10-1978

Bell v. Wolfish

Lewis F. Powell, Jr.

Grant

Presents important issue of the appropriate standard for judging validity of the way in which pre-trial detainees are treated.

CA 2, relying on presumption of innocence, held in a broadly sweeping opinion that "strict scrutiny" is applicable to conditions of imprisonment of persons not yet convicted.

There is conflict & confusion among CAs & DCs. See Judge Campbell's "reasonable relationship" standard (n5) that appeals to me.

Now case involves what seems to be the "counting clock" of prisons, Sec p 2

PRELIMINARY MEMORANDUM

Summer List 17, sheet 2

No. 77-1829 CFX

BELL (Attorney General) Cert to CA 2 (Kaufman, Timbers, Meskill)

v.

WOLFISH et al (pretrial detainees) Federal/Civil Timely (by ext)

1. SUMMARY. The SG petitions for cert to review CA 2's decision holding unconstitutional a wide range of pretrial detainment practices in the federal Metropolitan Correctional Center (MCC) in Manhatten. The SG presents two main issues for review. First, he points to a three-way conflict among the court below, CA 1 and CADC regarding the correct constitutional standard to be applied in assessing due process limitations on pretrial confinement conditions. The SG contends that the "strict scrutiny" approach adopted by CA 2 below is inconsistent with prior decisions of this Court. Second, he argues that CA 2, in declaring specific practices unconstitutional here, failed to com-

Please see p. 15.

ply with this Court's decisions acknowledging the Govt's compelling interest in maintaining prison security and order, and requiring deference to prison officials' determinations as to how this interest can best be achieved. The SG points to at least one circuit conflict regarding the legality of the practices involved in this case.

2. FACTS. The Manhatten MCC has as its primary purpose the housing of persons detained in custody prior to trial for federal criminal offenses; it also houses some convicted inmates awaiting transfer and a few inmates sentenced to serve their terms there. The MCC was built in 1975 and represents, in CA 2's words, "the architectural embodiment of the best and most progressive penological planning." Its design replaces traditional cellblock construction with self-contained residential units, or "modules," which, by eliminating routinized movements of detainees from one activity area to another, were meant to "humanize staff-inmate relations and provide a more 'homelike' atmosphere, affording inmates greater privacy and freedom than jails of earlier construction." Each module contains private rooms that open onto common areas; the common areas have recreational and exercise equipment, telephones, color TVs, books, food preparation and dining facilities, and visiting rooms. The floors are carpeted and the windows have clear glass with no bars. There is a rooftop recreational area with basketball, volleyball, and handball courts, as well as gym equpiment.

Better than many country clubs!

Just prior to the MCC's opening the number of pretrial detainees rose at an unprecedented rate. Despite persistent efforts, the Bureau of Prisons was unable to transfer enough inmates to reduce the population below the MCC's planned capacity. To provide sleeping space for these increased numbers, the MCC replaced single beds with bunk beds in 20% of the private rooms and installed bunk beds in the dormitory rooms so as to double their capacity. At certain times a small number of detainees were given temporary quarters in the common areas;

these persons were moved to private rooms as soon as possible.

Four months after the MCC opened resp filed a pro se habeas petn in federal court, challenging the alleged overcrowding and a vast array of other practices as violative of his constitutional rights. The suit was declared a class action on behalf of all persons confined, both pretrial detainees and sentenced prisoners. In a pair of preliminary injunctions, one opinion rendered on summary judgment, and a 125-page opinion rendered after trial, SDNY (Frankel, J) enjoined no fewer than 20 MCC administrative practices on constitutional and statutory grounds.

3. OPINION BELOW AND CONTENTIONS. CA 2 began by narrowing the issues before it. First, it reversed the DC's order insofar as it was premised on a finding that the Attorney General had breached his statutory duty to provide "suitable" care for inmates in his custody. The AG's actions in this respect, CA 2 held, were "committed to agency discretion by law" and hence judicially unreviewable. Second, CA 2 remanded the DC's findings of unconstitutional deprivations insofar as they related to sentenced inmates. The court noted that the DC had applied the same heightened level of scrutiny to restrictions on convicted persons as to restrictions on pretrial detainees, and held that a lower level of scrutiny under the 8th Amendment was properly applicable to the former. Third, CA 2 held that the DC's injunctions against certain MCC practices intruded too far into the minutiae of prison administration. Judge Frankel, for example, had (1) abolished the MCC's policy requiring visitors to request a bathroom key from a correctional officer; (2) ordered the MCC to take commissary requests every other day rather than twice a week; (3) ordered the MCC to instal 23 telephones so that inmates could make long-distance calls; (4) ordered that inmates be permitted to possess typewriters for personal use; (5) found the prison attire "garish, ill-fitting, degrading and

humiliating to wear" and ordered the MCC to "permit pretrial detainees to wear their own clothes unless they volunteer to wear correctional uniforms."

Although CA 2 detected some dissonances in Judge Frankel's treatment, however, it affirmed his opinion in the main. Specifically, it approved (a) the heightened level of constitutional scrutiny that he had applied to restrictions on pretrial detainees and (b) his application of those standards to the practices concerned.

(a) Constitutional Standards. CA 2 held squarely that "strict scrutiny" applied. Because an individual is presumed innocent until proven guilty, pretrial detainees must be accorded as far as possible the same rights as unincarcerated individuals. Accordingly, it is not enough that the conditions of their confinement "merely comport with contemporary standards of decency prescribed by" the 8th Amendment. Rather, the "indisuptable rudiments of due process" dictate that pretrial detainees "be subjected to only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities of jail administration.'" Under this standard of "compelling necessity," deprivation of detainees' rights cannot be justified by "the cries of fiscal necessity," "administrative convenience," or "the cold comfort that conditions in other jails are worse."

The SG contends that CA 2, by proscribing all restrictions on pretrial detainees that are not justified by a "compelling necessity," and by eliminating fiscal and administrative constraints as possible justifications, has enunciated a constitutional standard more stringent than that adopted either by CA 1 or CADC in their recent pretrial detainment opinions. In Feeley v. Sampson, 570 F2d 364 (1978) (Campbell, Markey (CCPA); Coffin, dissenting), CA 1 promulgated a "reasonable relationship" test. Judge Campbell there wrote:

Judge Campbell's standard

> While detainees are not convicts, the same practical reasons that counsel judicial restraint in second-guessing correctional officials dictates restraint in second-guessing the authorities who run jails....We believe that the proper standard by which to review the actions of those lawfully entrusted with the custody of detainees is that normally employed in reviewing administrative actions: whether the actions of jail authorities are arbitrary or capricious; whether they are lacking in a reasonable relationship to the limited purpose of the confinement; and whether they are otherwise not in accordance with law.

Id.at 371. The majority expressly rejected the "strict scrutiny" approach taken by the DC, under which "a state carries the burden of justifying every restriction imposed on an inmate on the basis of 'compelling interest', and must further demonstrate that each measure taken is the 'least restrictive alternative'." Id. at 370. Rather, said the majority, due process requires only that the conditions of confinement bear "a reasonable relation to the state's purpose in confining a detainee," id. at 369; that the state play "its limited custodial role in a reasonable, and hence a humane, manner," id. at 370; and that the detainee "be treated in a manner rationally related to the limited purpose for which he is imprisoned." Id. Judge Coffin dissented, believing that a higher standard of review was appropriate.

In Campbell v. McGruder, No. 77-1350 (CADC 30 March 1978) (Bazelon, Leventhal; MacKinnon, dissenting), CADC enunciated a standard intermediate between CA 2's "compelling necessity" and CA 1's "reasonable relationship" tests. Judge Bazelon stated that pretrial detainees possess a "liberty interest...rooted in the presumption of innocence." Slip op at 13. Accordingly,

> each restriction of the jail regimen must be carefully examined to determine if it is justified by substantial necessities of jail administration. To evaluate these necessities we will look to the needs of the state to produce the detainee for trial, to maintain the security of the jail, or generally to sustain the institution of pre-

trial detention at a feasible cost.

Id. at 17 (emphasis added). The majority specifically acknowledged the Govt's interest in being able "to manage the institution of pre-trial detention in an administratively feasible manner." Id. at 12. The majority held, however, that under certain circumstances this "balancing approach" must yield to a higher level of scrutiny. "[C]onditions of confinement that are likely to impair a detainee's mental or physical health," id. at 18, or which may impede a defendant's preparation or presentation of his defense at trial, "are constitutionally suspect and can be justified only by the most compelling necessity." Id. at 19. Judge MacKinnon dissented, rejecting the majority's reliance on the presumption of innocence, diss op at 32-33, and contending that greater deference to the judgments of prison authorities was required, id. at 36-37.

The decisions of CA 1, CADC, and CA 2 enunciate three distinct due process standards: a "reasonable relationship" test, a "substantial necessity" test allowing administrative and fiscal concerns as justifications, and a "compelling necessity" test allowing no administrative or fiscal justifications to be asserted. The SG notes that CA 4 has "adopted a standard that parallels the Second Circuit test." Petn at 21 n.16, citing Patterson v. Morrisette, 564 F2d 1109 (1977). Judge Coffin in Feeley noted that CAs 3 & 7 have adopted "rational relationship" tests similar to CA 1's. See 570 F2d at 378. The DC Circuit's intermediate test seems to stand alone, although the SG suggests rather optimistically that its test and CA 1's "lev[y] essentially similar requirements." Petn at 19.

After pointing out the circuit conflict, the SG argues that the due process standard adopted by CA 2 lacks substantial support in this Court's decisions. The SG initially questions the reasoning of both CA 2 and CADC that the "presumption of innocence" dictates a

heightened level of scrutiny for confinement conditions imposed on pretrial detainees. As CA 3 recently has noted, the "presumption of innocence" is not a source of substantive rights; it serves rather

> [to] allocate[] the burden of proof. It is a principle of evidence,...acting as the foundation for the procedural due process requirement of proof beyond a reasonable doubt.... If the "presumption of innocence" is read literally to apply to all pretrial procedures, it is impossible to justify bail or pretrial detention, both of which are restraints imposed upon an accused despite the presumption.

Hampton v. Holmesburg Prison Officials, 546 F2d 1077, 1080 n.1 (1976).

Following the reasoning of CA 3, the SG stresses that pretrial confinement--notwithstanding that it is itself a fundamental deprivation of liberty--is implicitly authorized by the 8th Amendment and is justified by the governmental interest in controlling crime. The prisoner, moreover, is afforded a hearing prior to commitment. Once detention is ordered, therefore, the conditions of the detainee's confinement, unless they trench on specific constitutional guarantees, such as 1st Amendment freedoms, impinge directly only on detainees' "understandable desire to live comfortably during detention." This Court has never elevated "the individual's interest in economic comfort to the level of a fundamental constitutional interest." This Court, moreover, has consistently held that the conditions of confinement are shaped importantly by considerations of prison order and security--considerations which are "peculiarly within the province and professional expertise of corrections officials" to whose judgment courts "should ordinarily defer." Jones v. North Carolina Prisoners' Labor Union, 433 US 119, 128 (1977), quoting Pell v. Procunier, 417 US 817, 827 (1974). The SG concludes that under this Court's decisions the proper standard of review is as follows:

> [I]n reviewing practices of detention for pretrial detainees under the Due Process Clause, unless a practice abridges a specific, fundamental right guaranteed by other provisions of the Constitution, the practice should be upheld if it is reasonably related to the objective of confinement and the inherent needs of the institution for security, order and safety. Furthermore, in determining whether living conditions during confinement are decent and reasonable, consideration should be given to cost, administrative feasibility, and available practical alternatives.

Resp seems to concede that the constitutional standards announced by CAs DC, 1 & 2 are mutually inconsistent. Whereas the SG says that CADC's test is "essentially similar" to CA 1's, however, resp thinks it "articulates the same substantive principle" as CA 2's. Resp contends in any event that this case is "an inappropriate vehicle for meaningful resolution" of the differences among the circuits, since the practices held illegal below would be invalidated regardless of which standard of review were applied. Resp agrees with the SG that this Court's cases compel deference to the opinions of correctional officials; resp contends, however, that the record and decisions below indicate that great "attention, consideration, and deference" were accorded the views of prison officials here.

(b) Application of the standard to the practices involved. CA 2 upheld the DC's injunction against approximately a dozen MCC administrative practices. Although the Govt professes to disagree "with virtually all" of CA 2's determinations, the SG has decided, "in order to avoid unduly complicating this Court's task should it elect to grant review in this case," not to seek review of them all. In some cases, the adverse impact of CA 2's ruling will be minimal; in others, the Bureau is rethinking its position anyway. The SG presents five issues for review:

(1) Overcrowding. CA 2 held that the overcrowded conditions violated detainees' constitutional rights of privacy. Placement of bunk beds in private rooms ("double-celling") afforded inmates

"virtually no space for minimal privacy or in which to avoid the other's presence." Double-celling, moreover, put more pressure on the common-area facilities, creating pressure "to eat in the cell, with its single chair, open toilet, and unsolicited companion." Because the Govt made "no showing of compelling necessity to justify the substantial abrogation of personal privacy imposed by double-celling," CA 2 held the practice unconstitutional. CA 2 also held that the temporary quartering of detainees in the common areas, where "the lights burn[ed] all night," gave inmates "no means of securing any degree of privacy." Since the MCC had "offered no explanation for this completely inadequate housing except administrative convenience," CA 2 declared it unconstitutional as well.

The SG replies that the double-celling was confined to 20% of the rooms; notes that the rooms were 75 feet square, significantly larger than those in previous cases finding overcrowding; and observes that detainees in the MCC in any event are confined to their rooms for only 7-8 hours per day, during which time "they are presumably asleep." Testimony at trial, moreover, indicated that double-bunking would have no "significant detrimental effects on the physical or psychological health of the inmates." Even assuming that a significan abridgment of personal privacy did occur, CA 2 erred in evaluating it under a "compelling necessity" test that accorded no weight at all to the fiscal and administrative constraints the MCC was operating under. The level of care did not fall below the minimum threshold of decency and humane treatment (citing Feeley). Finally, the SG argues that CA 2 has gone far beyond even its own precedents: a previous case, cited by CA 2 as support here, involved double-celling in rooms 48 feet square amid decidedly more archaic and unpleasant surroundings.

Resp relies on the analysis of CA 2 and asserts that the SG's

position in this case is "ironic," given that the Govt "has been prominent in its criticism of [double-celling] in state and local facilities."

(2) The "publisher-only" rule. The MCC enforced a Bureau of Prisons' rule, applicable to all its facilities, under which inmates can receive books only if mailed directly from the publisher or a book club. Federal corrections experts testified at trial that this rule was adopted to avert substantial security risks occasioned by inmates' receipt of books from other sources: books and magazines are easily used to smuggle drugs or money into jail; detection of these items in books is difficult; and an adequate inspection for such items often unavoidably destroys the books anyway. CA 2 held that the publisher-only rule "severely and impermissibly restricts the reading material available to inmates" and thus was "inconsistent with both the first amendment and due process." CA 2 dismissed the availability of the prison library by finding it "inconveivable that the first amendment rights of an incarcerated individual do not extend beyond a few, selected titles." CA 2 dismissed a decision of CA 10 upholding the publisher-only rule, Woods v. Daggett, 541 F2d 237 (1976), on the grounds that that case involved Leavenworth, where security justifications were more compelling.

The SG urges that the publisher-only rule is a reasonable accomodation between inmates' interests and prison security concerns. Other avenues to reading materials remain open, viz., books mailed from publishers and book clubs and books in the prison library. The SG says that CA 2 erred in ignoring the unanimous testimony of corrections officials that an item-by-item inspection of all arriving books would be unmanageable. The SG, finally, points to the circuit conflict with Daggett.

Resp contends that the publisher-only rule effectively leaves in-

mates no options: books cost money, publishers' names are hard to get, and the prison library is laughable. Resp asserts that the Justice Dept, in a June 1978 draft of Federal Standards for Correction has taken the position that inmates "may receive publications from any source, subject to search and inspection, except where there is clear and convincing evidence to justify limitations."

(3) Packages. The MCC prohibited inmates from receiving packages containing items of personal property. Corrections officials testified that this rule was necessary to avoid fighting, stealing, and extortion among inmates, and also to limit the introduction of contraband. The DC dismissed these concerns as "dire predictions" and ordered the MCC to promulgate regulations permitting receipt of at least some items. CA 2 agreed, noting that the DC "did no more than instruct the MCC to devise reasonable regulations" and that its action thus was "not inconsistent with the tenet that prison officials should retain as much control as possible over their institutions." Neither the DC nor CA 2 said what constitutional provision was violated by the no-packages rule.

The SG contends that CA 2's holding gives no deference to the security concerns voiced by expert witnesses at trial. There was no suggestion in the record that these concerns were disingenuous or exaggerated, and under these circumstances the regulation should have been upheld unless the corrections officials had been "conclusively shown to be wrong." Jones v North Carolina Prisoners' Labor Union, 433 US at 128. Resp contends that the regulation was arbitrary and capricious since inmates could purchase items of personal property at the commissary anyway--which presumably should give rise to the same "security" problems--and since there were other ways of policing introduction of contraband.

(4) Room searches. The MCC required inmates to leave their rooms during routine inspections for contraband. Trial testimony indicated that the rule was necessary to avoid friction between inmates and prison officials and to thwart attempts to conceal contraband. CA 2 held that this requirement was unconstitutional. The searches were "far from neat" and often caused tension among inmates who "suspected the officers of thievery." CA 2 saw

> no reason whatsoever not to permit a detainee to observe the search of his room and belongings from a reasonable distance. This is a small privilege to grant him and reassures the detainee's already diminished sense of control over self, that he still has some small private domain, while at the same time not interfering with the institution's security concern and the removal of possible contraband.

