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Superior Court of Connecticut, Judicial District of Hartford-New Britain.

Kenneth WASHINGTON, et al.
v.
Larry R. MEACHUM, Commissioner.

No. 534616. | March 06, 1995.

Opinion

MEMORANDUM OF DECISION RE SUBSTITUTION OF DEFENDANT

BLUE, Judge.

***1** This case is an action for injunctive, declaratory, and monetary relief arising from a regulation promulgated by the Department of Correction involving inmate communications. The Commissioner of Correction at the time of service of process, trial, and final argument was Larry R. Meachum. Commissioner Meachum, who was sued in both his official and personal capacities, was at all relevant times the sole defendant in the action.

The parties have informed me that Commissioner Meachum resigned in December 1994, shortly after final arguments had been heard. John J. Armstrong is presently the Commissioner-Designate. Commissioner-Designate Armstrong has agreed to be substituted without need for service of process for purposes of injunctive and declaratory relief only. Pursuant to his agreement, he is so substituted.

In a Memorandum of Decision filed this day, I grant certain injunctive relief but find no liability for damages. In the event that the denial of monetary relief is reversed on appeal, the intricate question of when (if at all) Commissioner Meachum's liability for damages ended and when (if at all) his successor's liability for damages began can be fully litigated. Because I find that no liability for damages exists, however, it is inappropriate for me to address that question. The present order is without prejudice to either side on this issue. For present purposes, the representations of the Commissioner-Designate and the Attorney General make it clear that the injunctive relief I do issue will be effective, assuming that it is not stayed or reversed on appeal.

MEMORANDUM OF DECISION

I. *INTRODUCTION*

***2** A prisoner's lot is not a very happy one. Hemmed in by bars and gates, watched by guards, and subject to cell and body searches, a prisoner loses by virtue of his incarceration that which most of us take for granted-his freedom. At the same time, however, the prisoner does not lose all of his freedom. As the courts have said many times, there is no iron curtain drawn between the constitution and the prisons of this country. Drawing a line between the freedom that is necessarily lost by the fact of incarceration and the freedom that is retained by prisoners under the constitution and laws of a free society is a delicate task. In this class action, I am called upon to draw that line in a number of particular contexts in the general area of inmate telephone conversations. This case results from the fact that the Connecticut Department of Correction (DOC) has commenced an ambitious program of recording and listening to such conversations. This program has also imposed certain limitations on privileged inmate telephone conversations (primarily with attorneys) that are not themselves recorded. In conjunction with this program, the DOC also monitors inmate mail. It should be made clear from the outset that it is the legality, rather than the wisdom, of this program that is before me. In considering the legality of this program, I am called upon to consider not only weighty constitutional issues, but a number of statutory issues of first impression. This case was tried before me over the course of eleven days in July 1994. By agreement of the parties, the trial was limited to questions of injunctive and declaratory relief and liability for damages. During this trial I heard the testimony of a large number of witnesses,

including inmates, correctional officials, and various professional people (such as lawyers and social workers) who work with inmates. I took an extremely helpful tour of the Hartford Community Correctional Center (HCCC) and personally made a call on a monitored telephone. In addition, the parties have submitted dozens of exhibits and extensive briefs and arguments. I have also had the benefit of arguments submitted by the Harvard Law School Criminal Justice Institute and other organizations as amici curiae. I now make the following findings of fact and conclusions of law.

II. *FINDINGS OF FACT*

A. *The DOC*

Conn.Gen.Stat. § 18-78 establishes a state department of correction, which consists of a number of different correctional institutions. At the time of trial, there were twenty-seven state correctional institutions in Connecticut, housing approximately 14,000 inmates. These inmates include both pretrial detainees and sentenced prisoners. It should be stated at the outset that the DOC does not operate-and this case in no way concerns-any of the local police lockups operated by the 169 towns in Connecticut, the Federal Correctional Institution in Danbury, the courthouse lockups and juvenile detention facilities operated by the Judicial Department, or the secure facilities such as Whiting Forensic Institute operated by the Department of Mental Health. The DOC does supervise approximately 3,000 persons who are on various forms of community release, but the rights of those persons are not presented by this case either. This case involves prisoners.

***3** Conn.Gen.Stat. § 18-80 provides that the Commissioner of Correction is the administrative head of the DOC. The Commissioner of Correction at the time of the adoption of the regulation about to be discussed and at the time of trial was Larry R. Meachum, who is, as § 18-80 requires, an experienced correctional administrator. (Commissioner Meachum resigned in December 1994, after the conclusion of the trial. John J. Armstrong, Commissioner-Designate of the Department of Correction, has been substituted as a defendant for purposes of injunctive and declaratory relief.) Below the Commissioner are a phalanx of deputy commissioners and other personnel with statewide responsibilities as well as directors of regional areas. Each individual facility has a unit administrator-a term that has replaced "warden" in correctional parlance. Below the level of unit administrator, there are dozens, or in the case of large facilities, hundreds of employees in each institution. These include, of course, a large contingent of correctional officers organized along paramilitary lines with military titles going up to the rank of captain. The DOC has approximately 6,000 total personnel.

The DOC has adopted a five-level security classification system for both institutions and inmates. Level 1 is community placement. Level 2, the lowest institutional level, is minimum security. Levels 3 and 4 are medium security, and level 5 is maximum security. Inmates are classified based on the nature of their crime, the length of their sentence, and their institutional behavior. With minor exceptions, no institution may house an inmate with a higher security level than the security level of the institution.

At the time of the hearing, only seven DOC facilities had actually implemented the recording and listening system about to be discussed. These institutions house both sentenced prisoners and pretrial detainees. The DOC intends to implement the system in every facility under his control as soon as the funding can be arranged. It is thus anticipated that every DOC inmate in the State will soon be subject to this system. This case thus concerns the rights of 14,000 currently incarcerated persons, as well, of course, as the rights of those who will be incarcerated in the future and those who were incarcerated at the inception of the recording and listening program but have since been released.

The inmates incarcerated by the DOC represent a broad spectrum of humanity. Some are unspeakable people who have committed unspeakable crimes. Some are more or less ordinary people who have violated the law in more modest ways. Some are pretrial detainees who will eventually be found to have committed no crimes at all. Moreover, an inmates' dangerousness, at least while he is incarcerated, is not necessarily a function of the heinousness of his crime. Some murderers are model inmates. Some persons convicted of relatively minor crimes or, for that matter, some pretrial detainees who are not convicted of anything, pose serious threats to the safety of their fellow inmates, correctional officials, and society.

B. *Telephones in Prisons*

***4** Correctional administrators have had telephones in their offices for decades, and it is likely that the history of inmates being allowed to use those phones in cases of family emergencies and the like goes back many years. Before the advent of collect call-only telephones, an inmate wishing to make a phone call would have to arrange with correctional officials to make it on a phone in, for example, the warden's or a counselor's office. Correctional officials would frequently listen to these calls on an extension telephone.

In 1974, Bell Telephone promoted what it called the "five minute parole." This was a collect call only telephone designed to be placed in an inmate residential area. There

were relatively few of these telephones at first, and their use was initially considered a privilege. Correctional officials would often stand by an inmate using the telephone and, in that way, monitor the conversation. Over time, the number of telephones increased, and, until the advent of electronic monitoring, many calls were unmonitored.

Telephone technology dramatically improved in the 1980's. The Federal Bureau of Prisons began the electronic monitoring of telephone calls at the Federal Correctional Institution in Leavenworth, Kansas in 1982 or 1983. Since that time, thirty-one states and the District of Columbia have implemented some form of electronic monitoring.

Collect call only telephones were introduced into Connecticut Correctional facilities in the late 1970's or early 1980's. At least in recent years, the telephones were extensively used by Connecticut prisoners for a variety of purposes-most legitimate, such as calls to family members or counselors, but some illegitimate. Calls on these telephones have not recently been considered a privilege available only to a favored few. Rather, these calls were available to the vast majority of inmates. For at least some of these inmates, these calls represent the only practical link to the outside world. For reasons of illiteracy and distance, letter writing and prison visits are not always viable alternatives.

These phones were not extensively monitored until the commencement of electronic monitoring at issue in this case. One correctional official testified that he had listened on an extension line to telephone calls made by a single individual on several occasions in 1992 and 1993. The evidence makes it clear that this was considered at the time to be an exceptional case.

The collect call only telephones in Connecticut's correctional facilities are mounted on walls in residential areas. There are no phone booths. The telephone that I used during my tour of the HCCC was located in a fairly small corridor that also contained the doors to approximately a dozen cells. Many of these doors were within listening distance of the telephone. The telephone line that I used had a modest amount of static, so talking in a whisper did not seem realistic. In any event, the testimony establishes that most calls are made during population movement times (such as times when inmates are going to meals, work, or recreation). This movement will inevitably generate noise, which will be especially intense in a small corridor. A good analogy would be the hallway noise in an urban high school when students are changing classes. Under these circumstances, it is necessary to talk loudly to be heard on the telephone. In addition, as will be the case at any pay phone in a crowded area, it is fairly common to have persons lining up to use the phone.

***5** The telephone that I used at the HCCC was unusual in one respect. That telephone was a single telephone located in a corridor. Most of the collect call only phones in Connecticut's correctional facilities are located in clusters of two or more in either housing units or other common areas. A photograph of one such phone cluster is in evidence. (Ex. 99.) That photograph shows two telephones, each with an inmate talking on it, about three or four feet apart. Each inmate has his head partially turned away from the other. The evidence suggests that at times there will be no one around when an inmate is using one of these telephones but at times there will be many people around, and other inmates (and possibly correction officers) will inevitably hear what is being said.

In addition to the collect call only telephones, correctional administrators and counselors have ordinary telephones in their offices. Inmates who obtain permission are allowed to use these latter telephones for privileged telephone calls (mostly to their attorneys) and, on rare occasions, in the event of family emergencies.

C. *Mail in Prison*

Prisoners have undoubtedly sent and received mail for centuries. Until recent decades, however, prison officials read and censored inmate correspondence more or less at will. *See* Ronald L. Goldfarb & Linda R. Singer, *After Conviction,* 509 (1973).

In recent times, prison control of inmate correspondence has been subject to both judicial and regulatory limitation. The relevant judicial decisions will be discussed in the Conclusions of Law, *infra.* The most recent administrative directive on the subject in Connecticut prior to the regulation in question here was an administrative directive promulgated on October 9, 1981 by then Commissioner of Correction John R. Manson. (Ex. AAAA.) That directive stated, in relevant part, that:

> Under exceptional circumstances, the review of both incoming and outgoing mail may be authorized in writing by the warden. Authorization to review mail may be given on a finding by the warden that there are indications creating a reasonable belief that:
>
> 1. Correspondence concerns sending contraband in or out of the institution or contains contraband.
>
> 2. Correspondence concerns plans to escape.
>
> 3. Correspondence concerns plans for activities in violation of institutional rules.
>
> 4. Correspondence concerns plans for criminal activity to be conducted within the institution.

5. Correspondence itself is in violation of institutional rules.

6. Correspondence contains material which would cause emotional trauma to the inmate or provide some suggestion of inmate emotional state as a potential suicide case.

DOC Administrative Directive 3.5(11)(a) (1981).

D. ***The Regulation***

On September 21, 1993, the Connecticut Law Journal printed the text of a new regulation, Conn.Agencies Reg. § 18-81-28, *et seq*. (the "Regulation"). Conn.L.J., Sept. 21, 1993, p. 17B. The Regulation technically became effective on August 18, 1993, when it was filed with the Secretary of State. In practice, however, it did not become effective until January 5, 1994, when the recording and listening program it authorizes actually began operation at the Connecticut Correctional Institution, Somers (CCIS).

***6** The Regulation is a fairly detailed one and since it has both been printed in the Law Journal and submitted as an exhibit (Ex. A.), it need only be summarized here. The Regulation begins with a definitional section. For present purposes, the most important definitions are those of the terms "General Correspondence" and "Privileged Communication." "General Correspondence" means "all correspondence not defined as privileged communication." "Privileged Communication" is defined as meaning any telephone call or written correspondence between inmates and federal, state, and local elected and appointed officials, the Connecticut Correctional Ombudsman, and attorneys.

The Regulation then turns to inmate correspondence. It provides that "All outgoing general correspondence shall be subject to being read at the direction of the Unit Administrator ... for either a specific inmate(s) or on a random basis if the Commissioner or Unit Administrator has reason to believe that such reading is generally necessary to further the substantial interests of security, order or rehabilitation." Section 18-81-31(a). Outgoing correspondence can then be confiscated if it contains or concerns any of a number of specified illegalities. Inmates are to be notified if their correspondence is confiscated but not if it is simply reviewed and sent on.

"Outgoing privileged correspondence shall not be opened or read." Section 18-81-35. "All incoming privileged correspondence shall be opened and inspected, but not read, only in the presence of an inmate addressee." Section 18-81-36.

The Regulation then turns to inmate telephone calls. These portions of the Regulation are sufficiently important that they must be set out in full:

Sec. 18-81-44. Recording and listening to "collect call only" telephone calls

Only telephone calls from "collect call only" telephones may be recorded and listened to provided the following provisions are complied with:

(a) Notification. A sign in English and Spanish shall be posted at each inmate telephone location which reads: "Any conversation utilizing these telephones shall be subject to recording and listening."

Upon admission, each inmate shall be given a form stating that inmate's telephone calls are subject to recording and listening. The inmate shall acknowledge reading the form by a legible printed name and signature or by an appropriate assent acknowledged in writing by a staff member. Any inmate not so consenting shall not be allowed use of the "collect call only" telephones and shall be instructed that any such use shall be unauthorized and in violation of institutional rules.

(b) Automatic Tone Warning. Inmate telephone calls shall be recorded in accordance with the provisions of Section 52-570d of the Connecticut General Statutes and any other applicable law. No call shall be recorded unless the recording is accompanied by an automatic tone warning device which automatically produces a distinct signal that is repeated at intervals of approximately 15 seconds during the communication while such instrument, device or equipment is in use.

***7** (c) Listening. Listening shall be authorized only by the Unit Administrator or higher authority when there is reason to believe that such listening is reasonably related to the maintenance of the security, good order or discipline of the facility or the prevention of criminal activity either within the facility or without.

