

VIRTUALLY FREE FROM PUNISHMENT UNTIL PROVEN GUILTY: THE INTERNET, WEB-CAMERAS AND THE COMPELLING NECESSITY STANDARD

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I. INTRODUCTION

[1] Few legal maxims have had greater resonance than the tenet that one is innocent until proven guilty.¹ It is a principle that has been traced back to Roman times,² and it entered the American legal lexicon through the United States Supreme Court decision *Coffin v. United States*.³ It has even been incorporated in the United Nations' 1948 Declaration of Human Rights under article eleven, section one.⁴

[2] It flows logically and constitutionally from this maxim that one should not be punished for a crime until it has been proven that one is guilty of

¹ See Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim. A Ennio Cortese*, ROMA: IL CIGNO GALILEO GALILEI EDIZIONI (2001), at <http://faculty.cua.edu/pennington/Law508/InnocentGuilty.htm> (last visited Sept. 4, 2005). Kenneth Pennington is the Kelly-Quinn Professor of Ecclesiastical and Legal History at The Catholic University of America Columbus School of Law.

² Cathy Lynne Bosworth, Note, *Pretrial Detainment: The Fruitless Search for the Presumption of Innocence*, 47 OHIO ST. L. J. 277, 277-78 (1986).

³ *Coffin v. United States*, 156 U.S. 432, 453 (1895) (“[The] presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

⁴ Pennington, *supra* note 1.

that crime.⁵ While not directly stated in the Constitution, penumbras of this principle are found in several of the amendments including the Fourth, which prohibits unreasonable searches and seizures,⁶ and the Fifth and Fourteenth amendments, which guarantee due process before one can be deprived of life, liberty or property.⁷ The Supreme Court has made clear that *after* conviction, the Eighth Amendment protects convicted prisoners from excessive force.⁸ What the Court has not resolved are the issues of which amendment provides pretrial detainees with protection against the deliberate use of excessive force, as well as what exactly amounts to excessive force.⁹

[3] The Ninth Circuit recently held in *Demery v. Arpaio* that the Fourteenth Amendment prohibits the use of webcams to stream live broadcasts of pre-trial detainees in various stages of the detention process.¹⁰ The court relied upon the Supreme Court's *Bell v. Wolfish* decision in holding that this practice placed a hardship on the detainees that rose to the level of a constitutional violation.¹¹ In so doing, the court made the proper decision, but appears to have used a level of constitutional review higher than the one dictated by the Supreme Court in *Wolfish*.

A. SCOPE AND PURPOSE

[4] The focus of this note will be threefold. First, it will explore the current jurisprudence surrounding pre-trial detainees. The second focus will be on whether the court made the correct decision, examining in particular the proper standard of constitutional review. Finally, this note will examine the effect *Demery* may have on the constitutional status of pre-trial detainees.

B. A HISTORICAL PERSPECTIVE OF PRE-TRIAL DETAINEE JURISPRUDENCE

⁵ See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 536 (1979) (explaining that the Due Process Clause prevents detainees from being punished before being found guilty).

⁶ U.S. CONST. amend. IV.

⁷ U.S. CONST. amend. V; U.S. CONST. amend. VIX.

⁸ *Whitley v. Albers*, 475 U.S. 312, 327 (1986).

⁹ *Id.*

¹⁰ *Demery v. Arpaio*, 378 F.3d 1020, 1033 (9th Cir. 2004).

¹¹ *Id.* at 1030.

[5] Pre-trial detainees are “unconvicted individuals awaiting trial, held . . . because they could not post bail.”¹² The basic proposition is that a person is innocent until there is a judicial determination of guilt, and therefore, a person held in confinement as a pre-trial detainee cannot “be subjected to any form of punishment for the crime for which he is charged with.”¹³ The presumption of innocence only ends once a person is convicted of a crime or enters a guilty plea and is sentenced.¹⁴ Although pre-trial detainees cannot be punished before a formal determination of guilt,¹⁵ they do not have all the freedoms that people who are not incarcerated enjoy.¹⁶

[6] Determining what freedoms and rights remain for pre-trial detainees has been a constitutional gray area. The Supreme Court’s own jurisprudence on this issue has not been clear, leaving the lower courts to determine what those rights are. Before the Supreme Court case *Bell v. Wolfish*, the lower courts used a “compelling necessity standard” to determine whether a restriction on a detainee’s rights was legitimate.¹⁷ According to that standard, outlined by the Second Circuit in *Detainees of the Brooklyn House of Detention for Men v. Malcolm*,¹⁸ prison officials had to demonstrate that regulations depriving detainees of certain rights were “premised on a compelling necessity to secure prison safety.”¹⁹ This approach gave “little deference to prison administrators,” while giving strong deference to the presumption of innocence of those incarcerated and awaiting trial.²⁰ Using the compelling necessity standard, lower courts held it unconstitutional to deny detainees regular contact visits,²¹

¹² *Wolfish v. Levi*, 573 F.2d 118, 122 n.6 (2d Cir. 1978).