The SG contends that "[t]here is no authority for the proposition that persons--either inside or outside of jail--have a privacy interest that requires that lawful searches of their premises be conducted in their presence." The SG points out that CA 2's finding of "no reason whatsoever" not to permit detainees to observe the search was inconsistent with the evidence at trial. The SG contends, finally, that CA 2 has ignored this Court's injunction that prison officials, "not courts, [make] the difficult judgments concerning institutional operations in situations such as this." Jones, supra, 433 US at 128.

Resp replies that, given the circumstances under which the inspections were made, the search would be "unreasonable" absent detainee observation. The officers rummaged through possessions willy-nilly and their actions constituted, in CA 2's words, a "regime of tyranny." Resp contends that prohibiting detainees from being present is an overbroad means of thwarting attempts to conceal contraband.

(5) Body Searches. The MCC, unlike many prisons, permits inmates to have "contact visits" with guests, i.e., interviews

without a glass or wire screen intervening between the interlocutors. Because contact visits "present a unique opportunity for passing contraband, including weapons and drugs, into the Jail," Feeley, supra, 570 F2d at 373, the MCC requires inmates after contact visits to strip naked and expose their armpits and the soles of their feet. In addition, they are required to submit their anal and genital areas to visual inspection. The DC left the basic strip search undisturbed, but found that the anal and genital inspections "plunged the inmate into a deep level of degradation and submission." He enjoined such visual inspections absent probable cause to believe that an inmate is hiding contraband. CA 2 agreed. It noted that the MCC had proved "only one instance in the several years of [the practice's] existence when contraband was found during a body cavity inspection," and held that the "gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility." CA 2 found that the procedure "shocks one's conscience," citing Rochin v. California.

The SG notes that body cavity searches have been upheld by CA 10 and by DCs in five other circuits. He contends that CA 2 erred in finding such searches of "little actual utility;" this observation "wholly ignores the substantial deterrent effect that such searches inevitably have on efforts to pass contraband to inmates during contact visits." The MCC's search policy, says the SG, is a necessary concomitant to its relatively liberal policies in allowing contact visits, policies the MCC is reluctant to restrict. The SG contends, finally, that CA 2 has again improperly substituted its judgment for that of prison officials.

Resp contends that body searches are unnecessary, since the Govt's

security interests can be achieved by far less restrictive means. Passing of contraband during contact visits is virtually impossible, since inmates and visitors are constantly monitored by officials through visiting-room windows, inmates wear one-piece jumpsuits which make surreptitious concealment of contraband impracticable, and inmates are not permitted to use the visiting-area rest room where passage of contraband might occur. Concealment of objects in the anal area also produces an "unusual gait" which invites suspicion. Resp notes, finally, that the Justice Dept's 1978 draft Standards propose to allow body cavity searches only when contact visits are "not constantly monitored." As noted above, contact visits at the MCC are so monitored.

5. DISCUSSION. The issues the SG presents for review defy easy answers no less than they defeat terse statement. Although cases involving the rights of pretrial detainees have flooded the lower courts in recent years, this Court has never dealt with these questions comprehensively--a fact that lower courts have both noted and bemoaned. Although this Court's pronouncements on the rights of convicted prisoners have figured largely in those courts' considerations, those pronouncements--involving persons with considerably diminished "liberty" interests--have been as often distinguished as followed.

Given the frequency with which pretrial detainment questions arise the circuit conflict as to the proper constitutional standard of review is bound to cause confusion among the district courts. The SG is correct, I believe, in saying that the three-way conflict is both substantial and real. The "compelling necessity" test adopted by CA 2 below, moreover, seems problematic on a practical no less than on a theoretical level: it is hard to imagine any restriction that could pass constitutional muster thereunder. Once fiscal and adminis-

trative justifications are eliminated, bail itself may stand condemned. House arrest could do the job, albeit more expensively, as well.

This case, additionally, presents questions of pretrial detainment in a peculiarly unadulterated guise. This case does not involve ramshackle jailhouses in remote county seats, equipped with the Dickensian amenities of an archaic age. It involves a modern federal facility built three years ago, designed and equipped with the best that contemporary architecture and penology can devise. If the Govt has not succeeded here, one is tempted to despair of success at all.

Finally, despite the large number of pretrial detainment cases that have been decided in the past three years, this is apparently the first case in which the SG has sought cert. It is hard not to suspect that he has been "sandbagging," waiting for the right case to come along. In my judgment, CA 2 in this case has cooperated handsomely. Right!

Grant.

There is a response.

9/1/78 Lauber Ops in petn

Deciding whether and how to distinguish between convicts and pretrial detainees, and setting out uniform constitutional standards governing treatment of the latter strike me as important issues. In view of the Circuit conflict and the well-developed record in this case, I would grant. E.A.

Justice Powell

I asked Eric to let me have a glance at this memo, as I am interested in this area of the law. Based on my work with Judge Campbell on Feeley v. Sampson, I feel that this is an extremely important issue and that the need for guidance from this Court is compelling (over)

I believe cases involving pretrial detainees have arisen in district courts in almost every circuit, and the conceptual confusion as to how to classify detainees has allowed those district judges who are so inclined practically to take over state and local jails and penitentiaries. Judge Campbell mentioned to me on several occasions after we got Farley out that he wished for guidance from the Court in this area more than any other.

Paul

September 25, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 77-1829

BELL

vs.

WOLFISH

Also motion of resps for leave to proceed ifp.

P.S. Under there is clear conflict among circuits.

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.					Jour		3						
Brennan, J.			✓										
Stewart, J.		✓											
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											

tent telephone use should be allowed pretrial detainees should be reconsidered with particular formula left to sound discretion of jail officials.

11. Prisons ⇐4(6)
Searches and Seizures ⇐3.2

Surveillance procedures employed by county jail officials, who disavowed any attention of scanning mail sent to counsel, public officials or the news media, were permissible and officials were not required to obtain search warrant before opening mail sent by pretrial detainees. U.S.C.A. Const. Amend. 1.

12. Prisons ⇐4(7)

While complete prohibition of personal belongings of pretrial detainees at county jail was not reasonably related to asserted state interest in security and order, list of approved items ordered by the district court was far too extensive in light of appropriate standard of review and accordingly remand was necessary to afford jail officials opportunity to determine in the first instance what personal items could be allowed in detainees' cells without unduly hampering efforts of officials to maintain order and security.

13. Constitutional Law ⇐262
Prisons ⇐13(9)

In light of already elaborate procedural safeguards to which county jail officials had acceded, and in light of state's very real interest in order and security, pretrial detainees did not have right to retain counsel in all disciplinary proceedings but rather due process required only that those accused of disciplinary infractions obtain some form of legal counselling where illiteracy or complexity of issues made it unlikely that detainee would be able adequately to apprehend case unassisted.

14. Prisons ⇐4(4)

Mere relative worsening in conditions of legitimate confinement of pretrial detainee does not trigger any constitutional interest, as long as "nature and duration" of new form of incarceration does not exceed original purpose for which detainee was committed.

15. Constitutional Law ⇐262
Prisons ⇐13.5(3)

Pretrial detainees, who under state law could be transferred to state prison from county jail upon recommendation of sheriff with approval of county commissioners, had no claim grounded in state law to which due process might attach in connection with transfers and thus were not entitled to procedural prerequisites to transfers specified by the district court. RSA N.H. 623:8.

Carleton Eldredge Stratham, N. H., for defendants, appellants.

Douglass P. Hill, Portsmouth, N. H., with whom Robert D. Gross, Manchester, N. H., was on brief, for plaintiffs, appellees.

Before COFFIN, Chief Judge, MARKEY, Chief Judge,* CAMPBELL, Circuit Judge.

LEVIN H. CAMPBELL, Circuit Judge.

Having recently considered questions regarding the constitutional rights of sentenced prisoners,[1] we now confront questions relative to the status of unconvicted persons ("detainees") awaiting trial. This appeal by New Hampshire county officials is from a judgment of the district court ordering changes in the conditions under which detainees are confined at the Rockingham County Jail (the Jail). The changes are intended to bring the conditions under which this category of prisoners is confined into conformity with the Constitution. The Jail, an elderly structure, was transformed in 1961 from a house of correction to its present status. As well as detainees awaiting trial, it houses men serving short misdemeanor sentences. The present class action under 42 U.S.C. § 1983 was brought by a detainee who later, upon conviction, went on to serve his sentence in the New Hampshire State Prison. He has been joined as

* Of the United States Court of Customs and Patent Appeals, sitting by designation.

1. *See Nadeau v. Helgemoe*, 561 F.2d 411 (1st Cir. 1977).

plaintiff by other detainees, and after discovery proceedings and in response to plaintiffs' motion for partial summary judgment the district court entered the order appealed from.

I

Some of the facts that were before the district court concerning the condition of detainees at the Jail are as follows: In 1975 the average length of a detainee's stay in the Jail was only about seven days. However, a stay of from three to four months was not uncommon and a few detainees were there for as long as eight or nine months. Detainees made up some 20–40 per cent of the population, which on the average totalled about fifty. Prior to the district court's intervention, the detainees were relegated to fourteen cells in the third tier, often two to a cell.

The detainees consist of persons accused of unbailable offenses, such as first degree murder, and those unable either to make bail or to qualify for release on recognizance.[2] Although presumptively innocent of the crimes for which they are being held for trial, detainees are almost invariably charged with misconduct far more serious than the minor misdemeanors for which convicted offenders are serving time in the Jail. Thus they may pose security problems, on one recent occasion having murdered a guard and more regularly engaging in incidents such as fights, arson, and the like "every couple of days". (Deposition of Sheriff Sampson). Detainees with drug or alcohol problems, only recently having been removed from the outside, are said to present special problems. Because the convicted misdemeanants work outside during the day, apparently with rather minimal security arrangements, contraband is easily smuggled to detainees inside the facility.

The detainees' cells are small (7′ × 5′ × 6½′) and contain a sink-toilet combination, two bunk beds, mattresses, sheets, pillows, blankets, a single shelf and a protected light bulb. The third tier cells face windows some 8½ feet away, across the tier. When suit was brought, detainees were allowed out during the day only on the 36′ × 4′ walkway adjoining their cells. They were not allowed to use the Jail's day room with television, radio, games, ping-pong table and "library" (apparently 75 assorted books left behind by inmates), nor to use other recreational equipment, or participate in work programs. Their meals were served in the cells or on the tier, although the sentenced inmates ate in a dining room. Detainees were permitted three showers a week while those sentenced to the Jail could shower at any reasonable time.

Visits took place in a portion of the first floor which was partitioned by a thinly meshed steel screen with benches on both sides. Inmates and their visitors could not touch one another. Conversations were, however, not monitored. There were no private facilities for consultations between attorney and client.

A detainee had to sign a statement consenting to the censorship of his mail; if he refused, all mail was withheld from him. Incoming mail, except lawyer's legal correspondence and letters to the media and public officials, was opened and scanned. Books, magazines and newspapers were censored for content. Outgoing mail, except legal correspondence and letters to the media and public officials, was opened and scanned.

It was the custom of the Jail without any notice or hearing whatever to transfer inmates who acted up to "discipline" cells on the first tier or to the "safe-keeping" cell located in a tunnel connecting the Jail with another building. Confinement continued until "the problem conduct abate[d]."

2. Under New Hampshire law, only first degree murder and offenses punishable by death are non-bailable crimes. NH RSA 597:1. Release on personal recognizance is required in misdemeanors and is available in felonies if the individual is deemed to be not a risk to himself or others and likely to appear. NH RSA 597:6-a. Since August of 1975, any person charged with an offense may appeal from the local courts to the Superior Court for a reduction in bail or for release on personal recognizance. NH RSA 597:6-b.

The Jail was administered virtually without written or oral rules. Correctional officers were told to use commonsense in disciplining. Decisions about who could visit and what mail would be censored were left up to the individual officers.

II

The district court summarized the issues before it as follows:

1. May defendants subject pretrial detainees to harsher conditions of confinement than those imposed upon sentenced prisoners;

2. Must defendants alter their visitation practices;

3. Must defendants provide plaintiffs greater access to telephones;

4. Must defendants alter their mail censorship practices;

5. Must defendants permit plaintiffs to possess various items of personal property;

6. Must defendants promulgate and distribute written, objective and reasonable rules governing the operation of the jail and delineating the rights and responsibilities of inmates;

7. Must defendants adopt certain disciplinary procedures;

8. Must defendants alter their practices concerning transfers of pretrial detainees to the New Hampshire State Prison.

Before addressing each of these questions, the court undertook to set out the principles it would apply. It said that detainees are "presumptively innocent individuals" and that they therefore "retain all the rights of free citizens" except that their mobility is necessarily curtailed and they must be subject to certain limitations to protect institutional security. The court felt that under the equal protection clause "any distinction between those detained and those free on bond must be based solely upon the precautions the state must take to assure the appearance of the accused at trial". Moreover, treatment of the detainees had to be equal to or less onerous than that accorded convicted offenders, "otherwise, the incarceration becomes punishment in violation of the Due Process Clause of the Fourteenth Amendment". In conclusion the court stated that "[t]he conditions of pretrial confinement must be the least restrictive means of achieving the state's sole legitimate end, the presence of the accused at trial," and that all restrictions, to be constitutional, had to be justified by "compelling necessity".

The court then applied these principles to the different grievances, ordering extensive relief. Only some of these remedial rulings, altering and improving conditions at the Jail, have been appealed. Officials have accepted the court's order that detainees be lodged in single cells and be permitted access to the same exercise and recreational facilities as sentenced prisoners; they have accepted some but not all modifications of visitation and mail censorship practices; they have accepted the court's order that written rules and regulations be promulgated setting forth the detainees' rights and obligations and the procedures for infractions; and they have accepted certain aspects of court-ordered disciplinary procedures. We need consider only those orders, described below, from which an appeal was taken. Before turning to the specific exceptions, we shall consider generally what constitutional constraints the fourteenth amendment imposes upon state and local authorities in the treatment of unconvicted detainees.

III

[1] At common law pretrial detainees were differentiated from sentenced prisoners. Blackstone said that

> "imprisonment [of those awaiting trial], as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, nor subjected to other hardships than such as are absolutely requisite for the purpose of confinement only . . . ."

4 W. Blackstone, Commentaries *300. In prohibiting excessive bail, the eighth amendment both limits pretrial confinement to situations where presence at trial cannot be safely assured by means other than confinement, *see Stack v. Boyle*, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951), and tacitly indicates the Founders' acceptance of the practice of pretrial confinement in such special cases.

While the Supreme Court has not yet discussed the status of detainees, there is general agreement among at least the four federal circuit courts that have ruled that the states may constitutionally deprive detainees of liberty only to the extent necessary to ensure their presence at trial.[3] *Duran v. Elrod*, 542 F.2d 998 (7th Cir. 1976); *United States ex rel. Tyrrell v. Speaker*, 535 F.2d 823, 827 (3d Cir. 1976); *Rhem v. Malcolm*, 507 F.2d 333, 336 (2d Cir. 1974); *Anderson v. Nosser*, 456 F.2d 835, 837–38 (5th Cir. 1972) (en banc) (modifying 438 F.2d 183 (5th Cir. 1971)), *cert. denied*, 409 U.S. 848, 93 S.Ct. 53, 34 L.Ed.2d 89 (1972).

These decisions reflect a strong consensus that restrictions designed only to serve some function irrelevant, or more burdensome than necessary, to secure the detainee's presence at trial are constitutionally impermissible. However, as the maintenance of institutional security "directly serves" the state's interest in ensuring the detainee's presence, jail order and security has been accepted as a consideration entitled to great weight when balancing the state's interest against the liberty interest of detainees. *Main Road v. Aytch*, 565 F.2d 54 (3d Cir. 1977); *Smith v. Shimp*, 562 F.2d 423 (7th Cir. 1977).

[2] Apart from more specific guarantees such as the first amendment, the constitutional provision most commonly, and we think accurately, cited as protecting detainees is the due process clause of the fourteenth amendment. *See: e. g., Duran v. Elrod, supra.* In an analogous context, the Supreme Court has said, "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S.Ct. 1845, 1858, 32 L.Ed.2d 435 (1972). *See McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 249–50, 92 S.Ct. 2083, 32 L.Ed.2d 719 (1972). *Compare O'Connor v. Donaldson*, 422 U.S. 563, 573–75, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975). Restrictions or conditions of confinement that are without reasonable relation to the state's purpose in confining a detainee—his production at trial—violate due process.[4]

3. A further valid reason for pre-trial detention in some instances might possibly be to protect the public against a dangerous individual, but as this ground would not alter the analysis or the outcome in cases like the present, there is no need to pursue it.

4. Pretrial confinement is not, however, a species of illegal or improper confinement, lacking in due process. The lower court seems, to some degree, to have so believed in insisting that pretrial confinees had to be extended rights comparable to those on bail. The eighth amendment by necessary implication contemplates the use of pretrial confinement in appropriate cases. A detainee will have received due process in the form of some kind of probable cause determination and a bail hearing; and he has the right to a speedy trial. *See Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *Smith v. Hooey*, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969); *cf. Ierardi v. Gunter*, 528 F.2d 929 (1st Cir. 1976); *Greci v. Birknes*, 527 F.2d 956 (1st Cir. 1976) (due process requirements for detention pursuant to extradition). While a detainee is presumptively innocent, this status does not require his jailers to act as if he were not a security risk. As the Third Circuit has put it,

> "We note that some courts have apparently relied upon the 'presumption of innocence' in cases involving pretrial detainees. However, we do not believe that principle serves as the source for those substantive rights. Rather, the presumption allocates the burden of proof. It is a principle of evidence, . . acting as the foundation for the procedural due process requirement of proof beyond a reasonable doubt. . . . If the 'presumption of innocence' is read literally to apply to all pretrial procedures, it is impossible to justify bail or pretrial detention, both of which are imposed upon the accused despite the presumption."

Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1080 n. 1 (3d Cir. 1976) [citations omitted].

[3] In the absence of further guidance from the Supreme Court it is less clear that, aside from specific guarantees such as the first amendment, other constitutional provisions apply. The Second Circuit has held that the eighth amendment does not apply to pretrial detainees because they are not being published. *See Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 32 (1973); *cf. Anderson v. Nosser, supra.* *See also Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). Several district courts have reached a different result, *see e. g., Johnson v. Lark*, 365 F.Supp. 289, 302 (E.D.Mo.1973); *Collins v. Schoonfield*, 344 F.Supp. 257, 264–65 (D.Md.1972); *Jones v. Wittenberg*, 323 F.Supp. 93, 99–100 (N.D.Ohio 1971), *aff'd*, 456 F.2d 854 (6th Cir. 1972). *See also Anderson v. Nosser supra*, 456 F.2d at 842 (Tuttle, J., dissenting). Like the Seventh Circuit we believe that whether or not the eighth amendment is directly applicable, precedent under the eighth amendment is relevant and persuasive in detainee cases, *Duran v. Elrod, supra*, 542 F.2d at 999–1000. The due process clause requires a state to play its limited custodial role in a reasonable, and hence a humane, manner. It is impossible to conceive of situations where treatment so cruel or barbaric as to violate the eighth amendment if visited upon a sentenced prisoner would satisfy a detainee's due process rights. Loading a detainee with chains and placing him in a dungeon might, it is true, further the state's interest in ensuring his presence at trial; but as it is obvious that in virtually all cases this purpose could be promoted without such harsh measures, resort to them would ordinarily violate due process.

While the eighth amendment—whether or not directly applicable—provides a relevant standard, the role of the equal protection clause in detainee cases is more questionable. Classifications by the state must have a rational basis, and to that extent the equal protection clause may be said to fortify a detainee's right, already protected under the due process clause, to be treated in a manner rationally related to the limited purpose for which he is imprisoned. But this concept of equal protection adds little if anything to the due process analysis. Those district courts, including the court below, that have engaged in equal protection analysis have usually adopted a "strict scrutiny" approach, under which a state carries a burden of justifying every restriction imposed upon an inmate on the basis of "compelling interest", and must further demonstrate that each measure taken is the "least restrictive alternative". The court below erroneously construed our decision in *Inmates of Suffolk County Jail v. Eisenstadt*, 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 189 (1974), as endorsing this form of analysis. Without questioning the correctness of the district court's ultimate judgments in *Eisenstadt*, 360 F.Supp. 676 (D.Mass.1973), we observe that the appeal in that case was limited to issues entirely unrelated to the matter of strict scrutiny. This court accordingly never had occasion to pass on the question.

As we indicated in *Nadeau v. Helgemoe*, 561 F.2d 411 (1st Cir. 1977), strict scrutiny has not found favor in the Supreme Court's prisoner cases; and while the state's control over detainees is for a more limited purpose than that over convicts, we are unpersuaded that this approach is viable even as to detainees. The Court has said that strict scrutiny of legislative classifications is appropriate only when "the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Mass. Board of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976) [footnote omitted]. Detainees are not a suspect class, and while confinement restricts liberty, a basic right, the Court has yet to suggest, in any way, that the dialectic between confinement and liberty triggers strict scrutiny analysis. *Id.* at n. 3. In prisoner cases involving first amendment rights—where it is most clear that even sentenced prisoners retain important constitutional protections—the Court has declined to shift the burden of justification wholly to

Standard of reasonableness
Rejects "compelling necessity"
& "strict scrutiny"

77-1829
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the state. Rather, in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977), the Court described the appropriate posture of judicial review:

> "Without a showing that these beliefs [in danger to security] were unreasonable, it was error for the District Court to conclude that [the officials] needed to show more. In particular, the burden was not on [the officials] to show affirmatively that the Union would be 'detrimental to proper penological objectives' or would constitute a 'present danger to security and order.' . . . Rather '[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.' "

Id. at 127–28, 97 S.Ct. at 2539, *quoting Pell v. Procunier*, 417 U.S. 817, 827, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). *See also Bounds v. Smith*, 430 U.S. 817, 832–33, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).

[4] While detainees are not convicts, the same practical reasons that counsel judicial restraint in second-guessing correctional officials dictates restraint in second-guessing the authorities who run jails. *See Main Road v. Aytch, supra*, 565 F.2d at 57. We believe that the proper standard by which to review the actions of those lawfully entrusted with the custody of detainees is that normally employed in reviewing administrative actions: whether the actions of jail authorities are arbitrary or capricious; whether they are lacking in a reasonable relationship to the limited purpose of the confinement; and whether they are otherwise not in accordance with law.

Strict scrutiny review would have the far-reaching effect of substituting "the values and judgment of a court for the values and judgment of the legislature and prison administration". *Nadeau v. Helgemoe, supra*, 561 F.2d at 417. Who is to say what is the "least restrictive alternative" within the means of the state? Who is to say what security precautions are "compelled" rather than merely prudent? We do not think that the Constitution requires, or indeed that it would be feasible or desirable, for judges to make decisions as to all the details of jail life, overriding the judgments, if reasonable, of both legislators and jail authorities.

[5] The court below adopted as a yardstick for measuring detainees' rights, a presumptive rule that it is unconstitutional to treat a detainee less well in any particular than a sentenced inmate. But while the treatment of other prisoners is relevant to whether or not a detainee is being treated with unnecessary restrictiveness, it is not conclusive. Facilities for short-term jail prisoners need not be as comprehensive in all respects as those provided for one serving a term of years. A detainee with a notorious record as a bank robber may not be entitled to as lenient security conditions as someone serving a misdemeanor sentence. Constitutional rights cannot be defined in terms of literal comparisons of this nature. Indeed, relying on comparisons to establish the level of a prisoner's rights could leave the state free to make everyone's lot worse instead of better. *Nadeau v. Helgemoe, supra*, 561 F.2d at 417.

In rejecting strict equal protection analysis, we do not denigrate the role of courts in enjoining conditions found to be inhumane or irrational. Restrictions upon detainees that serve no proper purpose, but merely reflect the lack of imagination or energy of local officials, are properly the subject of judicial correction; so too are conditions which, for whatever reason, fall below minimum standards of humanity and decency. It is not suggested that the unappealed orders of the district court, bringing about improvements at the Jail, might not be supportable on proper grounds. We do hold, however, that judicial review in a case like this should proceed under the standard we have described with proper deference to be accorded legislative and local judgments especially in the area of security within and without the Jail.

We now turn to the specific questions raised in this appeal.

IV

1. *Visitation*

[6] Prior to this litigation, visitation was permitted twice a week between 1 and 3 p. m., with visits to last a maximum of one-half hour each. The court found that "[e]ach detainee theoretically had a total of four visiting hours per week". Detainees were not allowed to touch their visitors, who were separated from them by a mesh screen. The limitation of visits to two specific days from 1 to 3 p. m. was altered by the administration during the pendency of these proceedings, so that visits are now allowed "at all reasonable times"; however, the administration did not indicate how many visits would be allowed, and plaintiffs complain that in failing to specify limits the administration meant to retain arbitrary control of visits on an *ad hoc* basis. The court undertook to clarify matters by ordering that each detainee be allowed three hours of visits a day. It also ordered that prisoners be allowed to have physical contact and communication with their visitors. The authorities complain that the three-hour rule will "produce severe overcrowding to the detriment of jail security and visitation conditions". They also are of the view that the opportunities for conveying contraband or taking a hostage are too great to allow contact visits.

Visitation rights, besides having to meet the previously described due process standard, reflect first amendment values, most clearly the right of association. The Supreme Court has recently said, in the case of convicts, that the "associational rights that the First Amendment protects outside of prison walls" are "the most obvious of the First Amendment rights that are necessarily curtailed by confinement". *Jones, supra,* 433 U.S. at 125–26, 97 S.Ct. at 2540. This was said, however, in the context of an asserted right of prisoners to unionize—a novel assertion posing an obvious threat to prison administration. For detainees to receive visits at regular intervals from loved ones and friends is a commonly accepted privilege; has been recognized at the Jail; and implicates, in the case of detainees especially, communicative as well as associational values protected by the first amendment. A refusal, therefore, to allow the ordinary detainee any visitation privileges, or the laying down of capricious limitations not justified by considerations of jail security and order, would be unconstitutional. *See Procunier v. Martinez,* 416 U.S. 396, 411–12, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). The Constitution does not, however, require that visitation be allowed on every day of the week. What days and hours and circumstances are reasonable is largely for the local authorities to decide in the first instance, subject only to limited court review for arbitrariness. Except where their decisions are arbitrary, a court must normally defer to the judgment of jail authorities. *Jones, supra.*

[7] In the present instance, the district court could conclude that is was arbitrary and capricious for Jail authorities, after abolishing the restrictive twice-weekly rule, not to issue a new rule or rules of general application clarifying what amount of visiting would be permitted. No valid security reason was presented for denying detainees and their relatives and friends a set of standards enabling them to plan visits. The situation which the court properly sought to correct was one that left each detainee at the unfettered discretion or whim of the sheriff and his assistants.

However, only if the authorities decline to promulgate any rule although invited to do so, or insist upon a patently inadequate one, should courts promulgate their own rules. The Jail is entitled to decide how many hours a week of visits are feasible, taking account both of the physical limitations of the Jail and the reasonable internal and external security needs of the institution. The authorities should have a further opportunity in light of this opinion to initiate a rule which the court may then reject if it should be capricious or otherwise unjustified. We vacate the three-hour requirement and remand for further proceed-

ings which will allow the Jail authorities to establish, and the court further to review, a suitable specific visitation rule.

[8] As for contact visits, we can discover no constitutional guarantee that such visits may take place. The question is simply whether considerations of Jail security and order make it reasonable for the authorities to refuse visits of this nature. In ordering such visits over the wishes of Jail authorities, the court relied on the fact that contact visits were allowed at the New Hampshire State Prison. That is a factor relevant in deciding whether the exclusion of contact visits is an arbitrary practice, but it is not conclusive. That institution may be constructed so that contact visits are more manageable, or there may be other factors making such visits feasible there. There may even be legitimate differences of opinion among state and local authorities as to what practices are safe within their particular institutions. Unless the denial of contact visits on security grounds can be found, on the basis of evidence of record, and with reasonable deference to the expertise of Jail authorities, to be an "exaggerated" response by Jail officials, *see Jones, supra*, the district court should not have substituted its judgment as to security needs for that of the officials.

[9] We do not believe such a finding can be made on this record. Contact visits present a unique opportunity for passing contraband, including weapons and drugs, into the Jail. The district court suggested that authorities could guard against this danger by searching both visitors and detainees, but this observation only highlights the difficulty of outsiders substituting their judgment as to how a jail should be run for that of those responsible for the institution. Visitors and detainees might resent thorough searches as too intrusive, and Jail officials might believe contraband could still slip through in spite of the most extensive precautions. That the responsible authorities have chosen one particular method of countering a conceded threat to the security of the Jail, and not some other, ought to be a decision sustained by a reviewing court as long as it is rationally supportable. The humanity and possible soothing effect of contact visits are qualities that Jail officials properly should consider in passing on their desirability. But whatever the wisdom of a decision to reject these benefits in favor of a harsher regimen for detainees, we cannot say that the choice is unsupportable. The term of confinement at the Jail is often very brief—in many cases only a week or less—and a substantial number of detainees have only recently been removed from drug or alcohol habits. Consequently we reverse the order of the district court to the extent it requires contact visits at the Jail. If the Jail officials have found that their experience under the court order has eased some of their fears about contact visits and demonstrated benefits to the detainees, it is of course open to them, as a matter of choice, to continue the practice.

2. *Telephone Privileges*

[10] The district court ordered Jail authorities to permit inmates a reasonable number of daily social telephone calls, not to exceed ten minutes each. The court justified the order by comparing the status of detainees to that of bailees:

> "Persons freed on bail have full and free access to telephones and may call anyone to discuss any matter without having to account for the reasons for the call. This court does not know of, and defendants have not put forward, any reason why plaintiffs, as incarcerated accused, should not be allowed the same access."

This standard is incorrect both because the court wrongly compared the freedom of those on bail and of detainees, and because the court wrongly placed the burden of justification entirely upon the state. By applying too demanding a standard to the actions of the Jail authorities, the court failed to consider whether limitations on telephone use reasonably reflected legitimate apprehensions about the security and order of the Jail. At the same time, the Jail officials did not introduce evidence sufficient to assess the reasonableness of their assertion that a complete ban on social calls

is necessary to satisfy their proper concerns. The matter is not free from doubt: numerous courts have confronted the question of access to telephones by detainees and, although many have used a standard of review more exacting than that we believe appropriate, the consensus has been in favor of at least some access. *Compare Dillard v. Pitchess*, 399 F.Supp. 1225, 1240 (C.D.Cal.1975); *Inmates of the Suffolk County Jail v. Eisenstadt, supra*, 360 F.Supp. at 690; *Collins v. Schoonfield, supra*, 344 F.Supp. at 279; *Brenneman v. Madigan*, 343 F.Supp. 128, 141 (N.D.Cal.1972); *Jones v. Wittenberg, supra*, 330 F.Supp. 707, 719 (N.D.Ohio 1971), *with Inmates of Milwaukee County Jail v. Petersen*, 353 F.Supp. 1157, 1169 (E.D.Wis.1973). Although the Jail permitted detainees to receive calls from their attorneys, the restriction was so all-encompassing as to limit the ability of a detainee to investigate and prepare his defense. *Cf. Bounds v. Smith, supra.*

Consequently we believe the district court should reconsider this portion of its order in light of legitimate concerns expressed by Jail authorities with regard to security. Evidence as to how other, similar facilities handle the problem and as to what security risks exist at the Jail would be useful. Jail officials and the court might consider reasonable ways of accommodating the interests of detainees with those of the Jail, such as by making access to a telephone contingent on recognition of the authority of guards to monitor the conversations. The particular formula for regulating telephone use should be left to the sound discretion of Jail officials, subject to review by the district court to guard against unreasonable restrictions.

3. *Mail Privileges*

[11] The district court upheld the authority of Jail officials to inspect incoming mail but ruled that mail sent by detainees should not be opened without a search warrant. It reasoned that because detainees' visits went unmonitored, escape plans or contraband "drops" could be plotted regardless of any surveillance of correspondence. The court apparently discounted the state's argument that because visits were limited to a relatively small number of approved persons, they presented less of a security risk.

The Supreme Court has passed on the closely related question of the first amendment rights of those who correspond with convicted prisoners. *Procunier v. Martinez, supra.* There the Court held that censorship of prisoner mail could be no greater than necessary to the protection of the particular governmental interest involved, security being one of the recognized state interests. 416 U.S. at 413, 94 S.Ct. 1800. The state here, however, asserts not a right to withhold mail but only the right to monitor. *Martinez* clearly recognized such a power in prison officials as a necessary incident of exercising an appropriate censorship function. *Id.* We do not believe the first amendment rights of those who correspond with detainees, or of detainees themselves, necessarily are any greater. Rather we concur with the Seventh Circuit, which recently observed:

> "We may take judicial notice of the fact that an opportunity for secret and lengthy communication between a detainee and his friends or relatives would substantially enlarge his opportunity for successful escape. We have no doubt that over the course of time some persons would take advantage of that opportunity."

Smith v. Shimp, supra, 562 F.2d at 426. To the extent New Hampshire disavows any intention of scanning mail sent to counsel, public officials, or the news media, the surveillance procedures employed were the same as those sustained in *Shimp.* We must permit these procedures here, and accordingly the portion of the district court's order concerning outgoing mail is reversed. On remand, the district court will be free to address the question, should it be necessary, of what steps might be required to ensure the censorship practices at the Jail—i. e., the withholding of particular communications—conform to *Martinez.*

4. *Personal Belongings*

[12] The district court ordered Jail authorities to prepare a list of personal property that inmates could keep in their cells, using as its standard that in effect at the New Hampshire State Prison. The court held that equal protection mandated this ruling:

> "While plaintiffs may not have a constitutional right to have a television or other personal property in jail, it is a constitutional requisite that defendants justify as absolutely necessary the rule that forbids all personal property at the Rockingham County Jail. I find it highly significant that the New Hampshire State Prison and another New Hampshire county jail allow inmates to have a variety of personal items, and it is unlikely that the introduction of such approved personal items at the Rockingham County Jail would create undue security risks at that institution that are not posed at others. Further, denial of this privilege to Rockingham County Jail detainees constitutes a denial of equal protection when both convicted inmates and pretrial detainees at other jails and prisons are permitted to have approved personal items."

The items held to be admissible included televisions, radios, tape cassette players, clothing, food, and tobacco. The Jail officials protest that some of these items can be used as weapons or to start fires, while all of items facilitate the concealment of contraband by cluttering the cells and create a risk of conflicts among inmates by causing property disputes.

Even as a comparison, the district court's argument was flawed inasmuch as it overlooked differences in both the facilities and inmate populations at other institutions. A quantity of personal possessions that might be tolerable in one prison with larger cells might amount to intolerable clutter at the Jail. An inmate's need for a variety of personal effects might be greater at an institution where the average stay was lengthy than at a local jail with a high rate of turnover in its population. Furthermore, as we have indicated above, even if the comparison were a fair one, the contrast in the restrictions employed would only be evidence of the possible arbitrariness of the Jail's total ban on personal property, but not conclusive.

In light of the record now before us, we are unable to hold that a complete prohibition of personal belongings at the Jail would be reasonably related to the asserted state interests in security and order. At the same time, the list of approved items ordered by the court seems far too extensive in light of the appropriate standard of review. Accordingly, we remand this question to the district court to afford Jail officials an opportunity to determine in the first instance what personal items could be allowed in detainees' cells without unduly hampering the efforts of the officials to maintain order and security.

