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Electronic Monitoring of Probationers: A Step Toward Big Brother?

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ELECTRONIC MONITORING OF PROBATIONERS: A STEP TOWARD BIG BROTHER?

I. INTRODUCTION

Thirty-six years ago George Orwell penned his novel, *1984*, in which he told of one man's struggle against a totalitarian state which used technology to deprive its citizens of privacy in order to control them. The year 1984 has arrived and many of Orwell's scenarios have come to pass. The development of electronic surveillance methods in recent decades has done much to change traditional concepts of privacy and fourth amendment guarantees, particularly in the area of criminal law. Uses of such technology have been applied by law enforcement officers in many facets of criminal investigation. Such uses have run the gamut from bugs in telephone booths[1] and pen registers[2] to beeper tracking devices.[3] Electronic monitoring of prison inmates has often been viewed as constitutionally permissible and an effective way of maintaining prison security.[4]

Recently, high technology has found an application in the area of probation.[5] Although the probation technology does not

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1. Katz v. United States, 389 U.S. 347 (1967) (fourth amendment protects against warrantless searches conducted via bugging devices).

2. Smith v. Maryland, 442 U.S. 735 (1979) (the constitution has been interpreted to permit the government to order the telephone company to place a pen register on a customer's phone lines so that a list of all telephone numbers dialed may be obtained without a warrant).

3. United States v. Knotts,___U.S.___,103 S.Ct. 1081 (1983). The Court held that monitoring the signal of a beeper placed in a container of chemicals that were being transported to the owner's cabin did not invade any legitimate expectation of privacy on the cabin owner's part.

4. United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978); *C.f.*, DeLancie v. Superior court, 31 Cal. 3d 865, 647 P.2d 142, 183 Cal. Rptr. 866 (1982).

5. One court in New Mexico has recently instituted a program where probationers wear a monitoring device to enforce home curfew. Seattle Times/Post Intelligencer, June 26, 1983, at A4, Col. 1.

Lake County, Illinois had also begun using a similar device in its probation program. ABA J., Oct. 1983, at 1352. This program, however, will not be discussed in this comment.

parallel the intrusiveness of some of the previously mentioned electronic surveillance techniques, such an application of high technology may lead to greater intrusions on not only the privacy of persons convicted of crimes, but on society in general. This comment will discuss an existing probationer surveillance program in New Mexico, an analysis of electronic surveillance under the fourth amendment, post-conviction rights, and whether or not such a monitoring program is a valid condition of probation under federal and state statues.

II. The New Mexico Program

In lieu of a prison or jail sentence, Judge Jack Love of Division III of the Second Judicial District of New Mexico implemented a pilot project to electronically monitor persons convicted of drunk driving or white collar crime when such persons agree to participate in the program as a condition of probation.[6] The New Mexico Supreme Court reviewed the program and gave the judge its approval to continue the program so long as the privacy and dignity of the individuals and their families was protected.[7] Under the New Mexico program, the first probationer was sentenced to wear an electronic monitoring device while under home curfew.[8] The device, manufactured by the National Incarceration Monitor and Control Services (NIMCOS), monitors the presence or absence of probationers at any given time or location.[9]

The GOSSlink system operates via a transmitter which is strapped to the ankle of the person convicted and sentenced to home curfew or house arrest as an alternative to imprisonment.[10] A receiver is placed in the probationer's home which detects the presence or absence of the transmitter signal. When the microprocessor attached to the receiver detects a change in status, i.e., acquisition or loss of the signal, it calls a centrally located computer via the probationer's telephone.[11] The receiver will lose

