, the court independently analyzes the regulation in light of both the interests of the prisoner and the legitimate interests of the correctional facility, the petitioner will receive an unbiased judgment. The critical inquiry, then, is what role the judiciary must assume when fundamental constitutional rights have been implicated by prison regulations.

JUDICIAL REVIEW OF THE PROPOSED RESTRICTIONS

The standard of judicial review in both state and federal courts applicable when determining the constitutional rights of non-inmates is strict scrutiny. Applying the strict scrutiny standard, courts require that the challenged law be necessary to promote a compelling governmental interest. The court must balance the governmental interests involved against the rights of the individual involved. The

148. Id.
149. Id.
150. Id.
151. See supra notes 116-20 and accompanying text.
153. See, e.g., Bell, 441 U.S. at 546-47.
154. See supra note 20 and accompanying text.
156. These rights include the following: (5) the right to privacy ...” Id. at 418 n.3.
157. Id. at 418.
158. Id.

1090
regulation must be tailored narrowly so that the goal sought is promoted in a way that infringes upon the fewest rights.\textsuperscript{159} This policy of demanding the most narrowly tailored regulation is referred to as the least restrictive means test.\textsuperscript{160} Although the least restrictive means test is applied universally in non-inmate cases, the United States Supreme Court in a recent case has refused to apply the least restrictive means test to a prisoner’s claim.\textsuperscript{161}

A. Judicial Review in the United State Supreme Court: Bell v. Wolfish

In a recent United States Supreme Court case concerning the rights of prisoners, petitioners brought suit charging that their due process rights were violated by prison practices.\textsuperscript{162} The Court discussed the critical role that the judiciary plays in balancing the constitutional and statutory rights of inmates with the requirements of institutional security and order.\textsuperscript{163} Bell v. Wolfish\textsuperscript{164} adopted the hands-off approach to the review of prison regulations.\textsuperscript{165} The Court based the holding in Bell upon three premises. First, courts owe great deference to the expertise of prison administrators.\textsuperscript{166} Second, the burden of establishing an impermissible violation is on the inmates who raise constitutional challenges to prison restrictions.\textsuperscript{167} Third, courts will interfere only when correctional officials are “conclusively shown to be wrong.”\textsuperscript{168} The Court did not explain exactly what criteria determine wrongfulness. The Court stated only that no evidence was presented to show that the officials exaggerated their response or that the restriction was irrational.\textsuperscript{169} This analysis represents a return to the hands-off approach.

The Court in Bell stressed that the prison must be permitted to ensure security.\textsuperscript{170} Courts should not second-guess the opinions and decisions of prison administrators who are better informed as to the

\begin{footnotesize}
\begin{enumerate}
\item[159.] \textit{Id.} at 873.
\item[160.] \textit{Id}; see also \textit{id.} at 418-19.
\item[161.] Bell v. Wolfish, 441 U.S. 520 (1979).
\item[162.] \textit{Id.} at 523; see \textit{supra} note 93.
\item[163.] Bell, 441 U.S. at 545-47.
\item[164.] 441 U.S. 520 (1979).
\item[165.] \textit{Id.} at 547-48.
\item[166.] \textit{Id.} at 547.
\item[167.] \textit{See id.} at 548.
\item[168.] \textit{Id.} at 555 (quoting Jones v. North Carolina Prisoner's Labor Union, 433 U.S. 119, 132 (1977)).
\item[169.] \textit{Id.} at 555.
\item[170.] \textit{See supra} notes 15-19 and accompanying text.
\item[171.] Bell, 441 U.S. at 546-47.
\end{enumerate}
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day-to-day administration of a prison. Petitioners had argued that the proper standard for the Court was the least restrictive means standard. The Supreme Court expressly rejected the least restrictive means standard when conditions were not alleged to infringe upon a more specific guarantee than the fourteenth amendment due process clause. When a prisoner’s claim was based upon a violation of due process alone, the Court in Bell held that courts should not second-guess prison officials and should defer to their judgments. The Court in Bell did not reject the least restrictive means test as the proper test to be applied when prison conditions infringe upon a right derived from a source more specific than the due process clause nor did the Court state what analysis should be used in that situation. Accordingly, several federal decisions rendered subsequent to Bell suggest that a higher level of judicial scrutiny is the appropriate standard for reviewing specific constitutional claims.