5. *Counsel at Disciplinary Proceedings*

[13] In place of the completely unstructured disciplinary program then in effect at the Jail, the district court substituted a system that incorporated published rules, advance written notice of charges, an impartial fact finder, power to call witnesses, and permitted a detainee to retain counsel. The defendants appeal only the last part of the order, arguing that the presence of counsel exceeds the requirements of due process and imposes an unreasonable burden upon the Jail. The court, to the contrary, found that the presence of counsel would not impose a burden to security and, to the extent such dangers were present in particular circumstances, permitted exclusion of counsel upon a showing by Jail officials that a security threat existed.

The Supreme Court has addressed the counsel issue with regard to convicted prisoners. In *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), the Court said:

> "[A]s we have indicated, the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully commit-

ted. . . . Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. . . . In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application."

Id. at 556, 94 S.Ct. at 2975. With particular regard to the presence of counsel in prisoner disciplinary proceedings, the Court observed,

"The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held. . . .

"Where an illiterate inmate is involved, however, or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by staff."

Id. at 570, 94 S.Ct. at 2981.

Due process is a flexible concept, and the court must in each case focus on the competing interests of the parties. *See Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *Downing v. LeBritton*, 550 F.2d 689, 691 (1st Cir. 1977). We are not dealing here with criminal proceedings. *Baxter v. Palmigiano*, 425 U.S. 308, 316, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). Looking to the state's interests, we note both the risk of delay and the heightened adversarial stance of the proceeding caused by the presence of counsel. Unlike the procedures involved in *Baxter* and *McDonnell*, no "correctional goals" as such are implicated here, but the state's very real interests in order and security are present to the same extent as in those cases. Consequently, we cannot hold that detainees have a right to retain counsel in all cases, especially in light of the already elaborate procedural safeguards to which Jail officials have acceded. We do not believe that due process requires greater participation by counsel in these proceedings than that required by *McDonnell* and *Baxter* in the prisoner context, namely that those accused of disciplinary infractions may obtain some form of legal counselling where illiteracy or the complexity of the issues makes it unlikely the detainee will be able adequately to apprehend the case unassisted. We remand this portion of the order to the district court for appropriate modification.

6. *Transfers*

New Hampshire Revised Statutes Annotated § 623:3 provides:

"*Transfer to State Prison.* Any person who is confined awaiting trial on a felony charge, may be transferred to the state prison, from the county jail or house of correction, upon the recommendation of the sheriff, and with the approval of the county commissioners of said county."

Before the district court's order in this case, Jail officials transferred detainees pursuant to this section whenever they believed transfer to be desirable. Among other purposes, these transfers enabled the officials to relieve overcrowding. The district court, however, held that the transfers occasioned substantial hardships for the transferees inasmuch as the conditions of confinement were in some respects more onerous at the state prison. The court distinguished two recent Supreme Court cases involving the due process rights of convicts transferred among prisons, *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976); *Montanye v. Haymes*, 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976), and held that various due process rights applied to such transfers.

[14, 15] We do not agree that *Meachum* and *Montanye* are distinguishable. It is true that convicted prisoners have been constitutionally deprived of their liberty, and

that therefore the only liberty interests retained that require the protection of due process are those created by state law. But it is equally true that detainees also have been constitutionally confined for legitimate state purposes. A mere relative worsening in the conditions of this confinement does not trigger any constitutional interest, as long as the "nature and duration" of the new form of incarceration does not exceed the original purpose for which the detainee was committed, *Jackson v. Indiana, supra*, 406 U.S. at 738, 92 S.Ct. 1845. And as the above quoted statute makes clear, plaintiffs have no claim grounded in state law to which due process may attach. Accordingly, we reverse the order of the district court inasmuch as it specified certain procedural prerequisites to transfer of detainees.

The order of the district court is vacated and remanded in part, and reversed in part.

COFFIN, Chief Judge (dissenting).

The court's opinion, while obviously thoughtful and responsive to understandable concerns, seems to me to proceed from false constitutional premises and to reject virtually all of the case law affecting pretrial detainees. The court begins, soundly enough, by recognizing that detainees have not yet been tried and found guilty and that current authority allows their liberty to be taken "only to the extent necessary to ensure their presence at trial." When the analysis reaches its end, however, we find that only those restrictions which are inhuman, serve no proper purpose, or are arbitrary and capricious in that they "merely reflect the lack of imagination or energy of local officials" may be judicially corrected. The path the court takes is the following: (1) encroachment on a detainee's liberty is permitted only if necessity requires it; (2) orderly and secure prisons are necessary to assure the detainee's presence at trial; (3) deference to local authority requires that a state need meet only a minimal burden to establish the nexus between the treatment of detainees and the goals of prison security. Therefore, the state may impose on pretrial detainees any condition of confinement that it can reasonably relate to its institutional concerns for safety and order in the prison where they are incarcerated. Through this logic the "necessity" of the court's initial principle is transformed to include the farthest limits of administrative rationality.

I appreciate some of the implicit and explicit premises which have led the court to this conclusion. There is a clear lack of commitment on the part of the body politic to provide significantly increased funding for correctional facilities. Courts in general and federal courts in particular are naturally reluctant to intrude into the administration of state and local government activity. While pretrial detainees are presumptively innocent of the charges against them, they may well be dangerous individuals who pose security risks for custodial authority.

Indeed, the court's formulation and analysis would comport perfectly with a constitution that guaranteed that "no citizen may be deprived of his liberty without due process of law except for encroachments deemed by legislative or administrative judgments to bear a reasonable relationship to legitimate societal interests." Such a guarantee would be entirely coherent; it would respect majoritarian decisions as to funding priorities, support institutional efficiency, and minimize federal court intrusions in state and local affairs. But this is not our constitution.

Nor does the overwhelming majority of the many courts which have considered the rights of pretrial detainees so view the constitution. I attempt to marshal the authorities below. But before considering these, I do not wish to appear to do a disservice to the authorities relied on by the court. Perhaps most pertinently the court, in suggesting a new standard with which to evaluate conditions of confinement of pretrial detainees, quotes Supreme Court language that "'At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.' *Jackson v. Indiana*, 406 U.S. 715, 738

[92 S.Ct. 1845, 1858, 32 L.Ed.2d 435] (1972)." The context in which that quotation is taken from in *Jackson*, a case involving the indefinite commitment of a person incompetent to stand trial, makes it clear that the Court was referring to the nature of the proceeding through which a state may incarcerate a person indefinitely and that the proceeding in question had not met the most minimal standards of due process. The case says nothing about conditions of confinement or the standards under which they should be evaluated.

I have found only three pretrial detainee cases which appear to provide support for the majority's standard. *Seale v. Manson*, 326 F.Supp. 1375 (D.Conn.1971) focused on the rights of two particular detainees, both of whom were accused of serious criminal offenses. However, it is clear that the reasonable relation standard utilized in *Seale* is no longer the law of the Second Circuit, *see Rhem v. Malcolm*, 507 F.2d 333, 336–37 (2d Cir. 1974); *Detainees of Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392, 397 (2d Cir. 1975); *United States ex rel. Wolfish v. Levi*, 406 F.Supp. 1243, 1247 (S.D.N.Y.1976).

The second case, *Duran v. Elrod*, 542 F.2d 998 (7th Cir. 1976), appears to present several standards, one of which, "that as a matter of due process, pre trial detainees may suffer no more restrictions than are reasonably necessary to ensure their presence at trial", is consistent with the court's opinion in the present case. Other language in *Duran* suggests a more protective view of detainee's rights. The opinion specifically permits detainees to present evidence as to whether their privileges can be increased "without jeopardizing the security of the institutions or requiring unreasonable expenditures." A later Seventh Circuit case strongly suggests that deprivations imposed on pretrial detainees must receive some sort of rigorous scrutiny. In *Smith v. Shimp*, 562 F.2d 423 (7th Cir. 1977), the court discusses *Duran* without ever mentioning a "reasonably necessary" standard. Instead, it states that "if conflict between the state's interest in jail security and the civil liberties of the detainees cannot be avoided or limited by reasonable means, the latter must yield." *Id.* at 426. This rule simply states the obvious—that the courts will not uphold unreasonable demands on the part of detainees and that there must be rational limits on their civil liberties if custody is to be maintained. It does not indicate that any "reasonable" deprivation imposed by the state will be upheld irregardless of whether sufficient security and order could be maintained by less restrictive means. Indeed, the court states this specifically, "We may assume that the defendants' practice would be unconstitutional if the interest in jail security could be protected by less burdensome means." *Id.* at 426.

The third case, *Main Road v. Aytch*, 565 F.2d 54 (3d Cir. 1977), does not detail a specific standard with which to evaluate the conditions of confinement of pretrial detainees, but it does suggest that prison authorities should be given considerable deference in their attempts to maintain security in prisons both for convicted prisoners and pretrial detainees alike. It is difficult to tell how much of the court's analysis was meant to apply to general conditions of confinement of pretrial detainees and how much of it was limited to the facts of the particular case being adjudicated. The Third Circuit was confronted with a mixed plaintiff class of pretrial detainees and convicted criminals (although the large majority were detainees); the district court had found that governing the two groups under separate regulations would not be feasible; detainees did not receive fewer privileges than their convicted counterparts; and while the privilege sought in the suit, the right to hold group press conferences, was denied, other forms of communication with the press such as mail and individual interviews were permitted. To the extent that the Third Circuit would extend equivalent deference to prison authorities whether they were holding convicted criminals or pretrial detainees in custody in most circumstances, not simply those described above, it provides support for the court's opinion in the present case.

I would not characterize these authorities as being a doctrinal source for a "reasonable relationship" test. In any event, the almost universal state of authority is in stark disagreement with the court's analysis. Indeed, the rigorous standard of scrutiny described by the district court below has been approved in both its aspects. Deprivations may be imposed on detainees for legitimate purposes such as institutional security only if such deprivations are justified by "compelling necessity", *see, e. g., Detainees of Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392, 397 (2d Cir. 1975); *Rhem v. Malcolm*, 507 F.2d 333, 336 (2d Cir. 1974); *Martinez Rodriquez v. Jimenez*, 409 F.Supp. 582 (D.P.R.1976); *United States ex rel. Wolfish v. Levi*, 406 F.Supp. 1243, 1247 (S.D.N.Y.1976); *Manicone v. Cleary*, 74 C. 575 (E.D.N.Y.1975); *Brenneman v. Madigan*, 343 F.Supp. 128, 138–39 (N.D.Cal. 1972); *Jones v. Wittenberg*, 323 F.Supp. 93 (N.D.Ohio 1971) ("absolute requisite" instead of compelling necessity), *aff'd sub nom., Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972), or if the deprivation is the least restrictive alternative available to maintain order and security, *see, e. g., Miller v. Carson*, 563 F.2d 741 (5th Cir. 1977); *Smith v. Shimp*, 562 F.2d at 426 (7th Cir. 1977); *Rhem v. Malcolm, supra*, 507 F.2d at 337; *Mitchell v. Untreiner*, 421 F.Supp. 886 (N.D. Florida 1976); *United States ex rel. Wolfish v. Levi, supra*, 406 F.Supp. at 1247; *Manicone v. Cleary, supra; Dillard v. Pitchess*, 399 F.Supp. 1225 (C.D.Cal.1975); *Cudnik v. Kreiger*, 392 F.Supp. 305 (N.D.Ohio 1974); *Wilson v. Beame*, 380 F.Supp. 1232, 1236 (E.D.N.Y.1974); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F.Supp. 676 (D.Mass. 1973); *Smith v. Sampson*, 349 F.Supp. 268, 271 (D.N.H.1972); *Brenneman v. Madigan, supra*, 343 F.Supp. at 138; *Hamilton v. Love*, 328 F.Supp. 1182 (E.D.Ark.1971); *Palmigiano v. Travisono*, 317 F.Supp. 776 (D.R.I.1970).

The compelling necessity standard is often derived from an equal protection analysis while the concept of least restrictive alternative is rooted in due process doctrine. However, regardless of their doctrinal source the two standards tend to meld together when they are applied. Often what results is the practical rule of thumb that, *at the least*, the state cannot provide its pretrial detainees with less tolerable conditions of confinement and privileges than it makes available to convicted criminals. *United States ex rel. Tyrrell v. Speaker*, 535 F.2d 823, 827 (3d Cir. 1976); *Rhem v. Malcolm, supra*, 507 F.2d at 336; *Campbell v. McGruder*, 416 F.Supp. 100 (D.C.D.C.1975); *Martinez Rodriguez v. Jimenez, supra*, 409 F.Supp. at 593; *Miller v. Carson*, 401 F.Supp. 835, 839, 864 (M.D.Fla.1975); *Dillard v. Pitchess, supra*, 399 F.Supp. at 1235; *Inmates of Suffolk County Jail v. Eisenstadt, supra*, 360 F.Supp. at 686; *Smith v. Sampson, supra*, 349 F.Supp. at 272; *Conklin v. Hancock*, 334 F.Supp. 1119, 1121–22 (D.N.H.1971).

This "rule" has the benefit of appealing simplicity, but it is open to the serious criticism that it provides too low a floor for the rights of detainees. *See Brenneman v. Madigan, supra*, 343 F.Supp. at 137–40; *Hamilton v. Love, supra*, 328 F.Supp. at 1191; *Jones v. Wittenberg, supra*, 323 F.Supp. at 100. This seems obvious on a theoretical level. While the detainee has lost the right to be a fully free citizen, he has not been found guilty of an offense for which he may be punished by constitutionally appropriate procedures. Since no one seriously maintains that prisons for convicted criminals are solely custodial and devoid of punitive dimensions, to equate the conditions under which a detainee may be confined with those imposed on a convicted criminal is irrational and unfair. The more appropriate analogy would be to equate the treatment of a detainee with that of a bailee with the obvious proviso of the additional deprivations necessary to safely keep the detainee in custody. *See, e. g., Patterson v. Morrisette*, 564 F.2d 1109 at 1110 (4th Cir. 1977); *Detainees of Brooklyn House of Detention for Men v. Malcolm, supra*, 520 F.2d at 397; *Martinez Rodriguez v. Dimenez, supra*, 409 F.Supp. at 594; *Miller v. Carson, supra*, 401 F.Supp. at 856–57; *Cudnik v. Kreiger, supra*, 392 F.Supp. at 331; *Inmates of Milwaukee County Jail v. Petersen*, 353 F.Supp. 1157, 1160 (E.D.Wis.1973).

Unfortunately, the vision of constitutional theoreticians must be tempered by harsh realities. It is one thing to say that pretrial detainees may not be punished as courts have repeatedly held, *see Mitchell v. Untreiner, supra,* 421 F.Supp. at 894; *Miller v. Carson, supra,* 401 F.Supp. at 839–40, 867; *Dillard v. Pitchess, supra,* 399 F.Supp. 1232, 1234; *Inmates of Suffolk County Jail v. Eisenstadt, supra,* 360 F.Supp. at 685–86; *Inmates of Milwaukee County Jail v. Petersen, supra,* 353 F.Supp. at 1160; *Brenneman v. Madigan, supra,* 343 F.Supp. at 136; *Conklin v. Hancock, supra,* 334 F.Supp. at 1191; *Jones v. Wittenberg, supra,* 323 F.Supp. at 100; it is quite another to insist that such a principle be rigidly enforced. It would be impossible, without playing fast and loose with the English language, for a court to examine the conditions of confinement under which detainees are incarcerated, even after extensive judicial relief, and conclude that their custody was not punitive in effect if not in intent. Yet there are practical limits to the scope of remedial relief available to the courts which make such results unavoidable.

If courts did not look to the conditions of confinement of convicted criminals, they would be adrift between two almost limitless absolutes. The major reason that detainees are subject to harsh conditions of confinement has nothing to do with safety requirements. It is because society has not made available sufficient funds to provide a safe and comfortable custodial environment for them. Indeed, once a detainee has been incarcerated to guarantee his presence, there would seem to be no justification, other than lack of funding, for denying him any of the amenities of life; given enough resources almost any privilege can be given detainees consistent with prison security concerns. Thus, one reason for courts looking to the treatment of convicted criminals for guidance is that it gives them some general sense of minimally acceptable conditions of confinement which society is willing to support.

The other reason is that almost any deprivation can be explained or defended by the justification that it improves the security of a jail or prison. By looking to security arrangements in other prisons, the courts can better evaluate claims that the denial of a privilege is essential to security. If other institutions make that privilege available to their inmates without suffering any significant adverse consequences, courts should reject the unsubstantiated view of prison authorities that the privilege is a security risk. In effect the existence of a privilege in another prison facility raises a presumption that it may be offered detainees without jeopardizing institutional security. That presumption may be rebutted, but only by clear and convincing evidence.

By using the rule that detainees must be treated at least as well as convicted criminals, courts limit their discretion and avoid the temptation of imposing value judgments on society that are not mandated by the constitution. This is the very result the court's opinion insists a more deferential standard is necessary to achieve. The rule is unfair to detainees under any abstract theory of justice. It permits the innocent to be punished, the accused to be lumped together with those adjudged guilty by a court of law. Still if applied as a strict minimum with the benefit of the doubt given to the detainees, I believe it is the most practical, workable, and just rule that courts can develop at this time.