6. *Id.*
7. *Id.*
8. NIMCOS, The National Incarceration Monitor and Control Services, Inc. report on its GOSSlink probationer monitoring device, at 2.
9. *Id.*
10. *Id.*
11. *Id.*

the signal at approximately one hundred and fifty feet. The central computer at the probation office records the arrival or departure times of the probationer and instructs the micro-processor to call the probationer's home at randomly selected times to ensure that the probationer has not circumvented the system.[12] The device is worn during the entire term of the probation period. The NIMCOS system has sensors which can detect whether its wearer has attempted to tamper with or remove the Gosslink. The probation department receives a printed report from the computer each morning detailing the probationer's arrivals, departures and any attempts at circumventing the system.[13]

Since the central computer at the probation department is able to note attempts to tamper with the system or times when the probationer failed to obey the home curfew terms of his or her probation, the probation department can take appropriate action.[14] Such an "early warning" system could save probation resources and improve the self-image of the probationer by limiting unnecessary home visits by probation officers.[15]

The current basic cost of the NIMCOS system is $100,000.00 per year.[16] The basic fee includes the cost of twenty-five monitoring units. Additional units may be obtained at a per unit cost of $1,000.00 per year. Judge Love and the authors of the NIMCOS literature believe that the system could save government money by providing an alternative to incarceration for less dangerous individuals.[17] Although the GOSSlink system may be a money-saving alternative to jail or prison, it remains to be seen whether such devices are constitutional or valid conditions of probation.[18]

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12. *Id.* at 1-2.
13. *Id.* at 2.
14. *Id.*
15. Kleinman, *Guess Who's Coming to Dinner: A Critical Look at Home Visits by Parole Officers*, 14 COLUM. HUMAN RIGHTS L. REV. 355, 375 (1982-83).

Kleinman states that parolees may suffer a lower self-image and, as a result, have a more difficult time rehabilitating themselves, because of parole surveillance. Since parolees are in a position similar to that of probationers, it is arguable that probationers may also have reduced self-image because of constant surveillance during their term of probation.

16. NIMCOS, *supra* note 5.
17. *Id.* at 4.
18. Seattle Times/Post Intelligencer, June 26, 1983, at A4, col. 1.

III. The Fourth Amendment and Electronic Technology

Courts analyzing uses of high technology have been forced to rethink many of their traditional notions of privacy. Originally, the fourth amendment was drafted to protect citizens from *physical* government intrusions into their homes.[19] Recently, courts have been faced with the dilemma of analyzing non-physical electronic intrusions by government officials under the Fourth Amendment. Much of the recent analysis of electronic surveillance has taken place in the context of *pre-conviction* investigatory uses by law enforcement agencies.

The Supreme Court's decision in *Katz v. United States*[20] marked a change in traditional fourth amendment analysis away from a theory based on property concepts to one grounded in notions of personal privacy. The *Katz* court recognized that surveillance, via an electronic bug placed on a public telephone booth, could constitute a search by the government, even though it did not constitute a "physical" invasion.[21]

Justice Harlan's concurring opinion in *Katz* announced a two-prong standard for determining whether a search had taken place for purposes of fourth amendment analysis. Harlan's ap-

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19. Warren & Brandis, *The Right to Privacy*, 4 Harv. L. Rev. 1983-220 (1980).

20. Katz, 389 U.S. 347.

21. *C.f.*, Lanza v. New York, 370 U.S. 139 (1962). In *Lanza*, the Supreme Court addressed a fourth amendment challenge to electronic interception of a conversation between a jail prisoner and visitor. The court concluded:

> [T]o say that a public jail is the equivalent of a man's "house" or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument. To be sure, the Court has been far from niggardly in construing the physical scope of Fourth Amendment protection. A business office is a protected area, and so may be a store. A hotel room, in the eyes of the Fourth Amendment, may become a person's "house," and so, of course, may an apartment . . . Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious 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.*

Id. at 143 (emphasis added).