Sec. 18-81-45. Access to and retention of recordings of telephone calls

Only personnel authorized in writing by the Unit Administrator or higher authority shall listen to inmate telephone calls or recordings of inmate telephone calls. Such person authorized in writing to listen should be a person whose duties relate to the purposes as stated in Subsection (c) of Section 18-81-44 and who has been instructed and trained in these governing standards so as to eliminate the listening to conversations not directly related to these standards. Access to tapes shall be limited to persons designated in writing by the Commissioner or the Unit Administrator or their designees. Tapes shall be maintained for a minimum of 90 days at which time they can be reused, except that any tape containing information leading to

> administrative, investigative or legal action shall be maintained for three years or for the duration of the proceedings whichever is longer.
>
> Sec. 18-81-46. Privileged telephone calls
>
> An inmate shall be provided a reasonable accommodation to make prearranged non-recorded telephone calls to any person enumerated in Subsection (e) of Section 18-81-28 on non-collect call only telephones without the recording and/or listening provided for in Section 18-81-44 above, and provided the person enumerated in Subsection (e) of Section 18-81-28 called agrees to accept the charges. Such calls shall be placed by staff who shall verify the party's identity prior to placing the inmate on the line. The staff member shall then move out of listening range of the inmate's conversation. The employee placing the call may maintain visual observation of the inmate. Such calls shall normally be limited to ten minutes duration.

The Regulation finally provides that, "Information obtained from correspondence and/or telephone calls by correctional staff, pursuant to the provisions of these regulations, shall be disclosed only as reasonably necessary to promote legitimate penological, law enforcement or public safety purposes." Section 18-81-51.

On October 12, 1993, Commissioner Meachum promulgated Administrative Directive 10.7 (Ex. FF.) relating to inmate communications. This Directive essentially tracks the Regulation. The Commissioner has also promulgated "Tape Recording and Listening Guidelines." (Ex. JJJ.) These Guidelines provide in relevant part as follows:

> A. Only personnel authorized in writing by the Unit Administrator or higher authority shall listen to an inmate telephone call(s) or a recording(s) of an inmate telephone call. Such person authorized in writing to listen should be a person whose duties relate to the purposes as stated in Subsection (c) of Section 18-81-44 of the Regulations of Connecticut State Agencies and who has been instructed and trained in these governing standards so as to eliminate the listening to conversations not directly related to these standards.
>
> ***8** B. The listening of an inmate telephone call(s) shall be authorized only by the Unit Administrator or higher authority when there is reason to believe that such listening is reasonably related to the maintenance of security, good order or discipline of the facility or the prevention of criminal activity either within the facility or without.
>
> C. Only persons who have been instructed and trained in the following shall be authorized to operate recording devices and handle recording tapes:
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> 1. The Regulations of the State Agencies Sections 18-81-28 through 18-81-51, Inmate Communications;
>
> 2. The operation of the recording and listening devices; and
>
> 3. The telephone recording and listening requirements contained herein.
>
> D. Telephone recording and listening equipment shall be maintained in a secured area(s) approved by the Director of Security. The recording equipment shall be in operation at all times. No person shall be allowed to turn off the recording equipment without authorization from the Commissioner. The telephone recording and listening area shall be used solely for telephone recording and listening, but may contain the independently secured telephone tape storage area. Access to the telephone recording and listening area shall be limited to persons designated in writing by the Commissioner or the Unit Administrator or designee(s). A Telephone Recording and Listening Log Book shall be maintained in the telephone recording and listening area. The following information shall be entered into the Telephone Recording and Listening Log Book each time the telephone recording and listening area is accessed:
>
> 1. Name of Person(s) accessing telephone recording and listening area;
>
> 2. Name of such person's agency;
>
> 3. Specific Division of the agency;
>
> 4. Date and time of entry and exit;
>
> 5. Authority or authorization for access;
>
> 6. Reason for accessing telephone recording and listening area.
>
> E. Random listening and/or targeted conversations may be authorized by the Unit Administrator or higher authority for the reasons stated in section 4B above. When random listening is performed, the authorized staff shall log the date and time period covered by the random listening in the Recording and Listening Log Book. All targeted conversations and any conversation that reveals significant information, related to the reasons listed in section 4B, shall be documented in the Recording and Listening Log Book, and in accordance with Administrative Directive 6.6, Reporting of Incidents,

to include the following information:

1. Subject name and number (if known);

2. Reason for listening;

3. Tape identification, recorder channel number, date and time frame (beginning and ending time);

4. Name of person making entry;

5. Significant information developed.

The Unit Administrator of designee shall be informed upon discovery of any conversation that reveals significant information related to the reasons listed in section 4B. The Unit Administrator or designee shall contact the Security Division, when appropriate.

***9** ....

K. A request from an outside law enforcement/judicial agency to the Department of Correction, for the purpose of recording and/or listening to a live telephone conversation(s), listening to a recorded conversation(s), and/or making a duplicate recording from a master tape, shall be submitted to the Commissioner or designee(s) (Director of Security) for authorization. Upon approval, the following additional information shall be added to the Telephone Recording and Listening Log Book:

1. Specific request;

2. Reason for request;

3. Listing of each conversation recorded and/or listened to by: tape identification, recording channel number, date, and time frame (beginning and duration).

The Guidelines also contain extensive provisions concerning the secure storage of the tapes.

E. ***The Reasons for the Regulation***

The decision to institute the listening and recording program established by the Regulation was made by Commissioner Meachum in the early 1990's. This decision was not prompted by any specific incident or any formal study. Listening and recording had by then been done by the Federal Bureau of Prisons for several years and was being increasingly done by the states. It is a fair conclusion from the evidence that the technology was available, and Commissioner Meachum felt that it was appropriate to use it. A 1991 memorandum to Commissioner Meachum from his executive assistant (Ex. H.) states that federal authorities have concluded that, "Intelligence gathering is a proactive approach toward avoiding serious incidents such as inmate escape plan, drug trafficking, gang activity, and assaults." Prisons are inhabited by persons who have broken the law, and it is clear that the collect call only telephones in DOC facilities were periodically used to further a variety of illegal activity along these general lines. (On the other hand, it is also clear that the vast majority of inmate calls were made for entirely legitimate reasons.) It is a fair inference from the evidence that, by instituting a program of telephone monitoring, Commissioner Meachum hoped to deter some illegal activity and to detect some of the illegal activity that was not deterred.

F. ***Implementation of the Regulation***

As already mentioned, implementation of the Regulation commenced on January 5, 1994 at C.C.I.S. At the time of the hearing, the recording and listening program had been instituted in seven facilities, and it was anticipated that it would be implemented in all DOC facilities as soon as funding became available.

Little evidence was presented concerning the implementation of the portions of the Regulation relating to inmate correspondence. It is quite clear that inmate correspondence was, in fact, reviewed both before and after the effective date of the Regulation. It is not clear whether the promulgation of the Regulation has been accompanied by an actual change in practice.

The implementation of the recording and listening portions of the Regulation, in contrast, was the subject of a great deal of evidence. It is helpful begin with my own observations at the HCCC.

***10** I have already described the placement of the telephone that I used. Stenciled above it, in block letters, in English and in Spanish, was the warning: ANY CONVERSATION, INCLUDING THE NUMBERS BEING CALLED, UTILIZING THESE TELEPHONES SHALL BE SUBJECT TO RECORDING AND LISTENING.

When the telephone was picked up and a number dialed, a prerecorded message from the operator stated: "This is SNET. This call will be placed collect. At the tone, please state your name." When a name was given, the operator said: "Thank you. Please hold for billing acceptance." Following billing acceptance, the operator said to the answering party in a message audible to the caller: "You have an SNET collect call from a Connecticut Correctional Institution. This call may be recorded and may have recorded your telephone number. The call is from [name of caller]. Please say yes if you accept the

charges or no if you refuse the charges now." (This latter message is apparently not given on calls made to locations outside of Connecticut.) During the call, a beep was given approximately every 13 seconds. The evidence establishes that this experience was unexceptional.

Before an inmate is allowed to make a call on a collect call only telephone, he must sign a notification form. The DOC has used two such forms. When the Regulation first became effective in January 1994 (and apparently shortly before that date as well) the form used was entitled "Notification And Agreement." (Ex. D.) The inmate, in the presence of a staff witness, placed his signature below a statement that, "I have been advised that the Commissioner of Correction has adopted regulations pertaining to mail and telephone use and that these regulations are contained in Sections 18-81-28 through 18-81-51 of the Regulations of Connecticut State Agencies." The form then went on to state that "Failure to cooperate in completion of this form shall be so noted below and shall subject the inmate to forfeiture of phone and mail privileges." A staff witness would then note if an inmate "refused to sign this agreement."

There is evidence that a number of inmates refused to sign the form and lost phone, and in some cases, mail privileges. A few weeks later, after protests that the Regulation makes no provision for the loss of mail privileges, the original form was replaced by a new one. (Ex. E.) This form, which was the form in use at the time of the hearing, is entitled "Notification and Acknowledgment for Inmates." It is sufficiently important that it is reproduced in full below:

> I have been advised that the Commissioner of the Department of Correction has adopted regulations pertaining to mail and telephone use, and that these regulations are contained in Sections 18-81-28 through 18-81-51 of the Regulations of Connecticut State Agencies. These regulations provide, in part, that:
>
> From "Collect Call Only" Telephones: Outgoing phone calls from "collect call only" telephones, including the number called, shall be recorded and may be listened to.
>
> Calls to Privileged Correspondent: An inmate may request, in writing, to make a prearranged collect telephone call to a privileged correspondent, on a non-collect call only telephone, without the call being recorded or listened to. "Privileged correspondent" means an attorney, (including organizations providing legal service to inmates), Connecticut Correctional Ombudsman and to federal, state and local (e.g., municipal, county or town) elected and appointed officials, including but not limited to the following: any judge or court, the Governor, the Legislature, the Attorney General, the Commissioner of Correction or any Department official appointed by the Commissioner, the Board of Parole, the Sentencing Review Committee, the Commissioner on Human Rights and Opportunities, the State Claims Commissioner, the Board of Pardon, and Elected Governmental officials.
>
> Listening to Non-Recorded Telephone Calls: Non-privileged telephone calls conducted on non-recorded telephone lines shall be placed by Department of Correction staff and may be listened to (e.g., on an extension line). The inmate and the party called shall be informed

that the call will be listened to, both shall agree to the arrangement with the inmate signing a statement agreeing to such.

I hereby acknowledge that I have been notified of the foregoing.

Inmate name (printed) _____ Inmate no. .....

Inmate signature _____ Date .....

My failure to acknowledge the above notification will be so noted below, and I will be subject to forfeiture of all privileges with regard to the use of collect-call only telephones. Notwithstanding the failure to sign this acknowledgment, privileged telephone calls will be reasonably accommodated.

Inmate _____ Number .....

refused to sign this notification and acknowledgement.

Date .....

I hereby certify that the above information was provided to the above-named inmate, who

refused to sign.

Staff witness _____ Title .....

***11** Inmates who refuse to sign the form are, in theory, not allowed to use the collect call only telephones. In practice, at least in some institutions, some inmates who refuse to sign the form manage to use the telephones anyway. In other instances, the rule has been strictly enforced.

All calls made on the collect call only telephones are recorded on equipment manufactured by Magnasync, a company located in Hollywood, California. The equipment is located in a secure telephone monitoring room, that may be entered only by persons authorized by the Commissioner or Unit Administrator. There are three important machines. The first is a reel-to-reel recorder. This machine, which records the calls, contains both operational and standby reels. The reels are large reels, containing sixty-one channels, that run continuously. The second machine is a playback only machine. This machine contains both speakers and an attachment device for headsets. (Most listening is done on headsets.) It can also transfer taped conversations from the large reels to cassette tapes. A third machine registers all calls being made.

***12** A correctional official using the equipment just described can do so in two different ways: he can listen to a conversation currently being conducted or he can listen to a recording of a conversation that has previously occurred. When the listener listens to a "live" conversation, however, there is, in fact, a seven-second delay. Thus, in either case, the listener is technically listening to a previously made recording.

With respect to either of these types of calls-i.e. the "live" calls and the previously made calls-the listener has two further choices: "random" listening and "target" listening. The "random" listening is not random in the dictionary sense of the word-*i.e.* "lacking or seeming to lack a regular plan, purpose, or pattern," *Webster's Third New International Dictionary* 1880 (1961)-but is somewhat analogous to channel surfing. The listener listens to a number of calls in an effort to locate any calls that affect the security or order of the facility or involve criminal activity in either the facility or the outside community. A trained listener will usually be able to determine in a few seconds (perhaps five to fifteen seconds) whether a given call is a call that may appropriately be listened to. If the call may appropriately be listened to, he will listen to it. If it cannot, he will move on. Operating in this fashion, the "random" listener may surf, if that is the word, through dozens of conversations before striking pay dirt.

"Target" listening, in contrast, involves listening to the conversations of preselected individuals or groups. The "target" listener might, for example, single out a specific individual for attention or might instead focus on a specific housing unit of the prison or the members of a specific gang.

Four basic types of monitoring are thus theoretically available: random live, target live, random recorded, and target recorded. In practice, however, almost no random recorded listening is done. Of the remaining three categories, target recorded listening is by far the most fruitful and occupies a high percentage (perhaps eighty to eighty-five percent) of the listener's time. Random live monitoring takes up most of the remaining portion of the listener's time, although some target live monitoring is also done.

Section 18-81-44(c) of the Regulation provides that, "Listening shall be authorized by the Unit Administrator or higher authority when there is reason to believe that such listening is reasonably related to the maintenance of the security, good order or discipline of the facility or the prevention of criminal activity either within the facility or without." In practice, authorization for such listening is routinely given on a weekly basis by the Unit Administrator of every facility equipped for monitoring. The Unit Administrator does so by checking and signing a preprinted form. Even where such a form is not filled out, as happened through oversight one week at CCIS, oral permission to monitor is given, and the monitoring continues uninterrupted. Although no witness came out and said so, I got the distinct impression from the testimony of the correctional officials submitted in this case that the decision as to whether or not to monitor was essentially a no brainer, and the only real question was what the monitoring for the week should focus on. It is a fair inference that permission to monitor will be given

every week in every facility.

***13** As of April 27, 1994, the DOC had trained and authorized ninety persons to listen to monitored telephone calls. Eighty-nine of these were correctional personnel and one was a state trooper. In practice, however, monitoring is primarily done by only a few people at each facility. At CCIS, for example, the bulk of the listening is done by William Grady, the CCIS Intelligence Coordinator. Mr. Grady, who testified at some length, impressed me as a decent and honest person who took his job seriously and had no interest in listening to purely personal phone calls. He estimated that he devotes four or five hours a day to listening, primarily to target recorded listening. In addition, however, he does some random live listening every day. In his experience, the vast majority of calls that inmates make are normal calls. Depending on the luck of the draw, he can happen on a call that may appropriately be listened to-*i.e.* a call that affects prison order or security or involves criminal activity-on his first attempt or he can go for days without hitting one. He estimates that in the average month he comes across ten to twenty calls that are appropriate to listen to. Of these latter calls, the vast majority yield information that may appropriately be turned over to a correctional or law enforcement authorities, but a few do not. Target monitoring yields dramatically better results than random monitoring.

