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NOTE

AN UNREASONABLE ONLINE SEARCH: HOW A SHERIFF'S WEBCAMS STRENGTHENED FOURTH AMENDMENT PRIVACY RIGHTS OF PRETRIAL DETAINEES

INTRODUCTION

Self-described as the “toughest sheriff in America,” Sheriff Joe Arpaio of Arizona’s Maricopa County is known for implementing controversial programs for jail inmates.¹ His programs include making inmates wear pink underwear, eat green bologna, and confining them in a “tent city” outside while using the jailhouse as an animal shelter.² Sheriff Arpaio has created the nation’s first all-female chain gang and has recently started the nation’s first all-juvenile chain gang.³ He has also created

¹ See Elvia Diaz, *Arpaio Easily Beats GOP Challenger Saban*, THE ARIZONA REPUBLIC, Sep. 8, 2004, at B5, available at 2004 WL 90090953; see also Maricopa County Sheriff’s Office Homepage, at <http://www.mcso.org/submenu.asp?file=aboutsheriff&page=1> (last visited Feb. 10, 2005).

² See Maxim Kniazkov, *Toughest US Sheriff Fights Crime with Pink Underwear*, AGENCE FRANCE PRESSE, Feb. 4, 2004, available at 2004 WL 69946501; see also Michael Tierney, *Women in Chains*, THE HERALD, Dec. 6, 2003 at 6 (noting bologna turns green when not properly mixed; air gets into the meat, resulting in oxidation), available at 2003 WL 69410223.

³ Quynh Tran, *Arpaio Ready to Start Chain Gangs for Teens*, THE ARIZONA REPUBLIC, Mar. 6, 2004, at B1, available at 2004 WL 71704990; see also Maricopa County Sheriff’s Office Homepage, *supra* note 1. Both male and female chain gangs

the cheapest inmate meals in the country, averaging less than 20 cents per meal.⁴ In July of 2000, Sheriff Arpaio installed webcams in one of his jails and streamed live images of detainees over the world-wide web.⁵ When the Sheriff announced the installation, he proclaimed, “[w]e get people booked in for murder all the way down to prostitution.... When those johns are arrested, they can wave to their wives on the camera.”⁶

The jail exclusively houses people who have been arrested, but have not yet been found guilty of their charged offenses.⁷ Twenty-four former detainees sued the Sheriff to have the webcams removed, alleging the webcam policy violated their constitutional rights against pretrial punishment.⁸ In *Demery v. Arpaio*, the Ninth Circuit considered the detainees’ claims, and held that broad exposure of their daily activities in confinement amounted to punishment.⁹ Sheriff Joe Arpaio has justified his policies on the basis that they save taxpayer money, educate the public, and improve the level of discipline necessary to run a safe correctional facility.¹⁰ Nevertheless, policies that benefit society at the expense of inmates not yet convicted of a crime raise Due Process issues.

This Note will discuss how courts approach pretrial detainees’ claims of punishment, exploring both Fourteenth Amendment Due Process claims and privacy rights under the Fourth Amendment. It will go on to discuss *Demery’s* implications for Fourth Amendment privacy rights of pretrial detainees. Part I explores the protections pretrial detainees are afforded under the Fourteenth Amendment Due Process Clause.¹¹ Part 1.A discusses the general differences between pretrial detainees and convicted prisoners.¹² Part I.B considers two Supreme Court cases – *Bell v. Wolfish* and *Block v. Rutherford* – that address the standards used in evaluating punishment

provide the community with “thousands of dollars of free labor” by cleaning the streets, painting over graffiti, and burying the indigent in the county cemetery. *Id.*

⁴ *Id.*

⁵ *Demery v. Arpaio*, 378 F.3d 1020, 1024 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3462 (U.S. Jan. 19, 2005) (No. 04-983).

⁶ *Id.* at 1024.

⁷ *Id.*

⁸ *Id.* at 1025.

⁹ *Id.* at 1033.

¹⁰ See Maricopa County Sheriff’s Office Homepage, *supra* note 1.

¹¹ See *infra* notes 18 to 100 and accompanying text.

¹² See *infra* notes 18 to 35 and accompanying text.

claims in a pretrial detention context under the Due Process Clause.¹³ Part I.C explores the Fourth Amendment and privacy rights in general.¹⁴ This section also discusses the level of protection prisoners and pretrial detainees are afforded under the Fourth Amendment after *Hudson v. Palmer*.¹⁵ This Note considers the interactions between these lines of cases in order to clarify the actual scope of privacy rights retained by pretrial detainees. Part II of the Note will examine the factual history and majority and minority opinions in *Demery*.¹⁶ Finally, Part III will discuss the impact *Demery* may have on pretrial detainees' privacy rights under the Fourth Amendment.¹⁷

I. BACKGROUND

A. PRETRIAL DETAINEES DISTINGUISHED FROM CONVICTED PRISONERS

Pretrial Detainees are people who have been arrested for an alleged criminal offense and are in jail awaiting trial.¹⁸ They are detained prior to trial because they do not qualify for release on personal recognizance or bail.¹⁹ Accordingly, pretrial detainees are confined for the sole purpose of assuring of their presence at trial.²⁰ Convicted inmates, on the other hand, are those who have been found guilty of a criminal offense.²¹ Unlike pretrial confinement, the purposes served by confining convicted prisoners are retribution, rehabilitation, deterrence, and prevention.²²

¹³ See *infra* notes 101 to 127 and accompanying text.

¹⁴ See *infra* notes 128 to 219 and accompanying text.

¹⁵ See *infra* notes 107 to 127 and accompanying text.

¹⁶ See *infra* notes 220 to 239 and accompanying text.

¹⁷ See *infra* notes 218 to 236 and accompanying text.

¹⁸ *Bell v. Wolfish*, 441 U.S. 520, 523 (1979).

¹⁹ *Norris v. Frame*, 585 F.2d 1183, 1184 (3rd Cir. 1978). See BLACK'S LAW DICTIONARY 1299 (8th ed. 2004) (defining "personal recognizance" as "[t]he release of a defendant in a criminal case in which the court takes the defendant's word that he or she will appear for a scheduled matter or when told to appear.")

²⁰ *Boring v. Kozakiewicz*, 833 F.2d 468, 477-478 (1987) (Gibbons, C. J., dissenting).

²¹ BLACK'S LAW DICTIONARY 358 (8th ed. 2004) (defining "convict" as "to find a person guilty of a criminal offense upon a criminal trial, a plea of guilty, or a plea of nolo contendere (no contest)." *Id.*

²² See generally James L. Esposito, Comment, *Virtual Freedom-Physical Confinement: An Analysis of Prisoner Use of the Internet*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 39, 59-65 (2000).

Although not yet convicted of any crime, pretrial detainees are subject to curtailed constitutional privacy rights while detained.²³ The Supreme Court has held that restrictions on constitutional rights are necessary to maintain security within jails and prisons.²⁴ For example, the government may impose restrictions to ensure that inmates do not obtain weapons or illicit drugs.²⁵ The Supreme Court has rejected the notion that pretrial detainees pose a lesser security risk than convicted inmates.²⁶

Neither convicted inmates nor pretrial detainees lose all of their civil rights when they are lawfully confined.²⁷ Among the rights they retain is a diminished expectation of privacy under the Fourth Amendment, and rights under the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution.²⁸ While it is unclear whether pretrial detainees retain more rights than convicted prisoners, the Supreme Court has stated that pretrial detainees retain “at least” those constitutional rights enjoyed by convicted prisoners.²⁹ While this suggests pretrial detainees retain more constitutional rights than convicted prisoners, the Supreme Court has

²³ *Bell*, 441 U.S. at 545, 546 fn. 28.

²⁴ *Id.* at 540.

²⁵ *Id.*

²⁶ *Id.* at 546 fn. 28. The Court suggested that pretrial detainees may occasionally pose an even greater security risk than convicted inmates:

“In the federal system, a detainee is committed to the detention facility only because no other less drastic means can reasonably assure his presence at trial.... As a result, those who are detained prior to trial may in many cases be individuals who are charged with serious crimes or who have prior records. They also may pose a greater risk of escape than convicted inmates.” *Id.*

See also, *Valencia v. Wiggins*, 981 F.2d 1440, 1446 (5th Cir. 1993) (“[I]t is impractical to draw a line between convicted prisoners and pretrial detainees for the purpose of maintaining jail security.”).

²⁷ *Houchins v. KQED, Inc.*, 438 U.S. 1, 5 n.2 (1978).

²⁸ *Bell*, 441 U.S. at 557; U.S. Const. amend. 14; see also, *Wolff v. McDonnell*, 418 U.S. 539 (1974) (holding prisoners enjoy the protections of Due Process).