Although *Katz* appears to have overruled the "protected area" analysis of *Lanza*, the court in U.S. v. Hearst, 563 F.2d 1331, 1335 (9th Cir. 1977) believed that the two decisions were compatible.

proach asks: (1) does the person have an actual expectation of privacy and (2) is that an expectation of privacy which society is prepared to recognize as reasonable.[22]

Courts have accepted the use of electronic monitoring systems in the form of beeper tracking devices in the area of pre-conviction police investigations.[23] The beepers, as they are called, emit periodic signals which are picked up by radio receivers in much the same way as the NIMCOS devices operate. Pre-conviction uses of the devices have included the attachment of beepers to persons, objects and automobiles for tracking by law enforcement agents. In such cases, the courts have concluded that the use of the beepers is permissible because the persons being tracked have held no reasonable expectation of privacy in their whereabouts.[24]

Although many courts have upheld the use of such beepers, several courts have noted the inherent dangers of beeper technology. In *United States v. Bobisink*,[25] the district court stated that indiscriminate electronic surveillance could be a prelude to "*1984*" networks of beepers used to monitor the movements of ordinary citizens for the "powers that be."[26] Such indiscriminate surveillance, according to the *Bobisink* court, would intrude upon the reasonable expectation of privacy an individual has in his or her movements.[27] Since the *Bobisink* court recognized a

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22. Katz, 389 U.S. at 361.

23. United States v. Knotts,___U.S.___, 103 S.Ct. 1081 (1983).

In *Knotts*, law enforcement officers attached a beeper to he inside of a five gallon drum of chloroform. The officers then monitored the movement of the drum from the store where it was purchased to the defendant's cabin. The Supreme Court upheld the use of the device stating that the defendant did not hold a reasonable expectation of privacy in the vehicle transporting the drum on public roads to the cabin. *See*, United States v. Moore, 562 F.2d 106 (1st Cir. 1979), *cert. denied sub. nom.*, Bobisink v. United States, U.S. 926 (1978); and United States v. Hufford, 539 F.2d 32 (9th CIr. 1976), *cert. denied*, 429 U.S. 1002 (1976) for other cases involving the pre-conviction uses of beeper devices.

24. *Id.*

25. United States v. Bobisink, 415 F.Supp. 1334 (D. Mass. 1976), *vacated and remanded*, 562 F.2d 106 (1977), *cert. denied*, 435 U.S. 926 (1978), *reaffirmed on remand*, 469 F.Supp. 453 (1979).

26. *Id.* at 1339.

27. *Id.*

Recognizing the inherent dangers of beeper devices the court stated:

> To allow such indiscriminate monitoring could conceivably be the prelude to sanctioning a "1984" network of such beepers connected to a master monitoring station which would keep

privacy interest in the movements of an individual, a probationer may also have such an interest, particularly when the movements monitored by the NIMCOS system are within the context of his own home.

The Ninth Circuit has also recognized the possibility that privacy interests will be limited by the use of beeper technology. In *United States v. Curtis*,[28] the court stated that law enforcement agencies should not have "carte blanche power to conduct indiscriminate surveillance" over citizens for unlimited periods of time.

Since courts, despite some concern that electronic surveillance invades privacy interest, have upheld such pre-conviction uses, it is likely that at least some applications of electronic surveillance in the post-conviction context will also be upheld.

IV. Post-Conviction and the Fourth Amendment

Katz involved the expectation of privacy an individual has prior to conviction.[29] A probationer stands in an entirely different position. The probationer stands convicted of a crime and has been sentenced after an adjudication of guilt. This section will discuss what, if any, expectation of privacy is retained by prisoners and probationers in the post-conviction context.

The Prisoner

Although courts have been slow to recognize prisoner rights, by the late 1960's courts began to scrutinize practices which deprived prisoners of basic human rights, including the fourth amendment right to be free from unreasonable searches and

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> track of each of our movements for the benefit of the powers that be. Certainly, the average, reasonable citizen, with the reasonable expectation of privacy, would take little solace in the fact that, while his every movement was recorded, his conversations were not.

Id.