Most of the listening done pursuant to the Regulation has been done by correctional personnel for correctional purposes. There have, however, been a few (perhaps eight or ten) exceptions to this rule. These exceptions have come about in two different ways. First, on about four occasions, the DOC has provided law enforcement personnel with cassettes of particular conversations. This has been done in response to written requests unaccompanied by warrants. One of these requests was made by the New Canaan Police Department, one by the Connecticut State Police, one by the Federal Bureau of Investigation, and one by the Massachusetts State Police. (Ex. SS.) Second, also on about four occasions, correctional personnel have done live target monitoring of the conversations of specific inmates at the request of law enforcement agencies (as distinct from the correctional official's own initiative). These requests have also been unaccompanied by warrants.

All persons authorized to listen to inmate telephone calls have been trained in the governing standards, as required by § 18-81-45. They are emphatically instructed that it is inappropriate to listen to purely personal telephone calls. Mr. Grady takes this responsibility seriously. The DOC personnel who testified in this case exhibited a great deal of professionalism. In addition, there is no evidence either that any purely personal conversation has been listened to after being identified as such or that any purely personal information overheard has been inappropriately disclosed.

***14** On the other hand, I am unable to make a finding that no purely personal information has been overheard or disclosed at all. Indeed, some personal information will inevitably be overheard because the entire approach of random monitoring is to listen to a small segment of one conversation after another in an effort to find a conversation that may appropriately be listened to. It may take a trained listener only a few seconds to determine that a particular conversation may not appropriately be listened to, but during those few seconds he will necessarily have listened to the conversation. It would be amazing if the listener did not periodically hear some purely personal information by doing this. In addition, it is also inevitable that some conversations that *may* appropriately be listened to will intermix personal and criminal information. For example, a gang leader may call his wife and exchange both criminal information involving gang activity and personal information involving his family. Under these circumstances, it is inevitable that a listener will overhear personal information. Occasionally such information will find its way into a report submitted to a superior. It should be emphasized, however, that there is no information that any inmate has ever been confronted or taunted with personal information overheard by a telephone monitor.

The implementation of § 18-81-46, dealing with privileged telephone calls, has been remarkably inconsistent. Significant problems have arisen in at least three different areas. First, the Regulation allows "*prearranged* non-recorded telephone calls." (Emphasis added.) There does not appear to be any uniform interpretation of the word "prearranged." Some institutions require an inmate to present an appointment letter from an attorney, essentially stating that the attorney expects the inmate to telephone him at a specific time. Other institutions are much looser and allow an inmate to call an attorney at the inmate's request. Commissioner Meachum testified that, in his opinion, the request could come from either the attorney or the inmate. An additional difficulty has been that requests for privileged calls are sometimes ignored or denied, even when those requests are made well in advance and comport with the prevailing institutional interpretation of the Regulation. A number of inmates credibly testified that requests for privileged phone calls duly accompanied by attorney letters had either been ignored altogether or had been granted at some time after the time specified in the attorney letter had already passed.

A second problem has arisen with the Regulation's requirement that "The staff member shall then move out of listening range of the inmate's conversation." There is overwhelming evidence that this requirement is often simply ignored. Most privileged calls are made from counselors' offices. (It is, as a practical matter, not feasible to make a call to an attorney on a collect call only

telephone because those telephones are now taped, and no attorney worth her salt will converse with a client on a taped phone.) These offices are little more than cubicles. Counselors often remain in their offices during privileged conversations. The size of the offices is sufficiently small that the counselors will inevitably hear much or all of the conversations being conducted.

***15** A final problem has arisen with respect to the Regulation's requirement that, "Such calls shall normally be limited to ten minutes duration." This requirement is interpreted and enforced virtually at the whim of the staff member in charge of the telephone. The actual time limit enforced seems to be between ten and twenty minutes, but that limit cannot be predicted with respect to any particular call. The substance of the call or the inmate's or the attorney's need for a longer conversation does not seem to be a factor. (Of course, at least in theory, the staff member is not supposed to be listening to the conversation in the first place.) Rather, the decisive factor in determining whether a privileged conversation is to be stopped-assuming that the decision is not wholly capricious-is the need of the staff member or another inmate to use the telephone. In any event, it is clear that many privileged conversations are simply stopped without consulting either inmate or attorney as to the need for a longer conversation.

G. ***The Effect of the Regulation***

Because the Regulation had been in effect for only seven months at the conclusion of the evidentiary hearing, its long term effects, both good and ill, cannot yet be measured. Much evidence was devoted to its short term effects. Because of the fact that I am asked to adjudicate the legality of the Regulation rather than its wisdom, this evidence need not be recited in detail. A brief summary of the evidence is, however, appropriate.

The Connecticut correctional officials who testified were unanimously of the opinion that the monitoring done pursuant to the Regulation-and especially the telephone monitoring-had made a unique contribution to institutional security. In their opinion, institutional disruptions had been deterred, law enforcement had been assisted, and contraband had been intercepted because of the monitoring. Copious reports have been submitted that leave no doubt that the monitoring has periodically resulted in the apprehension of criminals and of persons planning to violate institutional rules. In addition, although it cannot be proven, there can be little doubt that the highly publicized existence of the monitoring program has deterred other persons from using the collect call only telephones for illegal purposes.

This picture of success should not, however, be overdrawn. It would be a vast exaggeration to say that the Regulation has transformed a dangerous correctional system into a safe one. The character of the population housed by the DOC, the way in which that population is housed, and the way that it is guarded doubtless play a greater role in determining institutional security than does telephone monitoring. Moreover, the testimony of the DOC officials themselves leaves little doubt that many-and perhaps almost all-of the "beneficial" effects of monitoring could be achieved by target monitoring alone.

The effect of monitoring upon the class of inmates is not entirely clear. Several inmates credibly testified that the institution of the monitoring program had caused them to become more cautious and circumspect in their conversations with their families. They were inhibited not because their conversations would be in any way illegal but simply because they did not care to discuss personal or family matters on telephones recorded by correctional officials. This attitude is readily understandable. There is, however, no evidence that this attitude has significantly deterred the making of telephone calls themselves. Over one million calls were made from collect call only telephones in monitored institutions in the first six months of the program. Although no statistics on previous months are available, it is obvious that for many inmates use of these telephones remains an attractive, although perhaps less than ideal, method of communicating with the outside world.

***16** The enforcement of § 18-81-46, relating to privileged telephone calls, has had effects upon both inmates and their attorneys. First, it is clear that some inmates have requested to call their attorneys and have not been allowed to do so, either because their documentation has been found wanting or simply because their request has dropped into a bureaucratic black hole. Second, it is clear that staff members have on a number of occasions remained within listening range of privileged conversations. Third, it is clear that a number of attorney-client conversations have been stopped by correctional officials because of asserted time restraints. There is no evidence that any of these effects have (thus far) resulted in actual legal malpractice or unjust convictions. On the other hand, the quality of attorney-client communications conducted under these conditions must inevitably suffer.

III. ***THE ACTION***

A. ***The History of the Action***

As previously noted, the Regulation was published in the Connecticut Law Journal on September 21, 1993. On November 1, 1993, Attorney Philip D. Tegeler, a staff attorney of the CCLU Foundation, submitted a written request for Declaratory Ruling to Commissioner Meachum pursuant to Conn.Gen.Stat. § 4-176. The ruling

was requested "on behalf of current and future inmates in Connecticut correctional facilities." The specific question posed to Commissioner Meachum was "Does the recording of all non-privileged (non-attorney client) inmate telephone calls, as authorized by Connecticut State Agency Regulations §§ 18-81-44 and 18-81-45, violate Connecticut's Eavesdropping or Wiretapping statutes, C.G.S. §§ 53a-187 through 53a-189 and C.G.S. §§ 54-41a through 54-41t?" The request specifically reserved "[a]ny constitutional challenges."

On January 5, 1994, the very day that the Regulation became operational for practical purposes, Commissioner Meachum responded to Attorney Tegeler with a declaratory ruling that answered the question posed in the request in the negative. He noted that "this declaratory ruling has been reviewed and approved by the Office of the Attorney General and the Office of the Chief State's Attorney."

The summons and complaint in this case were timely served on February 22, 1994. The named plaintiffs were Kenneth Washington, David Copas, and Paul Graziani, all DOC inmates, but the complaint was accompanied by a motion for class certification. (The sole defendant is the Commissioner of Correction.) On May 3, 1994, without objection, I certified a class of plaintiffs consisting of all DOC inmates who are or will be subject to the Regulation. Pursuant to Practice Book § 90 notice of the pendency of the action was subsequently given to the members of the class. Because the action seeks, *inter alia,* a declaratory judgment, separate notice by publication and distribution was given to all persons having an interest in the subject matter of the complaint pursuant to Practice Book § 390(d). The parties have agreed to the adequacy of both notices.

***17** On March 25, 1994, the plaintiffs filed an Application For A Temporary Injunction. The complaint, however, seeks both temporary and permanent injunctions. At a scheduling conference, the parties agreed that the Application For A Temporary Injunction would not be separately claimed and that all demands for injunctive relief would be addressed at a consolidated hearing. The parties later agreed that the initial hearing would also encompass the liability phase of the claims for damages made in the complaint. The question of damages was, however, reserved for a subsequent hearing in the event that liability for damages is found.

B. *The Pleadings*

The complaint contains nine counts. These allegations are as follows:

First. The telephone monitoring practices of the defendant, Commissioner Meachum, violate Conn.Gen.Stat. §§ 54-41a, et seq., which regulate wiretapping and electronic surveillance ("the wiretapping statute").

Second. The telephone monitoring practices of the defendant violate Conn.Gen.Stat. §§ 53a-187, et seq., which prohibit tampering with private communications and eavesdropping ("the eavesdropping statute").

Third. The defendant's declaratory ruling is appealed pursuant to Conn.Gen.Stat § 4-183.

Fourth. The telephone monitoring practices of the defendant violate Conn. Const. Art. First, § 7, which provides protection from unreasonable searches and seizures.

Fifth. The defendant's limitations on privileged telephone calls violate Conn. Const. Art. First, §§ 8 and 10, which provide, *inter alia,* the right to counsel in criminal prosecutions and the right to open courts.

Sixth. The defendant's limitations on privileged telephone calls violate the right to counsel and right of access to the courts guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and constitute a deprivation of civil rights under color of state law, entitling the plaintiffs to relief under 42 U.S.C. § 1983.

Seventh. The Seventh Count complains of two separate practices: (a) the random review of outgoing mail pursuant to § 18-81-31(a) of the Regulation and (b) the denial of access to outgoing telephone calls for inmates who refuse to sign the "Notification and Acknowledgment" form. It is alleged that each of these practices violates the First and Fourteenth Amendments and that the plaintiffs are entitled to relief under 42 U.S.C. § 1983.

Eighth. The Regulation is not authorized by statutory authority.

Ninth. The telephone monitoring practices of the defendant violate Conn.Gen.Stat. §§ 19a-581, et seq., relating to AIDS testing and medical information.

The plaintiffs seek declaratory and injunctive relief and the award of damages, costs, and attorneys' fees.

The defendant has denied liability with respect to all counts. He has, in addition, asserted three special defenses.

First. To the extent that the action is brought against him in his official capacity for money damages, it is barred by the Eleventh Amendment to the Constitution of the United States and the doctrine of sovereign immunity.

***18** *Second.* To the extent that this action is brought against him in his individual capacity for money damages, he is entitled to qualified immunity.

Third. The plaintiffs' claims for money damages based on state law are barred by the Eleventh Amendment and the doctrine of sovereign immunity.

These claims and defenses must now be considered in detail.

IV. *CONCLUSIONS OF LAW*

A. *The Electronic Eavesdropping Statutes*

The Connecticut legislature has dealt with the problem of electronic eavesdropping on three separate occasions and has left in its wake a triptych of statutory enactments. The eavesdropping statute was enacted as part of the 1969 Penal Code. 1969 Conn.Pub.Acts No. 828, §§ 189-91. The wiretapping statute was enacted in 1971. 1971 Conn.Pub.Acts No. 68. In 1990, the legislature enacted "An Act Concerning the Recording of Telephone Conversations," 1990 Conn.Acts No. 90-305 (codified at Conn.Gen.Stat. § 52-570d) (the "recording statute"). These acts have been codified in three different titles of the General Statutes and are imperfectly referenced to each other. It is, however, essential to the proper resolution of this case that both the individual requirements of these statutes and the relationship between them be understood.

The eavesdropping statute is deceptively simple. Conn.Gen.Stat. § 53a-189(a) provides that, "A person is guilty of eavesdropping when he unlawfully engages in wiretapping or mechanical overhearing of a conversation." The terms "unlawfully" and "wiretapping" are statutorily defined. (The term "mechanical overhearing of a conversation" is also statutorily defined, Conn.Gen.Stat. § 53a-187(a)(2), but under the approach that I take to the eavesdropping statute, the distinction between "wiretapping" and "mechanical overhearing of a conversation" is unimportant.) "Unlawfully" means "not specifically authorized by law." Section 53a-187(a)(3). "Wiretapping" means "the intentional overhearing or recording of a telephonic or telegraphic communication or a communication made by cellular radio telephone by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment." Section 53a-187(a)(1). The eavesdropping statute finally excludes "wiretapping by criminal law enforcement officials in the lawful performance of their duties." Section 53a-187(b). This case requires the interpretation of each of these provisions. Because some of these provisions implicitly refer to other requirements of the law, however, it is useful to first review the provisions of the wiretapping and recording statutes.

The wiretapping statute is much more elaborate than the eavesdropping statute, but most of its provisions need not be discussed here because these provisions primarily concern prosecutors and police. The wiretapping statute is contained in Title 54 of the General Statutes, which deals with criminal procedure. It sets forth a mechanism whereby a prosecutor "may make application to a panel of judges for an order authorizing the interception of any wire communication by investigative officers having responsibility for the investigation of offenses as to which the application is made when such interception may provide evidence of [certain] offenses." Conn.Gen.Stat. § 54-41b.