²⁹ *Bell*, 441 U.S. 520, 545. For an argument favoring higher standards of treatment for pretrial detainees, see Gary Wood, Note, *Recent Applications of the Ban on Cruel and Unusual Punishments: Judicially Enforced Reform of Nonfederal Penal Institutions*, 23 HASTINGS L.J. 1111, 1128 (citing *Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark. 1971) (“It is clear that the conditions for pretrial detention must not only be equal to, but superior to, those permitted for prisoners serving sentences for the crimes they have committed against society.”) *Id.* at 1191.

declined to elaborate further.³⁰ One clear distinction between pretrial detainees and convicted prisoners is that only pretrial detainees receive protection against punishment under the Fourteenth Amendment's Due Process Clause.³¹

Government action constitutes punishment when (1) that action causes the inmate to suffer some harm or "disability," and (2) the purpose of the action is to punish the inmate.³² Punishment also requires that the harm or disability be significantly greater than, or be independent of, the inherent discomforts of confinement.³³ The Due Process Clause prohibits the punishment of pretrial detainees.³⁴ Convicted prisoners, however, may be punished so long as the punishment is not cruel and unusual.³⁵

B. FOURTEENTH AMENDMENT DUE PROCESS AND PUNISHMENT

Under the Fourteenth Amendment's Due Process Clause, states may not punish detained persons until they are found guilty of a crime.³⁶ The Fourteenth Amendment does not, how-

³⁰ See Gabriel M. Helmer, *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L. REV. 239, 258 (2001).

³¹ *Bell*, 441 U.S. at 535. Conversely, convicted prisoners may be punished so long as the punishment does not rise to the Eighth Amendment's "cruel and unusual" standard. *Id.* at n.16. See also, *Sandin v. Conner*, 515 U.S. 472 (1995) (stating that punishing convicted inmates "effectuates prison management and prisoner rehabilitative goals.") *Id.* at 485.

³² *Bell*, 441 U.S. at 538; but see, *Hart v. Sheahan*, 2005 WL 221963 (7th Cir. 2005) (Posner, J.) (noting that it is "unclear" as to "why proof of a punitive purpose should be necessary Punishment is not the only possible motive for brutal treatment. But whatever the motive is, if the brutal treatment is gratuitous, due process in its substantive sense has been violated.") *Id.* at *3.

³³ See *id.* at 537. See also *Fischer v. Winter*, 564 F. Supp. 281, 291 (N.D. Cal. 1983) (noting that inherent conditions of confinement include being in close quarters with mentally disturbed inmates, and a lack of physical security, as violence is a "fact of life in a jail"); *O'Bryan v. Saginaw County, Mich.*, 529 F. Supp. 206, 215 (E.D. Mich. 1981), *aff'd*, 741 F.2d 283 (6th Cir. 1984) (noting that inability to touch, embrace or kiss and converse without a barrier during visitation is an inherent incident of incarceration).

³⁴ *Bell*, 441 U.S. at 535. See also, *Hart*, 2005 WL 221963, at *3 ("Punishment' ... is really just a name for unreasonably harsh treatment meted out to inmates who have not yet been convicted of any crime.")

³⁵ *Bell*, 441 U.S. at 537 n.16.

³⁶ *Id.* at 535; U.S. Const. amend. XIV. The Fourteenth Amendment provides: "No State shall...deprive any person of life, liberty, or property, without Due Process of law...." See also *Hart*, 2005 WL 221963, at *2 ("The 'liberty' that the due process clauses secure against deprivation without due process of law includes not only the

ever, prohibit punishment of detainees altogether; jail officials may punish detainees for bad behavior or other disruptive acts committed while detained, but not for the crimes that led to their detention.³⁷ Pretrial detainees seeking to raise punishment claims must do so under the Fourteenth Amendment.³⁸

The major Supreme Court case to address punishment claims raised by pretrial detainees was *Bell v. Wolfish*.³⁹ In *Bell*, jail administrators implemented several regulations designed to maintain order and institutional security within the jail.⁴⁰ The detainees claimed these regulations were excessive and amounted to impermissible punishment.⁴¹ The Court formulated a test to determine whether a policy constitutes a regulation or punishment.⁴² The regulations must be reasonably related to maintaining security, and must not be excessive in achieving that purpose.⁴³ The Court also noted that administrators of correctional institutions should be given “wide-ranging deference” in the adoption and execution of policies.⁴⁴ The Supreme Court readdressed pretrial detainees’ punishment claims in *Block v. Rutherford*.⁴⁵ *Block* reiterated that courts were to play a “very limited role” in assessing the constitutionality of a challenged regulation, and should defer to corrections officials’ “expertise.”⁴⁶ In each case, the challenged jail policies were held to be reasonable.⁴⁷

right to be free, which pretrial detainees do not have, but also the right to bodily integrity, which they do.”)

³⁷ See, e.g., *Collazo-Leon v. United States Bureau of Prisons*, 51 F.3d 315 (1st Cir. 1995) (holding that jail’s punishment of detainee who attempted to escape and bribed a guard to induce his assistance in escape was proper); *Blakeney v. Rusk County Sheriff*, 89 Fed. Appx. 897 (5th Cir. 2004) (holding jail’s punishment of detainee by confining him to a chair for twenty hours was appropriate where detainee flooded and set fire to his cell), available at 2004 WL 442672.

³⁸ *Bell*, 441 U.S. at 537 n.16; see also, *Ingraham v. Wright*, 430 U.S. 651 (1977) (holding that the Eighth Amendment prohibits cruel and unusual punishment against those already convicted of a crime).

³⁹ *Bell*, 441 U.S. 520.

⁴⁰ *Id.* at 528-29.

⁴¹ *Id.* at 526.

⁴² *Id.* at 538-39; see *infra* notes 66-68 and accompanying text.

⁴³ *Id.* at 538.

⁴⁴ *Id.* at 547.

⁴⁵ *Block v. Rutherford*, 468 U.S. 576 (1984).

⁴⁶ *Id.* at 584.

⁴⁷ *Id.* at 591; *Bell*, 441 U.S. at 562.

1. *Bell v. Wolfish – Punishment Distinguished from Regulation*

Bell v. Wolfish was the first Supreme Court case to outline the constitutional restrictions and conditions of pretrial confinement.⁴⁸ Pretrial detainees at the New York City Metropolitan Correctional Center brought a class action lawsuit against the Center's administrator, claiming that several of the jail's conditions amounted to impermissible punishment.⁴⁹ Among other conditions, the inmates complained of "double-bunking," a "publisher-only" rule, and a prohibition against inmates receiving packages of food and personal items from outside the jail.⁵⁰ Inmates also challenged a rule requiring them to remain outside of their rooms during routine "shakedown" inspections.⁵¹ Finally, they challenged the jail's practice of conducting visual body-cavity searches of inmates following contact visits.⁵²

The Court determined that each practice was rationally related to a legitimate regulatory purpose.⁵³ Addressing the double-bunking rule, Justice Rehnquist, writing for the majority, noted that the "one man, one cell" principle did not exist in the constitution.⁵⁴ While the Court admitted the sleeping space was "rather small," the detainees spent minimal time in their cells and were not detained in the jail long enough for the conditions to be called punishment.⁵⁵ The publisher-only rule was a rational response to the security problem of preventing the

⁴⁸ Dennis D. Cohen, Comment, *Substantive Due Process Rights of Pretrial Detainees after Bell v. Wolfish*, 65 IOWA L. REV. 818, 819 (1979-1980).

⁴⁹ *Bell*, 441 U.S. at 523.

⁵⁰ *Id.* at 528, 529.

⁵¹ *Id.* at 554-555. A "shake-down" is when all inmates are cleared from their residential units while a team of guards searches each room. *Id.*

⁵² *Id.* at 555, 558 n.39. These searches were required on less than probable cause. After contact visits, males were required to lift their genitals and bend over to spread their buttocks for visual inspection. The vaginal and anal cavities of female inmates were also inspected. *Id.*

⁵³ *Id.* at 560-561.

⁵⁴ *See id.* The "Double-bunking" practice consisted of replacing single-bunks with double-bunks in individual rooms. Thus, rooms originally intended for single occupancy were used as sleeping quarters for two inmates.