28. *Id.* United States v. Curtis, 562 F.2d 1153, 1156 (9th Cir., 1977), *cert. denied*, 439 U.S. 910 (1978).

29. Katz, 389 U.S. 347.

seizures.[30] In addition, a trend may be underway in which courts will increasingly scrutinize prison practices which infringe upon prisoner privacy interests relating to personal property interests as well as the prisoner's interests in the freedom of expression and association.[31] Prison surveillance, however, has not been consistently held to as strict scrutiny as other prison practices have been.

In *United States v. Hearst*,[32] the Ninth Circuit discussed the constitutionality of a jail practice in which a prisoner's conversations with visitors were electronically taped. Although the court recognized that a prisoner is not deprived of all fourth amendment protections, the government has a weighty, countervailing interest in prison security and order which permits a jail to infringe on prisoner privacy to promote institutional security.[33] Two rationales have traditionally been given for such intrusions by prison officials. These rationales include the view that prisons are not "protected areas" and that prisoners do not have an expectation of privacy while incarcerated.[34]

The California Supreme Court recently recognized that prisoners in that state are accorded statutory privacy rights while incarcerated.[35] In *DeLancie v. Superior Court*,[36] a pretrial detainee[37] sued the San Mateo County jail for injunctive and declaratory relief from that jail's electronic surveillance procedures. The surveillance was conducted at the discretion of the jail administration for the alleged purpose of gathering incriminating evidence about the inmates.[38] The plaintiffs alleged that

30. Comment, *Electronic Surveillance in California Prisons after DeLancie v. Superior Court*, 22 SANTA CLARA L. REV. 1109, 1109 (1982).

31. *Id.* at 1122.

32. 563 F.2d 1331, 1344-1345 (9th Cir. 1977).

33. *Id.* at 1345-46 n.11; *See also* Comment, *Communications Behind Bars*, 4 COMMENT 327 (1982).

34. *See supra* note 30, at 1111.

35. DeLancie v. Superior Court, 31 Cal. 3d 865, 647 P.2d 142, 183 Cal. Rptr. 866 1982).

36. *Id.*

37. *Id.* Although this section discusses post-convictees, the Ninth Circuit in *Hearst* concluded that a distinction between pre-trial detainees and persons incarcerated after an adjudication of guilt was unnecessary because the concern in allowing jail surveillance is prison security, not the status of the prisoner. Hearst, 563 F.2d at 134-46 n.11.

38. DeLancie, 31 Cal. 3d at 869-70, 647 P.2d at 146-47, 186 Cal. Rptr. at 868-69.

their privacy rights under the California Constitution[39] as well as federal constitutional rights to free speech and to be free from cruel and unusual punishment had been violated. The plaintiffs also alleged that they had been subjected to a denial of equal protection and due process under the fourteenth amendment.[40]

The California Supreme Court, however, decided the case on California Penal Code Sections 2600 and 2601 which provide that a person sentenced to state prison may be deprived of only such rights, "as . . . necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public."[41]The court rejected the argument that prisoners had no expectation of privacy and concluded that the California Penal Code Sections 2600 and 2601 evidenced a protection of prisoner rights.[42]

Since the *DeLancie* court decided the case on statutory, rather than constitutional grounds, the breadth of *DeLancie*'s impact on the extension of prisoner privacy rights is unclear. *DeLancie*, however, in no way prohibits all electronic surveillance in the prisoner context. The court simply held that detainees could obtain relief if they could show that electronic surveillance in the jail did not have a justification in prison security.[43]

Although both the federal and California courts have recognized the government's interest in using electronic monitoring devices in the prison context,[44] the use of such devices has not been analyzed in the probation context where individuals are released into the community and reside in their own homes or half-way houses. The following section will discuss whether probationers have reasonable expectations of privacy under tradi-

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39. CAL. CONST. art. I, § I.