***19** These provisions are not directed toward civil agencies, such as the DOC. The wiretapping statute does contain a remedies provision, Conn.Gen.Stat. § 54-41r, which provides a civil cause of action and damages to persons injured by violations of *either* the eavesdropping or wiretapping statutes, but, because it incorporates *both* statutes by reference, § 54-41r does not itself address the question of what acts or actions violate the wiretapping statute alone. The plaintiffs rely on § 54-41p(a) & (d). These subsections provide as follows:

> (a) Any investigative officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire communication, or evidence derived therefrom, may, if specially authorized by the order authorizing the interception of such communication, disclose such contents to any investigative or law enforcement officer designated in such order to the extent that such disclosure is appropriate to the conduct of the investigation specified in the application for such order.
>
> ....
>
> (d) Any investigative officer who discloses the contents of any intercepted wire communication or evidence derived therefrom (1) to any person not authorized to receive such information or (2) in a manner otherwise than authorized by the provisions of this chapter shall be guilty of a class D felony.

Each of these provisions is expressly directed toward "investigative officer [s]." "Investigative officer" is a term of art, defined by Conn.Gen.Stat. § 54-41a(5) as follows:

> "Investigative officer" means (A) any officer of the Connecticut state police, (B) the chief inspector or any inspector in the division of criminal justice who is empowered by law to conduct investigations of

> or to make arrests for offenses enumerated in this chapter, (C) any municipal police officer who has been duly sworn as a special state police officer under the provisions of section 29-177 and who is currently assigned to the state-wide narcotics task force or the state-wide organized crime investigative task force and is acting under the direct authority of the Connecticut state police, and (D) any attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in this chapter....

The Commissioner of Correction and his employees are not "investigative officers" within the meaning of any of these categories. More generally, the DOC is not covered by the provisions of the wiretapping statute other than the remedies section, § 54-41r, which incorporates the eavesdropping statute by reference.

Reading the wiretapping and eavesdropping statutes together, it is readily apparent that the wiretapping statute is intended to regulate the conduct of police and prosecutors, and the eavesdropping statute is intended to regulate the conduct of all other actors, including both private individuals and civil agencies such as the DOC. This interpretation is consistent both with the substantive requirements of the wiretapping statute, which are obviously concerned with the conduct of police and prosecutors, and with the express exception to the ambit of the eavesdropping statute contained in Conn.Gen.Stat § 53a-187(b), which provides that the prohibitions of the eavesdropping statute "shall not apply to wiretapping by criminal law enforcement officials in the lawful performance of their duties."

***20** There is one narrow but important exception to this general statement. It is a fair inference from the language of the remedies section of the wiretapping statute, § 54-41r, and the obvious purpose of the wiretapping statute to control the electronic surveillance activities of police and prosecutors that the provisions of the wiretapping statute apply not just to police and prosecutors but to their *agents*. Section 54-41r(1), for example, provides a cause of action both against any person who intercepts, discloses, or uses wire communications in violation of the wiretapping statute and any person who "procures any other person to intercept, disclose or use, such communication." If the police "procure" a private citizen to violate the wiretapping statute, a cause of action is thus provided against both the person procuring and the person procured. This is important because, as set forth in the Findings of Fact, the DOC has on a few occasions, without a warrant, provided law enforcement personnel with cassettes of recorded inmate conversations and has done live target monitoring of the conversations of specific inmates at the request of law enforcement agencies. These actions do not rest easily with the clear purpose of the wiretapping statute to require the police and their agents to obtain authorizations prior to conducting electronic eavesdropping. For this reason, it is necessary to determine whether-at least in this handful of instances-the DOC has, in an agency capacity, violated the wiretapping statute. Before this question can be resolved, however, the third member of Connecticut's statutory trilogy must be considered.

Conn.Gen.Stat. § 52-570d provides, in full, as follows:

> (a) No person shall use any instrument, device or equipment to record an oral private telephonic communication unless the use of such instrument, device or equipment (1) is preceded by consent of all parties to the communication and such prior consent either is obtained in writing or is part of, and obtained at the start of, the recording, or (2) is preceded by verbal notification which is recorded at the beginning and is part of the communication by the recording party, or (3) is accompanied by an automatic tone warning device which automatically produces a distinct signal that is repeated at intervals of approximately fifteen seconds during the communication while such instrument, device or equipment is in use.
>
> (b) The provision of subsection (a) of this section shall not apply to:
>
> (1) Any federal, state or local criminal law enforcement official who in the lawful performance of his duties records telephonic communications;
>
> (2) Any officer, employee or agent of a public or private safety agency, as defined in section 28-25, who in the lawful performance of his duties records telephonic communications of an emergency nature;
>
> (3) Any person who, as the recipient of a telephonic communication which conveys threats of extortion, bodily harm or other unlawful requests or demands, records such telephonic communication;
>
> ***21** (4) Any person who, as the recipient of a telephonic communication which occurs repeatedly or at an extremely inconvenient hour, records such telephonic communication;
>
> (5) Any officer, employee or agent of any communication common carrier who in the lawful performance of his duties records telephonic communications or provides facilities to an investigative officer or criminal law enforcement

official authorized pursuant to chapter 959a to intercept a wire communication;

(6) Any officer, employee or agent of a Federal Communications Commission licensed broadcast station who records a telephonic communication solely for broadcast over the air;

(7) Any officer, employee or agent of the United States Secret Service who records telephonic communications which concern the safety and security of the President of the United States, members of his immediate family or the White House and its grounds; and

(8) Any officer, employee or agent of a Federal Communications Commission broadcast licensee who records a telephonic communication as part of a broadcast network or cooperative programming effort solely for broadcast over the air by a licensed broadcast station.

(c) Any person aggrieved by a violation of subsection (a) of this section may bring a civil action in the superior court to recover damages, together with costs and reasonable attorney's fee.

The recording statute contains one express reference to the wiretapping statute. Section 52-570d(b)(5) exempts from the ambit of subsection (a) communications common carriers who record telephonic communications or provide facilities to officials authorized pursuant to the wiretapping statute to intercept a wire communication. Section 52-570d(b)(1) contains an additional, albeit implicit, reference to the wiretapping statute in its exemption of state and local criminal law enforcement officials who in the "lawful performance" of their duties record telephonic communications. Such "lawful performance" will ordinarily occur through compliance with the requirements of the wiretapping statute.

The recording statute contains no similar overt reference to the eavesdropping statute. There is, however, persuasive evidence in the recording statute's legislative history that that statute was specifically intended to modify the requirements of the eavesdropping statute. Senator Richard Blumenthal, the sponsor of the recording statute in the Senate, stated that, "The effect of this bill if passed by the General Assembly would be to prohibit tape recorded conversations unless done by the knowledge of all parties to those telephonic conversations. Currently under law, the telephone conversation can be taped with the knowledge of one party." 33 S.Proc., Pt. 5, 1990 Sess. p. 1415, remarks of Senator Richard Blumenthal. This is a clear reference to the definition of "wiretapping" in the eavesdropping statute. Conn.Gen.Stat. § 53a-187(a)(1), as already mentioned, defines "wiretapping" as "the intentional overhearing or recording of a telephonic or telegraphic communication or a communication made by cellular radio telephone by a person other than a sender or receiver thereof, without the consent of *either* the sender or receiver, by means of any instrument, device or equipment." (Emphasis added.) The recording statute, by requiring that, through one of three alternative procedures, *both* parties be aware of the recording, was plainly intended to alter this requirement.

***22** The critical question here is whether the recording statute is a *modification* of the eavesdropping statute or an *additional* requirement for the recording of telephonic conversations. The question is important because it is theoretically possible to *notify* both parties that a conversation is being recorded, either by a prior verbal notification or by an automatic tone warning device (thus satisfying Conn.Gen.Stat. § 52-570d(a)(2) or (3)) and at the same time record the conversation without the *consent* (or at least the truly voluntary consent) of either party and thus engage in "wiretapping" as defined in Conn.Gen.Stat. § 53a-187(a)(1). This is, in fact, precisely what the plaintiffs claim has happened in this case. The recording statute, read literally, is capable of such an interpretation, because it provides that "[n]o person shall use any instrument, device or equipment to record an oral private telephonic communication unless the use of such instrument, device or equipment" is accompanied by one of the three alternative safeguards set forth in § 52-570d(a). This can be read as a necessary, but not a sufficient, condition for recording, with the eavesdropping statute remaining as a set of independent (and unmodified) conditions that must also be satisfied before any recording can actually be made. But while this is a plausible *literal* reading of the two statutes, it must be asked whether it is a *sensible* reading of these enactments.

"[T]he legislature is presumed to enact legislation that renders the body of the law coherent and consistent, rather than contradictory and inconsistent." *Fahy v. Fahy,* 227 Conn. 505, 513, 630 A.2d 1328 (1993). The most coherent way to read the recording and eavesdropping statutes together is to read the recording statute as implicitly modifying the eavesdropping statute. This reading of the respective statutes is supported by textual, historical, and policy considerations.

In the first place, the eavesdropping statute provides that a person is guilty of eavesdropping only when he "unlawfully" engages in wiretapping or mechanical overhearing of a conversation. Conn.Gen.Stat. § 53a-189(a). "Unlawfully," as already mentioned, means "not specifically authorized by law." Section 53a-187(a)(3). This provision plainly allows the legislature to modify the substantive requirements of the eavesdropping statute by "authorizing" certain types of wiretapping elsewhere in the General Statutes. The recording statute constitutes just such an authorization. When a person records a telephonic communication in compliance with the recording statute, he is doing so in a

manner "specifically authorized by law."

Second, there is persuasive historical evidence that the legislature that enacted the eavesdropping statute was primarily concerned with *surreptitious* recording. The Commission to Revise the Criminal Statutes, which drafted the 1969 Penal Code, commented that, "The term 'wiretapping' embraces any surreptitious overhearing or recording of a telephonic or telegraphic communication by means of any instrument, device or equipment." *Commentary on Title 53a, the Penal Code, reprinted in* 28 Conn.Gen.Stat.Ann. 670 (West 1994). This is consistent with the legislative history of the New York eavesdropping statute, N.Y.Penal Law § 250.00 (McKinney 1967), from which Conn.Gen.Stat. § 53a-187 was bodily lifted. The 1956 *Report of the New York State Joint Legislative Committee to Study Illegal Interception of Communications,* written by the legislative committee that drafted the New York eavesdropping statute, states that, "Secrecy, the surreptitious use of all these electronic devices, is the basic element of all the acts we are considering." *Id.* at 24. It is also consistent with the common law background of the crime of eavesdropping which, as Blackstone explained, was committed by "such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales." 4 William Blackstone, *Commentaries* *168 (1769). It is similarly evident that the Connecticut legislature was specifically concerned with surreptitious recording when it enacted the recording statute. Section 52-570d(a) provides three alternative procedures for recording, all of which negate the possibility of surreptitious recording, but only one of which involves formal "consent."

***23** It must finally be kept in mind that the eavesdropping statute is a penal statute. A person who violates it commits a crime. It would be anomalous to hold that a person could meticulously follow the requirements of the recording statute, which are specifically intended to safeguard the rights of parties to telephonic communications, and still be guilty of the crime of eavesdropping. To read the two statutes as establishing independent requirements for recording is to set a trap for the unwary. It is far more sensible-and protective of the rights of *both* the persons recorded and the persons recording-to read the recording statute as modifying the eavesdropping statute. Under this construction, if a person recording a telephonic conversation satisfies the requirements of § 52-570d(a), he has not committed "wiretapping" as defined in § 53a-187(a)(1). That is the construction that I adopt.

The final statutory question that must be addressed is the impact of the recording statute on the wiretapping statute. The recording statute, as already discussed, plainly provides that a law enforcement officer who acts in compliance with the wiretapping statute has not violated the recording statute. But what about the reverse situation? What if a law enforcement officer (or, as in this case, her agent) acts in compliance with the recording statute but fails to obtain an authorization prior to recording, as the wiretapping statute, taken by itself, plainly requires? Specifically, what if a law enforcement officer or her agent records a telephonic communication either preceded by a verbal notification or accompanied by an automatic tone warning device but does so without an authorization? This is not a theoretical question. In the handful of cases in which the DOC has acted at the specific request of law enforcement agencies, this very scenario has occurred in this case.

This problem can most sensibly be solved by the methodology that has been used with respect to the eavesdropping statute. The legislature that enacted the recording statute was, of course, aware of the existence of the wiretapping statute. In making the more recent enactment, it is presumed to create a consistent body of law. The recording statute, as already discussed, sets forth a set of specific alternative procedures that, if complied with, are intended to protect the rights of persons recording and persons recorded alike. The use of either a verbal notification or an automatic tone warning device will avoid the possibility of surreptitious recording. If a law enforcement officer uses one of these mechanisms, even without an authorization, only the most obtuse criminal will proceed to divulge incriminating information. The facts of this case do not require a discussion of the admissibility of evidence so obtained in a criminal case. In particular, the possible constitutional (as opposed to statutory) grounds for excluding such evidence need not be discussed. But, on a statutory level, if the recording and wiretapping statutes are to be read as a coherent whole, compliance with the requirements of the recording statute negates the recorder's civil liability under the wiretapping statute.

***24** The evidence in this case emphatically establishes that the DOC has complied with the requirements of the recording statute. The equipment it uses employs an automatic tone warning device which complies with the requirements of Conn.Gen.Stat. § 52-570d(a)(3). In addition, all calls made to locations inside Connecticut are preceded by a verbal notification which complies with the requirements of § 52-570d(a)(2). Since the requirements of § 52-570d(a) are stated in the disjunctive, either of these procedures is sufficient to protect the DOC from civil liability. For these reasons, I conclude that the plaintiffs have failed to establish liability under either the eavesdropping or wiretapping statutes.

B. *The Administrative Appeal*

Given the preceding discussion, the plaintiffs' administrative appeal, brought pursuant to Conn.Gen.Stat.

§ 4-183, must be summarily dismissed. The plaintiffs claim in this appeal that the Regulation exceeds the scope of the DOC's statutory authority because of the Regulation's asserted conflict with the eavesdropping and wiretapping statutes. Plaintiffs' Pretrial Memorandum at 22-25. As I have explained, this asserted conflict does not, in fact, exist. The plaintiffs make no independent claims of administrative law violations. For this reason, their administrative appeal must be dismissed.