B. Post-Bell Federal Cases

When a prison regulation offends a fundamental constitutional guarantee, federal courts are not required to abdicate to correctional officials the role of reviewing prison regulations. The United States Supreme Court in Procunier v. Martinez discussed the various standards of review applied by federal courts when constitutional violations were alleged by prisoners. The Court held that the prison regulation in question must further one or more of the substantial governmental interests of security, order, and rehabilitation. In addition, the limitation must be no greater than is necessary for the protection of the governmental interest involved. This standard of review, applied when prisoners allege that a regulation violates a specific constitutional guarantee, remains intact despite the United States Supreme Court decision of Bell v. Wolfish.

Courts faced with specific constitutional challenges to prison regula-
tions have applied the *Martinez* test despite the *Bell* decision. A prisoner proved a violation of a specific constitutional guarantee, the burden shifted to prison administrators to establish the reasonableness of the violation. A finding that the prison regulation merely was reasonably related to an important state interest was insufficient when fundamental rights were involved. The independent role of the judiciary in litigation concerning conditions of confinement recently was reaffirmed in a federal case concerning the California prison system. California courts have followed federal cases applying a higher level of review to allegations of specific constitutional violations.

C. Judicial Review in California Courts

California has rejected the argument that *Bell v. Wolfish* precludes the use of a strict scrutiny analysis when specific constitutional guarantees are involved. In a case decided after *Bell*, the First District Court of Appeals held that when institutional security as contemplated by section 2600 of the Penal Code can be promoted by different means, the least restrictive of these means must be chosen. When fundamental constitutional rights are not implicated, courts have exercised a lesser degree of judicial scrutiny.

In *In re Price*, the California Supreme Court upheld a ban on meetings of the Prisoners' Union imposed by the Department of Corrections. The court gave great deference to the findings and opinions of the prison administrators. Once the court found that the administrators' fears of potential security problems were reasonable,
the ban on meetings of the Prisoners' Union was upheld.\(^{196}\) Prison officials have argued that the standard in *Price* of deferring to prison officials is the correct standard to be applied when prisoners claim a prison regulation violates constitutional rights.\(^{197}\) The holding in *Price*, however, was premised upon a finding that the restriction did not implicate any fundamental constitutional right.\(^{198}\) Since constitutional rights of prisoners were not violated by the regulation, the court was not required to apply the strict scrutiny test. *Price*, therefore, is authority for the proposition that when rights other than constitutional rights are involved, courts may accord greater deference to the judgment of prison administrators. After *Price*, the least restrictive means test continued to be applied in cases in which fundamental rights were implicated.

Two recent California cases illustrate the application of the least restrictive means test. In *In re Bell*,\(^{199}\) the First District Court of Appeals was confronted with a restriction on a prisoner's right to receive visitors.\(^{200}\) Visitation rights specifically are protected by statute much like the rights involved in *Arias*.\(^{201}\) The court, interpreting section 2600, held that the word necessary as used in the statute was to be construed according to its common meaning.\(^{202}\) The court in *In re Bell* stressed a two-part analysis. First, the reasonableness of the warden’s belief that institutional security was affected had to be considered.\(^{203}\) The court in *In re Bell* found that the reasonableness of the warden’s concern regarding contraband in the prison was self-evident.\(^{204}\) This determination, however, was only the first part of the analysis. The second part of the analysis concerned the necessity of the particular response chosen by the prison administration.\(^{205}\) The court in *Bell* applied the least restrictive means test but since petitioners failed to show that less restrictive alternatives existed, the challenged regulation was upheld.\(^{206}\)

In *In re French*,\(^{207}\) another case concerning personal visits, the First

\(^{196}\) *Id.*

\(^{197}\) *Bell*, 110 Cal. App. 3d at 821, 168 Cal. Rptr. at 102.

\(^{198}\) *Price*, 25 Cal. 3d. at 453, 600 P.2d at 1332, 158 Cal. Rptr. at 875.

\(^{199}\) 110 Cal. App. 3d 818, 168 Cal. Rptr. 100 (1980).

\(^{200}\) *Id.* at 820, 168 Cal. Rptr. at 101.

\(^{201}\) *Id.* at 821-22, 168 Cal. Rptr. at 102. "A restriction... is not necessary if the goal which it is intended to promote can effectively be promoted by less restrictive means."