⁵⁵ *See id.* at 543-544. The detainees spent only 7 or 8 hours, usually sleeping at night, in their cells. The length of detention lasted generally a maximum period of 60 days.

smuggling of contraband in books sent from outside.⁵⁶ Books sent directly from the publisher were much less likely to contain money, drugs, or weapons hidden in the bindings.⁵⁷ The ban on receiving outside packages was rational for similar reasons.⁵⁸ Additionally, allowing outside packages would require substantial resources to inspect all contents of every package for contraband.⁵⁹ The policy of conducting unannounced shake-downs in the detainees' absence was rational because it facilitated a safe and effective way to search the cells.⁶⁰ Finally, the visual body cavity searches were held to be rational because the searches effectively mitigated the danger of detainees smuggling contraband into the jail.⁶¹ Thus, all of the challenged conditions were held to be permissible regulations, implemented to further the legitimate governmental objectives of security and order.⁶²

The Court discarded the notion that a detainee's subjective feelings (i.e., that she *feels* punished) are relevant in analyzing the constitutionality of a regulation.⁶³ Detention inevitably interferes with a detainee's desire to live comfortably.⁶⁴ The fact that the restrictions inherent in detention intrude on that desire does not convert those restrictions into punishment.⁶⁵ Nevertheless, in some instances, courts may infer from the presence of arbitrary or purposeless restrictions that intent to punish exists.⁶⁶ The Court formulated a test to determine whether jail administrators' actions constitute a punishment or a regulation.

In determining whether a certain condition constitutes a regulation or a punishment, courts look to whether there was

⁵⁶ *Id.* at 550-552. The "publisher-only" rule prohibited inmates from receiving hard-cover books not mailed directly from publishers.

⁵⁷ *Id.* at 551.

⁵⁸ *Id.* at 555.

⁵⁹ *Id.* at 553.

⁶⁰ *Id.* at 556-557. The Court rejected the claim that the searches in the detainees' absence violated their Fourth Amendment rights. The Court noted that, even assuming the detainees had an expectation of privacy in their cells, permitting them to watch the searches in no way lessened the invasion of privacy. *Id.*

⁶¹ *Id.* at 558-562

⁶² *Id.* at 560-561.

⁶³ *Id.* at 537

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 539.

an express intent to punish.⁶⁷ Absent an express intent to punish, courts ask whether the restriction may be rationally connected to serving the alternative, nonpunitive purpose assigned to it.⁶⁸ If the restriction is rationally related to the alternative purpose, but appears excessive in relation to that purpose, courts will infer intent to punish.⁶⁹ Thus, jail officials are not required to use the least imposing security measure; they must only refrain from implementing a restriction that appears excessive to the purpose it serves.⁷⁰ In addition, the *Bell* majority expressly discouraged courts from skeptically questioning challenged restrictions.⁷¹ In applying the above test, courts were commanded to afford administrators “wide-ranging deference” in implementing policies to maintain institutional security.⁷² Thus, *Bell* is known as the beginning of the “Deference Period.”⁷³

2. *Block v. Rutherford*

In *Block v. Rutherford*, the Supreme Court made it clear that the *Bell* test was to be applied in strong deference to jail administrators.⁷⁴ The Court encouraged lower courts to refrain from second-guessing correctional officials about allegedly ex-

⁶⁷ *Id.* at 538 n.4.

⁶⁸ *Id.*

⁶⁹ *Id.*, (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)). The *Bell* test is restricted to claims by pretrial detainees. In addressing claims of constitutional violations by convicted prisoners, courts make a four-part inquiry into the “reasonableness” of a challenged prison regulation under *Turner v. Safley*, 482 U.S. 78 (1987): (1) There must be a “valid, rational connection” between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right that remain open to prison inmates; (3) the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally, and (4) the absence of ready alternatives is evidence that a prison regulation is reasonable. *Id.* at 89-90.

⁷⁰ *Bell*, 441 U.S. at 559 n.40. (noting that the existence of less restrictive alternatives to body-cavity searches (i.e., use of metal detection, more closely monitoring contact visits, or banning contact visits altogether) does not render the body-cavity search policy unreasonable).

⁷¹ *Id.* at 547.

⁷² *Id.*

⁷³ See Jack E. Call, *The Supreme Court and Prisoners' Rights*, 59 FED. PROBATION 36 (1995). (“Historically, the Supreme Court case law on prisoners' rights can be divided into three periods: 1) the Hands-Off Period (before 1964), 2) the Rights Period (1964-78), and 3) the Deference Period (1979-present).”)

⁷⁴ *Block*, 468 U.S. at 584.

cessive practices.⁷⁵ The Court once again reversed a Ninth Circuit case which held that detainees were punished unconstitutionally.⁷⁶ In *Block*, pretrial detainees brought a class action lawsuit against county jail officials alleging that many of the jail's policies violated Due Process under the Fourteenth Amendment.⁷⁷ Two of the policies made it to the Supreme Court: the prohibition of contact visits with the detainees' spouses, children, and friends, and the policy of conducting irregularly scheduled shakedown searches of cells when occupants were absent.⁷⁸ The district court for the Central District of California sustained these challenges, and ordered the jail to allow low-risk detainees contact visits and permit them to watch searches of their cells.⁷⁹ On appeal, the Ninth Circuit remanded.⁸⁰ The court noted that the existence of less restrictive security measures was not proof of an exaggerated response to security concerns.⁸¹

On remand, the district court reaffirmed its previous orders, reasoning that although the jail authorities did not consciously intend to punish, the practices in question were nevertheless excessive.⁸² On second appeal, the Ninth Circuit was satisfied that the district court properly accorded the jail conditions "thorough review" as mandated by *Bell*.⁸³ The court affirmed the contact-visit and cell-search orders.⁸⁴ The Court of Appeals pointed out that the district court judge based his decision concerning the contact visits on a comparison of the jail's

⁷⁵ *Rights of Prisoners and Pretrial Detainees*, 98 HARV. L. REV. 151, 152 (1984).

⁷⁶ *Block*, 468 U.S. at 582.

⁷⁷ *Id.* at 578. Specifically, the inmates challenged the jail's policy of denying contact visits with the detainees' spouses, children, and friends. The inmates also challenged the jail's practice of irregularly scheduled shakedown searches of cells when occupants were absent. The inmates also complained of being confined to rooms lacking windows.

⁷⁸ *Id.* at 578. The prohibition on contact visits applied to all detainees, regardless of the crime charged. *See id.* at 596-597 (Marshall, J., dissenting) ("[A] pretrial detainee is not permitted any physical contact with members of his family, regardless of how long he is incarcerated pending his trial or how slight is the risk that he will abuse a visitation privilege.")

⁷⁹ *See*, *Rutherford v. Pitchess*, 457 F. Supp. 104 (C.D. Cal. 1978), *aff'd*, 710 F.2d 572 (9th Cir. 1983), *rev'd*, 468 U.S. 576 (1984).

⁸⁰ *Block*, 468 U.S. at 581.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See*, *Rights of Prisoners and Pretrial Detainees*, 98 HARV. L. REV. at 153.

⁸⁴ *Id.*

visitation practices with those of other county institutions.⁸⁵ The judge considered the specific capacities, limitations, and security risks of the particular jail at issue.⁸⁶ He also personally visited the jail and observed four alternative methods to conducting cell searches.⁸⁷ Based on these first-hand observations, he concluded that the cell searches conducted in the inmates' absence violated their Due Process rights.⁸⁸ The judge felt that the methods employed were excessive in relation to their purpose.⁸⁹

The Supreme Court reversed, holding that, absent proof of intent to punish, a detainee must prove the challenged conditions are so exaggerated and excessive as to warrant an inference of intent.⁹⁰ Writing for the majority, Chief Justice Burger echoed *Bell's* demand that lower courts ordinarily defer to the

⁸⁵ *Rutherford*, 710 F.2d at 576.