C. *The Connecticut Constitution*

It is reasonably clear that the recording of prison inmate telephone conversations without a warrant is not prohibited by the Fourth Amendment to the federal constitution, at least if the conversations are not privileged. The Supreme Court of the United States stated three decades ago that "a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day." *Lanza v. New York,* 370 U.S. 139, 143 (1962). (Footnote omitted.) Although the Supreme Court has not revisited this precise issue since its watershed decision in *Katz v. United States,* 389 U.S. 347 (1967), that "the Fourth Amendment protects people, not places," *id.* at 351, the lower federal and state courts that have considered this issue after *Katz* have overwhelmingly continued to hold that the Fourth Amendment provides no protection in this area. *See, e.g., United States v. Sababu,* 891 F.2d 1308, 1329-30 (7th Cir.1989); *Donaldson v. Superior Court,* 672 P.2d 110, 112-13 (Cal.1983); *State v. Fox,* 493 N.W.2d 829, 831-32 (Iowa 1992), and authorities cited therein. The Supreme Court has also held, in an arguably analogous case, that prison inmates have no reasonable expectation of privacy in their prison cells. *Hudson v. Palmer,* 468 U.S. 517 (1984). Perhaps for this reason, the plaintiffs in this case make no Fourth Amendment claim.

The plaintiffs instead rely on the Connecticut constitution, which is as yet untested in this area. Conn. Const. Art. First, § 7 provides that, "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation." The textual differences between this provision and the Fourth Amendment are unimportant, at least in the context of the issues presented in this case. There can be no doubt, however, that the Connecticut constitution retains independent vitality in this area. "Federal law, whether based upon statute or constitution, establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights." *Cologne v. Westfarms Associates,* 192 Conn. 48, 57, 469 A.2d 1201 (1984). Our Supreme Court has repeatedly recognized that this principle applies to Conn. Const. Art. First, § 7. *See State v. Joyce,* 229 Conn. 10, 639 A.2d 1007 (1994). The question that must now be confronted is how to appropriately interpret this state constitutional provision as it applies to this case.

***25** In analyzing issues that arise, for the first time, under the state constitution our Supreme Court has "identified six factors to be considered: (1) the text of the constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of our constitutional forbearers; and (6) contemporary understandings of applicable economic and sociological norms." *State v. Ross,* 230 Conn. 183, 249, 646 A.2d 1318 (1994). These factors will now be considered in turn.

(1) *The text of the constitutional provisions.*

As already mentioned, the texts of the Fourth Amendment and Conn. Const. Art. First, § 7 are virtually identical. The relatively minor textual differences do not affect any issue presented in this case.

(2) *Related Connecticut precedents.*

As already mentioned, this is a case of first impression in Connecticut. No closely analogous Connecticut decision exists. There are, however, two bodies of related Connecticut precedent to draw on. One line of cases involves the privacy rights of the general public. In addition, the Connecticut Supreme Court has on one significant occasion considered the speech and associational rights of prisoners.

Connecticut jurisprudence considering the privacy rights of the general public is quite bountiful, particularly if search and seizure cases are included in the tally. The Connecticut Supreme Court has recognized, in an important tort law decision, that "privacy is a basic right entitled to legal protection." *Goodrich v. Waterbury Republican-American, Inc.,* 188 Conn. 107, 126, 448 A.2d 1317 (1982). This "basic right" is embedded in the provisions of the state constitution as well. It plays a particularly important role in search and seizure cases. *See, e.g., State v. Joyce, supra,* 229 Conn. at 20.

In state, as in federal, constitutional cases involving searches and seizures, the person complaining of a search must have "a reasonable expectation of privacy." *State v. Joyce, supra,* 229 Conn. at 20. In determining whether such "a reasonable expectation" exists under the state constitution, the Connecticut Supreme Court has frequently used a two-part test first articulated by Justice

Harlan in *Katz v. United States, supra.* Justice Harlan explained that the Fourth Amendment has "a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " 389 U.S. at 361 (Harlan, J., concurring). These requirements have been used in articulating Art. First, § 7 as well. *State v. Joyce, supra,* 229 Conn. at 20.

There is, however, a serious question as to whether the first (subjective) prong of this test is appropriate in the context of this case. The problem is, to put it bluntly, that an independent requirement of an actual, subjective expectation of privacy in a case like this could be used by an Orwellian government as a sword to destroy the very privacy that the Fourth Amendment and Art. First, § 7 are meant to protect. As Professor Amsterdam put it in 1974, "the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance." Anthony G. Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn.L.Rev. 349, 384 (1974). A variation of this scenario-a scenario which would be plainly intolerable if applied to the general public-is exactly what has happened here. A government agency has openly announced that a specified class of citizens is forthwith being placed under comprehensive surveillance. No reasonable member of the specified class, upon hearing this announcement, could possibly have an actual, subjective expectation of privacy. Does this mean that the constitutional right to privacy, by virtue of this fact alone, is destroyed? Neither the United States Supreme Court nor the Connecticut Supreme Court has gone this far. Justice Harlan himself said four years after *Katz* that a proper analysis must "transcend the search for subjective expectations." *United States v. White,* 401 U.S. 745, 786 (1971) (Harlan, J., dissenting). If our constitutional freedom is to be appropriately preserved, the first *Katz* prong should not be applied here. Art. First, § 7 does not merely protect the privacy that we *expect.* It protects the privacy to which we have a *right. See State v. Campbell,* 759 P.2d 1040, 1044 (Or.1988) (construing the Oregon state constitution).

***26** For this reason, the fact that the telephone calls at issue here are made from telephones located in public areas is not itself dispositive of the state constitutional question. It is true that courts have held that conversations carried on in an area where they can be heard by passersby are conversations knowingly exposed to the public. *See, e.g., United States v. McLeod,* 493 F.2d 1186, 1188 (7th Cir.1974); *United States v. Llanes,* 398 F.2d 880, 884 (2d Cir.1968), *cert. denied,* 393 U.S. 1032 (1969). Those cases, however, involve members of the general public who have some degree of choice as to carrying on conversations in public or private areas. The plaintiffs in this case, in contrast, are prisoners, and the physical location of the collect call only telephones that they use is determined by the state. There is, of course, nothing wrong about this fact, but it makes an important analytical difference. If an Orwellian government were to control all of the telephones used by the general public, place those telephones exclusively in public areas, and then argue that it could monitor the telephones at will because the public location of the telephones destroyed the right to privacy in any event, the logic of this argument would not rest easily with the security from the government that Art. First, § 7 provides.

Given this analysis, the question that must squarely be addressed is whether a prisoner's expectation of privacy in calls from the collect call only telephones in Connecticut's correctional centers and institutions is one that society is prepared to recognize as reasonable. "Whether a defendant has established the reasonableness of his expectation of privacy requires a fact-specific inquiry into all the relevant circumstances." *State v. Brown,* 198 Conn. 348, 356, 503 A.2d 566 (1986). When the specific circumstances of correctional institutions are considered, the one case in which the Connecticut Supreme Court has directly considered the rights of prisoners provides no comfort to the plaintiffs in this case.

In *Roque v. Warden,* 181 Conn. 85, 434 A.2d 340 (1980), without separately considering the state constitution, the Supreme Court upheld disciplinary measures taken against an inmate for carrying documents that, in the judgment of correctional authorities, were capable of fomenting a prison riot. The prosecution of an unincarcerated person for carrying the same documents could have been justified, if at all, only by a showing of a compelling state interest. The Supreme Court stated that "[s]uch analysis is not appropriate ... in weighing the constitutionality of the conduct of state prison officials.... Restrictions on personal liberties that would be considered unacceptable where the general public is concerned are often essential within the strictures of the prison community." *Id.* at 97. It held that, "where the prisoner's freedom of speech is concerned," the appropriate test is that articulated by the Supreme Court of the United States in *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 132 (1977), concerning the curtailment of prisoners' First Amendment associational rights. 181 Conn. at 98. Under this test, " '[Associational rights] may be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations, whether through group meetings or otherwise, possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment.' " *Id. Cf. Sanchez v. Warden,* 214 Conn. 23, 570 A.2d 673 (1990) (holding that the First Amendment is not implicated by a policy of denying prisoners access to radios with speakers while granting them access to radios with headphones).

(3) *Persuasive federal precedents.*

***27** As already mentioned, the federal courts have held that the recording of prison inmate telephone conversations without a warrant is not prohibited by the Fourth Amendment. The precedents are collected in Clifford S. Fishman, *Wiretapping and Eavesdropping* § 24 (Cum.Supp.1994). The holding of *Hudson v. Palmer, supra,* that prison inmates have no reasonable expectation of privacy in their prison cells has also been mentioned. In addition, in considering a practice far more intrusive than the recording policy at issue here, the Supreme Court of the United States has held that the Fourth Amendment protects neither sentenced nor pretrial detainees from a Bureau of Prisons policy requiring all inmates to submit to strip and body cavity searches after contact visits with non-inmates. *Bell v. Wolfish,* 441 U.S. 520, 558-60 (1979). An emerging line of federal cases holds that inmates retain an inner core of privacy rights that protects them from such extraordinarily intrusive practices as cross-gender strip and body searches. *See Canedy v. Boardman,* 16 F.3d 183 (7th Cir.1994); *Jordan v. Gardner,* 986 F.2d 1521, 1532 (9th Cir.1992) (Reinhardt, Jr., concurring). The intrusion at issue in this case, however, while significant, is not remotely comparable. Federal precedent simply provides no support for the plaintiffs' position in this case.

(4) *Persuasive precedents of other state courts.*

As already mentioned, the state courts that have considered the issue have overwhelmingly held that the federal constitution provides no protection to prisoners making non-privileged telephone calls. The precedents are collected in Clifford S. Fishman, *supra,* § 24 (Cum.Supp.1994). Cases considering the scope of state constitutional protections in this area are exceedingly rare. The Court of Appeals of Oregon has recently held, in an arguably analogous case, that an arrested person detained in the back of a patrol car has no right of privacy under the Oregon state constitution that protects him from the nonsurreptitious recording of his conversation. *State v. Wischnofske,* 878 P.2d 1130, 1133 (Or.Ct.App.1994). *See State v. Smith,* 641 So.2d 849, 851 (Fla.1994) (construing the Florida constitution in accordance with the federal constitution in a similar case).

(5) *Historical insights into the intent of our constitutional forbearers.*

The telephone is a modern invention. This fact, however, is not dispositive of the case and does not eliminate the need to consult historical sources in construing Art. First, § 7. "[R]easonable expectations of privacy may be defeated by electronic as well as physical invasion." *Katz v. United States, supra,* 389 U.S. at 362. (Harlan, J., concurring). Justice Brandeis famously explained in his now-vindicated dissent in *Olmstead v. United States,* 277 U.S. 438 (1928), that the Fourth Amendment was enacted as a bulwark against tyranny and that "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping." *Id.* at 476 (Brandeis, J., dissenting).

***28** There can be no doubt that our state constitutional forbearers were profoundly influenced by the abuses of Lord Halifax, *see Burritt International Bancorporation v. Brooke Pointe Associates,* 42 Conn.Supp. 445, 458-59, 625 A.2d 851 (1992), and had a particular antipathy toward the use of general warrants, *see Grumon v. Raymond,* 1 Conn. 40, 43 (1814). This observation, however, sheds little light on the question presented here because cases like *Grumon* and its celebrated spiritual ancestor, *Entick v. Carrington,* 19 T.B. Howell, *State Trials* 1029 (C.P.1765), involved the privacy rights of the general public. This case involves expectations of privacy in correctional institutions. When the question of how our constitutional forbearers viewed this issue is asked, the answer can give little comfort to the plaintiffs.

When the Constitution of 1818 was adopted, the state prison was Newgate. (Wethersfield prison did not open until 1827.) Newgate, as is well known, was a hellhole. Its prisoners were housed in a copper mine in what would today be considered truly barbaric conditions. A vivid description of this dungeon is set forth in *State v. Ellis,* 197 Conn. 436, 452-53 n. 15, 497 A.2d 974 (1985). The prisoners living in it were "heavily ironed, and secured both by hand-cuffs and fetters." 1 Edward Augustas Kendall, *Travels through the Northern Parts of the United States* 210 (1809). As Kendall put it, "[p]risoners in this gaol are treated precisely as tigers are treated in a *menagerie.*" *Id.* at 215. This brutal history, of course, can set no imaginable constitutional standard of confinement in modern times, but it vividly illustrates that our constitutional forbearers failed to view prisoners as having any recognizable rights of privacy.

Significantly, even the prison *reformers* of the time, while seeking to treat prisoners in a more humane fashion, did not seek to give prisoners any right of privacy. The most striking example of this is Jeremy Bentham's *Panopticon,* subtitled "The Inspection-House," published in 1791, the very year in which the Fourth Amendment was ratified. Bentham proposed a circular prison in which a supervisor, placed in a central tower, could constantly watch the inmates in their cells. *See* Michael Foucault, *Discipline and Punish* 200-02 (Alan Sheridan trans. 1977). To Bentham, "the most important point" of this design was "that the persons to be inspected should always feel themselves as if under inspection." Jeremy Bentham, *Panopticon* 24 (1791). No reformer of the time

contemplated that prisoners should have privacy. For these reasons, an historical analysis cannot benefit the plaintiffs in this case.

(6) ***Contemporary understandings of applicable economic and sociological norms.***

No "economic norms" are applicable to this case, and there is no evidence of "applicable sociological norms," at least in the scientific sense of that term. In the broad sense of the term, however, there are certain human factors that must be considered. It must be understood, however, that the question is not whether I would choose to enact or implement the Regulation now before me if my role was that of a correctional administrator. The question, rather, is whether the Regulation and its implementation is "so lacking in moral and sociological justification that ... it is fundamentally offensive to evolving standards of human decency." *State v. Ross, supra,* 230 Conn. at 251. The evidence here does not permit this characterization.

***29** Certain caveats must be acknowledged. The Regulation is a promulgation of an administrative agency. It is not a statute enacted by a popularly elected legislature and, in that sense, does not directly reflect the standards of the community. This does not, however, mean that the Regulation is inconsistent with community standards. Reasonable persons can certainly differ on the wisdom of the Regulation, but the monitoring of prison telephone calls is widely done in our society, and there is plainly no contemporary consensus against it.

It must also be acknowledged that a monitoring system like that in question here is capable of abuse. The Connecticut correctional officials who testified at trial were entirely professional and there is no significant evidence of abuse, but this does not necessarily mean that abusive behavior will never occur. The general history of wiretapping in the hands of government authorities is not encouraging on this point. As is now well known, the Federal Bureau of Investigation-which has also had a reputation for professionalism-for many years used wiretapping in a series of covert action programs against a variety of American citizens. In a particularly notorious operation, the FBI wiretapped the personal conversations of Martin Luther King, Jr. and placed microphones in his hotel rooms. S.Rep. No. 94-755, 94th Cong., 2d Sess., Book III at 81. The 1956 *Report of the New York State Joint Legislative Committee to Study Illegal Interception of Communications* referred to earlier in this opinion documented a number of instances of New York law enforcement officers using wiretaps "for criminal purposes such as extortion." *Id.* at 40. Human nature being what it is, it would be myopic to think that such instances could not recur. The possibility of such abuse, however, is not a sufficient ground to invalidate an otherwise constitutional program.