Of course the rule has its defects and it is to some extent subject to manipulation. However, if it is applied in the spirit described above, these problems can be surmounted. For example, it is argued that legislatures may simply reduce the quality of conditions of confinement across the board to the lowest common denominator. First of all, they could certainly take such action under a lesser standard; and an absolute standard may stifle progressive flexibility in an effort to prevent potential backsliding. Second, there is no indication that legislatures have responded in this manner in reaction to judicial commands that conditions for detainees be improved. Indeed, many states have not appealed at all or appealed only a small part of the remedies ordered by courts. Third, courts are not

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expected to apply the standard in a temporal or geographical vacuum. If a privilege existed and was not a threat to institutional security in the past, there is no reason to assume it will be a problem in the future simply because it is no longer offered to the convicted criminal population. Similarly, if a privilege can be safely offered in a majority of the states, courts should require hard evidence as to why it would create safety problems in a particular institution.

Another problem and one raised by the court's opinion is that comparisons between the detainee population and the criminal population are inexact as to safety needs. This may indeed be the case. A detainee awaiting trial for murder may be more of a threat and require more stringent security precautions than a convicted car thief. I harbor no illusions that the detainee population may not include serious security risks, although I might also note that many detainees differ from bailees solely in their inability to finance their freedom by posting bail. However, just as correctional systems routinely differentiate between minimum, medium, and maximum security risks among convicted criminals, there is nothing to stop them from making similar distinctions, if supported by evidence, between detainees. Not all detainees need be treated alike. What is unacceptable is imposing restraints reserved for maximum security risks on the entire population of detainees simply because they are detainees.

Finally, it may be argued that differences in the physical structure of different prisons make an exact comparison of privileges a poor guide by which to evaluate security requirements. To some extent this is true. I believe a court could take account of these differences by grouping privileges for comparison. Thus, if the structure of one prison limited the number of visitors that could safely be accommodated, it could expand some other associational or communication privilege such as telephone access to compensate for more limited visiting hours. However, what is totally unacceptable is the view that one needless deprivation can be used to justify a further deprivation. Thus, in the instant case detainees are housed in abysmally small rooms approximately 7′ × 5′ in size. There is no justification based on institutional security needs to account for these conditions of confinement. Yet the court argues that because their rooms are smaller than the rooms available to convicted criminals, detainees may not be permitted to have as many or similar personal belongings as convicted criminals because such belongings might "clutter" their rooms. Under this form of analysis, the only floor to the conditions of confinement imposed on a detainee would be gross inhumanity. I believe the contrary to be the case. If the physical structure of a particular jail is such that there is no way that privileges routinely offered to convicted criminals can be made available to pretrial detainees, the constitution prohibits the state from incarcerating detainees in that facility.

Applying the standards I suggest to the particular issues on appeal in the present case, I would disagree with the court's conclusions on most but not all of them. On some issues, while I believe the district court may have gone further than the constitution requires, I would argue that the plaintiffs are entitled to greater relief than the majority here would permit. On other issues I would affirm the district court's analysis and conclusions in their entirety. However, since the standard of evaluation I contend the constitution requires has not been adopted by the court, I see little point in detailing exactly how my standard's application would differ from the altogether different analysis of my brothers. The focus of my dissent is the basic framework of pretrial detainee rights, not the nuances of how different judges might apply particular standards.

77-1829 BELL v. WOLFISH Argued 1/16/79

N. Y. Detention Center Case

Frey (SG)

Inmates: person held w/o bail awaiting bail; prisoner needed as witnesses who are transferred from other prisons

John raised Q as to appropriateness of H/C. Frey has not considered this.

Potter asked about case he wrote holding that H/C is appropriate only to obtain release – not to complain about conditions.

Two issues, principle are being "double-bunking."

CA2 relied on D/P clause. It held Due Process clause – by its own force – confers a liberty interest that entitled them to relief.

The "necessity" standard has no support in our cases.

Pretrial detainees can't be "punished" – not convicted. Thus 8th Amend. not involved. D/P clause applies.

Detaining for trial is not punishment.

Frey (cont.)

Bail is set as necessary to assure appearance to trial.

No one contests here that pre-trial detainees ~~are~~ have unlawfully detained. Only issue ~~is~~ related to conditions of detainment.

Mrs. Bamberger (for

D/Banking is bad because it is not "necessary" for purpose of detainment.

Gov't interest is limited - only to make ~~sure~~ sure detainee appear.

Size of room 10 x 7½

Security

√Regulations challenged

Strip searches occur after every visit, DC found ~~where~~ not unnecessary. "Every fact ~~is~~ found against us, must be presumed or decided for us" (New doctrine!)

Frey (Reply)

Only in three rooms during sleeping hrs - 11 to 6.

No hearing in this case. Thus no opportunity for govt to present ev.

Why?

Decided on summary judg.

Theory of "punishment" not basis of CA 2's opinion - cf. not in 8th Amend sense.

~~Unless~~

"Reasonable relationship" should be standard.

P. S. can't understand how D/P clause is implicated.

Brothers all over Kat.
Reverse out-right

1829 BELL WOLFISH
77-~~1701~~ ROSE v. ~~MITCHELL~~ Conf. 1/19/79

The Chief Justice Reverse in part & affirm in part

1. Double bunking: Reverse - if still in case
2. Strip Searches: Should require visitors to remain behind wire mesh - eliminating contact. But here seems went too far. Affirm.
3. Packages: OK to prohibit all. No const. rights
4. Books: No violation. Reverse
5. Room inspection. Reverse

Detainees include high % of persons too dangerous to allow bail. Presence of bail clause in Const. imp.

Mr. Justice Brennan There is protectable interest - liberty - Standard is "compelling necessity".

1.
2. affirm
3. ~~Reverse~~ Vacate + remand for trial
4. to allow Govt chance to
5. meet "compelling administrative necessity"

Vacate & Remand

The difficult with this decision is that Govt had no opp. to prove by ev. that there is a "compelling necessity". All we have here is pre-trial ~~hearing~~ hearing.

Mr. Justice Stewart Reverse 100% - except as to books

1.
2.
3.
4.
5.

Until one is convicted, he can't be punished at all. ~~There~~ There is no claim in any event of cruel & unusual punishment. Pre-trial detention is Constitutional. None of these practices amounts to punishment - but rule as to

Need consent books implicates 1st Amend.
x x x x
P.S. agree with TRS view that case must be decided on 8th Amend grounds.

Mr. Justice White Reverse

No punishment issue here.

But there can be illegal conduct w/respect to detainees that is short of punishment. Gov't conduct must be reasonably related to Const. permitted detainment of persons charged with crime.

Should be careful in ~~this~~ second guessing Gov't here.

(prison adm.) Would reverse 100%. Gov't better situated than judges to make these security decisions.

"punishment standard" is tough to get around that's reasonableness

Mr. Justice Marshall Affirm with modification

This ~~was~~ a temporary situation.

Overcrowding has stopped.

Cavity search is punishment - degrading.

Remand for Gov't to have opportunity to prove necessity.

But necessity standing should be middle tier - cut back some on CA2's standard. ~~But~~

T.M. has seen this facility.

Mr. Justice Blackmun Reverse & Remand

CA2 over-emphasized presumption of innocence. SG was about right.

Where 1st Amend interest are involved, necessity standard is OK.

SG recommends middle tier for ~~but~~ proven - body search

Cost & adm. feasibility should not be ignored. CA2 erred in this respect.

We should establish standard & remand.

With Gurt on 1, 2, & 4. Remand on other

Mr. Justice Powell Reverse - with some qualifications

There is a Fifth Amend - not an 8th Amend case.

Standard should be reasonableness except where 1st Amend Rts are implicated.

I have some reservation as to body search — but "right of privacy" is not a specific Const. guarantee. I'd not accept 5-6's middle tier as to this. Reasonableness - in light of experience - should be test.

I'd be willing to remand for trial as to book & privacy. Reverse otherwise

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Mr. Justice Rehnquist Reverse all board

Would prefer to analyze practices at issue. Then could establish standard & remand.

If practice is unreasonable then there would be punishment violative of 8th Amend. (Bell would trouble me — would expand concept of ~~cruel~~ cruel & unusual)

Mr. Justice Stevens Vacate & Remand

Most imp. aspect of case is dif. bet. punishment & due process.

May be inmates here are dangerous, but generally detainees are not dangerous.

Much of this conduct is so unrelated to prison objectives as to require Remand.

Agree with P.S. as to basic analysis. But would disagree as to what constitutes constitutional.

77-1829 ~~77-1829~~ [redacted] Bell v Wolfish

Fifth Amend - not 8th Amend case

Applying standard of reasonableness, except where 1st Amend rights are implicated.

Reverse 1. Double bunking -

not type privacy protected by Const.

no Const. Rt violated

Possibly Affirm or Remand 2. Packages - none allowed.

Total ban seems unreasonable but not sure.

Reverse in Part 3. Books - only from Publishers & Book Clubs.

SG now willing to allow paper backs & magazines. This seems reasonable & is only limited impairment of 1st Amend

Affirm with somewhat diff. analysis or Remand for reasonableness standard to be applied 4. Body Inspections -

Courts below require probable cause. There is privacy interest here - but reasonable suspicion standard OK

Reverse 5. Inspection of Rooms - ~~Defendants~~ Detainees want to be present

Basically - I'll Reverse & Remand on couple of issues

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

7 March 1979

Memorandum to the Conference

Re: No. 77-1829, Bell v. Wolfish

No

I have several conceptual difficulties with Bill's memorandum in this case:

(1) The definition of punishment that it sets out on pages 15-16 appears to me too narrow.[1] Conspicuously absent, for example, is the question of whether the "affirmative disability or restraint" in question causes actual harm --physical or mental-- to pretrial detainees. Surely such an inquiry is at least relevant to the issue of whether a particular restraint constitutes punishment, and especially so in the context of imprisonment, which has itself "historically been regarded as a punishment." See Wong Wing v. United States, 163 U.S. 228, 233-234 (1896).

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1. I would prefer to lodge the right of an unconvicted man to be free from punishment in the presumption of innnocence. I see the presumption as something more than a mere evidentiary doctrine. I view it, as did Stack v. Boyle, 242 U.S. 1, 4 (1951), as a shield that "serves to prevent the infliction of punishment prior to conviction." The cases cited in Bill's memorandum, of course, merely establish that the presumption of innocence has evidentiary implications, not that it is only evidentiary in nature.

The criterion of actual injury seems to be implied, although never made explicit, by the memorandum's language at p. 20.

(2) After designating the criteria for determining whether a measure is punitive, Bill's memorandum does not even make the attempt to apply these criteria to the security measures discussed in Part III. See p. 24 n.27. I agree that the security and management of the MCC are legitimate government interests. But the government may not effectuate these interests in a manner that punishes pretrial detainees. Bill's memorandum fails to ask whether the security measures discussed in Part III constitute punishment. Indeed, Part III seems to abandon as irrelevant one of the key criteria used in the citation from Mendoza-Martinez. Bill states that comparisons between security measures in different institutions are legally irrelevant, see pp. 32, despite Mendoza-Martinez's statement that "whether [a restriction] appears excessive in relation to the alternative purpose assigned" is a criterion by which it is to be determined whether the restriction constitutes punishment. How one could

determine whether a measure is "excessive" without asking whether other institutions accomplish the same purpose with less restrictive means is a mystery to me.

(3) The memorandum correctly observes that deference in matters of administrative expertise should be granted to prison officials, even in the context of pretrial detention. Whether administrative or security measures constitute punishment, however, is a legal question, with respect to which a similar deference is not appropriate. Bill's memorandum blurs this distinction at footnote 23, which states:

> In determining whether restrictions or conditions are reasonably related to the government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials ...."Pell v. Procunier, 417 U.S., at 827

Whether the security measures at issue in this case are "reasonably related" to the government's "interest in maintaining security and order and operating the

institution in a manageable fashion," is crucial to determining whether they constitute punishment under the Due Process Clause. Indeed to determine whether security or administrative measures are punishment, Bill's memorandum, borrowing from Mendoza-Martinez, would have us ask (a) whether security and effective management are "alternative purposes" assignable to these measures, and (b) whether these measures are excessive in relation to these purposes. If, in answering these questions, the Court defers to the administrative expertise of prison officials in the "wide-ranging" manner suggested by Bill's memorandum, p. 25, these officials will in effect be determining what is punishment under the Constitution. This is an unacceptable abdication of this Court's responsibility to protect pretrial detainees from punishment. This abdication is not justified by the deference due to the "Legislative and Executive Branches," p. 26, since the protection of citizens from punishment prior to conviction is the example par excellence of the necessity of an independent judicial bulwark against unconstitutional encroachments of these two Branches.

These three difficulties with Bill's memorandum lead me to an alternate view of the case. I agree with Bill that the dispositive question is whether pretrial detainees have been subjected to "punishment." But especially in a prison, which is the traditional arena of punishment, there is the strong possibility that specific administrative measures may in fact constitute punishment, particularly when pretrial detainees are mingled with convicted inmates. Thus to determine whether a specific measure constitutes punishment, a court must carefully balance several factors, including the purported purpose of the measure, alternative methods of achieving that purpose, the administrative and fiscal justifications for the measure, and the harm caused by the measure. As we have long recognized, this is an "extremely difficult and elusive" endeavor, Mendoza-Martinez, at 168, in which several factors are "all relevant to the inquiry, and may often point in differing directions." Id., at 169. It is not an inquiry we can resolve in the abstract by invoking the talisman "deference." The application of the factors we decide upon, therefore, is a job to be entrusted to the

good sense of federal judges, and not one for this Court -- except to the extent of correcting abuses as they arise.

The application of this view of the case leads me to quite different results than those reached by Bill:

(1) I would remand to the district court the provisions discussed in Part III A, B, C, and D of Bill's memorandum, for appropriate findings in light of these considerations.[2/]

(2) Courts that have enjoined double-bunking have generally found that overcrowding causes "physical and psychological damage" to detainees. Such harm is relevant to whether overcrowding constitutes punishment. The double bunking issue was decided below on summary judgment, however, and neither side was able to create a factual record as to the extent of harm caused detainees by double-bunking in this particular facility. I would therefore remand as to this issue.

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2. Although my own view of the prohibition against receipt of hardback books except if mailed directly from publishers, book clubs, or bookstores, is that it violates the First Amendment and is thus impermissible whether or not it constitutes punishment, I would be willing to hold this judgment in abeyance pending reconsideration by the District Court as to whether this provision constitutes punishment under the Due Process Clause.

W.J.B.Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 7, 1979

Re: No. 77-1829, Bell v. Wolfish

Dear Bill,

Although I originally had considerable doubt about the "publisher-only" rule under the First Amendment, you have dealt with it in III A of your Memorandum in such a way that I can acquiesce in it. In all other respects I agree with your Memorandum and shall join it if and when it becomes an opinion.

I have read with interest John's comments -- particularly his views as to what constitutes "punishment." This is a question that I wrestled with a good many years ago in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 201. I came to the conclusion that while certain practices are unquestionably "punishment," i.e. whipping or hanging somebody up by his thumbs, others may or may not be depending almost entirely upon the purpose behind them. Thus, denationalization is punishment in some cases and is not in others, and the test is the purpose for which it is imposed. Similarly, in the case now before us, incarceration in the MCC is clearly punishment for those who are there as a result of conviction on criminal charges, and yet incarceration in the identical facility is clearly not punishment for those who are there as pretrial detainees. In short, I think that John's proposed test, while an inviting one, is contrary to our precedents.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

John would invalidate all 4 practices discussed in Part III, I don't agree with his analysis.

March 7, 1979

Re: 77-1829 - Bell v. Wolfish

Dear Bill:

Your memorandum does an excellent job of stating the facts fairly and outlining the issues. I agree with your basic premise that the question concerning pretrial detainees is whether they are being subjected to punishment. I am, however, presently inclined to disagree with your conclusions in these respects:

1) Although I think you are probably correct with respect to double celling, I believe the correct procedure would be to remand to the District Court to decide the issue under the proper standard rather than for this Court to make the initial determination. I also would try to define the punishment standard somewhat differently--giving less emphasis to intent and more to the question whether a practice invades the basic dignity of an individual who has not yet been convicted of any crime.

2) With respect to the four practices discussed in Part III, I think it does amount to punishment to deny an innocent person the right to read a book loaned to him by a friend or relative while he is temporarily confined, to deny him the right to receive gifts or packages, to search his private possessions out of his presence, or to compel him to exhibit his private body cavities to the visual inspection of a prison guard. Absent probable cause to believe that a specific individual detainee poses a special security risk, I do not believe any of these practices would be reasonable if the pretrial detainees were confined in a facility separate and apart from convicted prisoners. If reasons of convenience justify

intermingling the two groups, it is not too much to require the prison administrators to accept the additional inspection burdens that would result from denying them the right to subject innocent citizens to these humiliating indignities.

A standard of "punishment" is admittedly difficult to articulate. I am persuaded, however, that a principal ingredient must be the violation of the dignity of the individual. Accordingly, although I agree that the MCC rules are all valid as applied to convicted prisoners, I would invalidate the four rules discussed in Part III as applied to pretrial detainees.

? No

Respectfully,

Mr. Justice Rehnquist

Copies to the Conference

Check my file + Pre-Conference Notes

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

L.F.P.
file
Lobby

From: Mr. Justice Rehnquist

Circulated: [redacted] MAR 1979

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–1829

Griffin B. Bell et al., Petitioners, v. Louis Wolfish et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March —, 1979]

Memorandum of MR. JUSTICE REHNQUIST.

Over the past five Terms, this Court has in several decisions considered constitutional challenges to prison conditions or practices by convicted prisoners.[1] This case requires us to examine the constitutional rights of pretrial detainees—those persons who have been charged with a crime but who have not yet been tried on the charge. The parties concede that to ensure their presence at trial, these persons legitimately may be incarcerated by the Government prior to a determination of their guilt or innocence, see *infra*, at 12–13 and n. 15, and it is the scope of their rights during this period of confinement prior to trial that is the primary focus of this case.

