Western New England Law Review

Volume 45 *45*
Issue 1

Article 6

2023

THE AMERICANS WITH DISABILITIES ACT V. THE INTERNET: THE MORE USE THE INTERNET GETS, THE MORE ACCESSIBLE IT SHOULD BE

Victoria Mosley

THE AMERICANS WITH DISABILITIES ACT V. THE INTERNET: THE MORE USE THE INTERNET GETS, THE MORE ACCESSIBLE IT SHOULD BE

Cover Page Footnote

Victoria Mosley, The Americans with Disabilities Act V. The Internet: The More Use the Internet Gets, the More Accessible It Should Be, 45 W. New Eng. L. Rev. 142 (2023)

PAPERS? PLEASE.: FOURTH AMENDMENT RIGHTS OF PRETRIAL DETAINEES' PAPERS

*Brendan Riley**

In 1984, the Supreme Court in Hudson v. Palmer,[1] *held that prisoners have no reasonable expectation of privacy within their jail cells and are not entitled to Fourth Amendment protections against unreasonable searches and seizures. The Court's reasoning was focused on the security needs of penal institutions and ensuring they were not compromised by an inmate's privacy rights. While this decision definitively answered the question concerning privacy rights of convicted prisoners, it left open the interpretation of the Fourth Amendment privacy rights of pretrial detainees. Since* Hudson*, courts across the country have varied on the constitutional guarantee of privacy rights to pretrial detainees. Some have held that the same reasoning applied in* Hudson *applies to pretrial detainees. Others have determined that a pretrial detainee retains a Fourth Amendment right to privacy, although somewhat diminished, but compelling enough to challenge an unreasonable search or seizure.*

It is well documented in American case law that courts have engaged in a constant struggle of weighing an individual's right to privacy against the reasonableness of the government's intrusion. This Note does recognize the need for institutional security to perform basic functions in a correctional facility. However, an incarcerated individual is not stripped of all rights against governmental intrusion.

This Note argues that the privacy rights of detained individuals, who have not been convicted of a crime, must be constitutionally guaranteed. The reason that many of these individuals are in detention is that they lack the sufficient funds to be released on bail. The innate injustice of stripping an individual's constitutional rights based on their economic capabilities is constitutionally offensive. As such, the Supreme Court should end the ambiguity surrounding a pretrial detainee's right against unreasonable searches and seizures to ensure equity and certainty to the law.

---

* J.D., 2023, Western New England University School of Law. Thank you to Dean Sudha Setty and the editors and staff of the *Western New England Law Review* for their guidance and assistance, and to my family and friends for their encouragement and support.

1. Hudson v. Palmer, 468 U.S. 517 (1984).

INTRODUCTION

In one particular case, Jose Andujar was suspected of committing a crime, arrested, and then held in a correctional institution because he was unable to post bail.[2] While Andujar was awaiting trial, a police officer received an already opened letter in his home mailbox.[3] The letter, addressed to Andujar's brother, contained information about the defendant's ongoing case, so the officer faxed a copy to the assigned detective.[4] The detective suspected that Andujar had written the letter, which prompted him to contact the special investigator at the correctional facility and inform him of his suspicions.[5] The investigator then listened to jail calls between Andujar and his brother, but did not find anything of interest.[6] After briefing his commanding officer of these findings, he was ordered to conduct a search of Andujar's cell which yielded numerous personal effects, including a yellow note pad with hand-written notes.[7] The search of Andujar's cell took place while he was absent and without a search warrant.[8] The search resulted in a handwriting comparison, an indented writing analysis,[9] and a torn edge examination[10] of the legal pad that were then used as evidence to charge the defendant on solicitation of murder charges.[11]

Andujar was convicted and upon his appeal, he argued, *inter alia*, that his items were illegally seized in violation of his Fourth Amendment privacy rights.[12] Affirming Andujar's conviction, the appellate court determined that pretrial detainees have no legitimate expectation of privacy in their jail cells based on their interpretation of *Hudson v. Palmer*.[13]

Now imagine this same scenario, except the defendant was not held in a correctional facility awaiting his trial, rather he was awaiting trial in

---

2. State v. Andujar, 899 A.2d 1209, 1211 (R.I. 2006).

3. *Id.*

4. *Id.*

5. *Id.* at 1212.

6. *Id.*

7. *Id.* at 1213.

8. *Id.*

9. Forensic experts analyze imprints on underlying pieces of paper when the top sheet was written upon. Mark Songer, *Questioned Document Examination – Expert Introduction*, ROBSON FORENSIC (Sept. 8, 2014) https://www.robsonforensic.com/articles/questioned-document-examination-expert. [https://perma.cc/NH64-KAP7].

10. Forensic experts use this method to determine if two pieces of torn paper were part of the original whole. Marilyn Aguilar, *Physical Match: Uniqueness of Torn Paper*, 7 THEMIS: RSCH. J. JUST. STUD. & FORENSIC SCI. 63, 75 (2019).

11. *Andujar*, 899 A2d. at 1213.

12. *Id.* at 1222–23.

13. *Id.* at 1224 (holding that there is "no room for any legitimate expectation of privacy for pretrial detainees regardless of the purpose for the search.").

the comfort of his home. Upon suspicion that the defendant sent a letter containing troubling information, the officer relayed this information to the detective, who then proceeded to conduct a warrantless search of the defendant's home for incriminating material. This search is clearly an impermissible violation of an individual's Fourth Amendment rights, yet the same conduct is, in essence, allowed if you are unfortunate enough to be a pretrial detainee.[14]

After the Supreme Court held in *Hudson* that a prisoner does not retain an expectation of privacy within their jail cell protecting them from unreasonable searches and seizures,[15] a jurisdictional split arose among the courts as to a pretrial detainee's Fourth Amendment rights. Some courts ruled as the judge in Andujar's case,[16] while others held that pretrial detainees retain a Fourth Amendment right against unreasonable searches and seizures.[17] This Note addresses the vast disparities in the rulings across various jurisdictions and the disadvantages this poses to defendants unable to afford bail. The Court should offer an affirmative ruling on pretrial detainees' Fourth Amendment rights to provide fairness when the government pursues criminal charges against an individual.

The circuit courts are struggling to balance a correctional facility's need for security and a pretrial detainee's Fourth Amendment rights against unreasonable searches and seizures. In the case of *U.S. v. Cohen*,[18] the Second Circuit struck a reasonable balance. The court held that a defendant "retains an expectation of privacy within his cell sufficient to challenge the investigatory search ordered by the prosecutor."[19] It demarcated the line between reasonable and unreasonable searches by declaring that any search "initiated by the prosecution solely to obtain information for a superseding indictment" without a warrant is challengeable.[20] While the court appreciated that security is a correctional facility's main objective, it held that it does not obliterate all constitutional rights afforded to the inmates.[21]

Part I of this Note will examine the origins of the Fourth Amendment and the Supreme Court's notion of individual privacy with respect to

14. The term applied to the defendant who is held prior to their trial on criminal charges because no bail is posted or is denied pre-trial release. *Pretrial Detainee Definition and Legal Meaning*, THE LAW DICTIONARY, https://thelawdictionary.org/pretrial-detainee/ [https://perma.cc/MDF7-X3A2].

15. Hudson v. Palmer, 468 U.S. 517, 526 (1984).

16. *E.g.*, People v. Phillips, 555 N.W.2d 742, 743–44 (Mich. Ct. App. 1996); State v. Martin, 367 S.E.2d 618, 621 (N.C. 1988).

17. *E.g.*, State v. Jackson, 729 A.2d 55, 63 (N.J. Super. Ct. Law Div. 1999); McCoy v. State, 639 So. 2d 163, 165–66 (Fla. Dis. Ct. App. 1994).

18. United States v. Cohen, 796 F.2d 20, 24 (2d Cir. 1986).

19. *Id.*

20. *Id.*

21. *Id.*

incarcerated individuals. It then will discuss *Hudson v. Palmer*[22]and present the jurisdictional split.

Part II will highlight the immense disadvantages pretrial detainees face and how court decisions throughout the country have been gradually eroding the exclusionary rule.[23]

Part III will evaluate how the Supreme Court has defined the parameters of a reasonable expectation of privacy against governmental intrusions and how the search and seizure of a pretrial detainee's papers conflicts with the spirit of the rule protecting attorney-client privilege. Additionally, this section will discuss the good faith doctrine and its possible utilization in situations which implicate the rights of pretrial detainees.

Finally, Part IV of this Note will argue that searches and seizures of a pretrial detainee's papers within their jail cell without a valid search warrant constitutes a violation of the pretrial detainee's Fourth Amendment rights.

The Supreme Court should resolve the dispute over the Fourth Amendment rights of pretrial detainees by affording them the same rights allowed to other defendants who are presumed innocent—protection against arbitrary searches and seizures of their papers. This narrowed approach will protect an individual's privacy rights while ensuring a correctional facility's principal goal of maintaining institutional security, thereby creating a more equitable system by preventing discrimination based on one's inability to make bail.

I. THE HISTORY OF THE FOURTH AMENDMENT AND THE EVOLUTION OF ITS INTERPRETATION

"The meaning of the rights enshrined in the Constitution provides a critical baseline for understanding the limits of government action—perhaps nowhere more so than in regard to the Fourth Amendment."[24] Professor Donohue's statement emphasizes the importance of the rights the Fourth Amendment provides and compels legal minds to explore its foundation and meaning. Understanding the history of the Fourth Amendment and how the Court has applied it throughout this country's history will help us decipher reasonable approaches to questions concerning the constitutional rights of citizens. This Part will begin by offering a brief history of the Fourth Amendment and explain the core

22. Hudson v. Palmer, 468 U.S. 517 (1984).

23. "The exclusionary rule prevents the government from using most evidence gathered in violation of the United States Constitution." Stephanie Jurkowski, *Exclusionary Rule*, LEGAL INFO. INST. https://www.law.cornell.edu/wex/exclusionary_rule [https://perma.cc/XM77-9H7D] [hereinafter *Exclusionary Rule*].