It must further be acknowledged that the actual effectiveness of the DOC's monitoring program has not (at least not yet) been definitively established. The evidence leaves no doubt that its use thus far has resulted in the detection of some criminal activity. The plaintiffs argue that a more selective monitoring system-the monitoring of "hot numbers," for example-could accomplish essentially the same results with less widespread intrusion. The DOC officials who testified in this case, however, disagreed with this assumption. The professionalism of those officials has already been mentioned. Although history counsels some wariness when government officials counsel that new means of surveillance are indispensable, *Roque v. Warden* teaches that, in the context of prisons, some deference must be given to the "informed discretion" of correctional officials. 181 Conn. at 98.

It must finally be acknowledged that the monitoring program at issue here is intrusive. Incarcerated persons, no less than the rest of us, use the telephone for intimate conversation. The fact that these conversations-the vast majority of which are entirely personal-are systematically recorded by a government agency has undeniable Orwellian overtones.

***30** On the other hand, prisons are dangerous places containing dangerous persons. As the Appellate Court has recognized, "the very tense and potentially explosive nature of correctional institutions poses a constant threat to both inmates and correctional personnel alike." *Board of Pardons v. Freedom of Information Commission,* 19 Conn.App. 539, 542, 563 A.2d 314 (1989). "Further, 'central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.' " *Id.* at 543 (quoting *Pell v. Procunier,* 417 U.S. 817, 823 (1974)). For these reasons, it is familiar law that "[a] prisoner's rights are diminished by the needs and exigencies of the institution in which he is incarcerated. He thus loses those rights that are necessarily sacrificed to legitimate penological needs." *Elliott v. Lynn,* 38 F.3d 188, 190-91 (5th Cir.1994). Prisons are Orwellian places. Prisoners are watched-or at least subject to being watched-at all times. They are subject to cell and body searches, and the use of informants is widespread. In this context, contemporary norms simply do not prohibit the monitoring-electronic or otherwise-of prison inmates.

(7) ***Conclusion.***

The factors that have been discussed lead to the conclusion that the recording and listening program in question is not prohibited by Art. First, § 7. This result is in conformity with the state constitutional text, state and federal judicial precedent, historical analysis, and

contemporary norms. The plaintiffs cannot prevail on this ground.

D. ***The Limitations on Privileged Telephone Calls***

The most compelling portion of the plaintiffs' case involves the DOC's limitations on privileged telephone calls. In practice, these are limitations on telephone calls to and from attorneys. (There is no evidence of significant limitations on telephone calls to or from government officials.) Serious constitutional problems have arisen in three different areas. First, § 18-81-46 of the Regulation provides that "[s]uch calls shall normally be limited to ten minutes duration." The haphazard implementation of this provision has been described in the Findings of Fact. Second, § 18-81-46 provides that, after placing the inmate on line, the staff member placing the call "shall then move out of listening range of the inmate's conversation." As described in the Findings of Fact, the evidence plainly shows that this provision has been violated on numerous occasions. Finally, § 18-81-46 provides that "[a]n inmate shall be provided a reasonable accommodation to make prearranged" privileged calls. The haphazard implementation of this provision is also described in the Findings of Fact. Considered separately, each of these scenarios involves a serious constitutional violation. Taken as a whole, the evidence overwhelmingly shows that § 18-81-46 and its enforcement are rife with constitutional violations and that the granting of injunctive relief is a necessity.

***31** The most egregious-and absolutely clear-cut-constitutional violation in this area is the practice of some DOC staff members of remaining within listening range of privileged conversations. While staff members may be constitutionally permitted to come within listening range of privileged calls in (presumably rare) cases of emergency, there is overwhelming evidence that DOC staff members have remained within listening distance of privileged calls on numerous occasions involving no emergency whatsoever. This is not only a violation of § 18-81-46 but is incompatible with the requirements of the state and federal constitutions.

It must be understood that the right of a detained person to have state officials out of earshot while he talks to his attorney is completely independent of the existence of either the right to counsel or the right to make a telephone call. *State v. Ferrell,* 191 Conn. 37, 463 A.2d 573 (1983), is decisive of this point. The defendant in *Ferrell* was arrested, taken to a police barracks, and permitted to call his attorney. The call was made from "a telephone in the report room where his conversation could be overheard by police officers in the room." 191 Conn. at 39. Our Supreme Court held that this practice violated the due process clauses of both the Fourteenth Amendment and Art. First, § 8 of the Connecticut constitution. *Id.* at 45 n. 12. This violation occurred in spite of the fact that the Sixth Amendment right to counsel had not yet attached, *id.* at 42 n. 5, and that an arrested person in Connecticut has no right to a phone call following arrest, *id.* at 45 n. 11. "But," as the Court pithily stated, "once access is provided, privacy must be ensured." *Id.* at 45. Consultation with an attorney "is meaningless if the accused cannot privately and freely discuss the case with that attorney. Such discussion is only possible under conditions free from eavesdropping by the authorities." *Id.*

The evidence in the present case confirms the accuracy of this observation. An attorney talking with a client who has a correctional official within earshot simply cannot carry on a meaningful consultation with that client. Such a circumstance makes a mockery of the entire consultation. For this reason, the provision of § 18-81-46 that staff members must move out of listening range of an inmate's privileged conversation is plainly a requirement of both the state and federal constitutions. Because the evidence demonstrates that this requirement has been violated on numerous occasions, the plaintiffs have clearly established that they have been deprived of their federal constitutional rights under color of state law, entitling them to relief not only under state law but under 42 U.S.C. § 1983.

The frequent violation of the requirement of § 18-81-46 that inmates "be provided a reasonable accommodation to make prearranged" privileged telephone calls also raises serious constitutional concerns. The law on this point, however, has not been definitively established. It is clear beyond doubt that both the state and federal constitutions guarantee prisoners a right of access to the courts. *Bounds v. Smith,* 430 U.S. 817, 821 (1977); Conn. Const. Art, First, §§ 8 & 10. It is also clear that this right "means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys." *Procunier v. Martinez,* 416 U.S. 396, 419 (1974). The question of whether this "reasonable opportunity" must include a reasonable opportunity for telephone calls to counsel has not been authoritively decided. Some lower courts have held that the federal constitution requires reasonable telephonic access between prisoners and their attorneys. *See, e.g., Johnson ex rel. Johnson v. Brelje,* 701 F.2d 1201 (7th Cir.1983); *In re Grimes,* 256 Cal.Rptr. 690 (Cal.Ct.App.1989). Justices Kennedy and O'Connor, however, have more recently suggested that the right of meaningful access to the courts "can be satisfied in various ways" and that "state legislatures and prison administrators must be given 'wide discretion' to select appropriate solutions." *Murray v. Giarratano,* 492 U.S. 1, 14 (1989) (Kennedy, J., concurring) (quoting *Bounds v. Smith, supra,* 430 U.S. at 833). Given the fact that the Supreme Court, in considering federal constitutional issues, is obliged to take into account the varying needs and conditions of the fifty states, it cannot be confidently

said that it would hold that the federal constitution imposes an across-the-board obligation of telephonic access on the states.

***32** The Connecticut constitution, however, has independent vitality in this area. The fact that state governments may afford higher levels of protection for individual rights than does the federal government has already been mentioned. Apart from this general consideration, the right of prisoners to meaningful access to courts and counsel implicates specific, well-established state constitutional guarantees and traditions. These specific factors must now be considered.

First, in addition to the right to be heard by counsel in all criminal prosecutions and the right to due process of law guaranteed by Art. First, § 8, the state constitution specifically provides, in Art. First, § 10 that "[a]ll courts shall be open" and that "right and justice" shall be administered without "denial or delay."

Second, Connecticut statutory laws require the assistance of counsel in many proceedings where no federal constitutional right to counsel exists. *See, e.g., Lozada v. Warden,* 223 Conn. 834, 838-39, 613 A.2d 818 (1992) (state habeas corpus proceedings); *Lavertue v. Niman,* 196 Conn. 403, 412-13, 493 A.2d 213 (1985) (paternity proceedings). The right to the assistance of counsel in these cases means the right to the *effective* assistance of counsel. *Lozada v. Warden, supra,* 223 Conn. at 838.

Third, "[t]his state has had a long history of recognizing the significance of the right to counsel, even before that right attained federal constitutional importance." *State v. Stoddard,* 206 Conn. 157, 164, 537 A.2d 446 (1988). *Stoddard* sets forth this history at length. *Id.* at 164-65.

Fourth, as *Stoddard* also explains, state "interference with counsel's access" to a person in custody raises state constitutional due process concerns. 206 Conn. at 166. Significantly, *Stoddard* expressly relies on *State v. Ferrell, supra,* in this regard. Both cases require that "exacting measures" be taken to assure that persons confined by the state be "treated with the most scrupulous fairness" in the ability to communicate with counsel. 206 Conn. at 166; 191 Conn. at 41. As *Stoddard* explains, this is the case even when there is no "prior existence of an attorney-client relationship." 206 Conn at 172.

Finally as *State v. Ross, supra,* recognizes, the guarantees of the state constitution can appropriately be analyzed with reference to contemporary understandings and norms. 230 Conn. at 249. In this regard, certain realities must be understood. Connecticut's correctional institutions house both sentenced prisoners and pretrial detainees. Many pretrial detainees are either on trial or are facing imminent trial in their criminal cases. At least some convicted persons are either on trial or facing imminent trial in such important civil matters as state and federal habeas corpus actions and termination of parental rights proceedings in juvenile court. A prisoner in this situation does not necessarily have time to send counsel a letter. Sometimes, a telephone call must be made.

***33** The realities facing Connecticut's lawyers must also be considered. Lawyers who represent incarcerated clients, like the incarcerated clients themselves, have no control over the location in which those clients are confined. Clients may be confined at a substantial distance from either their lawyers' offices or the courts in which those lawyers are obliged to appear. Lawyers are busy people. An attorney in Stamford who represents a client incarcerated in Somers will rarely have the luxury to take a day from his busy schedule and visit his client in person. If he is required to do so, other clients (and the courts) will be deprived of his services for that day. If a trial or other hearing is imminent, the mail may be too slow. In order to practice law efficiently and responsibly in the modern world, a Connecticut lawyer needs to have telephonic access to his clients.

For these reasons, I conclude that the state constitution's guarantees of meaningful access to courts and counsel require reasonable telephonic access between prisoners and their attorneys. On its face, § 18-81-46 guarantees this as well, but, as I have explained in the Findings of Fact, the evidence clearly establishes that violations of this right are widespread. Even timely requests for privileged calls duly accompanied by attorney letters have been ignored or granted only after the time specified in the attorney letter has passed. This is an intolerable situation. Where violations of fundamental constitutional guarantees are this systemic, the state constitution does not require that the courts avoid remedial action until demonstrable injury, perhaps in the form of legal malpractice or an unjust conviction, has occurred.

Before the appropriate remedial action is discussed, the third problem addressed by the plaintiffs must be considered. Section 18-81-46 provides that privileged calls "shall normally be limited to ten minutes duration." The haphazard enforcement of this policy is described in the Findings of Fact.

As described above, the state constitution guarantees reasonable telephonic access between prisoners and their attorneys. The "normal" ten-minute limit set forth in the Regulation is inconsistent with this constitutional requirement. Our Supreme Court has long disfavored time specific limitations involving the assistance of counsel in legal proceedings. *See Pet v. Department of Health Services,* 228 Conn. 651, 661, 638 A.2d 6 (1994) (finding one-hour limitation of cross-examination in administrative hearing "inappropriate," although concluding that the cross-examination actually conducted in that case was sufficient); *State v. Anthony,* 172 Conn.

172, 176-77, 374 A.2d 56 (1976) (reversing a conviction because of one-hour limitation of voir dire). Like the time limitation struck down in *Anthony,* the fixed time limitation here has been set without regard to the variable time that may be reasonably necessary to fairly accomplish the purposes of the privileged telephone call and with no apparent regard for the particular circumstances of the call. This is true both of the regulatory language itself and of the enforcement of that language.

***34** There are, moreover, significant differences between a legal proceeding, on the one hand, and a privileged phone call from a correctional institution, on the other, that make time limitations even less acceptable in the latter circumstance. A legal proceeding is presided over by a detached officer who can use her own observations to determine if the factual and legal matters that need to be addressed in the proceeding have, in fact, been addressed. *See Pet, supra,* 228 Conn. at 662. This type of supervision is neither feasible nor desirable in the case of a privileged phone call. As has already been explained, correctional officers cannot constitutionally listen to such calls in the first place. Within reasonable boundaries, the time limitations on those calls must be set by attorney and client, not by the DOC. In fact, as already discussed, lawyers are busy people. If a lawyer wishes to talk with her client on the telephone for longer than ten minutes, there will ordinarily be a need for doing so. The DOC is in absolutely no position, factually or constitutionally, to second-guess this need.

As just mentioned, there is doubtless some room for reasonable regulatory boundaries in this matter. Just as prisons set forth posted hours within which personal and professional visits may take place, they can legitimately establish reasonable hours within which privileged telephone calls may be made. Given the fact that lengthy calls can tie up telephone lines, even some reasonable, flexible time limitation on privileged telephone calls is permissible. The plaintiffs, to their credit, do not dispute this. They suggest a thirty minute limitation that shall be increased at the specific oral or written request of the attorney. This is an eminently reasonable position. On the other hand, the experience of a professional lifetime teaches that a ten minute limitation is unreasonably short. The only discovered case that has approved an analogous time limitation, *Wooden v. Norris,* 637 F.Supp. 543, 557 (M.D.Tenn.1986) (approving a five minute limitation on legal calls) did so on the basis of evidence that showed that the time limitation in question was rarely enforced. *Id.* at 551. That is not the case here. The ten-minute limitation here, as it is enforced, will inevitably interfere with an attorney's ability to counsel and represent her clients. Even in a relatively simple case, an attorney can easily spend ten minutes locating or looking through relevant documents. In a case that is factually or legally complex, a ten minute limitation is woefully inadequate.