This lawsuit was brought as a class action in the United States District Court for the Southern District of New York to challenge numerous conditions of confinement and practices at the Metropolitan Correctional Center (MCC), a federally operated short term custodial facility in New York City designed primarily to house pretrial detainees. The

[1] See, *e. g.*, *Hutto* v. *Finney*, 437 U. S. 678 (1978); *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S. 119 (1977); *Bounds* v. *Smith*, 430 U. S. 817 (1977); *Meachum* v. *Fano*, 427 U. S. 215 (1976); *Wolff* v. *McDonnell*, 418 U. S. 539 (1974); *Pell* v. *Procunier*, 417 U. S. 817 (1974); *Procunier* v. *Martinez*, 416 U. S. 396 (1974).

Renewed LFP 3/7

Permanent opinion.

Part II sustains the Double-Bunking

I'll join I + II and all of III except as to "cavity searches" & the one package rule.

District Court, in the words of the Court of Appeals for the Second Circuit, "intervened broadly into almost every facet of the institution" and enjoined no fewer than 20 MCC practices on constitutional and statutory grounds. The Court of Appeals largely affirmed the District Court's constitutional rulings and in the process held that under the Due Process Clause of the Fifth Amendment, pretrial detainees may "be subjected to only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities of jail administration.'" *Wolfish* v. *Levi*, 573 F. 2d 118, 124 (1978), quoting *Rhem* v. *Malcolm*, 507 F. 2d 333, 336 (CA2 1974). We granted certiorari to consider the important constitutional questions raised by these decisions and to resolve an apparent conflict among the circuits.[2] — U. S. — (1978). We now reverse.

I

The MCC was constructed in 1975 to replace the converted waterfront garage on West Street that had served as New York City's federal jail since 1928. It is located adjacent to the Foley Square federal courthouse and has as its primary objective the housing of persons who are being detained in custody prior to trial for federal criminal offenses in the United States District Courts for the Southern and Eastern Districts of New York and for the District of New Jersey. In addition to pretrial detainees, the MCC also houses some convicted inmates who are awaiting sentencing or transportation to federal prison or who are serving generally relatively

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[2] See, *e. g.*, *Norris* v. *Frame*, — F. 2d — (CA3, filed Oct. 31, 1978) (No. 78-1090); *Campbell* v. *Magruder*, — U. S. App. D. C. —, 580 F. 2d 521 (1978); *Wolfish* v. *Levi*, 573 F. 2d 118 (CA2 1978); *Feeley* v. *Sampson*, 570 F. 2d 364 (CA1 1978); *Main Road* v. *Aytch*, 565 F. 2d 54 (CA3 1977); *Patterson* v. *Morrisette*, 564 F. 2d 1109 (CA4 1977); *Miller* v. *Carson*, 563 F. 2d 741 (CA5 1977); *Duran* v. *Elrod*, 542 F. 2d 998 (CA7 1976).

short sentences in a service capacity at the MCC, convicted prisoners who have been lodged at the facility under writs of habeas corpus *ad prosequendum* or *ad testificandum* issued to ensure their presence at upcoming trials, witnesses in protective custody and persons incarcerated for contempt.[3]

The MCC differs markedly from the familiar image of a jail; there are no barred cells, dank, colorless corridors, or clanging steel gates. It was intended to include the most advanced and innovative features of modern correctional design. As the Court of Appeals stated: "[I]t represented the architectural embodiment of the best and most progressive penological planning." 573 F. 2d, at 121. The key design element of the 12-story structure is the "modular" or "unit" concept, whereby each floor designed to house inmates has one or two largely self-contained residential units that replace the traditional cellblock jail construction. Each unit in turn has several clusters or corridors of private rooms or dormitories radiating from a central 2-story "multipurpose" or common room, to which each inmate has free access approximately 16 hours a day. (See Appendix.) Because our analysis does not turn on the particulars of the MCC concept or design, we need not discuss them further.

When the MCC opened in August 1975, the planned capacity was 449 inmates, an increase of 50% over the former West Street facility. *Id.*, at 122. Despite some dormitory accommodations, the MCC was designed primarily to house these inmates in 389 rooms, which orginally were intended for single

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[3] This group of nondetainees may comprise, on a daily basis, between 40 and 60% of the MCC population. *United States ex rel. Wolfish* v. *United States*, 428 F. Supp. 333, 335 (SDNY 1977). Prior to the District Court's order, 50% of *all* MCC inmates spent less than 30 days at the facility and 73% less than 60 days. *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 127 (SDNY 1977). However, of the unsentenced detainees, over half spent less than 10 days at the MCC, three-quarters were released within a month and more than 85% were released within 60 days. *Wolfish* v. *Levi*, *supra*, at 129 n. 25.

occupancy. While the MCC was under construction, however, the number of persons committed to pretrial detention began to rise at an "unprecedented rate." *Ibid.* The Bureau of Prisons took several steps to accommodate this unexpected flow of persons assigned to the facility, but despite these efforts, the inmate population at the MCC rose above its planned capacity within a short time after its opening. To provide sleeping space for this increased population, the MCC replaced the single bunks in many of the individual rooms and dormitories with double bunks.[4] Also, each week some newly arrived inmates had to sleep on cots in the common areas until they could be transferred to residential rooms as space became available. See 573 F. 2d, at 127–128.

On November 28, 1975, less than four months after the MCC had opened, the named respondents initiated this action by filing in the District Court a petition for a writ of habeas corpus.[5] The District Court certified the case as a class

[4] Of the 389 residential rooms at the MCC, 121 had been "designated" for double-bunking at the time of the District Court's order. 428 F. Supp., at 336. The number of rooms actually housing two inmates, however, never exceeded 73 and, of these, only 35 were rooms in units that housed pretrial detainees. Brief for Petitioners 7 n. 6, Brief for Respondents 11–12; App. 33–35 (Affidavit of Larry Taylor, MCC Warden, dated Dec. 29, 1976).

[5] It appears that the named respondents may now have been transferred or released from the MCC. See *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp., at 119. "This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class." *Gerstein* v. *Pugh*, 420 U. S. 103, 110 n. 11 (1975); see *Sosna* v. *Iowa*, 419 U. S. 393 (1975). The named respondents had a case or controversy at the time the complaint was filed and at the time the class action was certified by the District Court pursuant to Fed. Rule Civ. Proc. 23, and there remains a live controversy between petitioners and the members of the class represented by the named respondents. See *Sosna* v. *Iowa*, 419 U. S., at 402. Finally, because of the temporary nature of confinement at the MCC, the issues presented are, as in *Sosna* and *Gerstein*, "capable of repetition, yet evading review." 420 U. S., at 110 n. 11; 419 U. S., at 400–401; see

action on behalf of all persons confined at the MCC, pretrial detainees and sentenced prisoners alike.[6] The petition served up a veritable potpourri of complaints that implicated virtually every facet of the institution's conditions and practices. Respondents charged, *inter alia*, that they had been deprived of their statutory and constitutional rights because of overcrowded conditions, undue length of confinement, improper searches, inadequate recreational, educational and employment opportunities, insufficient staff and objectionable restrictions on the purchase and receipt of personal items and books.[7]

Kremens v. *Bartley*, 431 U. S. 119, 133 (1977). Accordingly, the requirements of Art. III are met and the case is not moot.

[6] Petitioners apparently never contested the propriety of respondents' use of a writ of habeas corpus to challenge the conditions of their confinement and petitioners do not raise that question in this Court. However, respondents did plead an alternative basis for jurisdiction in their "Amended Petition" in the District Court—namely, 28 U. S. C. § 1361—that arguably provides jurisdiction. And, at the time of the relevant orders of the District Court in this case, jurisdiction would have been provided by 28 U. S. C. § 1331 (a), as amended, 90 Stat. 2721. Thus, we leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself. See *Preiser* v. *Rodriguez*, 411 U. S. 475, 499–500 (1973). See generally *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, — U. S. — (1979).

Similarly, petitioners do not contest the District Court's certification of this case as a class action. For much the same reasons as identified above, there is no need in this case to reach the question whether Fed. Rule Civ. Proc. 23, providing for class actions, is applicable to petitions for habeas corpus relief. Accordingly, we express no opinion as to the correctness of the District Court's action in this regard. See *Middendorf* v. *Henry*, 425 U. S. 25, 30 (1976).

[7] The Court of Appeals described the breadth of this action as follows: "As an indication of the scope of this action, the amended petition also decried the inadequate phone service; 'strip' searches; room searches outside the inmate's presence; a prohibition against the receipt of packages or the use of personal typewriters; interference with, and monitoring of, personal mail; inadequate and arbitrary disciplinary and grievance procedures;

In two opinions and a series of orders, the District Court enjoined numerous MCC practices and conditions. With respect to pretrial detainees, the court held that because they are "presumed to be innocent and held only to ensure their presence at trial, 'any deprivation or restriction of . . . rights beyond those which are necessary for confinement alone, must be justified by a compelling necessity.'" 439 F. Supp., at 124, quoting *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F. 2d 392, 397 (CA2 1975). And while acknowledging that the rights of sentenced inmates are to be measured by the different standard of the Eighth Amendment, the court declared that to house "an inferior minority of persons . . . in ways found unconstitutional for the rest" would amount to cruel and unusual punishment. 428 F. Supp., at 339.[8]

Applying these standards on cross-motions for partial summary judgment, the District Court enjoined the practice of housing two inmates in the individual rooms and prohibited enforcement of the so-called "publisher-only" rule, which at the time of the court's ruling prohibited the receipt of all books and magazines mailed from outside the MCC except those sent directly from a publisher or a book club.[9] After a trial on the remaining issues, the District Court enjoined, *inter alia*, the doubling of capacity in the dormitory areas, the use

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inadequate classification of prisoners; improper treatment of non-English speaking inmates; unsanitary conditions; poor ventilation; inadequate and unsanitary food; the denial of furloughs, unannounced transfers; improper restrictions on religious freedom; and an insufficiently trained staff." 573 F. 2d, at 123 n. 7.

[8] While most of the District Court's rulings were based on constitutional grounds, the court also held that some of the actions of the Bureau of Prisons were subject to review under the Administrative Procedure Act (APA) and were "arbitrary and capricious" within the meaning of the APA. 439 F. 2d, at 122–123, 141; see n. 11, *infra*.

[9] The District Court also enjoined confiscation of inmate property by prison officials without supplying a receipt and, except under specified circumstances, the reading and inspection of inmates' outgoing and incoming mail. 428 F. Supp., at 341–344. Petitioners do not challenge these rulings.

of the common rooms to provide temporary sleeping accommodations, the prohibition against inmates' receipt of packages containing food and items of personal property, and the practice of requiring inmates to expose their body cavities for visual inspection following contact visits. The court also granted relief in favor of pretrial detainees, but not convicted inmates, with respect to the requirement that detainees remain outside their rooms during routine inspections by MCC officials.[10]

The Court of Appeals largely affirmed the District Court's rulings, although it rejected that court's Eighth Amendment analysis of conditions of confinement for convicted prisoners because the "parameters of judicial intervention into . . . conditions . . . for sentenced prisoners are more restrictive than in the case of pretrial detainees." 573 F. 2d, at 125.[11] Ac-

CA2 affirmed

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[10] The District Court also granted respondents relief on the following issues: classification of inmates and movement between units; length of confinement; law library facilities; the commissary; use of personal typewriters; social and attorney visits; telephone service; inspection of inmates' mail; inmate uniforms; availability of exercise for inmates in administrative detention; food service; access to the bathroom in the visiting area; special diets for Muslim inmates; and women's "lock-in." 439 F. Supp., at 125–165. None of these rulings are before this Court.

[11] The Court of Appeals held that "[a]n institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety." 573 F. 2d, at 125.

The Court of Appeals also held that the District Court's reliance on the APA was erroneous. See n. 8, *supra*. The Court of Appeals concluded that because the Bureau of Prisons' enabling legislation vests broad discretionary powers in the Attorney General, the administration of federal prisons constitutes " 'agency action . . . committed to agency discretion by law' " that is exempt from judicial review under the APA, at least in the absence of a breach of a specific statutory mandate. 573 F. 2d, at 125; see 5 U. S. C. § 701 (a)(2). Because of its holding that the APA was inapplicable to this case, the Court of Appeals reversed the District Court's rulings that the bathroom in the visiting area must be kept unlocked, that prison officials must make a certain level of local and long-

cordingly, the court remanded the matter to the District Court for it to determine whether the housing for sentenced inmates at the MCC was constitutionally "adequate." But the Court of Appeals approved the due process standard employed by the District Court in enjoining the conditions of pretrial confinement. It therefore held that the MCC had failed to make a showing of "compelling necessity" sufficient to justify housing two pretrial detainees in the individual rooms. 573 F. 2d, at 126–127. And for purposes of our review (since petitioners challenge only some of the Court of Appeals' rulings), the court affirmed the District Court's granting of relief against the "publisher-only" rule, the practice of conducting body cavity searches after contact visits, the prohibition against receipt of packages of food and personal items from outside the institution, and the requirement that detainees remain outside their rooms during routine searches of the rooms by MCC officials. *Id.*, at 129–132.[12]

II

As a first step in our decision, we shall address "double-

Double bunking

distance telephone service available to MCC inmates, that the MCC must maintain unchanged its present schedule for social visits, and that the MCC must take commissary requests every other day. 573 F. 2d, at 125–126, and n. 16. Respondents have not cross-petitioned from the Court of Appeals' disposition of the District Court's Eighth Amendment and APA rulings.

[12] Although the Court of Appeals held that doubling the capacity of the dormitories was unlawful, it remanded for the District Court to determine "whether any number of inmates in excess of rated capacity could be suitably quartered within the dormitories." 573 F. 2d, at 128. In view of the changed conditions resulting from this litigation, the court also remanded to the District Court for reconsideration of its order limiting incarceration of detainees at the MCC to a period less than 60 days. *Id.*, at 129. The court reversed the District Court's rulings that inmates be permitted to possess typewriters for their personal use in their rooms and that inmates not be required to wear uniforms. *Id.*, at 132–133. None of these rulings are before this Court.

bunking" as it is referred to by the parties, since it is a condition of confinement that is alleged to violate only the Due Process Clause of the Fifth Amendment and no other specific guarantee of the Constitution. We will treat in order the Court of Appeals' standard of review, the analysis which we believe the Court of Appeals should have employed, and the conclusions to which our analysis leads us in the case of double-bunking.

A

The Court of Appeals did not dispute that the Government may permissibly incarcerate a person charged with a crime but not yet convicted to ensure his presence at trial. However, reasoning from the "premise that an individual is to be treated as innocent until proven guilty," the court concluded that pretrial detainees retain the "rights afforded unincarcerated individuals," and that therefore it is not sufficient that the conditions of confinement for pretrial detainees "merely comport with contemporary standards of decency prescribed by the cruel and unusual punishment clause of the eighth amendment." 573 F. 2d, at 124. Rather, the court held, the Due Process Clause requires that pretrial detainees "be subjected to only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities of jail administration.'" *Ibid.*, quoting *Rhem* v. *Malcolm*, 507 F. 2d, at 336. Under the Court of Appeals' "compelling necessity" standard, "deprivation of the rights of detainees cannot be justified by the cries of fiscal necessity, . . . administrative convenience, . . . or by the cold comfort that conditions in other jails are worse." 573 F. 2d, at 124 (citations omitted). The court acknowledged, however, that it could not "ignore" our admonition in *Procunier* v. *Martinez*, 416 U. S. 396, 405 (1974), that "courts are ill-equipped to deal with the increasingly urgent problems of prison administration," and concluded that it would "not [be] wise for [it]

CA 2 relied on D/P - not 8th amend.

- compelling necessity standard -

to second-guess the expert administrators on matters on which they are better informed." 573 F. 2d, at 124.[13]

Our fundamental disagreement with the Court of Appeals is that we fail to find a source in the Constitution for its compelling necessity standard.[14] Both the Court of Appeals and the District Court seem to have relied on the "presumption of innocence" as the source of the detainee's substantive right to be free from conditions of confinement that are not justified by compelling necessity. 573 F. 2d, at 124; 439 F. Supp., at 124; accord, *Campbell* v. *Magruder*, — U. S. App. D. C. —, 580 F. 2d 521, 529 (1978); *Detainees of Brooklyn House of*

Bell finds no source in Const. for "compelling necessity" standard

[13] The NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae*, argues that federal courts have inherent authority to correct conditions of pretrial confinement and that the practices at issue in this case violate the Attorney General's alleged duty to provide inmates with "suitable quarters" under 18 U. S. C. § 4042 (2). Brief for the NAACP Legal Defense and Educational Fund, Inc., at *Amicus Curiae* 22–46. Neither argument was presented to or passed on by the lower courts; nor have they been urged by either party in this Court. Accordingly, we have no occasion to reach them in this case. *Knetsch* v. *United States*, 364 U. S. 361, 370 (1960).

[14] As authority for its compelling necessity test, the court cited three of its prior decisions, *Rhem* v. *Malcolm*, 507 F. 2d 333 (CA2 1974) (*Rhem I*); *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F. 2d 392 (CA2 1975), and *Rhem* v. *Malcolm*, 527 F. 2d 1041 (CA2 1975) (*Rhem II*). *Rhem I*'s support for the compelling necessity test came from *Brenneman* v. *Madigan*, 343 F. Supp. 128, 142 (ND Cal. 1972), which in turn cited no cases in support of its statement of the relevant test. *Detainees* found support for the compelling necessity standard in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), *Tate* v. *Short*, 401 U. S. 395 (1971), *Williams* v. *Illinois*, 399 U. S. 235 (1970), and *Shelton* v. *Tucker*, 364 U. S. 479 (1960). But *Tate* and *Williams* dealt with equal protection challenges to imprisonment based on inability to pay fines or costs. Similarly, *Shapiro* concerned equal protection challenges to state welfare eligibility requirements found to violate the constitutional right to travel. In *Shelton*, the Court held that a school board policy requiring disclosure of personal associations violated the First and Fourteenth Amendment rights of a teacher. None of these cases support the court's compelling necessity test. Finally, *Rhem II* merely relied on *Rhem I* and *Detainees*.