\(^{202}\) *Id.*

\(^{203}\) *Id.* at 821, 168 Cal. Rptr. at 102.

\(^{204}\) *Id.*

\(^{205}\) *Id.*

\(^{206}\) *Id.* at 822, 168 Cal. Rptr. at 102.

\(^{207}\) 106 Cal. App. 3d 74, 164 Cal. Rptr. 800 (1980).
District Court of Appeals held that when a prison restriction violates rights specifically enumerated by the legislature a "counterweight" is presented to the purpose of the regulation. Bell and French are representative of the majority of California cases in which the strict scrutiny standard of review has been applied when constitutional rights of prisoners allegedly are violated. This standard is applied regardless of whether the inmates are adults or juveniles.

**JUDICIAL TREATMENT OF JUVENILE OFFENDERS**

The analysis employed by the court in Arias deviated significantly from the analysis accepted by California courts when fundamental constitutional rights are implicated. The result of the decision in Arias is a potentially unconstitutional infringement of a prisoner's fundamental rights. The cases relied upon by the Arias court concern adult prisoners. Application of these cases to juveniles, however, causes no analytical problems. The inmates at the CYA facility where Arias was detained are youthful offenders who have been found guilty of crimes in juvenile proceedings. Prisoners in CYA custody are confined involuntarily as are their adult counterparts. The freedom of movement of a juvenile ward is restricted and wards are under constant surveillance as are adult prisoners. Juvenile wards and adult inmates, thus, share many common characteristics by virtue of their confinement.

Penal Code section 2600 offers CYA wards the same protection offered adult inmates. The original version of section 2600 only applied to adult prisoners, suspending all civil rights subject to some discretion in correction officials. In 1968, the legislature amended section 2600 to specify that all prisoners retained civil rights subject to reasonable security concerns.

Considerations of equal protection dictate that persons similarly

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208. CAL. PENAL CODE §2601.
210. Id.
211. See infra notes 224-46 and accompanying text.
213. Id.
216. See infra notes 218-20 and accompanying text.
217. DeLancie, 31 Cal. 3d at 871, 647 P.2d at 146, 183 Cal. Rptr. at 870.
218. Id.
situated must be treated similarly by the law.\textsuperscript{219} With respect to the retention of constitutional rights, juveniles are similarly situated with adult inmates and are entitled to no fewer rights.\textsuperscript{220} Therefore, interpretations of Penal Code section 2600 have been applied to both adult and juvenile cases.\textsuperscript{221} Federal courts have recognized that children, as well as adults, have substantial liberty interests.\textsuperscript{222} These interests have been held to be protected by the same language and rationale codified in section 2600.\textsuperscript{223} Having established that California courts apply the least restrictive means test when prisoners contend that specific constitutional rights have been violated, the \textit{Arias} opinion now may be analyzed more fully.

\section*{Analysis of the \textit{Arias} Opinion}

In applying the least restrictive means test, courts consistently have held that the burden of justifying a prison regulation is upon prison officials once a prisoner's fundamental rights are implicated.\textsuperscript{224} The cases have required prison officials to produce evidence that consists of more than just an opinion of necessity to satisfy this burden.\textsuperscript{225} In \textit{In re Stone},\textsuperscript{226} the First District Court of Appeals seriously considered the views of prison officials and noted that the officials should be entitled to a certain degree of flexibility when taking effective action.\textsuperscript{227} Despite this consideration, the court invalidated the challenged regulation.\textsuperscript{228} The court found that the warden primarily had relied upon his own opinions, conclusions, and speculations.\textsuperscript{229} In the view of the court, the warden's opinion simply was not enough to sustain the burden of proving that the regulation was necessary.\textsuperscript{230} Prison officials have attempted to justify regulations in general terms as necessary to maintain institutional security.\textsuperscript{231} Courts have held that