The content of an appropriate remedial order must now be considered. One point admits of no doubt. The requirement of § 18-81-46 that, after placing a privileged call, "[t]he staff member shall then move out of listening range of the inmate's conversation," must be obeyed in the absence of exigent circumstances that require the privileged telephone call to be interrupted. Obvious examples of exigent circumstances are prison riots, escape attempts, and behavior by the inmate making the privileged call that constitutes a threat to property or physical safety. Staff members must also be allowed to move within listening range to terminate a call at the expiration of the time limitations about to be discussed. Absent such circumstances, the staff member must remain out of listening range.

***35** As I have already indicated, the time limitations suggested by the plaintiffs are appropriate. It is reasonable to order that, in the absence of exigent circumstances, privileged telephone calls may be limited to thirty minutes duration. This limitation shall be increased at the specific oral or written request of the attorney.

The frequency and speed with which telephonic access to counsel must be allowed must now be considered. This problem arises in two different situations: efforts by attorneys to reach prisoners and efforts by prisoners to reach attorneys. The first of these situations is relatively unproblematic. When an attorney (or a paralegal or law student working under an attorney's supervision) attempts to call a prisoner or delivers a written or verbal request to correctional authorities that a prisoner call him, it can be safely assumed that there is a legitimate professional need for such a call. Such requests must be honored without limitation as to their number or frequency. The only real problem, for purposes of framing an injunctive order covering a statewide system, is the speed with which such requests must be honored. While such requests should plainly be honored as quickly as possible, courts making orders of general application must be sensitive to the myriad of practical problems facing correctional authorities. Even in the absence of exigent circumstances, such as a sick or recalcitrant inmate or a prison riot, correctional staff members have numerous competing duties demanding their attention. Balancing these considerations, it does not seem particularly onerous to require that, in the absence of exigent circumstances, an attorney request for a privileged call be honored either by the close of the first business day following the day on which correctional authorities receive the request or at the time specified by the attorney, whichever shall later occur. It must be emphasized that this order sets only minimum standards. Given the DOC's general level of professionalism, it should be expected to honor attorney requests for privileged calls with all possible speed.

Efforts by prisoners to telephone attorneys pose a

somewhat different problem. Commissioner Meachum testified that § 18-81-46 allows inmates, as well as attorneys, to "prearrange" privileged calls. But, while it can be safely assumed that when an attorney attempts to telephone her client there is a legitimate professional need for such a call, the converse assumption cannot be made. While most efforts by prisoners to reach their attorneys will be entirely legitimate, it must sadly be recognized that, in a small but unavoidable number of cases, some prisoners will repeatedly request privileged calls in an effort to harass their jailers, their attorneys, or both. For this reason, an order that prisoner requests to make privileged phone calls be honored without limit would, in all probability, result in a correctional (and perhaps an attorney) nightmare. In addition to this consideration, the limitations of correctional resources must also be recognized.

***36** The plaintiffs acknowledge that, for purposes of a remedial order covering a statewide correctional system, some limitation as to the frequency of privileged calls made by prisoners is permissible. Their particular proposal is that each prisoner be allowed to make three professional calls a week. This number is, however, far too high for an order covering an overburdened statewide system. In addition to the opportunities for mail and personal visits that already exist, attorneys, pursuant to this decision, are permitted to call their incarcerated clients without limitation as to the number or frequency of such requests. Given these facts, a more modest order governing prisoner requests is appropriate. It is reasonable to order that, in the absence of exigent circumstances, each prisoner be allowed to make two privileged calls a month in addition to calls initiated by that prisoner's attorney. This total does not include calls answered by busy signals but does include calls answered by a person or machine capable of taking a message. (If the attorney receiving the message determines that it is appropriate to do so, she can subsequently deliver a request to correctional authorities that the prisoner call her.) The order that I have already articulated governing the speed with which attorney requests for privileged calls must be honored can reasonably govern prisoner requests for privileged calls as well. In the absence of exigent circumstances, a prisoner request for a privileged call shall be honored either by the close of the first business day following the day on which correctional authorities receive the request or at the time specified by the prisoner, whichever shall later occur. It must again be emphasized that this order sets only minimum standards. The DOC is not only permitted but encouraged to honor requests for privileged calls with even greater speed and frequency.

The final issue that must be addressed is the question of whether calls to attorneys placed from the prison must be placed collect. The evidence suggests that DOC policy on this subject has not been entirely uniform. In any event a distinction must be made between calls to private attorneys, on the one hand, and public defenders and Legal Assistance to Prisoners, on the other. If a prisoner has a private attorney, the constitution hardly forbids the DOC from requiring that that attorney be called collect. But public defenders are employed by the state to represent indigent clients and are not permitted to accept collect calls. Legal Assistance to Prisoners is similarly funded by the state, pursuant to Conn.Gen.Stat. § 18-81, and is also unable to accept collect calls. When the DOC requires prisoners to place collect calls to these agencies, it is placing both the prisoners and their attorneys in an impossible position. Consequently, the DOC must allow toll free calls to these agencies. This order does not, however, extend to private attorneys handling particular cases as special public defenders or on a *pro bono* basis. There is no evidence that such attorneys are unable to accept collect calls.

***37** A specific order incorporating these requirements is set forth at the end of this decision.

E. ***The Review of Outgoing Mail***

The seventh count of the plaintiffs' complaint asserts that the random review of outgoing mail pursuant to § 18-81-31(a) of the Regulation violates the First and Fourteenth Amendments. The narrow compass of this attack must be noted at the outset. The only practice complained of is the review of outgoing general correspondence. There is no complaint of actual censorship. Moreover, the status of outgoing privileged communications and of incoming mail of all descriptions is not in question. Finally, the plaintiffs invoke only the federal constitution and do not rely on the state constitution.

The plaintiffs specifically complain that the Regulation insufficiently limits the discretion that correctional officials enjoy in reviewing their outgoing general correspondence. They focus on § 18-81-31(a) of the Regulation, which provides that "[a]ll outgoing general correspondence shall be subject to being read at the direction of the Unit Administrator ... for either a specific inmate[s] or on a random basis if the Commissioner or Unit Administrator has reason to believe that such reading is generally necessary to further the substantial interests of security, order or rehabilitation." In contrast to the copious evidence submitted on the subject of telephone monitoring, comparatively little evidence has been submitted on the implementation of § 18-81-31(a). The thrust of the plaintiffs' case is that this provision is so standardless as to render any review occurring under it unconstitutional.

The Supreme Court held in *Procunier v. Martinez, supra,* that the censorship of prison mail is justified only if done

pursuant to a regulation or practice that furthers "an important or substantial governmental interest unrelated to the suppression of expression" and if the limitation of First Amendment freedoms resulting from such censorship is "no greater than is necessary or essential to the protection of the particular governmental interest involved." 416 U.S. at 413. The Court has since limited *Martinez* to the censorship of outgoing correspondence, but with respect to such censorship, *Martinez* remains the controlling authority. *Thornburgh v. Abbot,* 490 U.S. 401, 413 (1989). *Martinez* is the ring which the plaintiffs here seek to grasp.

There is, however, a critical difference between *Martinez* and this case. *Martinez* involved censorship. The letters found objectionable in that case were returned to the author or placed in the prisoner's file. 416 U.S. at 400. This case, in contrast, involves review. While § 18-81-31(a) authorizes the seizure of letters in certain specified instances, the seizure provisions of the Regulation are not challenged. The plaintiffs focus on review alone.

The difference between censorship and review was underscored by the Supreme Court less than two months after *Martinez* was decided. In *Wolff v. McDonnell,* 418 U.S. 539 (1974), the Court considered a Nebraska prison regulation providing that "[a]ll incoming and outgoing mail will be read and inspected." *Id.* at 574. The regulation further provided that if an incoming letter was marked "privileged," thus identifying it as being from an attorney, it would be opened in the presence of the inmate, but not actually read. This practice was upheld. The Court acknowledged that, under these circumstances, *Martinez* was not controlling. *Id.* at 575-76. "Furthermore," it pithily stated, "freedom from censorship is not equivalent to freedom from inspection or perusal." *Id.* at 576. The Court concluded that the inspection of privileged mail in the presence of the inmate is "all, and perhaps even more, than the Constitution requires." *Id.* at 577.

***38** *McDonnell,* like *Martinez,* is distinguishable from this case. The distinctions cut in both directions. On the one hand, in *McDonnell,* unlike the present case, the mail in question was inspected but not actually read. On the other hand, for reasons already discussed in the course of this opinion, communications with attorneys are something of a special case. Those communications are privileged under the state and federal constitutions and are subject to a number of protections that do not apply to general correspondence.

One additional, albeit much earlier, Supreme Court precedent must also be considered. *Stroud v. United States,* 251 U.S. 15 (1919), affirmed a criminal conviction resulting from a trial in which certain inculpatory letters of the defendant were admitted into evidence. The letters had been written while the defendant-later to be known as the Birdman of Alcatraz-was incarcerated in Leavenworth. "They came into the possession of the officials of the penitentiary under established practice, reasonably designed to promote the discipline of the institution." *Id.* at 21. Under these circumstances, the Court found no violation of the defendant's Fourth and Fifth Amendment rights. *Id.* at 21-22. The defendant's First Amendment rights were not considered.

Stroud is factually similar to *Martinez* because it involved an actual seizure of mail. Following *Martinez,* the lower federal courts have limited *Stroud* to "situations in which prison officials seize outgoing inmate letters in the exercise of 'legitimate governmental interests.' " *United States v. Brown,* 878 F.2d 222, 225 (8th Cir.1989). Nevertheless, *Stroud* "still controls cases in which such seizures are prompted by a reasonable justification." *Id. Accord United States v. Whalen,* 940 F.2d 1027, 1035 (7th Cir.), *cert. denied,* 112 S.Ct. 403 (1991).

In any event, seizure, like censorship, is much different from review. The lower federal courts have not addressed the question of random review of general inmate correspondence with a single voice. On the one hand, there is significant lower court authority that such review does not violate the federal constitution. *Smith v. Shimp,* 562 F.2d 423 (7th Cir.1977), is the leading case advancing this position. *Smith* points out that "an opportunity for secret and lengthy communication between a detainee and his friends or relatives would substantially enlarge his opportunity for successful escape." *Id.* at 426. Because of this fact, genuine security concerns exist. *Smith* further explains that vexing practical problems make random review a necessity:

> There is no apparent way that jail officials could anticipate which detainees might use the mail in an effort to escape. Thus, the burden of surveillance must be carried by all. *Cf. Wolff v. McDonnell, supra,* 418 U.S. at 577 ... (flexible test to determine when jail officials may open letters to search for contraband is "unworkable"). Correspondence with spouses may not be excluded from surveillance without jeopardizing the effectiveness of the check. A spouse may just as readily cooperate in a plan for escape as other relatives or friends of the detainee. Incoming and outgoing mail appear equally subject to use for the development of escape plans. If surveillance of one or the

> other were prohibited, the mail check could be frustrated easily by the use of coded messages in letters subject to the check. We therefore conclude that the burden imposed is no greater than necessary to protect the interest in jail security and that the plaintiffs' constitutional rights are not violated by the challenged practice.

***39** *Id.* (Footnote omitted.) *Accord Gaines v. Lane,* 790 F.2d 1299, 1304 (7th Cir.1986); *Meadows v. Hopkins,* 713 F.2d 206, 208-11 (6th Cir.1983). *Cf. United States v. Kelton,* 791 F.2d 101, 103 (8th Cir.), *cert. denied,* 479 U.S. 989 (1986) (holding that the random review of outgoing mail by federal correctional authorities does not violate the Fourth Amendment).

On the other hand, a series of decisions by the Second Circuit gives considerable support to the plaintiffs' position that the random review of outgoing correspondence is constitutionally objectionable. These cases must, however, be read with some care.

In *Wolfish v. Levi,* 573 F.2d 118 (2d Cir.1978), *rev'd on other grounds,* 441 U.S. 520 (1979), the Second Circuit rejected *Smith v. Shimp, supra,* and enjoined the practice of federal correctional authorities of routinely reading outgoing non-privileged mail. The Court did not acknowledge *McDonnell* 's distinction between censorship and perusal. Its decision rested on two grounds. First, it found that the reading of mail has a chilling effect on expression. As it poignantly stated, "a tender note, so important to the morale of the incarcerated individual, might never be penned if the writer knew that it would first be scrutinized by a guard." 573 F.2d at 130. Second, it relied on the trial court's finding that "since social visits and telephone calls are not monitored, the mail security justification was meaningless." *Id.*

In *Davidson v. Scully,* 694 F.2d 50 (2d Cir.1982), the Second Circuit found New York State prison mail review regulations irrational when applied to four specific letters written by an inmate. Three of these letters were to military officials and one was to the American Civil Liberties Union. Letters to such addressees were obviously unlikely to disrupt institutional security. The Court held that review of these letters was justifiable only "where the challenged interference substantially furthers a plausible security interest in a rational manner." *Id.* at 54. In doing so, it restated the concern of *Wolfish* that "routine reading of correspondence [is] unwarranted in the absence of similar restrictions on telephone calls and visitation conversations equally likely to jeopardize prison security." *Id.*

In *Heimerle v. Attorney General,* 753 F.2d 10 (2d Cir.1985), the Second Circuit considered a challenge to the practice of federal correctional authorities of reviewing incoming prison mail. (The status of outgoing mail was not in question on appeal.) The court repeated its concern with the monitoring of mail unaccompanied by the monitoring of telephone calls and social visits and remanded the case for a factual determination of "the general degree to which monitoring of telephone calls and social visits occurs" at the institution in question. *Id.* at 14.

These conflicting authorities reflect conflicting factual concerns. Both concerns are valid. On the one hand, if random review is allowed, it is likely that at least some prisoners will be chilled in the exercise of their legitimate First Amendment rights by the apprehension that their love notes or political statements will be read by correctional officials. On the other hand, if random review is not allowed, there can be no doubt that some prisoners will take advantage of the situation to plot escapes or other activities that jeopardize prison order and security. Either alternative will be attended by unhappy consequences in an imperfect world.

***40** Although the question is a close one, I have concluded that the random review of outgoing general correspondence under § 18-81-31(a) does not violate the federal constitution. This conclusion is grounded in a number of considerations.

First, the Second Circuit line of authority discussed above is factually distinguishable from this case. Those decisions were grounded in part on the absence of accompanying monitoring of social visits and telephone calls. Here, while no evidence on the monitoring of social visits has been submitted, the Regulation that provides for the random review of outgoing general correspondence does so as part of a more general surveillance program that also includes the monitoring of telephone calls. Under these circumstances, the mail security justification cannot be called meaningless.