Detention v. *Malcolm*, 520 F. 2d 392, 397 (CA2 1975); *Rhem* v. *Malcolm*, 507 F. 2d 333, 336 (CA2 1974). But see *Feeley* v. *Sampson*, 570 F. 2d 364, 369 n. 4 (CA1 1978); *Hampton* v. *Holmesburg Prison Officials*, 546 F. 2d 1077, 1080 n. 1 (CA3 1976). But the presumption of innocence provides no support for such a rule.

The presumption of innocence is principally an evidentiary doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment or custody or from other matters not introduced as proof at trial. *Taylor* v. *Kentucky*, 436 U. S. 478, 485 (1978); see *Estelle* v. *Williams*, 425 U. S. 501 (1976); *In re Winship*, 397 U. S. 358 (1970); 9 J. Wigmore, Evidence § 2511 (3d ed. 1940). It is "an inaccurate, shorthand description of the right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion . . .' [; an] 'assumption' that is indulged in the absence of contrary evidence." *Taylor* v. *Kentucky*, *supra*, at 483–484, n. 12. Without question, the presumption of innocence plays an important role in our criminal justice system. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin* v. *United States*, 156 U. S. 432, 453 (1895). But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.

The Court of Appeals also relied on what it termed the "indisputable rudiments of due process" in fashioning its compelling necessity test. We do not doubt that the Due Process Clause protects a detainee from certain conditions and restrictions of pretrial detainment. See *infra*, at 13–19. Nonetheless,

D/P

that clause provides no basis for application of a compelling necessity standard to conditions of pretrial confinement that are not alleged to infringe any other, more specific guarantee of the Constitution.

It is important to focus on what is at issue here. We are not concerned with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails. See *Gerstein* v. *Pugh*, 420 U. S. 103, 114 (1975); *United States* v. *Marion*, 404 U. S. 307, 320 (1971). Neither respondents nor the courts below question that the Government may permissibly detain a person suspected of committing a crime prior to a formal adjudication of guilt. See *Gerstein* v. *Pugh*, *supra*, at 111–114. Nor do they doubt that the Government has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences, or that confinement of such persons pending trial is a legitimate means of furthering that interest. Tr. of Oral Arg. 27; see *Stack* v. *Boyle*, 342 U. S. 1, 4 (1951).[15] Instead, what *is* at issue when an aspect of pretrial detention that is not alleged to violate any express guarantee of the Constitution is challenged, is the detainee's right to be free from punishment, see *infra*, at 13–14, and his desire to live as comfortably as possible during his confinement, both of which may conceivably coalesce at some point.

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[15] In order to imprison a person prior to trial, the Government must comply with constitutional requirements, *Gerstein* v. *Pugh*, 420 U. S., at 114; *Stack* v. *Boyle*, 342 U. S. 1, 5 (1951), and any applicable statutory provisions, *e. g.*, 18 U. S. C. §§ 3146, 3148. Respondents do not allege that the Government failed to comply with the constitutional or statutory requisites to pretrial detention.

The only justification for pretrial detention asserted by the Government is to ensure the detainees' presence at trial. Brief for Petitioners 43. Respondents do not question the legitimacy of this goal. Brief for Respondents 33; Tr. of Oral Arg. 27. We, therefore, have no occasion to consider whether any other governmental objectives may constitutionally justify pretrial detention.

It seems clear that the Court of Appeals did not rely on the detainee's right to be free from punishment, but even if it had that right does not warrant adoption of that court's compelling necessity test. See *infra*, at 13–19. And to the extent the court relied on the detainee's desire to live comfortably, it suffices to say that this desire simply does not rise to the level of those fundamental liberty interests delineated in cases such as *Roe* v. *Wade*, 410 U. S. 113 (1973); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Stanley* v. *Illinois*, 405 U. S. 645 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923).

CA2 did not rely on any right to be free from punishment

B

In evaluating the constitutionality of conditions or restrictions of pretrial detention that do not implicate a specific constitutional guarantee other than the Due Process Clause, we think that the "proper inquiry" is whether those conditions amount to punishment of the detainee.[16] For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.[17]

WHR thinks proper inquiry is whether conditions complained of amount to punishment

[16] The Court of Appeals properly relied on the Due Process Clause rather than Eighth Amendment in considering the claims of pretrial detainees. Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be "cruel and unusual" under the Eighth Amendment. The Court recognized this distinction in *Ingraham* v. *Wright*, 430 U. S. 651, 671–672, n. 40 (1977):

"Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guaranties traditionally associated with criminal prosecutions. See *United States* v. *Lovett*, 328 U. S. 303, 317–318 (1946) . . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment."

[17] We, of course, do not mean by this discussion of the rights of pretrial

See *Ingraham* v. *Wright*, 430 U. S. 651, 671–672 n. 40, 674 (1977); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 165–167, 186 (1963); *Wong Wing* v. *United States*, 163 U. S. 228, 237 (1896). A person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a "judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest." *Gerstein* v. *Pugh*, 420 U. S., at 114; see *Virginia* v. *Paul*, 148 U. S. 107, 119 (1893). And, if he is detained for a suspected violation of a federal law, he also has had a bail hearing. See 18 U. S. C. §§ 3146, 3148.[18] Under such circumstances, the Government concedely may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution.

Has had a "bail hearing"

Not every disability imposed during pretrial detention amounts to "punishment" in the constitutional sense, however. Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is

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detainees to cast doubt on any historical exceptions to the general principle that punishment can only follow a determination of guilt after trial or plea—exceptions such as the power summarily to punish for contempt of court. See, *e. g.*, *Bloom* v. *Illinois*, 391 U. S. 194 (1968); *United States* v. *Barnett*, 376 U. S. 681 (1964); *Cooke* v. *United States*, 267 U. S. 517 1925); *Ex parte Terry*, 128 U. S. 289 (1888); Fed. Rule Crim. Proc. 42.

[18] The Bail Reform Act of 1966 establishes a liberal policy in favor of pretrial release. 18 U. S. C. §§ 3146, 3148. Section 3146 provides in pertinent part:

"Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required."

entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison or a correctional institution, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into "punishment."

This Court has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may. See, *e. g., Kennedy* v. *Mendoza-Martinez, supra,* at 168; *Fleming* v. *Nestor,* 363 U. S. 603, 613–614 (1960); cf. *DeVeau* v. *Braisted,* 363 U. S. 144, 160 (1960). In *Kennedy* v. *Mendoza-Martinez, supra,* the Court examined the automatic forfeiture of citizenship provisions of the immigration laws to determine whether that sanction amounted to punishment or a mere regulatory restraint. While it is all but impossible to compress the distinction into a sentence or a paragraph, the Court there described the tests traditionally applied to determine whether a governmental act is punitive in nature:

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

> it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions." 372 U. S., at 168–169 (footnotes omitted).

Because forfeiture of citizenship traditionally had been considered punishment and the legislative history of the forfeiture provisions "conclusively" showed that the measure was intended to be punitive, the Court held that forfeiture of citizenship in such circumstances constituted punishment that could not constitutionally be imposed without due process of law. *Id.*, at 167–170, 186.

The factors identified in *Mendoza-Martinez* provide useful guideposts in determining whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word. A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. See *Flemming* v. *Nestor*, *supra*, at 613–617.[19] Absent a showing of an intent to punish on the part of corrections officials, that determination generally will turn on "[w]hether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Kennedy* v. *Mendoza-Martinez*, *supra*, at 168–169; see *Flemming* v. *Nestor*, *supra*, at 617. Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental

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[19] As Mr. Justice Frankfurter stated in *United States* v. *Lovett*, 328 U. S. 303, 324 (1946) (concurring opinion): "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation."

objective, it does not, without more, amount to "punishment." [20] Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees. See *Flemming* v. *Nestor, supra,* at 617.[21] Courts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a correctional facility. Cf. *United States* v. *Lovasco,* 431 U. S. 783, 790 (1977); *United States* v. *Russell,* 411 U. S. 423, 435 (1973).

One further point requires discussion. The Government asserts, and respondents concede, that the "essential objective of pretrial confinement is to insure the detainees' presence at trial." Brief for Petitioners 43; see Brief for Respondents 33. While this interest undoubtedly justifies the original decision to confine an individual in some manner, we do not accept respondent's argument that the Government's interest in ensuring a detainee's presence at trial is the *only* objective

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[20] This is not to say that corrections officials can justify punishment. They cannot. It is simply to say that in the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate governmental objective. See *Kennedy* v. *Mendoza-Martinez, supra,* at 168; *Flemming* v. *Nestor, supra,* at 617. Conversely, loading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.

[21] "There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." *Ingraham* v. *Wright, supra,* at 674.

that may justify restraints and conditions once the decision is lawfully made to confine a person. "If the government could confine or otherwise infringe the liberty of detainees only to the extent necessary to ensure their presence at trial, house arrest would in the end be the only constitutionally justified form of detention." *Campbell* v. *Magruder, supra,* at 529. The Government also has legitimate interests that stem from its need to manage the facility in which the individual is detained. These legitimate operational concerns may require administrative measures that go beyond those that are, strictly speaking, necessary to ensure that the detainee shows up at trial. For example, the Government must be able to take steps to maintain security and order at the institution.[22] Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial. We need not here attempt to detail the precise extent of the legitimate governmental interests that may justify conditions or restrictions of pretrial detention. It is enough simply to recognize that in addition to ensuring the detainees' presence at trial, the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.[23]

Legitimate operational concerns

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[22] In fact, security measures may directly serve the Government's interest in ensuring the detainee's presence at trial. See *Feeley* v. *Sampson,* 570 F. 2d, at 369.

[23] In determining whether restrictions or conditions are reasonably related to the government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of

C

Judged by this analysis, respondents' claim that double-bunking violated their due process rights fails. Neither the District Court nor the Court of Appeals intimated that it considered double-bunking to constitute punishment; instead, they found that it contravened the compelling necessity test, which today we reject. On this record, we are convinced as a matter of law that double-bunking as practiced at the MCC did not amount to unconstitutional punishment and did not, therefore, violate respondents' rights under the Due Process Clause of the Fifth Amendment.

Neither court below thought double bunking was punishment.

The rooms at the MCC that house pretrial detainees have a total floor space of approximately 75 square feet. Each of them designated for double-bunking, see n. 4, *supra,* contains a double bunkbed, certain other items of furniture, a wash basin and an uncovered toilet. (See Appendix.) Inmates generally are locked into their rooms from 11 p. m. to 6:30 a. m. and for brief periods during the afternoon and evening head counts. During the rest of the day, they may move about freely between their rooms and the common areas.

Based on affidavits and a personal visit to the facility, the District Court concluded that the practice of double-bunking was unconstitutional. The court relied on two factors for its conclusion: (1) the fact that the rooms were designed to house only one inmate, 428 F. Supp., at 336–337; and (2) its judgment that confining two persons in one room or cell of this size constituted a "fundamental denial[] of decency, privacy, personal security, and, simply, civilized humanity. . . ." *Id.,* at 339. The Court of Appeals agreed with the District Court. In response to petitioners' arguments that the rooms at the

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substantial evidence in the record to indicate that the officials have exaggerated their response to those considerations, courts should ordinarily defer to their expert judgment in such matters." *Pell* v. *Procunier,* 417 U. S., at 827; see *Jones* v. *North Carolina Prisoners' Labor Union, supra; Meachum* v. *Fano, supra; Procunier* v. *Martinez, supra.*

MCC were larger and more pleasant than the cells involved in the cases relied on by the District Court, the Court of Appeals stated:

> "[W]e find the lack of privacy inherent in double-celling in rooms intended for one individual a far more compelling consideration than a comparison of square footage or the substitution of doors for bars, carpet for concrete, or windows for walls. The Government has simply failed to show any substantial justification for double-celling." 573 F. 2d, at 127.

We disagree with both the District Court and the Court of Appeals that there is some sort of "one man, one cell" principle lurking in the Due Process Clause of the Fifth Amendment. While confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment, nothing even approaching such hardship is shown by this record.[24]

no one man, one cell principle

[24] Respondents seem to argue that double-bunking was unreasonable because petitioners were able to comply with the District Court's order forbidding double-bunking and still accommodate the increased numbers of detainees simply by transferring all but a handful of sentenced inmates who had been assigned to the MCC for the purpose of performing certain services and committing those tasks to detainees. Brief for Respondents 50. That petitioners were able to comply with the District Court's order in this fashion does not mean that petitioner's chosen method of coping with the increased inmate population—double-bunking—was unreasonable. Governmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional. See *Vance* v. *Bradley*, — U. S. — (1979); *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970).

That petitioners were able to comply with the District Court order also does not make this case moot, because petitioners still dispute the legality of the court's order and they have informed the Court that there is a reasonable expectation that they may be required to double-bunk again.

Detainees were required to spend only seven or eight hours each day in their rooms, during most or all of which they presumably are sleeping. The rooms provide more than adequate space for sleeping.[25] During the remainder of the time, the detainees are free to move between their rooms and the common area. While double-bunking may have taxed some of the equipment or particular facilities in certain of the common areas, *United States ex rel. Wolfish* v. *United States*, 428 F. Supp., at 337, this does not mean that the conditions at the MCC failed to meet the standards required by the Constitution. Our conclusion in this regard is further buttressed by the detainees' length of stay at the MCC. See *Hutto* v. *Finney*, 437 U. S. 678, 686–687 (1978). Nearly all of the detainees are released within 60 days. See n. 3, *supra*. We simply do not believe that requiring a detainee to share toilet facilities and this admittedly rather small sleeping place with another person for generally a maximum period of 60 days violates the Constitution.[26]

Reply Brief of Petitioners 6; Tr. of Oral Arg. 33–35, 56–57; see *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633 (1953).

[25] We thus fail to understand the emphasis of the Court of Appeals and the District Court on the amount of walking space in the double-bunked rooms. See 573 F. 2d, at 127; 428 F. Supp., at 337.

[26] Respondents' reliance on other lower court decisions concerning minimum space requirements for different institutions and on correctional standards issued by various groups is misplaced. Brief for Respondents 41, and nn. 40 and 41; see, *e. g.*, *Campbell* v. *Magruder*, *supra*; *Battle* v. *Anderson*, 564 F. 2d 388 (CA10 1977); *Chapman* v. *Rhodes*, 434 F. Supp. 1007 (SD Ohio 1977); *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676 (Mass. 1973); American Public Health Association, Standards for Health Services in Correctional Institutions 62 (1976); American Correctional Association, Manual of Standards for Adult Correctional Institutions 4142 (1977); National Sheriff's Association, A Handbook on Jail Architecture 63 (1975). The cases cited by respondents concerned facilities markedly different from the MCC. They involved traditional jails and cells in which inmates were locked during most of the day. Given this factual disparity, they have little or no application to the case at hand. Thus, we need not and do not decide whether we agree with the

III

Respondents also challenged certain MCC restrictions and practices that were designed to promote security and order at the facility on the ground that these restrictions violated the Due Process Clause of the Fifth Amendment, and certain other constitutional guarantees, such as the First and Fourth Amendments. The Court of Appeals seemed to approach the challenges to security restrictions in a different fashion than the other contested conditions and restrictions. It stated that "once it has been determined that the mere fact of confinement of the detainee justifies the restrictions, the institution must be permitted to use reasonable means to insure that its legitimate interests in security are safeguarded." 573 F. 2d, at 124. The court might disagree with the choice of means to effectuate those interests, but it should not "second-guess the expert administrators on matters on which they are better informed . . . . Concern with minutiae of prison administration can only distract the court from detached consideration of the one overriding question presented to it: does the practice or condition violate the Constitution?" *Id.*, at 124–125. Nonetheless, the court affirmed the District Court's injunction against several security restrictions. The Court rejected the arguments of petitioners that these practices served the MCC's interest in security and order and held that the practices were unjustified interferences with the retained constitutional rights of *both* detainees and convicted inmates. *Id.*, at 129–132. In

Security restrictions

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reasoning and conclusions of these cases. And while the recommendations of these various groups may be instructive in certain cases, they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question. For this same reason, the draft recommendations of the Federal Corrections Policy Task Force of the Department of Justice regarding conditions of confinement for pretrial detainees are not determinative of the requirements of the Constitution. See Dept. of Justice, Federal Corrections Policy Task Force, Draft Federal Standards for Corrections (June 1978).

our view, the Court of Appeals failed to heed its own admonition not to "second-guess" prison administrators.

Our cases have established several general principles that inform our evaluation of the constitutionality of the restrictions at issue. First, we have held that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison. See *Jones* v. *North Carolina Prisoners' Labor Union,* 433 U. S. 119, 129 (1977); *Meachum* v. *Fano,* 427 U. S. 215, 225 (1976); *Wolff* v. *McDonnell,* 418 U. S. 539, 555–556 (1974); *Pell* v. *Procunier,* 417 U. S. 817, 822 (1974). "There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff* v. *McDonnell, supra,* at 555–556. So, for example, our cases have held that sentenced prisoners enjoy freedom of speech and religion under the First and Fourteenth Amendments, see *Pell* v. *Procunier, supra; Cruz* v. *Beto,* 405 U. S. 319 (1972); *Cooper* v. *Pate,* 378 U. S. 546 (1964), that they are protected against invidious discrimination on the basis of race under the Equal Protection Clause of the Fourteenth Amendment, see *Lee* v. *Washington,* 390 U. S. 333 (1968), and that they may claim the protection of the Due Process Clause to prevent additional deprivation of life, liberty or property without due process of law, see *Meachum* v. *Fano, supra; Wolff* v. *McDonnell, supra. A fortiori,* pretrial detainees, who have not been convicted of any crimes, retain all of the constitutional rights that we have held are enjoyed by convicted prisoners.