¹³ *Rights of Pretrial Detainees*, LEGAL BULLETIN 4.1 (Lewisburg Prison Project, Lewisburg, P.A.), June 2000, at 1.

¹⁴ 142 Cong. Rec. H11,133 (daily ed. Sept. 25, 1996) (statement of Rep. McCollum) (“The presumption of innocence ends when the conviction is obtained.”).

¹⁵ *Pippins v. Adams County Jail*, 851 F. Supp. 1228, 1232 (C.D. Ill. 1994).

¹⁶ *Magill v. Lee County*, 990 F. Supp. 1382, 1387 (M.D. Ala. 1998).

¹⁷ *Detainees of the Brooklyn House of Det. for Men v. Malcolm*, 520 F.2d 392 (2d Cir. 1975).

¹⁸ *Id.*

¹⁹ Bosworth, *supra* note 2, at 279.

²⁰ *Id.*

²¹ *Marcera v. Chinlund*, 595 F.2d 1231, 1237 (2d Cir. 1979).

censor their mail, regulate their reading material, or monitor their telephone usage.²²

[7] An important shift away from the presumption of innocence occurred in the Fifth Circuit decision *Jones v. Diamond*.²³ The court held that, even though “pretrial detainees have not yet been convicted of any offense and are accorded the presumption of innocence when brought to trial, . . . the fact remains that they are being held on probable cause to believe that they are, in fact, guilty of a violation of the criminal statutes.”²⁴ This ruling helped encourage the judiciary to view the pre-trial detainee issue as one of probable guilt rather than one of presumed innocence.²⁵

[8] *Jones* set the foundation for *Bell v. Wolfish*, likely the most important Supreme Court ruling on the scope of the rights of pre-trial detainees during their period of confinement.²⁶ The majority in *Demery* relied upon *Wolfish* when it held that the use of webcams in jailhouses violated the rights of pretrial detainees.²⁷ In *Wolfish*, Chief Justice Rehnquist, writing for the majority, focused on whether the prison conditions at Manhattan’s Metropolitan Correctional Center (MCC), specifically its policy of double-bunking detainees, constituted a prohibited constitutional punishment.²⁸

[9] The majority’s holding first abolished the compelling necessity standard as it applied to pre-trial detainees, ruling that it failed to find a constitutional basis to support the standard in the Due Process Clause of the Fifth Amendment.²⁹ The Court also discussed the presumption of

²² *Milwaukee County Jail v. Petersen*, 353 F. Supp. 1157 (E.D. Wis. 1973).

²³ *Jones v. Diamond*, 594 F.2d 997 (5th Cir. 1979).

²⁴ *Id.* at 1003-04.

²⁵ *Bosworth*, *supra* note 2, at 281.

²⁶ *Bell v. Wolfish*, 441 U.S. 520 (1979).

²⁷ *Demery v. Arpaio*, 378 F.3d 1020, 1029-31 (9th Cir. 2004) (citing *Wolfish*, 441 U.S. at 535-39, 543), *cert. denied*, 125 S. Ct. 2961 (2005).

²⁸ *Wolfish*, 441 U.S. 520.

²⁹ *Wolfish*, 441 U.S. at 532.

We do not doubt that the Due Process Clause protects a detainee from certain conditions and restrictions of pretrial detention. Nonetheless, that Clause provides no basis for application of a compelling-necessity standard to conditions of pretrial confinement that are not alleged to infringe any other, more specific guarantee of the Constitution.