Second, the invalidation of a monitoring program on the ground that it is insufficiently pervasive is ultimately destructive of the very privacy values that the Second Circuit wishes to protect. If the courts inform correctional officials that unless they monitor everything they can monitor nothing, at least some officials will respond by monitoring everything. If the telephone and mail monitoring at issue in this case were to be invalidated because social visits remaining unmonitored, the hint to correctional authorities that they should monitor social visits as well would be unmistakable. The sending of such hints is not an appropriate judicial function.

Third, the fact that the accompanying monitoring of telephone calls is itself a significant consideration. To

allow the random monitoring of outgoing prisoner telephone calls but prohibit the random monitoring of outgoing prisoner mail would be anomalous in the extreme. As discussed above, there is overwhelming authority that the monitoring of prisoner telephone calls does not violate the federal constitution. While most telephone monitoring cases have focused on Fourth, rather than First, Amendment principles, the underlying issue in either analysis is the reasonable expectation of privacy that a prisoner should have in his communications with the outside world. As Justice Brandeis pointed out in his *Olmstead* dissent, "[t]here is, in essence, no difference between the sealed letter and the private telephone message." 277 U.S. at 475. Indeed, Justice Brandeis went on to say, that "[t]he evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails." *Id.* In the present age, when societal reliance on the telephone, as opposed to the letter, is doubtless even greater than it was in Brandeis' time, to prohibit mail monitoring while allowing telephone monitoring would be to strain at a gnat while swallowing a camel. In each case there is a real intrusion by government into private communications between individuals, but in each case-in the prison context-there is a legitimate governmental interest in maintaining institutional security and order. If the governmental interest in security and order is to prevail in the case of telephone calls, it should logically prevail in the case of mail as well.

***41** Fourth, while § 18-81-31(a) could doubtless be more tightly drafted, it is not entirely standardless. It is, for example, more highly articulated than its federal correctional counterpart. 28 C.F.R. § 540.14(c) provides that, in medium and high security federal prisons, outgoing mail from convicted prisoners "may not be sealed by the inmate and may be read and inspected by staff." Section 18-81-31(a), in contrast, allows random review only "if the Commissioner or Unit Administrator has reason to believe that such reading is generally necessary to further the substantial interests of security, order or rehabilitation." Moreover, unlike the regulation challenged in *Martinez,* § 18-81-31(a) specifically identifies the material deemed censorable. There is, further, no evidence that review under § 18-81-31(a) has been carried out in anything but a professional manner. If cases of individual abuse occur, those cases can be appropriately addressed by the judicial authority at the time. *See, e.g., Jolivet v. Deland,* 966 F.2d 573 (10th Cir.1992); *Parrish v. Johnson,* 800 F.2d 600 (6th Cir.1986). Considered as a whole, however, § 18-81-31(a) strikes a permissible balance between the constitutional rights of the plaintiffs and the legitimate concerns of correctional officials.

Finally, in the two decades since *Martinez* was decided, the Supreme Court has repeatedly admonished lower courts that, if legitimate penological interests are at stake, prison administrators must be given substantial deference in dealing with security problems and the intractable problems of prison administration. *See Turner v. Safley,* 482 U.S. 78, 89 (1987), and authorities cited therein. The Connecticut Supreme Court recognized the same need for deference in *Roque v. Warden, supra,* 181 Conn. at 97-98. Because legitimate penological interests are at stake in the present case, some deference to the judgment and experience of professional prison administrators is appropriate. Under all of the circumstances, their discretion has not been abused. On the evidence presented here, the review of outgoing correspondence under § 18-81-31(a) does not violate the federal constitution.

F. ***The Denial of Outgoing Telephone Calls***

The seventh count also contends that the denial of access to outgoing telephone calls for inmates who refuse to sign the "Notification and Acknowledgement" form violates the First and Fourteenth Amendments. This issue has not been briefed or argued and is deemed abandoned. It is, however, appropriate to note that if the DOC is going to monitor outgoing calls, and if that monitoring does not otherwise offend the constitution, it is not objectionable to require inmates making monitored calls to sign a notification form to create a clear record that the monitoring is not surreptitious. An inmate who does not wish to make monitored calls need not sign the form. Given the fact, discussed above, that the monitoring program itself does not violate the constitution, the use of the "Notification and Acknowledgement" form is constitutional as well.

G. ***Statutory Authority for the Regulation***

***42** The eighth count alleges that the Regulation is not authorized by statutory authority. The thrust of the plaintiffs' argument is that the Regulation is *ultra vires* because it conflicts with the wiretapping and eavesdropping statutes. As explained above, because the Regulation complies with the recording statute, the asserted conflict with the eavesdropping and wiretapping statutes does not exist. More generally, Conn.Gen.Stat. § 18-81, which gives broad powers to the Commissioner of Correction to administer and control the DOC, supervise and direct its facilities and activities, and establish rules for the custodial methods of those facilities, confers ample powers on the Commissioner to enact the Regulation.

H. ***The AIDS Testing and Medical Information Statute***

The ninth count invokes Connecticut's AIDS testing and medical information statute. Conn.Gen.Stat. §§ 19a-581, et. seq. The plaintiffs focus on a single statutory

provision. Conn.Gen.Stat. § 19a-583(a) provides that, except in certain specified cases, "[n]o person who obtains confidential HIV-related information may disclose or be compelled to disclose such information." The evidence establishes that a significant number of inmates in DOC facilities are HIV-positive. The thrust of the plaintiffs' argument is that these inmates are compelled to disclose this information over monitored telephones to the correctional officials who are monitoring them.

It must be understood at the outset that the "compulsion" claimed by the plaintiffs is internal rather than external. The DOC does not require any inmate to use a telephone. Any use of the telephone is purely voluntary. Moreover, the decision as to what is said over the telephone is exclusively the decision of the parties to a particular call. There is absolutely no evidence that the DOC requires any inmate to say anything over the telephone.

Under these circumstances, the plaintiffs' claim that the DOC "compels" them to disclose HIV-related information is unpersuasive. Case authority construing the word "compel" in analogous situations confirms that the plaintiffs' position must be rejected.

The most obvious analogy to the plaintiffs' claim is a line of cases construing the Fifth Amendment. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." The Supreme Court has repeatedly held that "the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege." *Fisher v. United States,* 425 U.S. 391, 397 (1976). In the specific case of telephone wiretapping, the Supreme Court held at an early date that persons voluntarily speaking on a monitored telephone are not "compelled" to incriminate themselves in violation of the Fifth Amendment. *Olmstead v. United States, supra,* 277 U.S. at 462. While *Olmstead* was overruled on Fourth Amendment grounds in *Katz v. United States, supra,* its Fifth Amendment holding remains viable. In *Hoffa v. United States,* 385 U.S. 293 (1966), for example, the celebrated union leader Jimmy Hoffa made incriminating statements to an undisclosed government informer. The Court held that because these statements were wholly voluntary, they were not "the product of any sort of coercion, legal or factual." *Id.* at 304. *Fisher v. United States* explains that the compulsion requirement of the Fifth Amendment is not "a general protector of privacy." 425 U.S. at 401. In the absence of coercion, compulsion does not exist.

***43** The Connecticut Supreme Court has also cast significant light on the meaning of "compel." *Ains v. Hayes,* 92 Conn. 130, 101 A. 579 (1917), addresses the meaning of the word in the context of a rental agreement. Ains rented a cottage from Hayes. Hayes signed a contract stating that Ains would be entitled to specific damages if he was "compelled to vacate my cottage .. through my selling said cottage." Hayes subsequently sold the cottage to a third party who increased the rent. Ains could not afford to pay the increased rent and had to move. The Supreme Court held that he had not been "compelled" to move by the sale of the cottage. It explained that "[t]he word 'compelled,' in its ordinary sense, means: to drive or urge with force; to constrain; oblige; necessitate, whether by physical or moral force." *Id.* at 133. The only "compulsion" shown was Ains' "inability to pay the rental of the property." *Id.* at 134. This "compulsion" was not attributable to Hayes.

These authorities confirm what common sense dictates in any event. Conn.Gen.Stat. § 19a-583(a) is violated only where real physical or moral compulsion from an external source is placed on a person who has obtained confidential HIV-related information to disclose that information. The evidence here fails to establish that the DOC has created any sort of coercion, legal or factual. The only "compulsion" to disclose that the plaintiffs can identify is an internal compulsion that compels them to disclose their erstwhile confidential information to others over the telephone. The protected individual himself is specifically entitled to disclose such information by Conn.Gen.Stat. § 19a-583(b). Of course, pursuant to § 19a-583(a), no other person can "compel" such disclosure, but under the circumstances here, no finding of external compulsion can be made. The AIDS testing and medical information statute has not been violated.

I. ***Liability for Damages***

The final issue that must be addressed is the question of liability for damages. I have found three constitutional violations, all involving the issue of privileged telephone calls. These violations are the practice of some DOC officials of remaining within listening range of privileged conversations, the violation of the requirement of § 18-81-46 that inmates "be provided a reasonable accommodation to make prearranged" privileged telephone calls, and the ten minute limit on such calls. The question of whether the plaintiffs have established liability for monetary damages for these violations must now be considered.

The sole defendant at the time of trial was Commissioner Meachum. With respect to the first two violations enumerated above-the practice of some DOC officials of remaining within listening range and the denial to some inmates and attorneys of "a reasonable accommodation" to make privileged calls-Commissioner Meachum's liability has not been factually established. Each of the first two violations is a violation of the Regulation which he promulgated. At trial, Commissioner Meachum credibly testified that he found these violations

unacceptable. There is no evidence that he caused any of these violations in any way. Consequently, his liability for these violations has not been established by the evidence.

***44** The third violation-the ten minute limit on privileged telephone calls-presents entirely different considerations. There can be no doubt that Commissioner Meachum "caused" this violation since it is expressly contained in the Regulation that he promulgated. But is he liable in damages for this violation? This is, as explained above, a violation of the state constitution and the state constitution alone. No state or federal statute expressly authorizes a monetary remedy for damages for such a violation. The question of whether the state constitution affords such a remedy is an exceedingly complicated one. *See Kelley Property Development, Inc. v. Town of Lebanon,* 226 Conn. 314, 627 A.2d 909 (1993). If such a remedy were found to exist, complex questions of sovereign immunity and qualified immunity, raised by Commissioner Meachum's special defenses, would also have to be addressed.

Although the plaintiffs claim "damages pursuant to the Connecticut Constitution" in their complaint, they have neither briefed nor argued this issue. The issue must consequently be deemed abandoned. It would be inappropriate to further consider the issue under these circumstances.

For these reasons, the defendant is not liable for monetary damages.

J. ***Attorney's Fees***

As explained above, one DOC practice-the practice of correctional officials remaining within earshot of privileged telephone calls-has deprived the plaintiffs of their federal constitutional rights under color of state law, entitling them to relief under 42 U.S.C. § 1983. In such an action, 42 U.S.C. § 1988(b) permits the allowance of a reasonable attorney's fee under some circumstances. The question of attorney's fees was not, however, included in the scope of the July 1994 hearing in this case. If the plaintiffs wish to seek attorney's fees, they may file an appropriate motion. A hearing on that motion will be held at the convenience of the parties.

K. ***Summary and Conclusion***

This decision is necessarily lengthy and in some respects complex. It may therefore be helpful to both the parties and the general public to set forth a summary of my more important conclusions. These are conclusions of law. I make no comment on the wisdom of the correctional practices in question.

First. Connecticut's 1990 recording statute modifies both the 1969 eavesdropping statute and the 1971 wiretapping statute. Because the DOC has complied with the recording statute by use of an automatic tone warning device and, in most cases, a verbal notification preceding the call, it has violated neither the eavesdropping nor the wiretapping statutes.

Second. The recording and listening program of the DOC does not violate the Connecticut constitution.

Third. Three different DOC practices involving telephone calls between prisoners and their attorneys violate the Connecticut constitution. These practices are (1) the practice of some DOC staff members of remaining within listening range of attorney-client conversations, (2) the denial to prisoners of a reasonable opportunity to call their attorneys, and (3) the ten minute limit on the duration of attorney-client calls. The first practice is a violation of the federal constitution as well. An order enjoining these practices is set forth at the end of this opinion.

***45** *Fourth.* The DOC's review of outgoing mail does not violate the federal constitution.

Fifth. The AIDS testing and medical information statute has not been violated.

Sixth. Commissioner Meachum is not liable for monetary damages.

For these reasons, judgment shall enter in favor of the plaintiffs on the fifth and sixth counts, and in favor of the defendant on the first, second, third, fourth, seventh, eighth and ninth counts. Injunctive relief is granted on the fifth and sixth counts, but monetary relief is denied.

L. ***Order***

It is ordered that the Commissioner of Correction, his officers, and employees shall:

(1) In the absence of exigent circumstances, comply with the provision of Conn.Agencies Regs. § 18-81-46 that, after the staff member placing a privileged call has verified the identity of the person called and placed the inmate on line, "[t]he staff member shall then move out of listening range of the inmate's conversation." A staff member shall approach within listening range only if exigent circumstances require the privileged call to be interrupted or in order to terminate a call at the expiration of the time limitations described below.

(2) In the absence of exigent circumstances, honor requests by attorneys (including paralegals and law students working under an attorney's supervision) for

privileged calls to inmates either by the close of the first business day following the day on which correctional authorities receive the request or at the time specified by the attorney, whichever shall later occur. Such requests shall be honored without limitation as to number or frequency.

(3) In the absence of exigent circumstances, allow each inmate to make two privileged calls a month in addition to calls initiated by that inmate's attorney. This total does not include calls answered by busy signals but does include calls answered by a person or machine capable of taking a message. In the absence of exigent circumstances, an inmate request for a privileged call shall be honored either by the close of the first business day following the day on which correctional authorities receive the request or at the time specified by the inmate, whichever shall later occur.

(4) Allow privileged calls placed to state and federal public defender offices and Legal Assistance to Prisoners to be made toll free. This order does not extend to private attorneys handling particular cases as special public defenders or on a *pro bono* basis.

(5) Cease and desist from enforcing the provision of Conn.Agencies Regs. § 18-81-46 that privileged telephone calls "shall normally be limited to ten minutes duration." In the absence of exigent circumstances, privileged telephone calls may be limited to thirty minutes duration. In the absence of exigent circumstances, this limitation shall be increased at the specific oral or written request of the attorney.

(6) Nothing in this order prohibits the Commissioner, his officers, and employees from establishing reasonable hours within which privileged telephone calls can be made.

***46** (7) This order shall become effective thirty (30) days from the date of this decision.

(8) Any party seeking to modify this order prior to its effective date shall file a motion to modify within ten (10) days of the date of this decision. Argument on the motion shall be heard only if deemed appropriate.