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\item \textsuperscript{219} J. NOWAK, R. ROTUNDA, & J. YOUNG, \textit{CONSTITUTIONAL LAW}, 586 (2d ed. 1983).
\item \textsuperscript{220} \textit{Arias}, 160 Cal. App. 3d at 809 n.1, 206 Cal. Rptr. at 809 n.1.
\item \textsuperscript{221} \textit{Id}.
\item \textsuperscript{222} Milonas v. Williams, 691 F.2d 931, 943 (10th Cir. 1982), \textit{cert. den.}, 103 S. Ct. 1524 (1983).
\item \textsuperscript{223} \textit{Id}.
\item \textsuperscript{224} \textit{See, e.g.}, \textit{In re Harrell}, 2 Cal. 3d 675, 687, 470 P.2d 640, 647, 87 Cal. Rptr. 504, 511 (1970).
\item \textsuperscript{225} \textit{See, e.g.}, People v. Woody, 61 Cal. 2d 716, 719, 394 P.2d 813, 815, 40 Cal. Rptr. 69, 71 (1964).
\item \textsuperscript{226} 130 Cal. App. 3d 922, 182 Cal. Rptr. 79 (1982).
\item \textsuperscript{227} \textit{Id}. at 930, 182 Cal. Rptr. at 84.
\item \textsuperscript{228} \textit{Id}.
\item \textsuperscript{229} \textit{Id}.
\item \textsuperscript{230} \textit{Id}.
\item \textsuperscript{231} \textit{In re Reynolds}, 25 Cal. 3d 131, 134, 599 P.2d 86, 88, 157 Cal. Rptr. 892, 894 (1979).
\end{itemize}
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these generalized assertions do not constitute sufficient evidence to sustain the burden of the state.\textsuperscript{232} An analysis of the way in which the \textit{Arias} court allocated the burden of justification, as well as the evidence the court admitted to sustain that burden, conflicts with the aforementioned case law.\textsuperscript{233} The \textit{Arias} court stated that the burden of proving necessity was not on prison officials.\textsuperscript{234} This statement is in direct conflict with prior authority that places the burden of justifying the regulation on prison officials.\textsuperscript{235} The \textit{Arias} court further stated that prison officials only had to produce evidence that a potential danger to institutional security would be presented by permitting petitioners to exercise certain constitutional rights.\textsuperscript{236} The court explained that testimony by the responsible officials would be sufficient if those opinions were held sincerely.\textsuperscript{237} This opinion evidence represents the kind of “wholly speculative predictions”\textsuperscript{238} and “untested assertions”\textsuperscript{239} that other California courts had found unacceptable.\textsuperscript{240} The \textit{Arias} court dismissed as irrelevant petitioner’s argument that there had never been an incident of violence in the chapel.\textsuperscript{241} This same factor, however, was dispositive in \textit{In Re Reynolds}\textsuperscript{242} in which the court struck down a prison regulation prohibiting prisoners from wearing a Prisoners’ Union button.\textsuperscript{243} The court found that the prison officials had alleged neither past disruption nor specific reasons for predicting future disruption.\textsuperscript{244} The \textit{Arias} court concluded that the state had met the burden of going forward with the evidence, and that, therefore, the court must defer to the judgment of the prison officials.\textsuperscript{245} The court was following the standard of review requiring that great deference be given to prison administrators as set forth in \textit{Bell v. Wolfish}.\textsuperscript{246}

This author suggests that the \textit{Arias} court should have invoked the least restrictive means test\textsuperscript{247} and should have required a stronger show-