Wolfish, 441 U.S. at 533.

innocence doctrine at some length, acknowledging the important role it plays in the criminal justice system.³⁰ However, without explaining his reasoning, Chief Justice Rehnquist held that the presumption of innocence “has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.”³¹

[10] Having rejected the innocence-presuming, compelling necessity standard, the Court then held that the proper inquiry is whether the conditions that pretrial detainees are subjected to “amount to punishment of the detainee.”³² In language cited by the majority’s opinion in *Demery*, the Court held that, “under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”³³

[11] The Court’s reasoning on the matter did not end with that statement, for the majority also held that even though prison inmates do retain certain constitutional rights, those rights are not necessarily guaranteed.³⁴ The Court stated that those rights may be burdened “if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to ‘punishment.’”³⁵ The Court did not specify exactly what legitimate governmental objectives are, but did mention several objectives that are not legitimate, including retribution and deterrence.³⁶

[12] One of the most important and relevant aspects of the Court’s decision in *Wolfish* was the two-fold test it employed for identifying unconstitutional punishment at the pretrial stage of the criminal proceeding. First, the court must look for an express intent to punish on the part of the detention facility officials.³⁷ If the court does not make such a finding, the inquiry then turns upon “whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it,

³⁰ *Id.* at 533.

³¹ *Id.*

³² *Id.* at 535.

³³ *Id.* (citations omitted).

³⁴ *Id.* at 545.

³⁵ *Id.* at 539.

³⁶ *Id.* at 539 n.20 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)).

³⁷ *Id.* at 538.

and whether it appears excessive in relation to the alternative purpose assigned [to it].”³⁸

[13] In other words, the Court in *Wolfish* allows prison officials to place conditions or restrictions on the constitutional rights of pretrial detainees as long as those conditions or restrictions are “reasonably related to a legitimate government objective.”³⁹ If there is a reasonable relation between the measure and a legitimate governmental purpose the measure will not be found to be punishment, “without more.”⁴⁰ This is an important point because the “more,” according to *Wolfish*, may invalidate a measure, even if it is found to be reasonably related to a legitimate government purpose.⁴¹ The “more” may include:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned⁴²

Using this reasoning, the *Wolfish* majority held that the practice of placing more than one detainee in each cell did not amount to a level of discomfort high enough to constitute a constitutional violation.⁴³

[14] In *Graham v. Connor*, the Supreme Court held that the right to be free from excessive force was a guaranteed right that derived from an unspecified source in the Constitution.⁴⁴ That case involved the use of

³⁸ Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

³⁹ *Wolfish*, 441 U.S. at 539.

⁴⁰ *Id.*

⁴¹ Demery v. Arpaio, 378 F.3d 1020, 1036-37 (9th Cir. 2004).

⁴² Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

⁴³ *Wolfish*, 441 U.S. at 541.

⁴⁴ *Graham v. Connor*, 490 U.S. 386, 394 (1989).

excessive force by law enforcement officials during arrest and seizure.⁴⁵ In *Graham*, the Court affirmed *Wolfish* by reiterating that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.⁴⁶ The Court held, however, that it has not “resolved the question [of] whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today.”⁴⁷

[15] As a result, in *Graham*, the Court left the door open as to whether the Fourth Amendment provides any protection for individuals beyond their initial arrest. With *Wolfish*, the Court held that pretrial detainees may not be punished by the states according to the Due Process Clause of the Fourteenth Amendment, but exactly what amounts to punishment is open to debate. Any use of excessive force after conviction is regulated by the Eighth Amendment.⁴⁸

II. THE FACTS OF *DEMERY*

[16] Joe Arpaio, sheriff of Maricopa County, Arizona, installed four webcams in his jailhouse, announcing that the public “has the right to know what’s going on in our jails.... And I believe that they act as a tool to deter crime. We hope that the *only* visit people make to our jail is a virtual visit.”⁴⁹ In July of 2000, the webcams began streaming live images of pre-trial detainees to Internet users.⁵⁰ The webcams were installed in areas that were inaccessible to the public except by prearranged tour, and were installed adjacent to the facility’s closed-circuit security cameras.⁵¹ The four cameras allowed the public to view a holding cell, the hallway outside of the holding cells, the pre-intake area (where detainees are photographed, fingerprinted and booked), and the intake search area (which showed pretrial detainees being patted down).⁵²

⁴⁵ *Id.*

⁴⁶ *Id.* at 395 n.10.

⁴⁷ *Id.*

⁴⁸ *Whitley v. Albers*, 475 U.S. 312, 327 (1986).