24. Laura K. Donohue, *The Original Fourth Amendment*, 83 CHI. L. REV. 1181, 1185 (2016).

principles it has established. In addition, this Part will discuss the Supreme Court's failure to address a pretrial detainee's Fourth Amendment privacy rights and the circuit split that ensued as a result.

A. *Individual Privacy Rights from Colonial America*

The notion that an individual should be free of unlawful intrusions by the state has existed in the American psyche pre-dating the nation's existence.[25] Indeed, the well-known cliché that "every man's house is his castle" is derived from the famed *Semayne's Case*, decided in England, January 1, 1604.[26] There, the court endorsed the concept that an individual's home is secure from unlawful entry, even from agents of the king.[27]

By the time of the American Revolution, the colonists had been subjected to a number of injustices, including unrestrained searches and seizures of their homes and businesses.[28] In an effort to curb smuggling in the colonies, the king issued writs of assistance, giving his agents unlimited and unfettered discretion on where to search and what to seize.[29] The writs were authorized by the king and remained valid throughout his life.[30] Therefore, new writs of assistance were requested after the death of King George II in 1760.[31] Colonial merchants opposed this action and retained James Otis to represent them before the Superior Court in England.[32] A young John Adams accompanied Otis to the trial and it was those events that inspired Adams to formulate the language and structure of the Fourth Amendment.[33] The importance that experience had on Adams cannot be understated when he wrote to his wife:

> When I look back to the year 1761, and recollect the argument concerning writs of assistance in the superior court, which I have hitherto considered as the commencement of this controversy between Great Britain and America, and run through the whole period, from that time to this, and recollect the series of political events, the chain

25. Tracey Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049, 1052 (2011).

26. SIR EDWARD COKE, THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON AND OTHER PLEAS OF THE CROWN. AND CRIMINAL CAUSES 161 (London, W. Lee & D. Pakeman 1604) ("for a man's house is his castle, et domus sua cuique est tutissimum refugium").

27. Seymane's Case (1603) 77 Eng. Rep. 194 (KB).

28. Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 980 (2011).

29. *Id.* at 991.

30. *Id.* at 991–92. The person who seized the goods was known as the "informer" and was entitled to a portion of the proceeds. *Id.*

31. *Id.* at 992.

32. *Id.*

33. *Id.* at 1006.

> of causes and effects, I am surprised at the suddenness as well as greatness of this revolution.[34]

During the drafting of the Fourth Amendment, James Madison chose to use the structure of Article 14 in the Massachusetts Declaration of Rights, composed by Adams, which encompassed four essential elements:

> 1) a right against search and seizures;
> 2) limiting that right to be against only "unreasonable" intrusions;
> 3) defining a list of objects specifically protected, including persons, houses, papers and "other property;" and
> 4) defining the quality of the right protected as the right to be "secure."[35]

After deliberation and ratification, the wording of the Fourth Amendment to the Constitution provides:

> 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.[36]

This Amendment has been tested time and time again throughout American jurisprudence concerning matters the Framer's never could have conceived.[37] However, the notion of bail and its considerations were well established within the Framer's minds and the consequences individuals faced upon arrest.[38] The Framers considered it such an infringement of liberty that being held without bail was only reserved for crimes punishable by death.[39]

B. *The Court's Modern Interpretation of Privacy Rights*

It is well known in the legal community that the right of privacy is not specifically enumerated within the Constitution, but has been established through Supreme Court jurisprudence interpreting a wide

---

34. *Id.* at 1004.

35. *Id.* at 1046.

36. U.S. CONST. amend. IV.

37. Barry Friedman & Orin Kerr, *Common Interpretation: The Fourth Amendment*, INTERACTIVE CONST., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-iv/interps/121 [https://perma.cc/8MZ9-66GY] (stating the Founding Fathers never could have imagined modern technologies and police forces as they exist today).

38. Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 921 (2013).

39. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (current version at FED. R. CRIM. P. 46(a)(1)).

range of issues.[40] Privacy rights were constitutionally recognized in the 1965 Supreme Court ruling in *Griswold v. Connecticut*.[41] In this case, appellant Estelle Griswold, the executive director of the Planned Parenthood League of Connecticut, along with the medical director of the clinic, challenged an 1879 state law banning the use of contraception.[42] Justice Douglas wrote for the majority stating that the Constitution protects essential individual freedoms not detailed within the document.[43] The Court reasoned that the right to privacy was within the penumbras of protections established by the Bill of Rights.[44] Specifically, the Ninth Amendment allowed fundamental rights (such as privacy) not enumerated in the Constitution to be protected from governmental intrusion.[45] These zones of privacy enabled by the Bill of Rights allow the courts to give substance to what privacy rights encompass.[46] With this decision the stage was set for determining personal privacy rights.

Katz v. U.S. presented the Court's answer to the scope of the Fourth Amendment's privacy protections against unreasonable searches.[47] In *Katz*, the government introduced evidence obtained from a warrantless wiretap of a public telephone booth.[48] After conviction, the Court of Appeals rejected Katz's claim that the government conducted an unreasonable search because there was no *physical* trespass levied against the defendant.[49]

The Supreme Court granted certiorari and held that this intrusion was an unconstitutional violation of the defendant's Fourth Amendment

---

40. Eugene McCarthy, *In Defense of* Griswold v. Connecticut*: Privacy, Originalism, and the Iceberg Theory of Omission*, 54 WILLAMETTE L. REV. 335, 338 (2018) ("It arises in relation to issues across the spectrum of constitutional law: search and seizure, choosing what and where to teach children, the ability to marry whom we choose, the right to die, and, of course, our reproductive rights relating to sex, contraception and abortion.").

41. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding that the marital right to privacy protects from state restrictions on contraception).

42. *Id.* at 480.

43. Richard Bronner, *Constitutional Law—Right of Privacy—Access to Contraceptive Information*, 17 CASE W. RSRV. L. REV. 601, 602 (1965).

44. "The right of privacy came partially from the First Amendment freedom of association, partially from the Third Amendment prohibition against the quartering of soldiers in private houses, partially from the Fourth Amendment right against unreasonable searches and seizures, and partially from the Fifth Amendment right against self-incrimination." Jordan M. Blanke, Carpenter v. U.S. *Begs for Action*, 2018 U. ILL. L. REV. ONLINE 260, 264. The Constitution suggests implicit zones of privacy established by the Ninth Amendment and through the due process clause of the Fourteenth Amendment. Bronner, *supra* note 43, at 603.

45. McCarthy, *supra* note 40, at 359–60; U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

46. *Griswold*, 381 U.S. at 484.

47. Katz v. United States, 389 U.S. 347, 351 (1967).

48. *Id.* at 348.

49. *Id.* at 348–49.

rights—rejecting the meaning of "search" established in *Olmstead v. U.S.*[50] Justice Stewart's majority opinion revised the Court's interpretation of privacy rights to encompass not only physical trespass, but also what an individual seeks to keep private.[51]

In his concurring opinion, Justice Harlan understood that the underlying question before the Court was what protections the Fourth Amendment provides to people.[52] In his answer, he established the modern test for determining a reasonable expectation of privacy.[53] He stated that "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation [of privacy] be one that society is prepared to recognize as 'reasonable.'"[54] Ever since the ruling, this test has been the standard for every challenge to a warrantless search and seizure.[55] This Note will next examine the Court's application of this standard towards incarcerated individuals.

C. *The Supreme Court's Ruling on a Prisoner's Reasonable Expectation of Privacy Against Institutional Security Needs of a Prison*

The application of the Constitution to the rights of incarcerated individuals finds its origins in *Hudson v. Palmer*.[56] To understand the current split among the circuit courts, an examination of the Supreme Court's holding is necessary.

In *Hudson*, the defendant was serving his sentence in a Virginia

50. David Alan Sklansky, *"One Train May Hide Another":* Katz*, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U. C. DAVIS L. REV. 875, 882 (2008); Olmstead v. United States, 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967) (holding the Fourth Amendment protects only against searches by physical trespass).

51. "For the Fourth Amendment protects people, not places. . . . [W]hat he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, 389 U.S. at 351.

52. Sklansky, *supra* note 50, at 882–83.

53. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Orin Kerr has argued that the subjective test is irrelevant, and most courts treat it as such. Orin S. Kerr, Katz *Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 114 (2015). The objective test of what society considers reasonable is how courts determine expectations of privacy. *Id.* at 113–14.

54. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Defying expectations, the post-Warren Court afforded fewer protections than anticipated by finding a reasonable expectation of privacy was lacking when a police search was challenged. Michael Vitiello, Katz v. United States*: Back to the Future?*, 52 U. RICH. L. REV. 425, 434 (2018).

55. Martin McKown, *Fifty Years of* Katz*: A Look Back—and Forward—At the Influence of Justice Harlan's Concurring Opinion on the Reasonable Expectation of Privacy*, 85 GEO. WASH. L. REV. ARGUENDO 140 (2017).

56. Hudson v. Palmer, 468 U.S. 517 (1984).

correctional institution for convictions on an assortment of crimes.[57] During his incarceration, the defendant was subjected to a "shakedown"[58] search of his jail cell for contraband, which resulted in a conviction of destruction of state property.[59] Upon appeal, the Fourth Circuit held that the defendant had a "limited privacy right" against unreasonable searches of his jail cell.[60] The Supreme Court then granted certiorari and held that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell, and that accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."[61]

The decision resulted in severe restrictions on the privacy rights of prisoners, and while it explicitly excluded ruling on seizure of an inmate's papers, it did provide a theoretical basis for denying protections for such items.[62] The Court's reasoning for such limitations was based upon the necessity of institutional security as stated in *Bell v. Wolfish*.[63] The Court's opinion in *Wolfish* laid the framework for determining Fourth Amendment challenges by weighing the privacy rights of the inmate against the institutional security needs of the facility.[64] The Court in *Wolfish* hinted that institutional security was a high bar for a prisoner's privacy rights to supersede, as evidenced in subsequent cases.[65]

Of more importance, in the Court's majority opinion, Justice Burger

---

57. *Id.* at 519.

58. This is described as an "unannounced search[] of inmate living areas at irregular intervals." Bell v. Wolfish, 441 U.S. 520, 555 (1979).