40. DeLancie, 31 Cal. 3d 865, 647 P.2d 142, 183 Cal. Rptr. 866.

41. CAL. PENAL CODE, § 2600 (West Supp. 1984).

42. DeLancie, 31 Cal. 3d at 877, 647 P.2d at 149, 183 Cal. Rptr. at 873.

43. *See supra*, note 30, at 1119.

44. In *Hearst*, the Ninth Circuit stated that "once the government establishes that the intrusion is for the 'justifiable purpose of prison security,' the Fourth Amendment is essentially resolved in its favor." Hearst, 563 F.2d at 1346, quoting United States v. Dawson, 516 F.2d 796, 806 (9th Cir.) *cert. denied*, 423 U.S. 855 (1975). The court noted that this approach reflects the federal court's " 'broad hands-off attitude toward problems of prison administration' and the traditional notions regarding official surveillance of prisoners" in relation to the reduction in the reasonable expectation of privacy held by a prisoner. Procunier v. Martinez, 416 U.S. 396, 404 (1974).

tional fourth amendment analysis.

The Probationer

Probation is looked upon as a privilege rather than a right.[45] A judge is not required to sentence a defendant to probation in lieu of prison and the judge is also given broad discretion in setting probation conditions in each case.[46] As the Supreme Court stated, "The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain."[47]

When probationers challenge their conditions of probation, they usually base their challenges on the federal constitution.[48] Irrespective of the constitutional challenges, the judicial response has been to note that probationers have a special status which permits courts to impose limitations upon the constitutional rights of probationers. The courts have however, required that such limitations upon probationer's rights be narrowly drawn to serve the legitimate goals of the probation system.[49]

In addition, such limitations on the constitutional rights of probationers are often premised on a theory of waiver. The waiver must be reasonably related to the legitimate policies and objectives of the government and there must be no substitute measures available.[50] The state, according to one commentator, can validly condition the receipt of the benefit of probation upon the waiver of the probationer's constitutional rights.[51]

The courts have used a balancing test to weigh the competing interests involved in probation conditions which affect fundamental rights.[52] The Ninth Circuit upheld probation conditions which inhibited the first amendment freedom of

45. Weissman, *Constitutional Primer on Modern Probation Conditions*, 8 NEW ENG. J. PRISON L. 367, 371 (1982); *See* Escoe v. Zerbst, 295 U.S. 490 (1935) for the traditional view of probation as an act of "grace" rather than a right.

46. *Id.*

47. Burns v. United States, 287 U.S. 216, 220 (1932).

48. N. COHEN & J. GOBERT, THE LAW OF PROBATION AND PAROLE 212 (1983).

49. *Id.* at 212-213.

50. *See supra* note 45, at 372, 373.

51. *Id.*

52. *Id.*

association rights of a probationer in *Malone v. United States*.[53] The probationer in Malone was convicted of the unlawful exportation of firearms to Ireland. The trial court suspended the defendant's sentence and placed him on probation. The terms of the probation included a prohibition on participating in or belonging to any Irish groups or organizations.[54]

Malone contested the conditions on the basis of the First Amendment's freedom of association clause. The Ninth Circuit, however, upheld the condition stating that there was a "reasonable nexus" between the conditions and the goals or probation.[55] The court stated that an individual's right to freedom of association could be reasonably restricted as part of his sentence to prevent future criminal conduct.[56]

Particularly onerous conditions of probation led the Ninth Circuit, to invalidate probation conditions as being violative of the eight amendment's proscription against cruel and unusual punishment in *Dear Wing Jung v. United States*.[57] In another challenge to probation conditions, the Ninth Circuit held that conditions which required the probationer to work at a veteran's hospital, pay a fine of fifty dollars per month and donate a pint of blood to the Red Cross were constitutional.[58] In *Springer v.*

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53. Malone v. United States, 502 F.2d 554 (9th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975).