⁴⁹ *Demery v. Arpaio*, 378 F.3d 1020, 1024 (9th Cir. 2004).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

[17] To make the images available to the public, Sheriff Arpaio set up an arrangement with a website called “Crime.com.”⁵³ The website contained the following message to visitors: “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.”⁵⁴

[18] To view the webcam images, visitors to the Crime.com website had to click on a series of links.⁵⁵ Visitors to the website were able to meet a virtual Sheriff Arpaio, receive a virtual tour of the jail, watch current conditions in the jail, and view footage of the jail’s first shakedown in four years.⁵⁶ The website recorded more than six million hits during its first days of operation, from visitors as far away as Germany, Britain and Sweden.⁵⁷

[19] Twenty-four former jail detainees brought suit, challenging the constitutionality of the webcam policy under the Fourteenth Amendment.⁵⁸ The former inmates argued that public access to the webcam footage is the type of punishment that courts prevent governments from imposing on unconvicted detainees.⁵⁹ Sheriff Arpaio countered with several arguments, including that the webcams deterred crime and furthered the public’s interest in government transparency and accountability by allowing the public to scrutinize activities in the pre-trial detention center.⁶⁰ The trial court agreed with the inmates and enjoined the use of the webcam.⁶¹

[20] The Ninth Circuit court affirmed the trial court’s decision. According to the majority, the intrusion resulting from the webcam

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 1024-25.

⁵⁷ *Id.* at 1025.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1028.

⁶⁰ *Id.* at 1030-31.

⁶¹ *Id.* at 1023.

transmission was exponentially greater than the “intrusion inherent in incarceration.”⁶² After finding that the web images constituted a harm, the court then determined that the harm did not serve a “legitimate governmental purpose.”⁶³ As a result, according to the Ninth Circuit, “the webcams are not reasonably related to a non punitive purpose,” and were therefore an unconstitutional violation of the Fourteenth Amendment’s substantive due process rights of pretrial detainees.⁶⁴

III. ANALYSIS

[21] The issues raised for analysis in *Demery* are whether webcams in jail houses actually amount to a constitutional infringement of fundamental rights that pretrial detainees retain, and what effect *Demery* will have on the constitutional status of pretrial detainees.

A. DOES THE USE OF WEBCAMS IN A JAIL CELL ACTUALLY AMOUNT TO A CONSTITUTIONAL VIOLATION

[22] In *Wolfish*, the Supreme Court held that pretrial detainees may not be subject to punishment under the Fourteenth Amendment.⁶⁵ While *Wolfish* did not enumerate exactly what punishment means, it did give guidance in determining whether an action constitutes punishment.⁶⁶ However, the Court did hold that a restriction or condition placed on a detainee does not in itself amount to an unconstitutional punishment.⁶⁷ The circuit courts have been left with the task of determining when a restriction or condition is a constitutional violation.

[23] This was the task faced by the Ninth Circuit in *Demery v. Arpaio*.⁶⁸ *Demery* introduced a new twist in the uneven jurisprudence of pretrial detainee rights by implicating the Internet and technology.⁶⁹ The question in *Demery* was whether the use of a webcam to film pretrial detainees

⁶² *Id.* at 1030.

⁶³ *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).

⁶⁴ *Demery*, 378 F.3d at 1033.

⁶⁵ *Wolfish*, 441 U.S. at 535.

⁶⁶ *Id.* at 538.

⁶⁷ *Id.* at 536-37.

⁶⁸ *Demery*, 378 F.3d 1020.

⁶⁹ *Id.*

amounted to an unconstitutionally condition or restriction on those detainees' rights.⁷⁰

[24] In *Demery*, the majority undertook the two-step analysis of *Wolfish* by looking first at whether the webcams caused the detainee to suffer some harm or disability.⁷¹ The court reasoned that “exposure to million of complete strangers... as one is booked, fingerprinted, and generally processed as an arrestee, and as one sits, stands, or lies in a holding cell, constitutes a level of humiliation that almost anyone would regard as profoundly undesirable and strive to avoid.”⁷² To the majority, that exposure constituted a punishment in addition to the harm that is inherent to being incarcerated in the first place.⁷³ The court, however, did not rely upon other sources or precedent in making its determination that this exposure rose to the level of a constitutional violation.

[25] Once it determined that the webcam transmissions constituted a harm, the Ninth Circuit then turned to the issue of whether the harm was imposed “for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.”⁷⁴ This is a rational-relation standard, and it typically affords the government significant deference.⁷⁵ When the court employs a rational relation test, only in rare situations will it not uphold the government’s arguments.⁷⁶ In *Demery*, however, the court examined the claims of the government and dismissed them one by one. In doing so, the court seemed to use analysis more analogous to the compelling necessity standard that was dismissed by the Supreme Court in *Wolfish* than the rational relationship test that it should have employed.