⁸⁶ *Id.* at 577.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See Block*, 468 U.S. at 584, (citing *Bell*, 441 U.S. at 538 (quoting *Kennedy*, 372 U.S. at 168-169)). *See e.g.*, *Atwood v. Vilsack*, 338 F. Supp. 2d 985 (S.D. Iowa 2004) (holding conditions of pretrial detainees' confinement, including keeping them in lockdown the majority of the day, and denying them reasonable access to visitors, telephones, educational programming, mental health treatment, recreation, exercise, religious services, medical care, and hygiene, were not reasonably related to government's objective of preventing them from harming themselves or others, and thus violated their Due Process rights); *State ex rel. Riley v. Rudloff*, 575 S.E.2d 377 (2002) (holding that state statute prohibiting applications for involuntary hospitalization of pretrial detainees violated their Due Process rights under the Fourteenth Amendment); *Newkirk v. Sheers*, 834 F. Supp. 772 (E.D. Pa. 1993) (inferring intent to punish where detainees were paired in single occupancy cells and not provided a second bed); *Robles v. Prince George's County, Maryland*, 302 F.3d 262 (4th Cir. 2002) (holding that officers' tying up pretrial detainee to metal pole in deserted parking lot for ten minutes was arbitrary and purposeless); *Terry ex rel. Terry v. Hill*, 232 F. Supp. 2d 934 (E.D. Ark. 2002) (inferring intent to punish from inordinate delays of several months in providing evaluation and treatment of pretrial detainees for purposes of determining their fitness to stand trial); *Stevenson v. Anderson*, No. CIV.A.3:00-CV-2157-M, 2002 WL 432889 (N.D. Tex. Mar. 18, 2002) (holding sufficient basis for Due Process violation where jail officials failed to provide detainees safe, sanitary showers and ignored requests for medical treatment required for injuries suffered therein); *Campbell v. Cauthron*, 623 F.2d 503, 507 (8th Cir. 1980) (Due Process violated where up to eight pretrial detainees were held in approximately 130 square feet for 24 hours per day, with release three times weekly for periods of 15 to 30 minutes); *Lock v. Jenkins*, 641 F.2d 488 (7th Cir. 1981) (holding that arbitrary confinement of all pretrial detainees in prison cells measuring eight feet by four feet eight inches for 22 hours per day without regard for the individual situations of each detainee, when the average length of confinement was about 60 days, amounted to punishment).

“expert judgment” of corrections officials when considering the “excessiveness” of security measures.⁹¹

The *Block* majority found the blanket restriction on contact visits rational for a variety of reasons. It recalled dicta in *Bell* in which the Court discussed a prohibition on contact visits as one permissible alternative to the body cavity searches.⁹² Chief Justice Burger stressed that contact visits leave the jail vulnerable to visitors smuggling in weapons, drugs, and other contraband.⁹³ Chief Justice Burger also emphasized the potential for some detainees to hold visitors or jail staff hostage to effect escape attempts.⁹⁴ Low-risk detainees could also potentially be enlisted to help obtain contraband.⁹⁵ Thus, the policy prohibiting contact visits bore a rational connection to the legitimate goal of internal security.⁹⁶ In addressing the cell-search challenge, the Court declined to reconsider the issue; it had already declared a virtually identical policy valid in *Bell*.⁹⁷

Like *Bell*, the *Block* Court found that the challenged practices constituted restrictions that were reasonably related to maintaining security. The majority further noted that the district court improperly substituted its judgment for that of the administrators in determining whether the policy was excessively intrusive.⁹⁸ So long as a policy “reasonably relates to legitimate governmental objectives,” an inference of punishment will not be drawn.⁹⁹

In both *Bell* and *Block*, pretrial detainees raised Fourth Amendment challenges to policies which allowed officers to search their cells. In both cases, the Court found that the searches were not unreasonable under the Fourth Amendment.¹⁰⁰ The following section explores the extent of Fourth Amendment protection afforded to pretrial detainees.

⁹¹ *Block*, 468 U.S. at 584.

⁹² *Id.* at 586 n.7.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 587.

⁹⁶ *Id.* at 586.

⁹⁷ *Id.* at 591.

⁹⁸ *Rights of Prisoners and Pretrial Detainees*, 98 HARV. L. REV. at 152.

⁹⁹ *Block*, 468 U.S. at 584.

¹⁰⁰ *See, supra* notes 51-61 and accompanying text.

C. THE FOURTH AMENDMENT

The Fourth Amendment protects people from unreasonable government searches and seizures.¹⁰¹ A search is “unreasonable” when the person being searched has a subjective expectation of privacy in the area searched that society accepts as objectively reasonable.¹⁰² At the heart of the Fourth Amendment are the privacy interests of individuals.¹⁰³ In each case, courts must balance the need for the particular search against the invasion of personal rights that the search entails.¹⁰⁴ Courts must consider the scope of the particular intrusion, the manner in which it occurs, the justification for its initiation, and the location where it happens.¹⁰⁵ Without a reasonable expectation of privacy, the intrusion does not amount to a “search” for Fourth Amendment purposes.¹⁰⁶

In *Hudson v. Palmer*, the Supreme Court squarely addressed the Fourth Amendment’s applicability to an inmate’s cell.¹⁰⁷ In *Hudson*, a correctional officer conducted a “shake-down” search of inmate Russel Palmer’s cell.¹⁰⁸ During the search, the officer discovered a ripped pillow case in the trash can beside Palmer’s bunk.¹⁰⁹ Palmer was later found guilty on a

¹⁰¹ U.S. Const. amend. IV. The full text of the Fourth Amendment states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

¹⁰² See, *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (“[T]here is a twofold 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.’”) *Id.* In describing the “reasonable” test, the Supreme Court has said it has “no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable. Instead, ‘the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion.’” *O’Connor v. Ortega*, 480 U.S. 709, 715 (1987) (O’Connor, J.) (quoting *Oliver v. United States*, 466 U.S. 170, 178 (1984)).

¹⁰³ See, *United States v. Choate*, 576 F.2d 165, 197 (9th Cir. 1978).

¹⁰⁴ *Bell*, 441 U.S. at 559.

¹⁰⁵ *Id.*

¹⁰⁶ See *United States v. Kincade*, 379 F.3d 813, 874 (9th Cir. 2004) (Kozinski, J., dissenting).

¹⁰⁷ 468 U.S. 517 (1984); see also *Soria v. State*, 933 S.W.2d 46 (Tex. Crim. App. 1996) (holding *Hudson* reasoning “applies in the context of pretrial detention in jail”). *Id.* at 60

¹⁰⁸ *Hudson*, 468 U.S. at 519.

¹⁰⁹ *Id.*

charge of destroying state property.¹¹⁰ Palmer then sued the officer, claiming the search of his cell was an unreasonable search in violation of the Fourth Amendment.¹¹¹ The district court granted summary judgment to the officer, but the Court of Appeals reversed.¹¹² The Fourth Circuit held that an inmate has a "limited privacy right" in a cell, entitling him to protection against searches conducted solely to harass or to humiliate.¹¹³ The Supreme Court reversed, holding that a prisoner has no reasonable expectation of privacy in his prison cell warranting protection under the Fourth Amendment.¹¹⁴

The majority reasoned that society accepts loss of freedom and privacy as inherent incidents of confinement.¹¹⁵ Accordingly, confined persons do not have any subjective expectation of privacy that society deems objectively reasonable.¹¹⁶ In other words, since inmates have no reasonable expectation of privacy in their cells, a cell-search is not a "search" under the Fourth Amendment.¹¹⁷

After *Hudson*, some courts and commentators have considered whether inmates maintain any right to privacy under the Fourth Amendment.¹¹⁸ The Ninth Circuit has demonstrated that it is possible to extend Fourth Amendment protections to incarcerated inmates, and still be consistent with *Hudson*.¹¹⁹ In *Thompson v. Souza*, a prisoner alleged that three prison officials subjected him to an unreasonable strip search in violation of the Fourth Amendment.¹²⁰ After discussing the context of the search, The Ninth Circuit concluded the searches were reasonable.¹²¹ Consistent with *Hudson*, the court found the searches to be reasonably related to the officials' interest in keeping drugs out of the prison.¹²² In dicta, the court suggested that ex-

¹¹⁰ *Id.* at 520.

¹¹¹ *Id.* at 522.

¹¹² *Id.* at 521.

¹¹³ *Id.*

¹¹⁴ *Id.* at 526.

¹¹⁵ *Id.* at 528 (citing *Bell*, 441 U.S. at 537).

¹¹⁶ *Id.* at 526.

¹¹⁷ *See id.*

¹¹⁸ Deborah L. MacGregor, Note, *Stripped of All Reason? The Appropriate Standard for Evaluating Strip Searches of Arrestees and Pretrial Detainees in Correctional Facilities*, 36 COLUM. J.L. & SOC. PROBS. 163, 174 n.62 (2003).

¹¹⁹ *See*, *Thompson v. Souza*, 111 F.3d 694, 699 (9th Cir. 1997).

¹²⁰ *Id.*

¹²¹ *Id.* at 701.