54. Malone, 502 F.2d at 555.

The conditions of probation imposed upon Malone included that: 1) He obey all local, state and federal laws; 2) he comply with the rules and regulations of the probation office; 3) he not participate in any American Irish Republican movement; 4) he belong to no Irish organizations, cultural or otherwise; 5) he not participate in any Irish Catholic organizations or groups; 6) he not visit any Irish pubs; 7) he accept no employment that directly or indirectly associated him with any Irish organization or movement; and 8) he pay a fine imposed by the court. *Id.*

55. *Id.* at 556.

56. *Id.* at 556-557.

57. Dear Wing Jung v. United States, 312 F.2d 73 (9th Cir. 1962)

In *Dear Wing Jung*, the defendant had been convicted of making false statements to the INS about his wife. The trial court imposed a suspended sentence upon the defendant on the condition that he leave the United States. The Ninth Circuit stated that the government's condition would force the probationer to "choose" to leave his wife and children in the United States without any hope of return. Such a condition, the court concluded, would constitute "banishment." The court stated that such a condition constituted either cruel or unusual punishment or a denial of due process which rendered the condition unconstitutional. *Id.* at 76.

58. Springer v. United States, 148 F.2d 411 (9th Cir. 1945).

United States,[59] the court held that such conditions did not violate the eight amendment's prohibition of cruel and unusual punishment because the conditions of probation are intended to be "ameliorations" of the punishment prescribed by law for the offense committed.

Although probationers have been accorded some fourth amendment protections, the courts have permitted restrictions on fourth amendment rights in the probation context when such restrictions are necessary to achieve the goals of probation.[60] Although an invasion of a probationer's privacy may be warranted by the given nature of the probationer's underlying criminal behavior,[61] it has been suggested that courts fairly accommodate the state interests in public safety, rehabilitation and deterrence as well as the personal liberty interests of the probationer.[62] In formulating probation conditions, the courts should select conditions designed to achieve designated penal aims, consider a variety of existing options, design conditions which are proportional to the underlying crime and attempt to maximize the benefits of the probation function.[63]

From the foregoing discussion, it would seem that although probationers do not possess the full panapoly of constitutional rights enjoyed by the average citizen, courts have protected probationer rights in certain instances. Read in conjunction with the prisoner rights cases, it is possible that the courts may recognize that probationers retain an expectation of privacy which might preclude electronic surveillance when such monitoring fails to satisfy an articulated "security" interest or if such monitoring fails to rehabilitate or deter future criminal conduct.[64]

The intrusiveness of the NIMCOS system on the probationer must be weighed against the alternatives awaiting that probationer. While the NIMCOS device allows the probation department to know when a probationer is at home, it does not communicate the probationer's conversations or the conversa-

59. *Id.*
60. United States v. Consuelo-Gonzales, 521 F.2d 259 (9th Cir. 1975).
61. *Id.*
62. *See supra* note 45, at 391-92.
63. *Id.*
64. DeLancie, 31 Cal. 3d 865, 873 648 P.2d 142, 147, 183 Cal. Rptr. 866, 871.

tions of third parties to the probation office. The NIMCOS system does not track the probationer around town, allowing the probation department to know with whom the probationer visits or speaks to throughout the course of a day. Additionally, the intrusiveness of the NIMCOS must be viewed in light of the probationer's alternative of spending time behind bars. It can therefore be argued that the probationer has waived his fourth amendment rights in exchange for leniency.

While the NIMCOS device may appear to be an attractive alternative to incarceration or other more intrusive methods of surveillance, the issue which should really be addressed by persons engaged in the criminal justice system is whether or not electronic monitoring via the NIMCOS device serves legitimate goals of probation systems. Will such a device protect the public, deter future criminal conduct and serve to rehabilitate the probationer? Or will such a system be an excuse for cutbacks on probation services, such as psychological counseling, job training, community service and other programs? In order for conditions of probation to be upheld by courts as "reasonable," apart from constitutional requirements, courts have also required that such conditions further the goals of probation, i.e., public safety and rehabilitation. These may be grounds for invalidating electronic monitoring systems when such devices pass constitutional muster.