59. *Hudson*, 468 U.S. at 519. During the search, correctional officers discovered a torn pillowcase in the defendant's trash can, which subsequently led to a destruction of state property conviction and a reprimand entered on his prison record. *Id.* at 519–20.

60. *Id.* at 521.

61. *Id.* at 526; Teresa A. Miller, *Bright Lines, Black Bodies: The* Florence *Strip Search Case and its Dire Repercussions*, 46 AKRON L. REV. 433, 455 (2013) ("*Hudson* considered convicted felons serving sentences in maximum-security state prison, but Kennedy cites it as a precedent for a county jail and an unconvicted citizen . . . .").

62. Martin R. Gardner, Hudson v. Palmer*—"Bright Lines" but Dark Directions for Prisoner Privacy Rights*, 76 J. CRIM. L. & CRIMINOLOGY 75, 77–78 (1985).

63. Bell v. Wolfish, 441 U.S. 520, 546 (1979) ("[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees.").

64. *Id.* at 560. It should be noted that *Hudson* went further than *Wolfish*, stating that the privacy interests of prisoners against searches always yield to institutional security. Antoine McNamara, Note, *The "Special Needs" of Prison, Probation and Parole*, 82 N. Y. U. L. REV. 209, 225–26 (2007).

65. *See* Block v. Rutherford, 468 U.S. 576 (1984) (upholding a ban on all contact visits because of the security threat they posed); *see also* Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington, 566 U.S. 318 (2012) (holding strip searches struck a reasonable balance between inmate privacy and prison security).

analyzed "whether a *prison inmate* has a reasonable expectation of privacy in his *prison cell* entitling him to the protection of the Fourth Amendment against unreasonable searches and seizures."[66] Justice Burger's reliance on the Eighth Amendment demonstrates that this decision only affects individuals already convicted of criminal offences and serving jail or prison time.[67] It therefore stands to reason that the Court's decision in *Hudson* does not apply to pretrial detainees, and it should adopt another standard.[68] To determine this standard by weighing the privacy rights of a pretrial detainee against the institutional security needs, we must establish the Court's interpretation of institutional security.

In matters of incarcerated individuals' privacy rights, the Supreme Court has often expressed that the objective of institutional security to a correctional facility is vital to its operation.[69] While the Court has never expressly defined "institutional security," it has explained that it includes "to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry."[70] The latest case involving the security interests of prisons, *Florence v. Board of Chosen Freeholders of County of Burlington*, was decided in 2012.[71]

Petitioner Albert Florence was arrested during a traffic stop based on a still active, but errant warrant.[72] During his incarceration, he was subjected to a delousing shower and strip search.[73] Florence was released and his charges were dismissed after the error with the warrant was discovered.[74] He brought suit against the government, arguing that a strip search of nonindictable offenders without reasonable suspicion was a violation of his Fourth Amendment rights.[75] The Third Circuit upheld the search as reasonable, and the Supreme Court granted certiorari.[76]

Justice Kennedy wrote the majority opinion, holding that the strip search was reasonable based on the institutional security needs of the

66. *Hudson*, 468 U.S. at 519 (emphasis added); WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.9(a) (6th ed. 2020).

67. *Hudson*, 468 U.S. at 530; Ingraham v. Wright, 430 U.S. 651, 664 (1977) (holding that the Eighth Amendment "was designed to protect those convicted of crimes.").

68. *See* LAFAVE, *supra* note 66.

69. *See Wolfish*, 441 U.S. at 546 (1979); *Block*, 468 U.S. at 583; *Hudson*, 468 U.S. at 528; *Florence*, 566 U.S. at 318.

70. *Wolfish*, 441 U.S at 547.

71. *Florence*, 566 U.S. at 322.

72. *Id.* at 323. The facts of the case begin in 1998 when petitioner Albert Florence was convicted of offenses that required him to pay a fine in installments. *Id.* In 2003, Florence fell behind on the payments and a warrant was issued for his arrest. *Id.* He paid the balance within a week, but due to a technical error, his warrant remained in the database. *Id.*

73. *Id.* at 324.

74. *Id.*

75. *Id.* at 324–25.

76. *Id.* at 325–26.

prison.[77] When reviewing the security procedures, the Court deferred to the expertise of the correctional officials due to their familiarity with managing difficult situations in a prison setting.[78]

The *Florence* decision was another setback for proponents of prisoners' rights. The Court stated that matters of institutional security are left to the discretion of the facilities' administrators.[79] Justice Kennedy employed the reasoning in *Hudson* that corrections officials may fashion security guidelines in accordance with the dangers of operating a prison.[80] However, *Florence* addresses invasive searches of detainees, concluding deferment to corrections officials sets a high threshold, and Fourth Amendment violations only exist when the evidence shows egregious intrusions.[81]

The Supreme Court established that the Fourth Amendment rights of convicted prisoners yield to the institutional security needs of the facility. The Court, however, did not answer the parameters of a pretrial detainee's privacy rights.

D. *The Circuit Court Split on Pretrial Detainee Privacy Rights*

After the Supreme Court's ruling issued in *Hudson*, the lower courts split concerning the Fourth Amendment rights of pretrial detainees.[82] The contentious issue of privacy rights versus the institutional security needs of correctional facilities has been challenged in various jurisdictions, and unsurprisingly courts have rendered conflicting decisions.[83] This Note will next explore a sampling of cases and the reasoning the courts applied in their holdings.

1. Courts Holding That a Pretrial Detainee Has No Reasonable Expectation of Privacy in Their Jail Cells

In *State v. Martin*, the defendant was a pretrial detainee being held on suspicion of a number of crimes.[84] While awaiting trial, a corrections official searched his cell and discovered a letter addressed to the defendant's brother purportedly asking him to commit perjury at his

77. *Id.* at 339.

78. George M. Dery III, Florence *and the Machine: The Supreme Court Upholds Suspicionless Strip Searches Resulting from Computer Error*, 40 AM. J. CRIM. L. 173, 181 (2013).

79. *See* Teresa A. Miller, *Bright Lines, Black Bodies: The* Florence *Strip Search Case and its Dire Repercussions*, 46 AKRON L. REV. 433, 445–46 (2013).

80. Dery, *supra* note 78, at 178.

81. Miller, *supra* note 79, at 446–47.

82. MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 9:10 (5th ed.), Westlaw (database updated Oct. 2021).

83. *Id.*

84. State v. Martin, 367 S.E.2d 618, 619 (N.C. 1988).

trial.[85] The defendant objected to the prosecution's questioning about the letter during trial because even if the jailer was allowed to search his cell, he went beyond the scope of the search by reading a personal notebook of the defendant.[86] The *Martin* court held that the Supreme Court's ruling in *Wolfish* applied equally to pretrial detainees as well as convicted prisoners serving their sentences.[87] Furthermore, by applying *Hudson*, the jailer had the right to inspect everything within the jail cell and he "could have discovered something by reading the notebook that would have enabled him to better maintain order in the jail."[88] Hence, the court justified a seizure of incriminating evidence in an ongoing trial because the search was purportedly instigated by correctional officers for the purpose of maintaining institutional security.

Similarly in *People v. Phillips*, the court applied similar reasoning as *Martin* towards a defendant's claim of a violation of his Fourth Amendment right when the prosecution was allowed to admit papers seized from his jail cell.[89] The court held that the institutional security of the facility was paramount, and any person within a place of confinement posed a security threat no matter their conviction status.[90]

It stands to reason that when weighing the privacy rights of pretrial detainees, these decisions have determined that the security needs are near sacrosanct, and any semblance of privacy retained by an incarcerated individual within their jail cell is forfeited. These rulings give permission for most any intrusion by detention facility agents inside a pretrial detainee's jail cell for security reasons without any form of redress concerning their Fourth Amendment rights.

2. Courts Holding That a Pretrial Detainee Has a Diminished Fourth Amendment Right to Privacy Within Their Jail Cells

Pretrial detainees are not consigned to a diminished Fourth Amendment right because they are criminal defendants. The reduced privacy rights relate to the institutional security needs of the facility.[91]

Shortly after the decision in *Hudson*, the Second Circuit decided a case involving a pretrial detainee's challenge to a search of his jail cell.

---

85. *Id.* at 621. The facts as outlined in the opinion do not indicate whether the search exceeded stated reasons of institutional security. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. People v. Phillips, 555 N.W.2d 742, 743–44 (Mich. Ct. App. 1996). Despite a lack of information provided in the opinion about the search, it may be inferred it was executed for security reasons. *Id* at 744.

90. *Id.* The court held that the lack of privacy rights of prisoners applied to pretrial detainees as well. TIMOTHY A. BAUGHMAN, GILLESPIE MICH. CRIM. L. & PROC. SEARCH & SEIZURE § 4:32 (2d ed.), Westlaw (database updated Mar. 2021).

91. Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 531 (2018).

In *U.S. v. Cohen*, appellant Arthur Barr was being held on drug conspiracy charges, and a corrections officer conducted a "contraband" search of his jail cell initiated by the Assistant United States Attorney for the purpose of uncovering documents that might be helpful to the prosecution.[92] Relying on the information gathered from that warrantless search, a magistrate issued a warrant for seizure of all "written, non-legal materials belonging to Harold Barr."[93] On the authority of this warrant, the police seized Barr's papers that contained "witness lists, notes on specific charges, personal matters, notes on conversations between Barr and his attorneys, and a sheet of paper on which the government contended Barr was practicing to disguise his handwriting."[94]

The trial court excluded some of these materials on Sixth Amendment grounds, but admitted the rest, which resulted in Barr's conviction.[95] Barr appealed, and the government argued that according to *Hudson*, the defendant retained no Fourth Amendment right to privacy in his prison cell, and the fruits of this search cannot be suppressed on constitutional grounds.[96]

The Second Circuit held that the *Hudson* decision did not consider whether prosecutors could initiate a search of the prisoner's cell in order to procure indictments against them.[97] The Second Circuit interpreted the *Hudson* ruling to mean that prison officials are in the best position to determine security threats, and whether to conduct a search of an inmate's cell best lies with those officials.[98] The court concluded that if the search was administered at the behest of a prison official, the "search would not be subject to constitutional challenge, regardless of whether security needs could justify it."[99] Here, the court ruled the search of Barr's cell was effectuated at the direction of the prosecutor for non-security reasons, and therefore was subject to a Fourth Amendment challenge.[100] This decision determines that the constitutionality of a jail cell search is dependent on who or what entity initiates the search and on what merits. The fact that

92. United States v. Cohen, 796 F.2d 20, 21 (2d Cir.1986). The Assistant United States Attorney instructed the officers "to look for certain types of documents that may have contained the names and phone numbers of other of Barr's co-conspirators and witnesses who Barr had already contacted and was still in the process of trying to contact." *Id.* The officer's "contraband" search lasted approximately one and a half hours and consisted solely of Barr's papers. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 21–22.