¹²² *Id.*

tending Fourth Amendment protections to confined persons was consistent with *Hudson*: “Notwithstanding the language in *Hudson* [stating that a Fourth Amendment right to privacy is “fundamentally incompatible” with necessary security measures], our circuit has held that the Fourth Amendment right to be secure against unreasonable searches and seizures extends to incarcerated prisoners.”¹²³

Despite *Hudson*’s broad language, the Supreme Court’s Fourth Amendment analysis was limited within the framework of institutional security.¹²⁴ The majority balanced two interests: society’s interest in secure penal institutions, and the prisoner’s interest “in privacy within his cell.”¹²⁵ The Court held that an inmate’s expectation of privacy must “always yield” to the paramount interest of institutional security.¹²⁶ Thus, *Hudson* did not discard the notion that inmates retain an expectation of privacy in their cells when the search is unrelated to institutional security.¹²⁷

II. *DEMERY V. ARPAIO*

In *Demery v. Arpaio*, the Ninth Circuit considered whether a jail’s use of webcams to stream live images of pretrial detainees over the internet constituted punishment in violation of the Fourteenth Amendment.¹²⁸ The court noted that the Due Process Clause of the Fourteenth Amendment prohibits states from punishing detained persons prior to their being found guilty.¹²⁹ After evaluating Sheriff Arpaio’s justifications for the webcam policy and its impact on the inmates, the court determined that the policy violated the detainees’ rights under the Fourteenth Amendment Due Process Clause.¹³⁰ Accordingly, the court’s ma-

¹²³ *Id.* at 699.

¹²⁴ *Hudson*, 468 U.S. at 527.

¹²⁵ *Id.*

¹²⁶ *Id.* at 528.

¹²⁷ See e.g., *United States v. Cohen*, 796 F.2d 20 (2nd Cir. 1986) (“We read *Hudson* to hold that *prison officials* are presumed to do their best to evaluate and monitor objectively the security needs of the institution and the inmates in their custody, and then to determine whether and when such concerns necessitate a search of a prison cell ... [T]he loss of [constitutional] rights is occasioned only by the *legitimate* needs of institutional security.”) *Id.* at 23.

¹²⁸ *Demery*, 378 F.3d at 1020.

¹²⁹ *Id.* at 1028.

¹³⁰ *Id.* at 1033.

majority opinion held that the district court properly granted preliminary injunctive relief.¹³¹ Judge Carlos Bea wrote a dissenting opinion.¹³²

A. FACTS AND PROCEDURAL HISTORY

In July of 2000, Sheriff Arpaio installed four webcams in Phoenix's Madison Street Jail, which exclusively holds people awaiting trial.¹³³ The four webcams were placed in areas of the jail not open to the public except through prearranged tours.¹³⁴ One webcam faced the men's holding cell, capturing images of only a portion of the cell, including the bunk-bed area.¹³⁵ A second webcam was trained on the pre-intake area, where pretrial detainees could be viewed being photographed, fingerprinted, and booked.¹³⁶ A third webcam focused on the intake search area, capturing live images of pretrial detainees being subjected to patdown searches.¹³⁷ The fourth webcam was briefly directed at the toilet and surrounding area of the women's holding cell.¹³⁸ Initially, the Maricopa County's Sheriff's website hosted the webcam images.¹³⁹ A large number of visitors quickly overwhelmed the website's capacity, resulting in Sher-

¹³¹ *Id.*

¹³² *Id.* at 1033 (Bea, J., dissenting).

¹³³ Howard Fischer, *Court Blocks Sheriff's Use of Webcams*, THE ARIZONA DAILY STAR, Aug. 7, 2004, at A3, available at 2004 WL 66802243. For a description of the Madison Street Jail, see the Maricopa County Sheriff's Homepage, at <http://www.mcso.org/submenu.asp?file=madison> (last visited Feb. 10, 2005). According to the website, the Madison Street Jail was designed to house 960 inmates, single-bunked. The jail "is approximately 397,000 square feet, or one city block, and as tall as a ten story building." *Id.* Currently, Madison Street Jail houses more than 1,500 inmates, including: all maximum security inmates in Maricopa County; juveniles remanded to adult court; administratively segregated inmates (protective custody); close custody inmates (super maximum security); a state-licensed psychiatric unit; and working inmates assigned to Madison and downtown job sites. All inmates at the Madison Street Jail are pretrial detainees. *Id.*

¹³⁴ *Demery*, 378 F.3d at 1024.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* The plaintiffs claimed that this webcam streamed live images of the toilet area for six months, while the Sheriff contended that his officers moved the camera within hours of learning that the images of the toilet were being streamed over the internet. This webcam was ultimately repositioned to focus on the hallway area outside of the holding cells.

¹³⁹ *Id.*

iff Arpaio entering into an arrangement with another website, Crime.com, to stream the images to the public.¹⁴⁰

Website visitors were informed:

If you find yourself sitting on this bunk, you probably have been arrested for drunk and disorderly behavior, drug possession, spousal abuse, or prostitution. Most people inside the Madison Street Jail are facing misdemeanor charges but Deputies see their fair share of murderers as well.¹⁴¹

Visitors to Crime.com's "Jail Cam Special Ops" webpage saw the following four links:

1. "crime.com's Virtual Tour: You are busted! Enter the Madison Street Jail as a detainee and see what it's like to be booked, searched, and locked-up."
2. "Meet Sheriff Joe: It's his jail and he's proud of it. Spend a day in the life of Sheriff Joe Arpaio on his own turf, where inmates wear pink underwear, eat green bologna and work on chain gangs."
3. "Jail Cam: See the first live camera in a working jail. Watch what's happening at Madison Street Jail NOW."
4. "Shakedown: See the first shakedown in four years at the Madison Street Jail. Watch as SWAT teams raid male and female inmate holding cells in search of smuggled drugs and crude weapons."¹⁴²

Visitors that selected the "Jail Cam" link were directed to a web page where they could select one of the four webcams.¹⁴³

Within the first few days of operation, the Crime.com website recorded six million hits.¹⁴⁴ Web users from as far away as Sweden, Britain, and Germany visited the site.¹⁴⁵ Eventually, because the Crime.com website was unable to accommodate the

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 1024-1025.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1025. See BLACK'S LAW DICTIONARY 748 (8th ed. 2004) (defining "hit" as "[a] single instance of a computer's connection to a webpage.")

¹⁴⁵ *Demery*, 378 F.3d at 1025.

large number of visitors interested in watching the webcam images, the website ceased operations.¹⁴⁶

In May of 2001, twenty-four former inmates at the Madison Street Jail filed a lawsuit against Sheriff Arpaio and Maricopa County, in Arizona state court, seeking to enjoin the Sheriff from reactivating the webcams in the jail.¹⁴⁷ The former inmates raised constitutional privacy claims and alleged they were punished in violation of the Fourteenth Amendment.¹⁴⁸ The Sheriff and the County removed the case to the United States District Court for the District of Arizona.¹⁴⁹ The district court rejected the detainees' argument that the Sheriff's conduct violated their constitutional privacy rights.¹⁵⁰ Nevertheless, the court held that the webcam policy constituted punishment in violation of the Fourteenth Amendment of the United States Constitution, and preliminarily enjoined the Sheriff from operating the webcams.¹⁵¹

B. THE MAJORITY'S ANALYSIS

1. *The Bell Standard Controls*

The Ninth Circuit briefly addressed *sua sponte* whether the case was moot.¹⁵² The court noted Sheriff Arpaio's efforts to

¹⁴⁶ See *id.* For reasons unclear from the record, the website ceased operations after the lawsuit was filed but before the district court granted the injunction.

¹⁴⁷ *Id.* The plaintiffs in this action are Jamie Demery, Samantha Moore, Aracelia Leticia Pfeifer, Janet Lee King, Jerri Cabaniss, Rosa Velazquez, Cynthia Matthers, Rhonda Farmer, Sandra Puebla, Jordan Martin, Laura Hartney, Elena M. Irvine, Yvette Rose Leon, Tina Marie Sox, Loretta Christie, Alison Lee Adair, Victoria Zepeda, Nikisha Calliste, Terry McEvoy, Tom Odenkirk, Dean Tousignant, Benny David Berryman, Damon Scoggin, and Sean Botkin. *Id.* at 1020.

¹⁴⁸ See Appellant's Reply Brief at 4, *Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004) (No. 03-15698), available at 2003 WL 22716980; *Demery*, 378 F.3d at 1028.

¹⁴⁹ *Demery*, 378 F.3d at 1025.

¹⁵⁰ See Appellant's Petition for Writ of Certiorari at 6, *Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004) (No. 04-983), available at 2005 WL 166979.

¹⁵¹ *Demery*, 378 F.3d at 1025.