V. Federal Probation Goals and Conditions

Probation, as an alternative to incarceration, is provided for in federal law under Title 18, United States Code, section 3651. The statute states that for offenses not punishable by death, the court may impose probation conditions which will best serve the public as well as the interests of the defendant.[65] The purposes of this act include the protection of the public safety as well as the rehabilitation of the individual defendant.[66]

Although the trial court has wide discretion over the impo-

65. 18 U.S.C. § 3651 (1979).

66. United States v. Pierce, 561 F.2d 735, 739 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978).

sition of probation conditions,[67] the conditions must reasonably aid the purposes of public safety and rehabilitation.[68] Probationers, as previously pointed out, do not possess the full panapoly of constitutional rights enjoyed by ordinary citizens.[69] Therefore, the courts may impose conditions on probationers which would be considered violations of constitutional rights if applied to non-convicted citizens.

The Ninth Circuit has upheld probation conditions which infringe on the privacy of probationers when such conditions carry out the dual purposes of rehabilitating the defendant and protecting the public.[70]

The Ninth Circuit, however, refused to uphold a search condition imposed on a probationer because the condition was too broad. It allowed law enforcement officers to conduct searches of the probationer and her property around the clock. Such a condition was found to be unreasonable.[71] In *United States v. Consuelo-Gonzales*, the court stated, "[t]hat when fundamental rights are curbed [by probation conditions, they] must be done sensitively and with a keen appreciation that the infringement must serve the broad purposes of the Probation Act."[72] The court was unable to find any justification for such a gross infringement on the probationer's privacy because the condition was totally unrelated to her conviction for heroin possession and that such searches would not contribute to the probationer's re-

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67. United States v. Kahl, 583 F.2d 1351 (5th Cir. 1978); United states v. Arhtur, 602 F.2d 660 (4th Cir. 1979).

68. United States v. Consuelo-Gonzales, 521 F.2d 259 (9th Cir. 1975); United States v. Pierce, 561 F.2d 735.

69. *Id.*

70. Pierce, 561 F.2d at 739-740.

The defendant in *Pierce* pled guilty to a federal tax evasion charge. Although the petitioner in *Pierce* argued that compulsion to reveal such information would result in self-incrimination, the court held that the condition was valid because it carried out the dual purposes of rehabilitating the defendant and protected the public. *Id.* at 738.

71. Consuelo-Gonzales, 521 F.2d at 262-263.

72. *Id.* at 265; *See also* United States v. Gordon, 540 F.2d 452, 453 (9th cir. 1976), in which the Ninth Circuit upheld a probation condition which required the probationer to submit to warrantless searches of his home, person or vehicle at any hour of the day or night by law enforcement officers. Gordon was convicted of carrying firearms as a felon as well as possession of a controlled substance. The court held that the search condition reasonably contributed to both the rehabilitation of the convict and to the protection of the public. The court, citing *Consuelo-Gonzales*, stated that Gordon's's probation condition was reasonable under the fourth amendment. *Id.*

habilitation. The court concluded, "A probationer . . . has the right to enjoy a significant degree of privacy."[73]

Electronic monitoring of probationers may be too high a price to pay for probation. Electronic surveillance in its most intrusive sense has been likened to the "general searches" which were at the root of fourth amendment protections.[74] While the NIMCOS device which is presently in existence may not appear to constitute a great intrusion into the personal privacy of the probationer, it does not appear that the NIMCOS device promotes the federal probation goals of rehabilitation and public safety. In its present application to drunk drivers and white collar criminals, the device may encourage the probationer to remain at home, but in and of itself, the device does nothing to prohibit the drunk driver from drinking or driving. Nor does the device necessarily restrain the misdeeds of white collar criminals who may continue their illegal business at home with the help of their personal computers.