97. *Id.* at 23.

98. *Id.*

99. *Id.* at 24.

100. *Id.* ("An individual's mere presence in a prison cell does not totally strip away every garment cloaking his Fourth Amendment rights, even though the covering that remains is but a small remnant.").

a prosecutor requested a search for the sole purpose of obtaining evidence to be used against the defendant rendered it a Fourth Amendment violation according to the Second Circuit.[101]

Ensuing case law challenging Fourth Amendment violations of pretrial detainees in other jurisdictions also invalidated warrantless searches and seizures based upon the reasoning offered in *Cohen*.[102] In *McCoy v. State*, a prosecutor and police officer went to the defendant's jail cell and executed a search including all of his written materials.[103] The prosecutor admitted the search was conducted without probable cause, was not based on security concerns of the institution, and had the sole purpose of uncovering incriminating material against the defendant.[104] Upon hearing these undisputed facts, the court claimed "we cannot conceive of any 'legitimate health or security purpose[]' which might have justified seizure of the documents in this case," and held that searches "which are not initiated by institutional personnel and are not even colorably motivated by concerns about institutional security" are unconstitutional.[105]

More interestingly, in *State v. Jackson*, the court found that even a search initiated by a prosecutor under the pretext of institutional security is impermissible.[106] In this case, while Reggie Jackson was being detained pending trial on an assortment of charges, the chief prosecutor sought a warrant for the defendant's bunk area for any letters pertaining to an alleged attempted obstruction.[107] The prosecutor did not procure a warrant claiming the judge assured him that he did not need a warrant to search and seize a defendant's property at the jail.[108] Relying on this information, the prosecutor contacted the supervising officer at the jail and instructed him as to which materials were to be seized and to conduct a search without arousing the suspicion of the defendant.[109] The defendant moved to suppress this evidence and the State argued that the defendant had no Fourth Amendment privacy protections under *Hudson*.[110] The court held that the *Cohen* rationale applied stating:

> At this juncture, he is cloaked with the presumption of innocence.

---

101. *Id.*

102. *E.g.*, McCoy v. State, 639 So. 2d 163 (Fla. Dist. Ct. App. 1994); State v. Jackson, 729 A.2d 55, 63 (N.J. Super. Ct. Law Div. 1999).

103. *McCoy*, 639 So .2d at 164.

104. *Id.*

105. *Id.* at 166–67.

106. *Jackson*, 729 A.2d at 63.

107. *Id.* at 58.

108. *Id.*

109. *Id.* The officer proceeded to conduct the search under the guise of a routine contraband search, seized and photocopied the materials requested, and returned them to their original place as not to alert the defendant to their true objective. *Id.* at 58–59.

110. *Id.* at 59.

> While that cloak may not shield him or his property from the prying eyes of his jailors in their efforts to maintain institutional security, it will insulate him from surreptitious attempts of the prosecutor to obtain evidence without the benefit of a warrant. Defendant's expectations of privacy may be greatly diminished, but they are not completely extinguished.[111]

The judge concluded that if the State had followed institutional security procedure, perhaps the evidence they sought would have been uncovered.[112] Consequently, that pretextual search, masked as a contraband search was a violation of the defendant's Fourth Amendment right against unreasonable search and seizure.[113]

Based on these rulings, the crux of the legality of a warrantless search seems to rise and fall on a prison official's determination of whether there is a security need for a search. Furthermore, any pretextual security search initiated by the government that is actually intended to uncover incriminating evidence should be considered an end-run around the Fourth Amendment and a violation of a pretrial detainee's privacy rights.

II. JUSTICE ISSUES AFFECTING PRETRIAL DETAINEES

The rights of pretrial detainees cannot solely be viewed through the lens of judicial interpretations. Pretrial detainees' rights are also affected by other factors that compound the obstacles they face. This Note will next discuss two of those factors.

A. *Systemic Discrimination of Poor Pretrial Detainees*

Individuals unable to afford bail face an extreme disadvantage in preparing their defense compared to those who are released, yet face the same charge.[114] Recent studies have shown that when charged with the same crime, pretrial detainees are much more likely to be convicted than defendants released on bail.[115] The Vera Institute of Justice reported a study that "found that people who were unable to pay bail within seven days of their bail hearings were 25 percent more likely to be convicted than similarly situated people who paid bail and were released . . . ."[116] In addition to the fact that convictions are more likely for those unable to make bail, sentencing is harsher as well, resulting in an almost doubling

111. *Id.* at 63.

112. *Id.*

113. *Id.*

114. Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA EVIDENCE BRIEF: FOR THE RECORD (Vera Inst. of Just., New York, N.Y.), Apr. 2019, at 4.

115. *Id.* at 4.

116. *Id.*

of sentence length and court costs compared to their counterparts.[117]

A jury's bias can play a significant role in this disparity just by the image a pretrial detainee might present.[118] The stress of incarceration may lead to a disheveled look, and a defendant's appearance in court wearing jail issued garments preys on a juror's unconscious determinations of a defendant's guilt.[119]

Another major factor contributing to this disparity is that detention limits an accused person's ability to meet with defense counsel and assist in preparing a defense.[120] This may result in pretrial detainees having to rely on friends or family to track down possible witnesses and attempt to collect evidence.[121] Furthermore, when pretrial detainees consequently lose their jobs due to their incarceration, they are unable to provide evidence that they are able to pay restitution.[122] Unconfined criminal defendants are able to mitigate their sentences by demonstrating to the court that they are productive members of society, while the detained can only add up time served.[123] This encourages defendants to accept plea bargains, even when innocent, in order to be conditionally released or to conclude the matter with time served.[124] When compounded against the other detriments incarceration can impose on an individual such as social stigma, external effects on the family, or likelihood of recidivism, the hardships they are faced with can be overwhelming.[125]

---

117. *Id.* at 5 ("[P]eople detained for the entire pretrial period were 4.44 times more likely to receive a jail sentence and 3.32 times more likely to receive a prison sentence than those released at some point prior to case resolution."); Cindy Grace Thyer, *Is It Time for Arkansas to Consider Pretrial Reform?*, 42 U. ARK. LITTLE ROCK L. REV. 511, 526 (2020) ("Studies have also found that pretrial detention has had the effect of lengthening the defendant's sentence by 42% and increasing the amount of non-bail court fees by 41%."); Christopher T. Lowenkamp, Marie VanNostrand & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, LAURA & JOHN ARNOLD FOUND. REPORT (Laura & John Arnold Found., New York, N.Y.), Nov. 2013, at 10–11, https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf [https://perma.cc/SXZ8-JC5P].

118. Douglas J. Klein, *The Pretrial Detention "Crisis": The Causes and the Cure*, 52 WASH. U. J. URB. & CONTEMP. L. 281, 294 (1997).

119. *Id.*

120. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2493 (2004).

121. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1355–56 (2014).

122. *See* Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1419 (2017).

123. Digard & Swavola, *supra* note 114, at 5.

124. Klein, *supra* note 118, at 290–91.

125. The author recognizes that the hardships mentioned in this subpart are not exhaustive and further discussion on this topic would be valuable in another Note.

B. *Trend of the Courts to Abandon the Exclusionary Rule*[126]

The exclusionary rule is a long-held principle first established by the United States Supreme Court in *Weeks v. United States*.[127] It was initially created to remedy the harm the defendant suffered when the defendant's property was unlawfully taken.[128] By 1961, the Supreme Court ruled in *Mapp v. Ohio* that this rule is applicable to all State criminal defendants.[129] The Court's reasoning for the exclusionary rule was that it is to be a "deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation."[130] The Court wanted to protect the integrity of admissible evidence and believed that this rule would deter police misconduct in the collection of evidence.[131] Furthermore, it also held that exclusion of illegally obtained evidence was fundamental to the privacy rights of individuals.[132] The effects of that ruling reverberated throughout subsequent jurisprudence.[133]

Unfortunately for civil rights proponents, there has been a shift by the Court to chip away at this rule.[134] Since the inception of the exclusionary rule, the Court has adopted exceptions to allow otherwise inadmissible

126. *Exclusionary Rule, supra* note 23 ("The exclusionary rule prevents the government from using most evidence gathered in violation of the United States Constitution.").

127. Weeks v. United States, 232 U.S. 383 (1914).

128. William C. Hefferman, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 800 (2000).

129. Mapp v. Ohio, 367 U.S. 643, 660 (1961).

130. Davis v. United States, 564 U.S. 229, 231–32 (2011). "The modern Court denies that exclusion can perform a reparative function. According to the Court, once a government official interferes with the privacy the Fourth Amendment protects, the harm someone has suffered as a result cannot be repaired; privacy wrongs, the Court reasons, are irreversible and so irreparable." Hefferman, *supra* note 128.

131. United States v. Leon, 468 U.S. 897, 916 (1984) ("First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates."); Edward J. Imwinkelried, *The Dangerous Trend Blurring the Distinction Between a Reasonable Expectation of Confidentiality in Privilege Law and a Reasonable Expectation of Privacy in Fourth Amendment Jurisprudence*, U.C. DAVIS LEGAL STUD. RSCH. PAPER SERIES (Research Paper No. 237), Dec. 2010, at 3.

132. *Mapp*, 367 U.S. at 655–56 ("[W]ithout [the exclusionary] rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty.'").

133. Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681, 704 (1974). ("[T]he decreases in arrests following *Mapp* were both dramatically sudden and truly spectacular; one would be hard pressed to attribute them in large measure to anything but the imposition of the exclusionary rule.").

134. Lyle Denniston, *Opinion Analysis: The Fading "Exclusionary Rule"*, SCOTUSBLOG (June 25, 2011, 8:58 AM) https://www.scotusblog.com/2011/06/opinion-analysis-the-fading-exclusionary-rule/ [https://perma.cc/U6ZM-8GHX].

evidence to be admitted.[135] Even in cases that were seemingly "wins" for the defendant, the Court ruled in narrow terms for exclusion.[136] This disturbing trend poses severe obstacles to criminal defendants and "[t]o abandon this rule would result in loss of respect for constitutional values and would deny justice to the actual victims of unlawful official behavior."[137] Stripping any semblance of Fourth Amendment rights of these individuals will only exacerbate the discriminatory effect on pretrial detainees.

III. NAVIGATING A PRETRIAL DETAINEE'S RIGHT TO PRIVACY

A more expansive view to a pretrial detainee's privacy rights can be explained by examining the Supreme Court's interpretation of what it considers a permissible individual right to privacy, and the necessity for a shield against warrantless searches. This Part will recount the Court's establishment of an individual's reasonable expectation of privacy and how it has evolved in subsequent case law. Next, this Part will present the need for a pretrial detainee's privacy rights for their protection against violations of attorney-client privilege. Finally, this Part will counter the argument that the good faith exception can be applied to a warrantless search of a pretrial detainee's papers within their jail cell.

A. *The Supreme Court's Establishment of a Reasonable Expectation of Privacy*

The core of the Fourth Amendment's protections is based on an individual's privacy interest against unreasonable searches.[138] Establishing whether a reasonable expectation of privacy exists is essential to determine whether a search occurred for Fourth Amendment purposes.[139] To determine if a reasonable expectation of privacy exists, Justice Harlan's concurrence in *Katz* provides that an individual must have a subjective expectation of privacy in the place searched and the expectation of privacy is one society is prepared to recognize as

135. *See generally Exclusionary Rule*, *supra* note 23 (highlighting that these exceptions include good faith exception, independent source doctrine, inevitable discovery doctrine, attenuation doctrine, evidence admissible for impeachment, and qualified immunity).

136. Orin Kerr, Opinion, *Supreme Court Construes the Exclusionary Rule Narrowly in* Utah v. Strieff, WASH. POST (June 21, 2016, 7:56 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/21/supreme-court-construes-the-exclusionary-rule-narrowly-in-utah-v-strieff/ [https://perma.cc/GN9V-29LG].

137. Steven Cann & Bob Egbert, *The Exclusionary Rule: Its Necessity in Constitutional Democracy*, 23 HOW. L.J. 299, 323 (1980).

138. Ian Wood, Note, *An Unreasonable Online Search: How a Sheriff's Webcams Strengthened Fourth Amendment Privacy Rights of Pretrial Detainees*, 35 GOLDEN GATE U. L. REV. 1, 13 (2005).

139. *Id.*

objectively reasonable.[140] When Fourth Amendment rights are implicated a judge must weigh law enforcement's need for the particular search against the privacy rights of the individual by analyzing the scope, manner, place, and justification of the intrusion.[141] Thus, if a warrantless search is conducted where an individual has a reasonable expectation of privacy, the search is presumed to be unconstitutional.[142]

Despite this generalized theory, the Supreme Court has carved out numerous exceptions to allow warrantless searches.[143] In addition, a further examination of the Court's rulings on privacy rights suggests an adjustment of the subjective requirement of the *Katz* test.[144] Even the Supreme Court has recognized that the government could, in effect, define privacy out of existence simply by putting the citizens on notice that there is no presumption of privacy.[145]

Justice Marshall stated in his dissent of *Smith v. Maryland* that when determining if a reasonable expectation of privacy exists "courts must evaluate the 'intrinsic character' of investigative practices with reference to the basic values underlying the Fourth Amendment."[146] The gradual elimination of the subjective requirement shows the Court's reasoning on privacy relates to the nature of the challenged activity and the information sought with such intrusions.[147] Next, this Note will discuss the more recent Supreme Court rulings on particular instances pertaining to an individual's reasonable expectation of privacy.

In the past few years, the Supreme Court has taken up challenges to Fourth Amendment rights that have resulted in a narrowing of what and where privacy interests should be protected.[148] Although the ongoing trend of the Court has been leaning towards abandoning the exclusionary rule, these recent decisions have indicated the Court believes that an individual's right to privacy is significant, and the Court's reasoning in these decisions lends support for a protection of a pretrial detainee's papers against warrantless search and seizure.

The current rediscovery of individual privacy rights began with *U.S.*

---

140. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan J., concurring) (establishing the reasonable expectation of privacy (REOP) standard test).

141. Wood, *supra* note 138, at 13; Bell v. Wolfish, 441 U.S. 520 (1979).

142. *See generally Fourth Amendment*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/fourth_amendment [https://perma.cc/9GAB-PHJF].

143. Friedman & Kerr, *supra* note 37.

144. Kerr, *supra* note 53.

145. *See* Geneva Ramirez, *The Erosion of* Smith v. Maryland, 70 CASE W. RSRV. L. REV. 489, 501 (2019).

146. Smith v. Maryland, 442 U.S. 735, 751 (1979) (Marshall, J., dissenting) (quoting California Bankers Assn. v. Shultz, 416 U.S. 21, 95 (1974) (Marshall, J., dissenting)).

147. Ramirez, *supra* note 145, at 503.

148. *See, e.g.*, United States v. Jones, 565 U.S. 400 (2012); Riley v. California, 573 U.S. 373 (2014); Carpenter v. United States, 138 S. Ct. 2206 (2018).

v. Jones, in a complex opinion authored by Justice Scalia.[149] In this case the government placed a GPS tracking device underneath Jones' vehicle after their warrant had expired.[150] The information gathered from the monitoring of the vehicle over a four-week period resulted in a multiple-count indictment of conspiracy and distribution charges.[151] The Supreme Court granted certiorari to determine whether the attachment of the GPS device constituted a search under the Fourth Amendment.[152]

Writing for the majority, Justice Scalia determined that the combination of the installation of the GPS device *and* using it to track his whereabouts constituted a search for Fourth Amendment purposes.[153] The narrow scope of the decision asserted that there is a privacy interest within an individual's property if the trespass is for reasons of collecting information, but the property did not have an expectation of privacy within itself.[154] Nevertheless, five of the other Justices agreed with Justice Alito's concurrence that this sort of invasion did implicate reasonable expectations of privacy.[155]

This is an important decision regarding the privacy rights of pretrial detainees because it makes clear that a governmental intrusion on an individual's constitutionally protected property for the purpose of collecting information constitutes a search for Fourth Amendment purposes.[156] Incarcerated individuals are permitted to retain personal property within their jail cells, including legal materials.[157] Although the *Jones* decision did not rule on the warrant requirements for such searches, the significance of the ruling lies with Justice Scalia's majority opinion and the willingness of the five concurring Justices to address the reasonable expectation of privacy of *property* as an issue pertaining to

149. *Jones*, 565 U.S. at 404. In this case, Respondent Antoine Jones was suspected of trafficking narcotics. *Id.* at 402.

150. *Id.* at 402–03.

151. *Id.* at 403.

152. *Id.* at 402.

153. Tom Goldstein, *Why* Jones *Is Still Less of a Pro-Privacy Decision Than Most Thought (Conclusion Slightly Revised Jan. 31*), SCOTUSBLOG, (Jan. 30, 2012, 10:53 AM) https://www.scotusblog.com/2012/01/why-jones-is-still-less-of-a-pro-privacy-decision-than-most-thought/ [https://perma.cc/AX9G-GJE9]. Neither of these actions standing alone would constitute a Fourth Amendment search, with the exception of Justice Sotomayor's stance that using a device for tracking *would* constitute a search. *Id.*

154. *Id.*; *Jones*, 565 U.S. at 406 ("Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001))).

155. Goldstein, *supra* note 153. Regrettably, the Court did not address the warrant requirements of such a search, leaving it to be answered in a future case. *Id.*

156. *Jones*, 565 U.S. at 407 (citing United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan J., concurring)).

157. 28 C.F.R. §§ 553.10–11 (2021).

Fourth Amendment violations.[158] When placed in the context of this decision, the ground is laid for the argument that if a pretrial detainee's personal papers are seized without a warrant, the search and seizure is challengeable on Fourth Amendment grounds (presuming they have a reasonable expectation of privacy in their papers).[159]

The next case the Supreme Court addressed implicating Fourth Amendment privacy rights was the 2014 decision of *Riley v. California*.[160] In this case, officers placed Riley under arrest, confiscated his cell phone, and inspected its contents.[161] Riley's phone contained evidence linking him to an unsolved shooting which was subsequently used to convict him of attempted murder.[162] After the California Supreme Court denied Riley's petition for review, the Supreme Court granted certiorari.[163]

In *Riley*, the Court applied the balancing test to determine the reasonableness of the search conducted by the police.[164] The Court first considered the government's argument that the search was necessary for the safety of the police officers.[165] Chief Justice Roberts concluded that the nature of the phone's content posed no actual physical threat to the officers.[166] He did note that while the data on the phone could not be used as a weapon against the officers, they were free to examine the outside of the phone for possible dangerous objects.[167] Next, he addressed the government's argument that there was a need for prevention of evidence destruction.[168] The government was concerned with possible data wiping and encryption, but the Court concluded that these obstacles were not

158. Goldstein, *supra* note 153.

159. *See* Katz v. United States, 389 U.S. 347 (1967) (Harlan J., concurring) (establishing the REOP standard test).

160. Riley v. California, 573 U.S. 373 (2014). This case was consolidated on appeal by two defendants questioning whether a cell phone may be searched without a warrant. *Id.* at 378. For the purposes of this Note, only the case involving petitioner David Riley will be considered.

161. *Id.* at 378–79. Riley had his car pulled over for expired tags, and upon further investigation it was discovered that his license was suspended and that he was in possession of firearms. *Id.* at 378.

162. *Id.* at 379.