¹⁵² The court noted that "two significant events" might render this case moot: the plaintiffs were released from the jail, and the webcam images were no longer online. *Demery*, 378 F.3d at 1025. Neither the plaintiffs nor the Sheriff and County contended on appeal that the case was moot. The court thus voluntarily considered the issue of mootness. *Id.* See *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986 (9th Cir.1999) ("The requisite personal interest that must exist at the commencement of the litigation ... must continue throughout its existence." *Id.* at 989. See also, *Powell v. McCormack*, 395 U.S. 486, 496 (1969) (stating that a case is "moot" when the issues presented are no longer live or the parties lack any legally cognizable interest in the outcome.)

find a new website host, and determined that the events were likely to recur.¹⁵³ Concluding the case was not moot, the court addressed the Sheriff's arguments.¹⁵⁴

Sheriff Arpaio argued that the district court applied the wrong legal standard by using the *Bell* test. He argued that the *Bell* test for punishment was replaced by the "reasonable relation" test in *Turner v. Safley*.¹⁵⁵ In *Turner*, convicted inmates brought a class action challenging their prison's mail and marriage regulations.¹⁵⁶ The *Turner* majority stated that courts should determine a policy's reasonableness by asking whether it is rationally connected to a legitimate governmental interest.¹⁵⁷ The Court held that the mail regulation was constitutional because it was "reasonably related" to valid security interests.¹⁵⁸ The Court struck down the marriage regulation as unconstitutional, finding that it was an exaggerated response to such interests.¹⁵⁹ The Ninth Circuit rejected Arpaio's contention that *Turner's* "reasonable relation" test replaced the *Bell* punishment test.¹⁶⁰ *Turner* addressed constitutional claims against cruel and unusual punishment under the Eighth Amendment, raised by convicted inmates.¹⁶¹ Thus, the *Bell* test is appropriate when analyzing punishment claims by pretrial detainees under the Fourteenth Amendment.¹⁶²

¹⁵³ *Demery*, 378 F.3d at 1026.

¹⁵⁴ *Id.*

¹⁵⁵ See *supra* note 68.

¹⁵⁶ *Turner*, 482 U.S. 78. The mail regulation permitted correspondence between immediate family members incarcerated at different institutions within the jurisdiction, and between inmates concerning legal matters. Correspondence between other inmates was only permitted if each inmate's "classification/treatment team" deemed it to be within the parties' best interests. *Id.* at 81-82. The marriage regulation required an inmate to obtain the superintendent's permission before being able to marry. See *id.* at 95-96. The superintendent generally granted permission only upon finding "compelling reasons" to do so. *Id.* The Supreme Court held that the mail restriction was constitutional, but found the marriage restriction unconstitutional. See *id.* at 81.

¹⁵⁷ See *id.* at 89-90.

¹⁵⁸ *Id.* at 91-92. The Court noted that restrictions on inmate correspondence furthered the interests in combating communications among prison gang members.

¹⁵⁹ *Id.* at 97-98.

¹⁶⁰ *Demery*, 378 F.3d at 1028.

¹⁶¹ *Id.* But see, *Velez v. Johnson*, 2005 WL 77149 (7th Cir. 2005) (noting that there is "little practical difference" between the standards of the Eighth and Fourteenth Amendments.) *Id.*

¹⁶² See *Hart*, 2005 WL 221963 (Posner, J.) (stating "[Pretrial detainees] cannot be punished ... even in a nonbrutal fashion, because punishment requires a conviction.") *Id.* at *3.

The Ninth Circuit reasserted the standard mandated by *Bell*: The means employed in maintaining jail security cannot be “excessive in relation to the alternative purpose.”¹⁶³ The district court determined that, since the webcams were placed nearby closed-circuit security cameras, any images they were monitoring were already being picked up by the security cameras.¹⁶⁴ Thus, the webcams served no legitimate alternative purpose, such as improving security.¹⁶⁵ Moreover, the webcams were excessive because, unlike the security camera images, the webcams streamed images seen by millions of viewers worldwide.¹⁶⁶ The lower court concluded that the webcams amounted to an excessive response to an “already-fulfilled security need,” and the Ninth Circuit agreed.¹⁶⁷ Thus, the district court applied the correct legal standard.

2. *The Bell Test Applied*

The Ninth Circuit also agreed with the lower court’s application of the *Bell* standard to the facts of this case.¹⁶⁸ The court began its analysis by restating *Bell*’s definition of punishment by government action.¹⁶⁹ To constitute punishment, the conduct must result in some harm or “disability.”¹⁷⁰ In addition, the purpose behind the action must be to punish.¹⁷¹ The harm or disability caused by the conduct must either significantly exceed, or be independent of, the inherent discomforts of confinement.¹⁷² The Ninth Circuit found that all elements of punishment were met.¹⁷³

¹⁶³ *Demery* at 1029.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*; *Bell* 441 U.S. at 538.

¹⁷² *Demery*, 378 F.3d at 1030. See *Bell*, 441 U.S. at 537. (“Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee’s understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into ‘punishment.’”) *Id.*

¹⁷³ *Demery*, 378 F.3d at 1030.

a. Harm

Sheriff Arpaio's use of the webcams harmed the detainees by subjecting their everyday activities to world-wide scrutiny.¹⁷⁴ The webcams exposed all stages of the arrest process – being booked, fingerprinted, as well as sitting, lying, or standing in a holding cell – to friends, loved ones, family, and to millions of strangers around the world.¹⁷⁵ The court stated that such exposure constituted a “level of humiliation that almost anyone would regard as profoundly undesirable and strive to avoid.”¹⁷⁶

b. Purpose to Punish

The court determined that, since the webcams were placed beside closed-circuit security video cameras, they provided no images of areas that weren't already under surveillance and thus served no security purpose whatsoever.¹⁷⁷ Moreover, since the Sheriff's deputies were presumably already monitoring the security camera video, the online images provided no additional benefit.¹⁷⁸ The court gave a brief hypothetical illustrating the improbable security impact: “An unruly detainee, willing to ignore the watchful eye of nearby prison guards, would not be deterred from engaging in disruptive behavior by the prospect of an unknown private citizen halfway around the world viewing his grainy image over the internet.”¹⁷⁹

The Sheriff gave two other arguments defending the webcams. First, public access to the online images of detainees being fingerprinted and searched would deter the public from participating in criminal activity.¹⁸⁰ Second, Maricopa County had an interest in opening the pretrial detention centers to public scrutiny.¹⁸¹

The court rejected the notion that deterrence and retribution are legitimate nonpunitive objectives.¹⁸² Accordingly, they

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1029-1030.

¹⁷⁷ *Id.* at 1030.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1031.

¹⁸¹ *Id.*

¹⁸² *Id.*

do not justify the adverse conditions of pretrial detention.¹⁸³ Creating unfavorable detention conditions to further deterrence is impermissible because it does not comport with the main objectives of detaining persons before trial: to assure their presence at trial and maintain security and order at the facility.¹⁸⁴

Additionally, the Court found neither of these objectives served by the County's interest in opening detention centers to the public.¹⁸⁵ While informing the general public about the administration of criminal justice, assuring accountability, and subjecting facilities to public scrutiny are valid governmental interests, they do not justify the "broad public exposure" of the detainees' "intimate circumstances" when neither of the purposes of pretrial detention are served.¹⁸⁶ The majority cited two Supreme Court cases supporting the rights of criminally accused from public exposure, *Houchins v. KQED, Inc.* and *Wilson v. Layne*.¹⁸⁷

In *Houchins*, a broadcasting company sought access to tour a county jail as part of its investigation of an inmate suicide that occurred there.¹⁸⁸ The Sheriff denied access, and the broadcasting company sued. The district court enjoined the Sheriff from denying access to the jail and the Ninth Circuit affirmed.¹⁸⁹ In reversing, the Supreme Court recognized that "[i]nmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however "educational" the process may be for others.¹⁹⁰ This passage from Chief Justice Burger's majority

¹⁸³ *Id.*

¹⁸⁴ *Id.* See also *Duran v. Elrod* 542 F.2d 998, 999 (7th Cir. 1976) ("[A]s a matter of due process, pre-trial detainees may suffer no more restrictions than are reasonably necessary to ensure their presence at trial.")

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1032.

¹⁸⁷ *Id.*; *Houchins*, 438 U.S. 1; *Wilson v. Layne*, 526 U.S. 603 (1999).

¹⁸⁸ *Houchins*, 438 U.S. at 3.

¹⁸⁹ *Id.* at 7.