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\item \textsuperscript{232} \textit{Id.} at 134-35, 599 P.2d at 88, 157 Cal. Rptr. at 894.
\item \textsuperscript{233} See supra notes 224-25 and accompanying text.
\item \textsuperscript{234} \textit{Arias}, 160 Cal. App. 3d at 811, 206 Cal. Rptr. at 810.
\item \textsuperscript{235} See supra note 224 and accompanying text.
\item \textsuperscript{236} \textit{Arias}, 160 Cal. App. 3d at 811, 206 Cal. Rptr. at 810.
\item \textsuperscript{237} \textit{Id.}
\item \textsuperscript{238} \textit{In re Jordan}, 7 Cal. 3d. 930, 937, 500 P.2d 873, 876, 103 Cal. Rptr. 849, 852 (1972).
\item \textsuperscript{239} \textit{Woody}, 61 Cal. 2d at 724, 394 P.2d at 819, 40 Cal. Rptr. at 75.
\item \textsuperscript{240} See supra note 229-32 and accompanying text.
\item \textsuperscript{241} \textit{Arias}, 160 Cal. App. 3d at 812, 206 Cal. Rptr. at 811.
\item \textsuperscript{242} 25 Cal. 3d 131, 599 P.2d 86, 157 Cal. Rptr. 892 (1979).
\item \textsuperscript{243} \textit{Reynolds}, 25 Cal. 3d at 133, 599 P.2d at 87, 157 Cal. Rptr. at 893.
\item \textsuperscript{244} \textit{Id.} at 134, 599 P.2d at 88, 157 Cal. Rptr. at 894.
\item \textsuperscript{245} \textit{Arias}, 160 Cal. App. 3d at 811, 206 Cal. Rptr. at 810.
\item \textsuperscript{246} See supra notes 164-68 and accompanying text.
\item \textsuperscript{247} See supra notes 157-60 and accompanying text.
\end{itemize}
ing of evidence to sustain the burden that initially should have been placed on the prison administration. If the least restrictive means test had been used the court would have found that less restrictive alternatives were available. The system in use prior to installation of the sound system in question consisted of FM beepers which were carried by security personnel. The court found this monitoring system inadequate for three reasons. First, the beepers had to be activated manually by the wearer, hence they were ineffective if the wearer for some reason could not activate the alarm. Second, the beepers did not permit two-way communication. Once the beeper was activated, security personnel were aware that a problem existed, but had no way of discovering the nature or severity of the problem. Third, because the beepers were provided only to the staff, inmates were unprotected unless a staff member was present and aware of the disturbance. The court in Arias held that no equally effective alternatives to the sound system existed. Testimony in respondent's own brief suggested other monitoring systems were available which addressed each concern. An electronic specialist testified that a wide range of FM type alarms existed that transmit sound. Using these alarms, security control personnel would be able to hear the nature of any disturbance after the alarm had been activated. These systems would be less intrusive than a system that allowed continual sound surveillance, and would be just as effective. The alternative FM beepers also are activated when moved into a horizontal position. Thus, if a staff member was knocked to the ground, the alarm would be activated automatically. Finally, with regard to the concern of the court that the wards were unprotected in the absence of a guard, testimony was offered that no one was inside the chapel area without a staff member.

248. See supra notes 224-32 and accompanying text.
250. Id.
251. Id.
252. Id.
253. Id.
254. Id.
255. Id. at 812, 206 Cal. Rptr. at 811.
257. Id.
258. Id.
259. Id.
260. Id.
The above discussion suggests that less restrictive alternatives to the proposed sound monitoring device in the chapel may have existed. Since the proposed system violated petitioner's fundamental constitutional right to privacy, the court should have applied the least restrictive means test to consider alternative systems. The failure of the court in *Arias* to analyze the alternative systems led to an impermissible violation of petitioner's right to privacy.

**CONCLUSION**

When the fundamental rights of a juvenile inmate are violated by a prison regulation, the court should utilize a strict scrutiny level of review. The court should require that the regulation be the least restrictive alternative available. This level of review best reflects the position of the legislature that inmates are entitled to the same constitutional protection as non-inmates, subject only to restrictions necessary for the security of the institution and the protection of the public.

The legislature has not been specific regarding the rights retained by prisoners and the extent upon which these rights may be infringed. Penal Code section 2600 states that prisoners may suffer some infringements of their rights by virtue of confinement. Penal Code section 636 codifies several absolute privileges based upon certain special relationships including the penitent-clergy relationship. In addition, prisoners retain constitutional rights. A finding that a violation under either the United States or California Constitutions has occurred requires the court to decide whether that violation is permissible in light of the goals and interests involved.

The scope of judicial review exercised by the court is directly related to the nature of the rights involved. Although not all courts are in agreement, the great weight of California authority suggests that the least restrictive means test should apply to determine whether a regulation that impinges upon fundamental constitutional rights is valid. A judicial finding that the interest of the prison administration could be promoted in a less intrusive manner requires the court to invalidate the regulation.

*In re Arias* concerned fundamental constitutional rights of prisoners infringed upon by the installation of a sound monitoring surveillance system in a prison chapel. The appropriate standard of judicial review is the strict scrutiny test. The *Arias* court, therefore, erred in applying a lesser standard. Had the court employed the stricter test, a less restrictive alternative would have been discovered. The use of the sound
system in *In re Arias*, therefore, unconstitutionally violated the petitioner's rights and should have been declared unconstitutional.

*Mona Halprin*