163. *Id.* at 380.

164. *Fourth Amendment–Search and Seizure–Searching Cell Phones Incident to Arrest–* Riley v. California, 128 HARV. L. REV. 251, 253 (2014) [hereinafter *Searching Cell Phones*]; *Riley*, 573 U.S. at 385 ("[W]e generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes on an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999))).

165. *Riley*, 573 U.S. at 387–88.

166. *Id. See also Searching Cell Phones*, *supra* note 164; Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 531 (2018).

167. *Riley*, 573 U.S. at 387.

168. *Searching Cell Phones*, *supra* note 164.

widespread and could easily be solved by other means.[169]

After rejecting the government's arguments that the search was valid, the Court then turned to the privacy interests of the individual.[170] Noting that a cell phone has massive storage capacity and the ability to retain private information, it must be reasoned that it is not "a container whose contents may be searched incident to an arrest . . as an initial matter."[171]

This ruling has important implications that pertain to the pretrial detainee's privacy rights to their papers within their jail cell. Before explaining his decision on the reasonableness of the search, Chief Justice Roberts made an explicit effort to draw attention to the fact that, even though an arrestee has a diminished privacy right, this "does not mean that the Fourth Amendment falls out of the picture entirely."[172] This is the same contention the *Cohen* court made and applied to pretrial detainees.[173] While Chief Justice Roberts did note the quantitative aspect of the digital data stored in a phone, the privacy interests lay within the qualitative nature of the information.[174] Chief Justice Roberts was concerned with the type of information that could be gleaned from an unrestrained search of a cell phone, giving it the same consideration as Justice Stewart did in his dissent of *Smith v. Maryland*.[175] This goes to the heart of why a pretrial detainee's papers should be protected against a warrantless search and seizure.

The Supreme Court's reasoning in *Riley* is congruent with the needs of pretrial detainees and their papers. The papers in and of themselves pose no real danger to an investigating agent, just as "data on [a] phone can endanger no one."[176] Chief Justice Robert's assertion that it is permissible for a cell phone to be searched for dangerous objects is consistent with a prison official's "shakedown" search for contraband.[177] An inspection of the papers for hidden weapons or impermissible items

169. *Riley*, 573 U.S. at 390 (suggesting that the police could simply turn off the phone or place it in a bag composed of aluminum foil).

170. *Id.* at 391–92. *See also Searching Cell Phones*, *supra* note 164.

171. *Riley*, 573 U.S. at 397.

172. *Id.* at 392.

173. United States v. Cohen, 796 F.2d 20, 24 (2d Cir. 1986).

174. Marc Rotenberg & Alan Butler, *Symposium: In* Riley v. California*, a Unanimous Supreme Court Sets Out Fourth Amendment for Digital Age*, SCOTUSBLOG, (Jan. 26, 2014, 6:07 PM), https://www.scotusblog.com/2014/06/symposium-in-riley-v-california-a-unanimous-supreme-court-sets-out-fourth-amendment-for-digital-age/ [https://perma.cc/88XJ-JRTU].

175. *Riley*, 573 U.S. at 395–96. Roberts touched on the sensitive private information that existed on the phone applications, such as internet history, political affiliations, and location information. *Id. Searching Cell Phones*, *supra* note 164, at 254; Smith v. Maryland, 442 U.S. 735, 748 (1979) (Stewart, J., dissenting) (noting dialed phone numbers would not be incriminating, but could "reveal the most intimate details of a person's life.").

176. *Riley*, 573 U.S. at 387.

177. *Id.*

would be reasonable, but an examination of the information within the papers would not be.

The latest Supreme Court decision involving Fourth Amendment privacy rights is *Carpenter v. U.S.*[178] In this case, the Government obtained cell-site location information (CSLI) on Carpenter's cell phone pursuant to a court order under the Stored Communications Act rather than a warrant based on probable cause.[179] At his trial, an FBI expert witness offered testimony explaining how the CSLI data linked Carpenter to the robberies, resulting in his conviction.[180]

Carpenter's conviction was affirmed in the Sixth Circuit and the Supreme Court granted certiorari.[181] Chief Justice Roberts once again penned the opinion of the Court concentrating his decision on the third-party doctrine's application to CSLI.[182] To get to the answer, the Court needed to resolve the reasonableness of the search and determine if the defendant had a reasonable expectation of privacy in their CSLI.[183] According to Roberts, the third-party doctrine should be interpreted more narrowly to protect the privacy rights of individuals in the wake of technological advances in surveillance.[184] Deciding there was a privacy right involved, the Court next applied the traditional analysis of warrant requirements and concluded a warrant was required for acquisition of CSLI records.[185]

While the ruling in *Carpenter* focuses mainly on the third-party doctrine and the protection of the shared information, it does give insight to a possible shift in the Court's interpretation of Fourth Amendment rights that will be construed in favor of an individual's reasonable expectation of privacy.[186]

---

178. Carpenter v. United States, 138 S. Ct. 2206 (2018).

179. *Id.* at 2212. The government secured CSLI on Timothy Carpenter's cellular phone based upon information provided by an armed robbery suspect. *Id.*

180. *Id.* at 2212–13.

181. *Id.* at 2213. The constitutionality of the search was challenged based on the issuing of the CSLI by a court order instead of a valid search warrant. *Id.* at 2206; Alan Z. Rozenshtein, *Fourth Amendment Reasonableness After* Carpenter, 2019 YALE L.J. F. 943, 946 (2019).

182. Rozenshtein, *supra* note 181, at 946. *See also*, Orin S. Kerr, *The Case for the Third Party Doctrine*, 107 MICH. L. REV. 561, 561 (2009) (The third-party doctrine is "the controversial rule that information loses Fourth Amendment protection when it is knowingly revealed to a third party.").

183. Donald L. Buresh, *The Meaning of Justice Gorsuch's Dissent in* Carpenter v. United States, 43 AM. J. TRIAL ADVOC. 55, 77–79 (2019).

184. *Id.*

185. *Carpenter*, 138 S. Ct. at 2221 ("[O]ur cases establish that warrantless searches are typically unreasonable where 'a search is undertaken by law enforcement officials to discover evidence of a criminal wrongdoing.'" (quoting Vernonia Sch. Dist. 47J. v. Acton, 515 U.S. 646, 652–53 (1995))).

186. Buresh, *supra* note 183, at 96. *But see*, *Carpenter*, 138 S. Ct. at 2236 (Thomas, J., dissenting) (Justice Thomas has an overall aversion to Justice Harlan's reasonable expectation

This could bode well for pretrial detainees seeking to have courts recognize a reasonable expectation of privacy pertaining to their papers. If the Court is indicating that privacy rights are based on what society considers reasonable, a pretrial detainee's papers would fall within that category.

The privacy interests contained within the information of a pretrial detainee's papers are near inviolate, and their importance will be discussed in Subpart B.[187] The communications between a client and their attorney are privileged because they encourage candor, and the mere possibility that the prosecution could be privy to these discussions destroys the soul of this principle.[188] The same sentiment Chief Justice Roberts had toward cell phones in *Riley* should be applied towards a pretrial detainee's papers.[189]

B. *Risk of Attorney-Client Privilege Violation*

The inherent danger of warrantless searches of a pretrial detainee's papers is the likelihood of attorney-client privilege violations. This Subpart will establish the doctrine of attorney-client privilege, what protections it assigns, and provide case law examples of how violations of this doctrine affect pretrial detainees.

The attorney-client privilege doctrine has been asserted as a foundation in the practice of law for hundreds of years, but its application within the legal realities of our system has been subject to debate.[190] A widely used definition for its implementation, broken down into its respective elements, is:

> (1) Where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by

---

of privacy test claiming it has no history or basis in the Fourth Amendment.); *See* Jordan M. Blanke, Carpenter v. United States *Begs for Action*, U. ILL. L. REV. ONLINE 260, 262–63 (Nov. 28, 2018) (Similarly, Justice Gorsuch claims the court is ill-equipped to determine what society considers a reasonable expectation of privacy, but he is willing to accept that an individual retains a privacy interest in their information, even when supplied to a third party.).

187. *Infra*, Subpart B.

188. JOHN CUTLER & CHARLES F. CAGNEY, POWELL'S PRINCIPLES AND PRACTICE OF THE LAW OF EVIDENCE, 102 (8th ed. 1904) ("In the absence of the above-mentioned rule, no man would dare consult a professional adviser with a view to his defence, or the enforcements of his rights.").

189. Riley v. California, 573 U.S 373, 403 (2014). "Our answer to the question of what police must do . . . is accordingly simple—get a warrant." *Id.*

190. Jason Batts, *Rethinking Attorney–Client Privilege*, 33 GEO. J. LEGAL ETHICS 1 (2020).

the legal adviser, (8) except the protection can be waived.[191]

This doctrine fosters a relationship between an attorney and their client to encourage divulging sensitive information and aid in the attorney's advocacy for the client, but it also serves as an effective tool for excluding evidence that could be used against the client in a trial.[192] The Fourth Amendment exclusionary rule and the attorney-client privilege doctrine are similar in the respect that they rest on the expectations of the individual.[193] A Fourth Amendment challenge requires an argument that the government violated the individual's reasonable expectation of privacy, and a privilege claim requires the individual to show they had a reasonable expectation of confidentiality in their communications.[194] The kinship of these two principles is evident when considering the privacy protections of a pretrial detainee's papers.

The ramifications of exposing a pretrial detainee's papers to examination by the police or prosecution produce dire consequences for the defendant. An example of this arose in a trial not long after the *Hudson* decision was published. In *State v. Warner*, the defendant was arrested on suspicion of murder.[195] Thirty days before Warner's trial, jail personnel conducted a "shakedown" search of his cell to search for documents supporting evidence of perjury.[196] The officers collected all of Warner's papers, copied them, returned the originals to the defendant, and sent them for inspection by the County Attorney's office.[197] The seized papers contained transcripts and summaries documenting the defendant's conversations with his attorney.[198]

The defense moved to dismiss the charges for violation of the attorney-client privilege and an illegal search of the defendant's cell.[199] The prosecution admitted to reading the defendant's papers after an assistant told them "there may be some interesting things in there and that I should look at them."[200] The prosecution claimed to have gained no

191. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 54 (McNaughton 1961 & Supp. 1961).