¹⁹⁰ See *id.* at 5 n.2. *Houchins* focused on the broadcasting company's First Amendment rights, and not the inmates' Fourth or Fourteenth Amendment rights. The Court held that news media have no greater First Amendment right of access to the county jail over and above that of other persons. *Id.* at 16.

opinion has been repeatedly cited as a basis for inmate privacy rights.¹⁹¹

In *Wilson*, deputy federal marshals and local sheriff's deputies invited a Washington Post reporter and photographer to accompany them on a "media ride-along" in the execution of an arrest warrant for Dominic Wilson.¹⁹² At 6:45 a.m., plain clothes officers arrived at the home of his parents, Charles and Geraldine Wilson, believing Dominic lived there.¹⁹³ The officers, along with the reporters, entered the Wilson's home when Charles and Geraldine were still in bed.¹⁹⁴ Dressed only in a pair of briefs, Charles went into the living room to confront the officers.¹⁹⁵ The officers, believing he was Dominic, wrestled Charles to the floor as his wife Geraldine emerged dressed only in her nightgown.¹⁹⁶ The reporters observed and photographed the confrontation between Charles and the officers, but did not assist the officers in their execution of the warrant.¹⁹⁷ The photos of the incident were never published.¹⁹⁸ The parents sued the officers, contending that the officers' actions in bringing the media to observe and record the attempted execution of the arrest warrant violated their Fourth Amendment rights.¹⁹⁹ The Supreme Court agreed, holding that the "media ride-along" into the home violated the Fourth Amendment.²⁰⁰

The Fourth Amendment requires that police actions in executing a warrant be related to the objectives of the author-

¹⁹¹ See Gary H. Loeb, *Protecting the Right to Informational Privacy for HIV-Positive Prisoners*, 27 COLUM. J.L. & SOC. PROBS. 269, 289 (1994).

¹⁹² *Wilson*, 526 U.S. at 607.

¹⁹³ *Id.* A "ride-along" occurs when journalists or camera crews accompany law enforcement into the field. For a discussion of media actors' liability under the Fourth Amendment in ride-alongs, see Hannah Shay Chanoine, Note: *Clarifying the Joint Action Test For Media Actors When Law Enforcement Violates the Fourth Amendment*, 104 COLUM. L. REV. 1356 (2004).

¹⁹⁴ *Wilson*, 526 U.S. 607.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 608.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 605-606. However, the Court also concluded that, since the state of the law was not clearly established at the time the search in this case took place, the officers were entitled to the defense of qualified immunity. *Id.* The "qualified immunity" defense shields government agents from liability for civil damages when their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have known. See *Kwai Fun Wong v. United States*, 373 F.3d 952, 966 (9th Cir. 2004).

ized intrusion.²⁰¹ The Supreme Court determined that the presence of the reporters, who did not engage in the execution of the warrant or assist the police in their task, was not related to the objective of the authorized intrusion, the apprehension of petitioners' son.²⁰² The officers argued that they should be able to exercise reasonable discretion in determining when it would further law enforcement missions to permit members of the news media to accompany officers in executing a warrant.²⁰³ In addition, the officers asserted numerous reasons to justify "media ride-alongs," namely that the presence of third parties could serve in some situations to minimize police abuses and protect suspects, to protect the safety of the officers, to serve the law enforcement purpose of publicizing the government's efforts to combat crime, and to facilitate accurate reporting on law enforcement activities.²⁰⁴ The Court, however, found that none of these reasons was sufficient to trump the Fourth Amendment right to residential privacy.²⁰⁵

The *Demery* court used this Fourth Amendment case to illustrate how an invasion of privacy can constitute punishment.²⁰⁶ The majority also found Sheriff Arpaio's public education argument in support of his webcam policy weak because displaying images of the detainees to millions of internet users all over the world was not connected to goals associated with educating the citizens of Maricopa County.²⁰⁷

C. THE DISSENT

Judge Carlos Bea dissented on three grounds. First, he found the case to be moot.²⁰⁸ He also rejected the contention

²⁰¹ *Wilson*, 526 U.S. at 604. See also *Arizona v. Hicks*, 480 U.S. 321 (1987) (holding officer's moving of stereo equipment to view serial numbers, when officer was in respondent's apartment to find shooter during exigent circumstances, constituted "taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents," and "produce[d] a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry.") *Id.* at 325.

²⁰² *Wilson*, 526 U.S. at 604.

²⁰³ *Id.* at 612.

²⁰⁴ *Id.* at 612-613.

²⁰⁵ *Id.* at 612-614.

²⁰⁶ *Demery*, 378 F.3d at 1032.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1033-34 (Bea, J., dissenting).

that the webcasts caused a harm amounting to punishment.²⁰⁹ Finally, Judge Bea found a rational relation between the webcasts and legally permissible purposes stated by Sheriff Arpaio.²¹⁰ He concluded that the majority erroneously second-guessed the judgment of the Sheriff.²¹¹

In rejecting the majority's conclusion that the public humiliation and shame experienced by the detainees constituted punishment, the dissent compared the webcasts to "perp walks."²¹² Judge Bea found the detainees' shame and humiliation to be attendant circumstances of the government's legitimate aim of maintaining transparency in the criminal justice system.²¹³ In addition, he compared the detainees' claims of harm to the Fourth Amendment claims raised by arrestees subjected to perp-walks.²¹⁴ Citing *Hudson*, Judge Bea argued that the detainees lacked an expectation of privacy in their cells.²¹⁵ Thus, while arrestees subjected to perp-walks may have a remedy under the Fourth Amendment, the detainees do not.²¹⁶

Finally, Judge Bea found that deterrence of the public was a legitimate government interest, and the webcasts were reasonably related to that purpose.²¹⁷ He argued that the majority's broad reading of *Bell* undermined the Sheriff's ability to prevent crime.²¹⁸ Judge Bea found no constitutional violations in the operation of the webcams.²¹⁹

²⁰⁹ *Id.* at 1038 (Bea, J., dissenting).

²¹⁰ *Id.* at 1040 (Bea, J., dissenting).

²¹¹ *Id.* at 1035. (Bea, J., dissenting).

²¹² A "perp walk" is the process in which a suspect is walked past the waiting cameras of reporters while in police custody. See generally Kyle J. Kaiser, Note, *Twenty-First Century Stocks and Pillory: Perp Walks as Pretrial Punishment*, 88 IOWA L. REV. 1205 (2003). Staged perp-walks which do not advance legitimate law enforcement purposes have been termed unreasonable seizures. Thus, arrestees subjected to perp-walks have a remedy under the Fourth Amendment. *Id.* Conversely, perp-walks that are not staged have been held constitutional. See *id.* The term "perp" is an abbreviation of "perpetrator." *Id.* at 1207 n.2.

²¹³ *Demery*, 378 F.3d at 1039 (Bea, J., dissenting).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 1041 (Bea, J., dissenting).

²¹⁸ *Id.*

²¹⁹ *Id.*

III. DEMERY'S IMPACT ON PRETRIAL DETAINEES' PRIVACY RIGHTS UNDER THE FOURTH AMENDMENT

The Ninth Circuit focused primarily on the substantive Due Process protections against punishment; the Fourth Amendment and substantive Due Process privacy rights were not issues in this appeal.²²⁰ Nevertheless, the *manner* in which the detainees were punished – live webcasts of their incarceration – centers on their privacy interests. The court held that these privacy invasions amounted to punishment; one must conclude that detainees enjoy an expectation of privacy in their cells. It is hard to imagine how public disclosure of private affairs can humiliate someone unless that person enjoys an expectation of privacy in those affairs.²²¹ The decision therefore necessarily impacts the Fourth Amendment privacy rights of detainees.

Commentators have noted that the Supreme Court has yet to articulate the scope of protection afforded pretrial detainees under the Fourth Amendment.²²² As a result, it remains unclear as to what, if any, greater protection the Fourth Amendment affords detainees as opposed to convicted inmates.²²³ It does seem clear, however, that they retain some expectation of privacy: The *Bell* Court found that pretrial detainees are protected under the Fourth Amendment against unreasonable strip searches, suggesting those strip searches constitute punishment.²²⁴ Logically, the main reason a strip search consti-

²²⁰ Appellee's Answering Brief at 4 n.1, *Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004) (No. 03-15698) ("Appellees do not accept the decision that the Fourth Amendment does not apply to the circumstances of this case, but that is not at issue in this appeal, which addresses a preliminary injunction grounded in the Fourteenth Amendment's Due Process Clause.") available at 2003 WL 22716971.

²²¹ Thus, it is difficult to reconcile the Arizona district court's dismissal of privacy claims with its holding that the webcams constituted punishment under the Fourteenth Amendment's Due Process Clause. Note that Judge Bea stated in his dissent, "The district court properly rejected Appellees' claims of violations of privacy rights for the best of reasons: The Supreme Court has held that prisoners in custody do not have a reasonable expectation of privacy in their cells arising from the Fourth Amendment." *Demery*, 378 F.3d at 1038 n.8 (Bea J., dissenting).

²²² See Helmer, *supra* note 29, at 255; see generally, Irene M. Baker, Comment, *Wilson v. Spain: Will Pretrial Detainees Escape the Constitutional "Twilight Zone"?*, 75 ST. JOHN'S L. REV. 449 (2001).