[26] First, the majority in its analysis held that webcams did not improve the security of the prison as Sheriff Arpaio claimed.⁷⁷ The jail already contained a closed-circuit surveillance system, and because the webcams

⁷⁰ *Id.*

⁷¹ *Demery*, 378 F.3d at 1029.

⁷² *Id.* at 1029-30.

⁷³ *Id.* at 1030.

⁷⁴ *Id.* at 1030 (quoting *Bell v. Wolfish*, 441 U.S. 520, 538 (1979)).

⁷⁵ ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 646 (2d ed. 2002).

⁷⁶ *Id.*

⁷⁷ *Demery*, 378 F.3d at 1030.

were placed next to the closed-circuit cameras, they did not increase the size of the area being surveilled.⁷⁸ The court then dismissed the Sheriff's argument that the webcams deterred crime because the public, after viewing the webcam footage, would decide to avoid engaging in activities that lead to arrest and incarceration.⁷⁹ The court, in reliance upon *Wolfish*, stated that this claim had to fail because “[r]etribution and deterrence are not legitimate nonpunitive governmental objectives’ that can justify adverse conditions of detention for pretrial detainees.”⁸⁰ The court also relied on its own precedent in *White v. Roper*, where it held that deterrence does not qualify as a nonpunitive goal for pretrial detainees.⁸¹ Deterrence of crime is typically a legitimate governmental objective, but “where an individual is incarcerated before trial but has not been convicted of any crime, imposing adverse conditions during his detention as a means of deterring crime is not permissible.”⁸²

[27] The Ninth Circuit also dismissed the Sheriff's final main argument that the cameras furthered the public's interest in government transparency and accountability.⁸³ Although facilitating public scrutiny is a legitimate government interest, the court said that it failed to understand how turning pretrial detainees into the “unwilling objects of the latest reality show serves any of these legitimate goals.”⁸⁴ As a result, according to the Ninth Circuit, the normally valid governmental interest in assuring accountability and public scrutiny does not stand up in this case.⁸⁵

[28] The court concluded by stating that the webcams are not “reasonably related to a non-punitive purpose.”⁸⁶ It does seem, however, that at least one of the arguments advanced by Sheriff Arpaio is rationally related to legitimate non-punitive governmental purposes. The Sheriff's argument that carried the most weight was his contention that the webcams provided

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 1030-31 (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979)).

⁸¹ *White v. Roper*, 901 F.2d 1501, 1504-05 (9th Cir. 1990) (citing *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979)).

⁸² *Demery*, 378 F.3d at 1031.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 1032.

⁸⁶ *Id.* at 1033.

greater transparency to governmental operations of the facility, which they surely did. With the webcams in place, it would be difficult for any type of abuse of detainees to take place because, at any given moment, thousands of people could be monitoring the activities inside the jail. As the dissent noted, the jail also allowed prearranged tours of the jail facility that allowed the pretrial detainees to be viewed by those members of the public in the tour group.⁸⁷ The main difference between the webcams and those tours “is surely a matter of degree, left to the discretion of an elected official, restrained only by notions of whether choice of the larger number of viewers makes the measure ‘excessive’ under [*Wolfish*].”⁸⁸ As a result, the webcams provided nearly the same function as the prearranged tours, except that millions, rather than dozens, of people were able to watch.

[29] If the transparency argument is at all true, the court should have concluded under the deferential rationale relation test that the use of the webcam was permissible. Instead, the majority struck down even this seemingly rational and legitimate governmental purpose. In so doing, the court’s rationale seemed to be that it is wrong on a constitutional and moral basis to expose individuals who have been convicted of no crime to a level of shame and humiliation analogous to that of those who have been convicted of a crime. However, the court’s decision seems to indicate a rejection of the rationale relationship test of *Wolfish*.

[30] Under Fourteenth Amendment Due Process analysis, courts typically look first for a substantive right and second for whether that right has been violated.⁸⁹ If the court finds a substantive right, it uses a strict level of scrutiny of the government action implicated.⁹⁰ If the right is fundamental, the government must present a compelling interest to justify the infringement.⁹¹ If, however, the right is not fundamental, the law will be upheld if it is demonstrated that it has merely a legitimate purpose.⁹² Under strict scrutiny, the government must not only demonstrate that the

⁸⁷ *Id.* at 1036 (Bea, J., dissenting).