192. Imwinkelried, *supra* note 131, at 3.

193. *Id.* at 4.

194. *Id.* at 4–5.

195. State v. Warner, 722 P.2d 291, 292 (Ariz. 1986). While awaiting trial, Warner and his co-defendant were housed in the same jail facility, and various inmates alerted authorities that they were in discussion to alter their testimony at the trial. *Id.* at 293.

196. *Id.*

197. *Id.*

198. *Id.* Although the County Attorney was in possession of these privileged documents for nearly thirty days, defense counsel was only made aware of this three days prior to Warner's trial. *Id.* at 293–94.

199. *Id.* at 294.

200. *Id.*

information from the material.[201] The defense argued that witnesses were called and the defendant was forced to take the stand based upon the information contained within the documents.[202] The trial court denied the defense's motion to dismiss the charges and Warner was convicted.[203]

The Supreme Court of Arizona rejected Warner's claim of an illegal search and seizure in his jail cell, relying upon the reasoning in *Hudson*.[204] However, the court agreed to determine if the seizure of the defendant's papers was a violation of attorney-client privilege.[205] The court ruled the defendant's right to counsel was violated when his documents were seized and given to the County Attorney's office for inspection.[206] The court's remedy to this violation was to follow Supreme Court precedent and conduct a hearing to examine if and how the evidence produced at trial prejudiced the defendant.[207]

While the burden of proof lies with the prosecution to show that the evidence presented at trial was not tainted, the remedy creates an untenable situation for the defendant. Under *Warner*, there are three possible outcomes for the defendant. First, the hearing could conclude that the evidence seized was not used against the defendant at trial.[208] Second, the hearing could result in a finding that the evidence was tainted, but its exclusion would not result in a different finding by the jury.[209] Finally, the hearing could result in a determination that the evidence should have been suppressed at the trial, and that its prejudicial effect was so apparent that the defendant was denied a fair trial and the verdict should be vacated.[210]

The first and second potential results of the hearing would bear no benefits for the defendant because the guilty verdict would remain, despite exposure to the defendant's privileged information. It is inconceivable that a prosecutor would not have gained an advantage by even a slight revelation of the defense's communications.[211] The third result, while seemingly fair and reasonable, still renders the defendant at an extreme disadvantage. While the prosecution would be barred from introducing the evidence in the defendant's likely retrial, the defense cannot "un-ring

201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 295.
207. *Id.* at 296 (citing Weatherford v. Bursey, 429 U.S. 545, 558 (1977)).
208. *Weatherford*, 429 U.S. at 551.
209. *Warner*, 722 P.2d at 296 (citing United States v. Morrison, 449 U.S. 665, 666 (1981)).
210. *Id.* at 297.
211. *In re* Lott, 424 F.3d 446, 451 (6th Cir. 2005).

the bell." The prosecution was privy to secret and sensitive information concerning the case they are about to try, making the previously observed material susceptible to exploitation.[212]

The case of *Carter v. State* offers insight into the inherent dangers of the seizure of a pretrial detainee's papers even in a search not intended to procure incriminating information.[213] Defendant Deon Carter was being held on suspicion of murder charges in a Baltimore jail.[214] While he was being transferred to another facility, a correctional officer discovered two pieces of paper that defense counsel asked him to create containing maps and statements about his case.[215] The officer recognized their significance and gave the items to the investigating detective.[216] Over the defense's objection, the items were introduced at trial and helped produce a guilty verdict.[217]

Carter appealed the decision on grounds that the evidence should have been suppressed due to the violation of his Fourth Amendment and attorney-client privilege rights.[218] The State made the argument that the exhibits were not privileged because the defendant made no effort to identify them as such.[219] The court found this argument unconvincing under the inadvertent disclosure theory.[220] The State then argued that the search and seizure was legal and the court agreed that no Fourth Amendment right barred the correctional officer from searching the jail cell and examining the papers.[221] However, the court did state that once the correctional officer realized the exhibits were related to the charges the defendant was facing, they should have returned them to the defendant, rather than the police department.[222] The court determined the delivery of those items to the prosecution violated the defendant's Sixth Amendment right to counsel and the State's extensive use of these items at Carter's trial resulted in an error that required the court to vacate the verdict and entitled the defendant to a new trial.[223]

The results of this trial present an inevitable problem with allowing a

212. *Id.* at 452.

213. Carter v. State, 817 A.2d 277 (Md. Ct. Spec. App. 2003).

214. *Id.* at 279.

215. *Id.*

216. *Id.*

217. *Id.* at 280.

218. *Id.* at 282–84.

219. *Id.* at 284–85.

220. *Id.* ("We are persuaded that appellant's failure to designate the exhibits as 'privileged' does not render the exhibits admissible under the theory of inadvertent disclosure."); FED. R. EVID. 502(b)(2) ("the holder of the privilege or protection took reasonable steps to prevent disclosure").

221. *Carter*, 817 A.2d at 283.

222. *Id.*

223. *Id.* at 282.

warrantless search and seizure of a pretrial detainee's papers. Even if the correctional officer followed the protocol suggested by the judge, there is nothing stopping the prosecution from discussing what the correctional officer observed in those papers.[224] The indelible prejudice the defendant would face in such a situation would be insurmountable and it violates the very spirit of what the attorney-client privilege doctrine was created to protect against.[225]

C. *Good Faith Exception to the Exclusionary Rule Applied to Warrantless Searches of a Pretrial Detainee's Papers*

To admit evidence seized by a warrantless search of a pretrial detainee's papers, a prosecutor might invoke the good faith exception to prevent exclusion of the evidence.[226] This Subpart will examine the establishment of the exception and how its application to a pretrial detainee's papers is inapplicable.

The good faith exception to the exclusionary rule was introduced in *United States v. Leon*, where the Court refused to exclude evidence collected by the police operating in reasonable reliance on the validity of a warrant issued by a neutral magistrate that was later to be found erroneous.[227] The Court's later decisions broadened the scope of this exception by including: warrants allowed by a law subsequently found to be in violation of the Fourth Amendment; recordkeeping errors made by court clerks or the police department; and police reliance on binding precedent at the time of the search that was later to be overturned.[228]

An argument for application of a good faith exception to a warrantless search of a pretrial detainee's papers is incompatible with the basis of the doctrine.[229] The exception mainly applies to evidence obtained by searches pursuant to a warrant that were subsequently found to be invalid.[230] This exception cannot include a warrantless search of a pretrial detainee's papers; no investigating officer or neutral magistrate made a

---

224. Gregory Sisk et al., *Reading the Prisoner's Letter: Attorney-Client Confidentiality in Inmate Correspondence*, 109 J. CRIM. L. & CRIMINOLOGY 559, 600 (2019).

225. *Id.*

226. "An exception to the exclusionary rule barring the use at trial of evidence obtained pursuant to an unlawful search and seizure." *Good Faith Exception to Exclusionary Rule*, CORNELL LEGAL INFO. INST.: WEX, https://www.law.cornell.edu/wex/good_faith_exception_to_exclusionary_rule [https://perma.cc/3QKN-EQKQ].

227. United States v. Leon, 468 U.S. 897 (1984).

228. *Toward a General Good Faith Exception*, 127 HARV. L. REV. 773, 776 (2013).

229. Gretchan R. Diffendal, *Application of the Good-Faith Exception in Instances of a Predicate Illegal Search: "Reasonable" Means Around the Exclusionary Rule?*, 68 ST. JOHN'S L. REV. 217, 231–32 (1994); *See* Blake R. Hills, *It's Time to Believe: Resolving the Circuit Split Over the Good–Faith Exception to the Exclusionary Rule*, 48 HOFSTRA L. REV. 761, 785 (2020).

230. Diffendal, *supra* note 229, at 226.

reasonable mistake pertaining to a warrant.[231] The examination of a pretrial detainee's papers for evidence of a crime is not excusable due to clerical error or reliance on a miscommunication by the magistrate in the warrant—there is no warrant to be challenged.

If a prosecutor directs an officer to search a pretrial detainee's papers under the pretext of a security search, the government cannot then claim it was a reasonable mistake examining that material.[232] To expand the good faith doctrine to include evidence introduced at trial collected without a warrant would trample the deterrence intention of the exclusionary rule and effectively render the probable cause necessity in a warrant a bureaucratic ritual.[233]

Altogether, the above-mentioned arguments considering a pretrial detainee's reasonable expectation of privacy, the risk of attorney-client privilege violations, and the incompatibility of the good faith exception to the exclusionary rule cry out for a solution regarding the Fourth Amendment rights of pretrial detainees. Therefore, we must ask ourselves, how do we protect the rights of not yet convicted prisoners while still maintaining the vital institutional security needs of detention facilities?

IV. SEARCH AND SEIZURE OF A PRETRIAL DETAINEE'S PAPERS AT THE BEHEST OF LAW ENFORCEMENT REQUIRES A WARRANT

In light of the ambiguity surrounding the extent of a pretrial detainee's Fourth Amendment rights, the Supreme Court must render a decision to resolve the circuit court split. The Court should apply the reasoning of *Cohen* and create an equitable rule satisfying the constitutional rights of a pretrial detainee and preserving the institutional security needs of detention facilities. Subpart A will demonstrate the necessity for Fourth Amendment privacy rights of pretrial detainees, and how a warrant requirement for their papers will satisfy this need. Subpart B will explain that this reasonable requirement does not compromise the institutional security needs of a detention center.

A. *A Pretrial Detainee has a Reasonable Expectation of Privacy Within Their Papers*

A Supreme Court decision declaring that a pretrial detainee has a reasonable expectation of privacy within their papers would offer

231. *See Leon*, 468 U.S. at 924.