²²³ See Helmer, *supra* note 29, at 255.

²²⁴ See MacGregor, *supra* note 116, at 168 (citing Helmer, *supra* note 29, at 255). See also, *Bell*, 441 U.S. at 560. Writing for the majority, Justice Rehnquist wrote, "[w]e do not underestimate the degree to which these searches may invade the personal

tutes punishment is because it is a dehumanizing violation of privacy.²²⁵ Nevertheless, the Court has stated that any Fourth Amendment expectation of privacy would be of a “diminished” nature.²²⁶ Indeed, many Fourth Amendment rights are relinquished upon confinement.²²⁷ Nonetheless, as one court noted, “[t]he door on prisoner's rights against unreasonable searches has not been slammed shut and locked.”²²⁸

Although pretrial detainees retain *some* expectation of privacy, the Fourth Amendment does not apply to a jail cell searched in furtherance of security or maintenance purposes.²²⁹ When those purposes are absent, however, it seems clear that such a search is unreasonable and violates the Fourth Amendment.²³⁰ This is because the Fourth Amendment’s application is not limited by the borders of the inmate’s cell, but depends on the specific interests involved.²³¹

privacy of inmates. Nor do we doubt ... that on occasion a security guard may conduct the search in an abusive fashion. Such an abuse cannot be condoned. The searches must be conducted in a reasonable manner.” *Id.*

²²⁵ See Robin Lee Fenton, Comment, *The Constitutionality of Policies Requiring Strip Searches of All Misdemeanants and Minor Traffic Offenders*, 54 U. CIN. L. REV. 175 (1985) (“Psychological testimony has revealed that the intrusion is not limited to causing physical discomfort. The psychological after-effects are similar to rape; those who were subjected to body cavity searches hesitate to participate in normal sexual relations afterwards.”) *Id.* at 187 (citing Simons, *Strip Search: Women Arrested for Minor Traffic Violations Have Had Their Bodies Probed and Their Minds Mugged*, 6 BARRISTER 8 (1979)). See also Jill Duman, *Strip Search Litigation Taking Off*, THE RECORDER, October 26, 2004 (discussing multimillion dollar settlement paid by Sacramento County to persons subjected to routine visual strip searches even though arrested only for routine, nonviolent offenses).

²²⁶ *Bell*, 441 U.S. at 557.

²²⁷ Karoline E. Jackson, Note: *The Legitimacy of Cross-Gender Searches and Surveillance in Prisons: Defining an Appropriate and Uniform Review*, 73 IND. L.J. 959, 963 (1998). See generally, *Substantive Rights Retained by Prisoners*, 91 GEO. L.J. 887 (2003) (noting pretrial detainees may be subject to visual body-cavity searches, have their mail opened by jail officials, have phone calls monitored, and have a limited privacy right in their cells.)

²²⁸ *Cohen*, 796 F.3d at 23.

²²⁹ See *State v. Twyman*, 2001 Del. Super. LEXIS 305 (2001) (“Reading the *Hudson*, *Bell*, and *Block* standards together, although pre-trial detainees retain some expectation of privacy, the Fourth Amendment does not apply to a search by jail officials of a pre-trial detainee's cell for security or maintenance purposes.”) *Id.* at *5.

²³⁰ See, e.g., *State v. Jackson*, 729 A.2d 55 (1999) (holding the Fourth Amendment precluded a warrantless search of an inmate’s cell for the sole purpose of obtaining information for a superceding indictment); *Cohen*, 796 F.2d at 23 (holding the Fourth Amendment was violated when a corrections officer searched an inmate’s cell at the behest of the prosecution to find evidence that would bolster the prosecution’s case).

²³¹ See *Schmerber v. California*, 384 U.S. 768 (1966).

Bell, *Block* and *Hudson* commanded that inmates' Fourth Amendment privacy interests yield to society's interest in safe penal institutions.²³² *Demery* exemplifies how inmate privacy interests need not yield where those security concerns are absent. Accordingly, *Demery* provides guidance to Ninth Circuit courts in construing the "diminished" privacy interest retained by pretrial detainees: Detainees retain an expectation of privacy in their persons and cells that must yield *only* to legitimate governmental means of maintaining institutional security.

The *Demery* majority mentions the Fourth Amendment only once, discussing it in the context of *Wilson's* holding.²³³ The court's use of *Wilson*, a Fourth Amendment case, to support its discussion of punishment is significant. The search in *Wilson* occurred in the home; nowhere is the protective force of the Fourth Amendment more powerful.²³⁴ Yet in comparing the webcasts' intrusiveness to *Wilson's* media ride-along, the *Demery* court suggests the detainees had a reasonable expectation of privacy in their cells warranting as much protection as afforded the *Wilson* plaintiffs. The court properly recognized that the psychological harm caused by a privacy invasion is not mitigated simply because the invasion occurs in a jail.²³⁵

In contrast, the Supreme Court in *Hudson* declared inmates have no reasonable expectation of privacy in their cells under the Fourth Amendment.²³⁶ This does not render *Demery* inconsistent with *Hudson*. *Hudson's* holding was made under the presumption that corrections officials conduct searches based on the needs of institutional security.²³⁷ Sheriff Arpaio's webcam policy fell entirely outside of that framework; the webcasts were not reasonably related to any legitimate security

²³² See *Bell*, 441 U.S. at 560 ("Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that [officials may conduct body-cavity searches on less than probable cause]"); see also *Hudson*, 468 U.S. at 527. ("The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.")

²³³ *Demery*, 378 F.3d at 1032.

²³⁴ *Los Angeles Police Protective League v. Gates*, 907 F.2d 879 (9th Cir. 1990) ("Nowhere is the protective force of the fourth amendment more powerful than it is when the sanctity of the home is involved.") *Id.* at 884.

²³⁵ See *Fenton*, *supra* note 224.

²³⁶ See *Hudson*, 468 U.S. 517.

²³⁷ See, *supra* note 125.

interest. Accordingly, the jail's exploitative scrutiny constituted an unreasonable search in violation of the Fourth Amendment.

By rejecting Sheriff Arpaio's attempts to justify intrusive violations of privacy, the Ninth Circuit confirmed that detainees maintain tangible privacy rights. Indeed, greater recognition and protection of inmates' Fourth Amendment privacy rights comports with *Bell's* assertion that, no matter how imperative the needs of law enforcement officials, confined individuals "retain certain fundamental rights of privacy."²³⁸ Jail restrictions that infringe upon these fundamental rights, yet fail to serve the legitimate goal of institutional security, cannot stand.

Demery is consistent with *Bell*, *Block*, and *Hudson* in requiring that regulations be rationally related to legitimate security goals. However, *Demery* could be interpreted as going further in three respects. First, it refines the theory of *Hudson*: Inmates are not entirely without any subjective expectation of privacy. Second, the Ninth Circuit has added more substance to an inmate's subjective expectation of privacy. Our society recognizes a reasonable expectation that privacy may not be invaded by restrictions unassociated with institutional security. Furthermore, while the fact of an arrest may be widely publicized, the arrest process itself may not be.²³⁹ This case shows a promising trend towards the recognition of privacy rights for inmates.

IV. CONCLUSION

In *Demery v. Arpaio*, the Ninth Circuit Court of Appeals recognized that pretrial detainees have an expectation of privacy in their cells. This case provides an example of how an unreasonable violation of that privacy can run afoul of both Fourth and Fourteenth Amendment principles. While courts must afford broad deference to corrections officials, this deference should not preclude close analysis of a challenged policy in light of institutional security. Scrutiny of detainees and their

²³⁸ *Bell*, 441 U.S. at 540.

²³⁹ *Demery*, 378 F.3d at 1032 n.6 (citing *Paul v. Davis*, 424 U.S. 693, 713 (1976) (holding disclosure of an arrest record does not violate a constitutionally protected right of privacy)).

cells for purposes unrelated to institutional security is an unreasonable intrusion of privacy. Accordingly, courts should apply the Fourth Amendment to jail cells.²⁴⁰ *Demery* appears to open the way for greater Fourth Amendment protection of pre-trial detainees.

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²⁴⁰ See generally, WAYNE LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.9(a), at 407-08 (4th ed. 2004) ("It would be most unfortunate if *Hudson* were extended so as to deprive pretrial detainees, as yet not convicted of the crimes alleged, of all privacy and possessory rights in their effects. For example, if a pretrial detainee was subjected to a cell search not 'even colorably motivated by institutional security concerns,' then surely *Hudson* should not be treated as foreclosing challenge of that search.") (citing *Cohen*, 796 F.2d at 23).

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