Standing alone, the NIMCOS system does not promote public safety or rehabilitation. The device, may, however, achieve federal probation goals when used in conjunction with narrowly tailored goals and objectives directed at a particular probationer. In the absence of such additional conditions, the device should not be used exclusively as a cost-saving measure to support cuts in programs geared toward rehabilitative and public safety goals.

VI. State Probation Goals and Conditions

Search conditions have been imposed on probationers and upheld as valid by courts in New Mexico[75] and California.[76] The search conditions which have been imposed by the state courts have included searches by law enforcement officers as well as by probation officers.[77]

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73. Consuelo-Gonzales, 521 F.2d at 265; *see also* Morrisey v. Brewer, 408 U.S. 471, 482 (1972).

74. Comment, *Electronic General Searches*, 22 Santa Clara L. Rev. 993, 1000 (1982).

75. State v. Garner, 95 N.M. 171, 619 P.2d 847 (N.M. Ct. App. 1980).

76. People v. Knox, 95 Cal. App. 3d 420, 157 Cal. Rptr. 238 (1979).

77. People v. Natale, 77 Cal. App. 3d 568, 143 Cal. Rptr. 629 (1978). (This case involved a search by an officer with the permission of a parole officer.)

Some authorities raise serious doubts about the constitutionality of wide-scale searches performed as a condition of probation. Neil P. Cohen and James J. Gobert state that search conditions diminish the probationer's privacy as well as the privacy of third parties present during a search of the family home or automobile.[78] One advantage of the NIMCOS system is that it would limit its surveillance to the probationer and not intrude upon third persons.

Although there are few statutes authorizing search conditions within states, in many instances, courts do require that such conditions promote goals of rehabilitation, deterrence and public safety as is the case in the federal system.[79]

Since the goals of state probation systems are very similar to those employed by the federal system, the same considerations of the NIMCOS system are applicable to a state law analysis. Unless the system is accompanied by additional conditions which promote public safety and rehabilitation, the NIMCOS-type electronic monitoring system may be invalid as a condition of probation within the states.

VII. CONCLUSION

At a time when federal and state prisons and jails are facing severe problems with overcrowding and decreased funding, alternatives to incarceration should be considered. Knee-jerk responses which are not responsive to the promotion of public safety, deterrence or rehabilitation of probationers should not be automatically implemented just because they are economically feasible.

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78. COHEN & GOBERT *supra* note 48, at 225; State v. Gardner, 95 N.M. 171, 619 P.2d 847 (N.M. Ct. App. 1980).

79. The court in In re Martinez, 86 Cal. App. 3d 577, 150 Cal. Rptr. 366 (1978), on the other other hand, came to a different conclusion when presented with a probation search condition. The court refused to uphold a general search condition because the search of the probationer's person or possessions would not, unlike the situations involving convictions for drug possession, further the goals of probation. *Id.*

The New Mexico appeals court upheld a search condition imposed on a person convicted of drug possession. In State v. Gardner, the court concluded that a search condition was reasonably related to the underlying offense because the condition was aimed at deterring or discovering subsequent narcotics use or possession by the defendant. 95 N.M. 171, 619 P.2d 847 (N.M. Ct. App. 1980).

The NIMCOS-type monitoring system deserves closer scrutiny by the criminal justice system before widespread application. Such a system, which could result in more far reaching and more intrusive surveillance methods, should not be viewed as a cure-all solution for prison over-crowding. Courts, practitioners and probation officials should also ask whether or not such a device and its technology should be allowed to further erode traditional notions of privacy under the fourth amendment. Courts and practitioners should also concern themselves with the possibilities for abuse which make such surveillance devices a step toward *1984* networks which could operate to deprive not only probationers of their privacy, but may also work to deny ordinary citizens of their right to be free from unreasonable government intrusions into their private lives.

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