232. State v. Jackson, 729 A.2d 55, 63 (N.J. Super. Ct. Law Div. 1999).

233. Kit Kinports, *Illegal Predicate Searches and Tainted Warrants After* Heien *and* Strieff, 92 TUL. L. REV. 837, 880 (2018); LAFAVE, *supra* note 66, § 1.3(g) ("[T]he fact that a broader good faith exception, applicable even when the police conduct did not have the prior approval of a magistrate, would be perceived and treated by the police as a license to engage in the same conduct in the future.").

protections for persons not yet convicted of a crime, thus preserving the confidentiality of their privileged communications.[234] In addition, it would retain the basic Fourth Amendment rights that permeate a jail cell while not disturbing the reasoning set out in *Hudson*.[235]

1. Preservation of Attorney-Client Privilege

The foremost need for a warrant requirement to search a pretrial detainee's jail cell is the protection against attorney-client privilege violations.[236] The narrowing of the Court's ruling pertaining to a pretrial detainee's papers would be consistent with its latest decisions regarding warrant requirements.[237] It would also be an area society would recognize as having a reasonable expectation of privacy.[238] Furthermore, in applying for a warrant, the particularity requirement should be met in an affidavit providing probable cause of evidence of a crime.[239] After *Riley* was decided, civil rights advocates expected a restriction on the scope of warrants issued on cell phones.[240] Unfortunately, while judges have examined affidavits to determine if there is probable cause, many warrants are so broad in scope they resemble the general warrants the Founding Fathers protested.[241] While this may be a disturbing revelation pertaining to cell phone searches, magistrates should not allow such blanket warrants for a pretrial detainee's papers due to the privilege implications.[242] In an ideal world, if legally seized papers have the potential to expose confidential information, a judge would examine the material in-camera[243] and determine what may or may not be used as evidence.

---

234. Teri Dobbins, *Protecting the Unpopular from the Unreasonable: Warrantless Monitoring of Attorney Client Communications in Federal Prisons*, 53 CATH. U. L. REV. 295, 337 (2004).

235. Wood, *supra* note 138, at 27.

236. Dobbins, *supra* note 234, at 338.

237. United States v. Jones, 565 U.S. 400 (2012); Riley v. California, 573 U.S. 373 (2014); Carpenter v. United States, 138 S. Ct. 2206 (2018).

238. *See* Dobbins, *supra* note 234, at 338.

239. U.S. CONST. amend. IV; Marron v. United States, 275 U.S. 192, 196 (1927) ("The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.").

240. Adam M. Gershowitz, *The Post*-Riley *Search Warrant: Search Protocols and Particularity in Cell Phone Searches*, 69 VAND. L. REV. 585, 588 (2016).

241. *Id.* at 600–01.

242. LAFAVE, *supra* note 66, § 4.6(d); "[T]here are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable." Andresen v. Maryland, 427 U.S. 463 n.11 (1976).

243. *In Camera Inspection*, BLACK'S LAW DICTIONARY (4th ed. 1996) ("A trial judge's private consideration of evidence.").

2. Balancing Privacy Rights and Efficiency of the Justice System

Requiring a warrant for a pretrial detainee's papers would also maintain the Fourth Amendment's general right to privacy that yields preferable results for police and private citizens alike.[244] The principles underlying the need for a warrant are to protect individuals from unjustifiable intrusions by the police.[245] The Supreme Court's interpretation of the Fourth Amendment requirement has evolved through successive case law[246] and the Court has recently made rulings emphasizing individual privacy rights.[247] Despite these "constraints" on law enforcement, studies have shown that when an officer conducts a search pursuant to a warrant, they are much more likely to obtain evidence than they are with warrantless searches.[248] A warrant provides security for the public's privacy interests, and ensures efficiency and efficacy within the legal process.[249] Emulating the reasoning in *Cohen* as it pertains to pretrial detainees' papers would not disrupt the Court's prior ruling in *Hudson* regarding convicted inmates.

B. *A Warrant Requirement for Pretrial Detainees' Papers Preserves Detention Facility Institutional Security Needs*

This Subpart will explain that correctional facilities' security will be maintained despite the "burden" of requiring a warrant to search a pretrial detainee's papers. The protocol suggested in this Subpart would ensure safety within the facility, while securing a pretrial detainee's Fourth Amendment rights.

Requiring a warrant to search and seize a pretrial detainee's papers would not disrupt the institutional security needs of the facility. "Shakedown" searches for contraband, conducted by correctional officials, would still be permitted in accordance with the Supreme Court's previous ruling in *Block v. Rutherford*.[250] Denying a contraband search in the pretext of scrounging up evidence is a reasonable limitation similar to denying a checkpoint search "whose primary purpose was to detect evidence of ordinary criminal wrongdoing."[251] As long as a search of a

244. David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. REV. 425, 479–80 (2016) (searches conducted pursuant to a warrant yield more reliable evidence while maintaining the public's assurance of their privacy rights).

245. *Id.* at 474.

246. *Id.* at 475.

247. *E.g.*, United States v. Jones, 565 U.S. 400 (2012); Riley v. California, 573 U.S. 373 (2014); Carpenter v. United States, 138 S. Ct. 2206 (2018).

248. Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 923-25 (2009).

249. Gray, *supra* note 244, at 480.

250. Block v. Rutherford, 468 U.S. 576, 589–91 (1984) (holding that random "shakedown" searches did not violate a pretrial detainee's constitutional rights).

251. City of Indianapolis v. Edmond, 531 U.S. 32, 38 (2000).

pretrial detainee's jail cell was instigated by an institutional official for security reasons, rather than a prosecutor or police officer for evidentiary reasons, the search for contraband would not run afoul of a pretrial detainee's Fourth Amendment rights, and the institutional security needs would still be met.

A rudimentary search through a pretrial detainee's papers for *prohibited objects* would not be an unnecessary intrusion, but even a mere scanning of the contents of the papers could subject the investigator to privileged material.[252] To protect a pretrial detainee's Fourth and Sixth Amendment rights, a contraband search within their papers must be conducted in their presence to make sure the materials are not read. The protocols should be similar to the requirements of examining an inmate's incoming legal mail. Correctional officers conducting a contraband search within a pretrial detainee's papers should be reasonably within view of the inmate, have proper training, notify the inmate the purpose of the search is for contraband, and refrain from reading or making inappropriate comments to the inmate about the papers' contents.[253] If a pretrial detainee observes an officer reading their papers, they should notify their counsel so the attorney can bring the matter to the attention of the court and the prosecuting attorney. In such a situation, if any evidence is collected, or any derivative evidence resulting from the examination obtained, it should be considered a violation of the pretrial detainee's Fourth Amendment rights and be excluded.[254] This would deter the officers from conduct that might result in substantial attorney-client privilege violations.[255]

Under this approach a pretrial detainee's papers would not be untouchable, it would merely require a warrant to search and seize them. If there is an interest regarding what is contained within the papers, a warrant satisfying the particularity requirement would be required. After their seizure, a neutral third party should review the subject matter within the papers and exclude any privileged communications or products. This would adequately protect the detainee's sensitive information while preserving the security needs of the correctional facility.

---

252. Sisk et al., *supra* note 224, at 600–01 (describing how "[s]kimming no less than reading wholly destroys confidentiality and invades the privacy of the narrative.").

253. Tate McCotter, *Standard E04.02.01: Privileged Mail*, NATIONAL INSTITUTE FOR JAIL OPERATIONS, https://jailtraining.org/standard-e04-02-01-privileged-mail/ [https://perma.cc/5CNP-E637].

254. "A doctrine that extends the exclusionary rule to make evidence inadmissible in court if it was derived from evidence that was illegally obtained." *Fruit of the Poisonous Tree*, CORNELL LEGAL INFO. INST.: WEX, https://www.law.cornell.edu/wex/fruit_of_the_poisonous_tree [https://perma.cc/AW6P-C7MZ].

255. *See* Davis v. United States, 546 U.S. 229, 231–32 (2011); *See also* Hefferman, *supra* note 128.

CONCLUSION

The Supreme Court should declare a pretrial detainee has a Fourth Amendment right against unreasonable searches and seizures of their papers within their jail cell because it logically follows the Court's articulation of a reasonable expectation of privacy. Throughout the years, the Court has extended Fourth Amendment protection to distinct situations where it has deemed society is willing to accept an expectation of privacy.[256] The latest rulings provide insight into how far the Court is willing to allow the government to invade into individuals' sensitive information without a warrant. If the Court extends protections to information obtained from GPS, cell phones, and CSLI, surely it follows to extend protections to information contained within an un-convicted person's papers.

The Supreme Court should continue this push for individual privacy rights and apply the reasoning held in the Second Circuit's *Cohen* decision towards a pretrial detainee's papers.[257] It would not be unreasonable for society to believe that an individual, not convicted of a crime, should have an expectation of privacy regarding the papers in their jail cell due to the intimate and protected information they contain.[258] To reject this protection would be an affront to the basic rights and freedoms the Founding Fathers provided to citizens through the Constitution. Further, in providing this privacy protection to a pretrial detainee, the institutional security needs of the facility would still be met. This Note submits that when a search is initiated of a jail cell, and a government agent wishes to examine a pretrial detainee's papers the answer is, as Chief Justice Roberts declared, "simple—get a warrant."[259]

256. Stephen E Henderson, Carpenter v. United States *and the Fourth Amendment: The Best Way Forward*, 26 WM. & MARY BILL RTS. J. 495, 520 (2017); Katz v. United States, 389 U.S. 347 (1967) (holding a person retains an expectation of privacy within a public phone booth); Kyllo v. United States, 533 U.S. 27 (2001) (holding that a heat scanner collection information about the interior of a home violates a person's reasonable expectation of privacy); United States v. Jones, 565 U.S. 400 (2012) (holding attaching a GPS device to a car was a Fourth Amendment search); Riley v. California, 573 U.S. 373 (2014) (holding that a person has a reasonable expectation of privacy pertaining to the contents of their cell phone); Carpenter v. United States, 138 S. Ct. 2206 (2018) (holding that the access of a person's cell-site location information without a warrant was too intrusive).

257. United States v. Cohen, 796 F.2d 20 (1986) (holding that a pretrial detainee retains a Fourth Amendment right sufficient enough to challenge a warrantless search of their jail cell).

258. LAFAVE, *supra* note 66, § 10.9(a).

259. Riley v. California, 573 U.S. 373, 403 (2014).