⁸⁸ *Id.*

⁸⁹ CHEMERINSKY, *supra* note 75, at 764.

⁹⁰ *Id.*

⁹¹ *Id.* at 767.

⁹² *Id.*

law has a compelling purpose, it must also show that the law is necessary to accomplish that compelling purpose.⁹³

[31] In this case involving webcams and pretrial detainees, it is not easy to identify exactly one constitutional right that has been violated. However, it does seem that their right to privacy was violated, which the Supreme Court has deemed a fundamental right.⁹⁴ As unconvicted criminals, detainees should retain the right that we all have to not be filmed or exposed to public humiliation.⁹⁵ Detainees are not, as the Supreme Court stated, “animals in a zoo to be filmed and photographed at will by the public or by media reporters.”⁹⁶

B. WHAT AFFECT WILL THIS RULING HAVE ON THE TREATMENT OF PRETRIAL DETAINEES?

[32] It was doubtful after *Wolfish* if courts would again examine prison actions that might have violated detainees’ constitutional rights.⁹⁷ However, with *Demery*, the Ninth Circuit took up the issue of detainees’ rights and ruled in their favor, thereby expanding protection for those who have yet to be convicted of a crime.⁹⁸

[33] The Ninth Circuit’s decision may subtly indicate a rejection of *Wolfish*’s rational relationship test and the beginning of a return to the compelling necessity standard. The *Demery* court struck down all the governmental interests that burdened the detainees’ rights as unconstitutional.⁹⁹ After *Demery*, it is difficult to imagine a legitimate nonpunitive use of webcams that would be considered constitutional. The court struck down a seemingly legitimate governmental objective using what is typically an extremely deferential standard of review.¹⁰⁰ As a

⁹³ *Id.*

⁹⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁹⁵ *See Wilson v. Layne*, 526 U.S. 603, 614 (1999) (“It is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.”).

⁹⁶ *Houchins v. KQED, Inc.*, 438 U.S. 1, 5 n.2 (1978).

⁹⁷ *Bosworth*, *supra* note 2, at 283.

⁹⁸ *Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

result, it would appear that the court, in fact, used a higher level of review than the one called for in *Wolfish*.

[34] Clearly a constitutional gray area exists here. Those who have been arrested are detained because there is probable cause that they actually committed the crime for which they were arrested.¹⁰¹ They do not have all the freedoms that non-incarcerated people have. The Court has held that the act of being detained prior to trial does not in itself violate one's constitutional rights.¹⁰² However, just because someone has been incarcerated does not automatically mean that they are guilty of a crime. Because of this, courts should err on the side of protecting the rights of these detainees. To best protect the rights of those who have yet to be convicted of a crime, courts need to firmly return to the presumption of innocence, and subject the actions of prison officials to a strict level of constitutional scrutiny. Contrary to one of the holdings of *Wolfish*, the presumption of innocence *should* apply to pretrial detainees. Courts should return to the compelling necessity standard that was used prior to *Bell v. Wolfish*. *Demery* may signal the beginning of a shift back to a level of review that places a higher burden on government officials.

III. CONCLUSION

[35] The majority in *Demery* relied upon the Supreme Court's decision in *Wolfish* when making its ruling, but in fact seems to have used a constitutional level of review higher than what was mandated by *Wolfish*. This decision may indicate a shift in thinking back to the compelling necessity standard used by many of the circuit courts before being struck down by *Wolfish*. The scope of this case is limited, as it is mandatory authority only for the lower courts of the Ninth Circuit. However, it could have a more widespread effect as persuasive authority for the other circuit courts across the country. In at least the Ninth Circuit, however, those who have yet to be convicted of a crime cannot be treated as though they have, at least in regard to being the unwilling participants in an online "reality show."¹⁰³

¹⁰¹ Gerstein v. Pugh, 420 U.S. 103, 111 (1975).

¹⁰² *Id.* at 114.

¹⁰³ *Demery v. Arpaio*, 378 F.3d 1020, 1031 (9th Cir. 2004).

[36] With the rise of the Internet, it is likely that there will be more clashes between such technology and the Constitution. However, as one commentator noted, *Demery* “represents an instance where the power of the Internet does not trump constitutional protections.”¹⁰⁴

¹⁰⁴ Eric J. Sinrod, *Jailhouse Webcams: Courts Aren't Seeing Their Way Clear*, USA TODAY, Sept. 1, 2004, http://www.usatoday.com/tech/columnist/ericjsinrod/2004-09-01-sinrod_x.htm.