But our cases also have insisted on a second proposition: simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston,* 334 U. S. 266, 285 (1948); see *Jones* v. *North Carolina Prisoners' Labor*

Union, supra, at 125; *Wolff* v. *McDonnell, supra,* at 555; *Pell* v. *Procunier, supra,* at 822. The fact of confinement as well as the legitimate goals and policies of the penal institution limit these retained constitutional rights. *Jones* v. *North Carolina Prisoners' Labor Union, supra,* at 125; *Pell* v. *Procunier, supra,* at 822. There must be a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Wolff* v. *McDonnell, supra,* at 556. This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the full range of freedoms of an unincarcerated individual.

Third, maintaining 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.[27] "Central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Pell* v. *Procunier, supra,* at 823; see *Jones* v. *North Carolina Prisoners' Labor Union, supra,* at 129; *Procunier* v. *Martinez,* 416 U. S. 396, 412 (1974). Prison

Essential

[27] Neither the Court of Appeals nor the District Court distinguished between pretrial detainees and convicted inmates in reviewing the challenged security practices, and we see no reason to do so. There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order. See, *e. g., Main Road* v. *Aytch,* 565 F. 2d 54, 57 (CA3 1977). In the federal system, a detainee is committed to the detention facility only because no other less drastic means can reasonably assure his presence at trial. See 18 U. S. C. § 3146. As a result, those who are detained prior to trial may in many cases be individuals who are charged with serious crimes or who have prior records. They also may pose a greater risk of escape than convicted inmates. See Joint App. (No. 77–2035, CA2) 1393–1398, 1531–1532. This may be particularly true at facilities like the MCC, where the resident convicted inmates have been sentenced to only short terms of incarceration and many of the detainees face the possibility of lengthy imprisonment if convicted.

officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security. *Jones* v. *North Carolina Prisoners' Labor Union, supra,* at 129; *Pell* v. *Procunier, supra,* at 822, 826; *Procunier* v. *Martinez, supra,* at 412–414.

Finally, as the Court of Appeals correctly acknowledged, the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Jones* v. *North Carolina Prisoners' Labor Union, supra,* at 128; *Procunier* v. *Martinez, supra,* at 404–405; *Cruz* v. *Beto,* 405 U. S., at 321; see *Meachum* v. *Fano,* 427 U. S., at 228–229.[28] "Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these consid-

[28] Respondents argue that this Court's cases holding that substantial deference should be accorded prison officials are not applicable to this case because those decisions concerned convicted inmates, not pretrial detainees. Brief for Respondents 52. We disagree. Those decisions held that courts should defer to the informed discretion of prison administrators because the realities of running a corrections institution are complex and difficult, courts are ill-equipped to deal with these problems and the management of these facilities is confided to the Executive and Legislative Branches, not to the Judicial Branch. See *Jones* v. *North Carolina Prisoners' Labor Union,* 433 U. S., at 126; *Pell* v. *Procunier,* 417 U. S., at 827; *Procunier* v. *Martinez,* 416 U. S., at 404–405. While those cases each concerned restrictions governing convicted inmates, the principle of deference enunciated in them is not dependent on that happenstance.

erations, courts should ordinarily defer to their expert judgment in such matters." *Pell* v. *Procunier, supra,* at 827.[29] We further observe that on occasion, prison administrators may be "experts" only by Act of Congress or of a state legislature. But judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial. *Procunier* v. *Martinez, supra,* at 405; cf. *Meachum* v. *Fano, supra,* at 229. With these teachings of our cases in mind, we turn to an examination of the MCC security practices that are alleged to violate the Constitution.

A

At the time of the lower courts' decisions, the Bureau of Prisons' "publisher-only" rule, which applies to all Bureau facilities, permitted inmates to receive books and magazines from outside the institution only if the materials were mailed directly from the publisher or a book club. 573 F. 2d, at 129–130. The warden of the MCC stated in an affidavit that

Publisher's rule w/respect to books

[29] What the Court said in *Procunier* v. *Martinez, supra,* bears repeating here:

"Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge to these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism." 416 U. S., at 404–405.

"serious" security and administrative problems were caused when bound items were received by inmates from unidentified sources outside the facility. App. 24. He noted that in order to make a "proper and thorough" inspection of such items, prison officials would have to remove the covers of hardback books and to leaf through every page of all books and magazines to ensure that drugs, money, weapons or other contraband were not secreted in the material. "This search process would take a substantial and inordinate amount of available staff time." *Ibid.* However, "there is relatively little risk that material received directly from the publisher or book club would contain contraband, and therefore, the security problems are significantly reduced without a drastic drain on staff resources." *Ibid.*

Bound books — problem

The Court of Appeals rejected these security and administrative justifications and affirmed the District Court's order enjoining enforcement of the "publisher-only" rule at the MCC. The Court of Appeals held that the rule "severely and impermissibly restricts the reading material available to inmates" and therefore violates their First Amendment and due process rights. 573 F. 2d, at 130.

It is desirable at this point to place in focus the precise question that now is before this Court. Subsequent to the decision of the Court of Appeals, the Bureau of Prisons amended its "publisher-only" rule to permit the receipt of books and magazines from bookstores as well as publishers and book clubs. 43 Fed. Reg. 30576 (July 17, 1978). In addition, petitioners have informed the Court that the Bureau proposes to amend the rule further to allow receipt of paperback books, magazines and other soft-covered materials from any source. Brief for Petitioners 66 n. 49, 69, and n. 51. The Bureau regards hardback books as the "more dangerous source of risk to institutional security," however, and intends to retain the prohibition against receipt of hardback books unless they are mailed directly from publishers, book clubs or bookstores. *Id.*, at 69 n. 51. Accordingly, petitioners request this

Rule has been amended

Court to review the District Court's injunction only to the extent it enjoins petitioners from prohibiting receipt of hardcover books that are not mailed directly from publishers, book clubs or bookstores. *Id.*, at 69; Tr. of Oral Arg. 59–60.[30]

We conclude that a prohibition against receipt of hardback books unless mailed directly from publishers, book clubs or bookstores does not violate the constitutional rights of MCC inmates. That limited restriction is a rational response by prison officials to an obvious security problem. It hardly needs to be emphasized that hardback books are especially serviceable for smuggling contraband into an institution; money, drugs and weapons easily may be secreted in the bindings. *E. g., Woods* v. *Daggett,* 541 F. 2d 237 (CA10

WHR would sustain security reg vs hard back books unless mailed directly.

[30] Because of the changes in the "publisher-only" rule, some of which apparently occurred after we granted certiorari, respondents, citing *Sanks* v. *Georgia,* 401 U. S. 144 (1971), urge the Court to dismiss the writ of certiorari as improvidently granted with respect to the validity of the rule, as modified. Brief for Respondents 68. *Sanks,* however, is quite different from the instant case. In *Sanks* the events that transpired after noting probable jurisdiction "had so drastically undermined the premises on which we originally set [the] case for plenary consideration as to lead us to conclude that, with due regard for the proper functioning of this Court, we should not . . . adjudicate it." *Id.*, at 145. The focus of that case had been "completely blurred, if not altogether obliterated," and a judgment on the issues involved had become "potentially immaterial." *Id.*, at 152. This is not true here. Unlike the situation in *Sanks*, the Government has not substituted an entirely different regulatory scheme and wholly abandoned the restrictions that were invalidated below. There is still a dispute, which is not "blurred" or "obliterated," on which a judgment will not be "immaterial." Petitioners have merely chosen to limit their disagreement with the lower courts' rulings. Also, the question that is now posed is fairly comprised within the questions presented in the Petition for Certiorari. See Pet. for Cert. 2 ("Whether the governmental interest in maintaining jail security and order justifies rules that . . . (b) prohibit receipt at the jail of books and magazines that are not mailed directly from publishers"). We, of course, express no view as to the validity of those portions of the lower courts' rulings that concern magazines or soft-cover books.

1976).[31] They also are difficult to search effectively. There is simply no evidence in the record to indicate that corrections officials have exaggerated their response to this security problem and to the administrative difficulties posed by the necessity of carefully inspecting each book mailed from unidentified sources. Therefore, the considered judgment of these experts must control in the absence of prohibitions far more sweeping than those involved here. See *Jones* v. *North Carolina Prisoners' Labor Union, supra,* at 128; *Pell* v. *Procunier, supra,* at 827.

Our conclusion that this limited restriction on receipt of hardback books does not infringe the First Amendment rights of MCC inmates is influenced by several other factors. The rule operates in a neutral fashion, without regard to the content of the expression. *Pell* v. *Procunier, supra,* at 828. And there are alternative means of obtaining reading material that have not been shown to be burdensome or insufficient. "We regard the available 'alternative means of [communication as] a relevant factor' in a case such as this where 'we [are] called upon to balance First Amendment rights against [legitimate] governmental . . . interests.'" *Id.,* at 824, quoting *Kliendienst* v. *Mandel,* 408 U. S. 753, 765 (1972); see

[31] The District Court stated, "With no record of untoward experience at places like the MCC, and with no history of resort to less restrictive measures, [petitioners'] invocation of security cannot avail with respect to the high constitutional interests here at stake." 428 F. Supp., at 340. We rejected this line of reasoning in *Jones* v. *North Carolina Prisoners' Labor Union, supra,* at 132–133, where we stated, "Responsible prison officials must be permitted to take reasonable steps to forestall . . . threat[s to security], and they must be permitted to act before the time when they can compile a dossier on the eve of a riot." We reject it again, now. In *Jones,* we also emphasized that the "informed discretion of prison officials that there is *potential* danger may be sufficient for limiting rights even though this showing might be 'unimpressive if . . . submitted as justification for governmental restriction of personal communication among members of the general public.'" (Emphasis added.) *Id.,* at 133 n. 9, quoting *Pell* v. *Procunier, supra,* at 825, see *Procunier* v. *Martinez,* 416 U. S., at 414.

Cruz v. *Beto*, 405 U. S., at 321, 322 n. 2. The restriction, as it is now before us, allows soft bound books and magazines to be received from any source and hardback books to be received from publishers, bookstores and book clubs. In addition, the MCC has a "relatively large" library for use by inmates. *United States ex rel. Wolfish* v. *United States*, 428 F. Supp., at 340.[32] To the limited extent the rule might possibly increase the cost of obtaining published materials, this Court has held that where "other avenues" remain available for the receipt of materials by inmates, the loss of "cost advantages does not fundamentally implicate *free speech* values." See *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, at 130–131. We are also influenced in our decision by the fact that the rule's impact on pretrial detainees is limited to a maximum period of approximately 60 days. See n. 3, *supra*. In sum, considering all the circumstances, we view the rule, as we now find it, to be a "reasonable 'time, place and manner' regulation[] . . . [that is] necessary to further significant governmental interests. . . ." *Grayned* v. *City of Rockford*, 408 U. S. 104, 115 (1972); see *Cox* v. *New Hampshire*, 312 U. S. 569, 575–576 (1941); *Cox* v. *Louisiana*, 379 U. S. 536, 554–555 (1965); *Adderley* v. *Florida*, 385 U. S. 39, 46–48 (1966).

B

Inmates at the MCC were not permitted to receive packages from outside the facility containing items of food or personal property, except for one package of food at Christmas. This

No package

[32] The general library consists of more than 3,000 hardback books, which include general reference texts and fiction and nonfiction works, and more than 5,000 assorted paperbacks, including fiction and nonfiction. The MCC offers for sale to inmates four daily newspapers and certain magazines. Joint App. (No. 77–2035, CA2) 102–103 (Affidavit of Robert Harris, MCC Education Specialist, dated Oct. 19, 1976). Other paperback books and magazines are donated periodically and distributed among the units for inmate use. *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp., at 131.

rule was justified by MCC officials on three grounds. First, officials testified to "serious" security problems that arise from the introduction of such packages into the institution, the "traditional file in the cake kind of situation" as well as the concealment of drugs "in heels of shoes [and] seams of clothing." App. 80; see *id.*, at 24, 84–85. As in the case of the "publisher-only" rule, the warden testified that if such packages were allowed, the inspection process necessary to ensure the security of the institution would require a "substantial and inordinate amount of available staff time." *Id.*, at 24. Second, officials were concerned that the introduction of personal property into the facility would increase the risk of thefts, gambling and inmate conflicts, the "age-old problem of you have it and I don't." *Id.*, at 80; see *id.*, at 85. Finally, they noted storage and sanitary problems that would result from inmates' receipt of food packages. *Id.*, at 67, 80. Inmates are permitted, however, to purchase certain items of food and personal property from the MCC commissary.[83]

The District Court dismissed these justifications as "dire predictions." It was unconvinced by the asserted security problems because other institutions allow greater ownership of personal property and receipt of packages than does the MCC. And because the MCC permitted inmates to purchase items in the commissary, the court could not accept official fears of increased theft, gambling or conflicts if packages were allowed. Finally, it believed that sanitation could be assured by proper housekeeping regulations. Accordingly, it ordered the MCC to promulgate regulations to permit receipt of at least items of the kind that are available in the commissary. 439 F. Supp., at 152–153. The Court of Appeals accepted the District Court's analysis and affirmed, although it noted that the MCC could place a ceiling on the permissible dollar

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[83] Inmates are permitted to spend a total of $15 per week or up to $50 per month at the commissary. *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp., at 132.

value of goods received and restrict the number of packages. 573 F. 2d, at 132.

Neither the District Court nor the Court of Appeals identified which provision of the Constitution was violated by this MCC restriction. We assume, for present purposes, that their decisions were based on the Due Process Clause of the Fifth Amendment, which provides protection for convicted prisoners and pretrial detainees alike against the deprivation of their property without due process of law. See *supra*, at 23. But as we have stated, the due process rights of prisoners and pretrial detainees are not absolute; they are subject to reasonable limitation or retraction in light of the legitimate security concerns of the institution.

We think the District Court and the Court of Appeals have trenched too cavalierly into areas that are properly the concern of MCC officials. It is plain from their opinions, that the lower courts simply disagreed with the judgment of MCC officials about the extent of the security interests affected and the means required to further those interests. But our decisions have time and again emphasized that this sort of unguided substitution of judicial judgment for that of the expert prison administrators on matters such as this is inappropriate. See *Jones* v. *North Carolina Prisoners' Labor Union, supra; Pell* v. *Procunier, supra; Procunier* v. *Martinez, supra.* We do not doubt that the rule devised by the District Court and modified by the Court of Appeals may be a reasonable way of coping with the problems of security, order and sanitation. It simply is not, however, the only constitutionally permissible approach to these problems. Certainly, the Due Process Clause does not mandate a "lowest common denominator" security standard, whereby a practice permitted at one penal institution must be permitted at all institutions.

Corrections officials concluded that permitting the introduction of packages of personal property and food would increase the risks of gambling, theft and inmate fights over that which

the institution already experienced by permitting certain items to be purchased from its commissary. "It is enough to say that they have not been conclusively shown to be wrong in this view." *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, at 132. It is also all too obvious that such packages are handy devices for the smuggling of contraband. There simply is no basis in this record for concluding that MCC officials have exaggerated their response to these serious problems or that this restriction is irrational. It does not therefore violate the rights of convicted inmates or of pretrial detainees[34] under the Due Process Clause of the Fifth Amendment.

C

The MCC staff conducts unannounced searches of inmate living areas at irregular intervals. These searches generally are formal unit "shakedowns" during which all inmates are cleared of the residential units, and a team of guards searches each room. Prior to the District Courts' order, inmates were not permitted to watch the searches. Officials testified that permitting inmates to observe room inspections would lead to friction between the inmates and security guards and would allow the inmates to attempt to frustrate the search by distracting personnel and moving contraband from one room to another ahead of the search team.[35]

Random searches

[34] With regard to pretrial detainees, we again note that this restriction affects them for generally a maximum of 60 days. See n. 3, *supra*.

[35] One of the correctional experts testified as follows:

". . . the requirement that prisoners not be in the immediate area obviously has its basis again in the requirements of security.

"It is quite obvious that if a group of officers start a searching process of a housing area at the MCC, if it be a corridor or an area of rooms or in a typical jail if it were a cell block, unless all prisoners are removed from that immediate area, there are a wide variety of opportunities for the confiscation of contraband by prisoners who may have such in their possession and cells.

"It can go down the toilet or out the window, swallowed, a wide variety of methods of confiscation of contraband." App. 78.

The District Court held that this procedure could not stand as applied to pretrial detainees because MCC officials had not shown that the restriction was justified by "compelling necessity." [36] The court stated that "[a]t least until or unless [petitioners] can show a pattern of violence or other disruptions taxing the powers of control—a kind of showing not remotely approached by the Warden's expressions—the security argument for banishing inmates while their rooms are searched must be rejected." 439 F. Supp., at 149. It also noted that in many instances inmates suspected guards of thievery. *Id.*, at 148–149. The Court of Appeals agreed with the District Court. It saw "no reason whatsoever not to permit a detainee to observe the search of his room and belongings from a reasonable distance," although the court permitted the removal of any detainee who became "obstructive." 573 F. 2d, at 132.

The Court of Appeals did not identify the constitutional provision on which it relied in invalidating the room search rule. The District Court stated that the rule infringed the detainee's interest in privacy and indicated that this interest in privacy was founded on the Fourth Amendment. 439 F. Supp., at 149–150. It may well be argued that a person confined in a corrections facility has no reasonable expectation of privacy with respect to his room or cell and that therefore the Fourth Amendment provides no protection for such a person. Cf. *Lanza* v. *New York,* 370 U. S. 139, 143–144 (1962). In any case, given the realities of institutional confinement, any reasonable expectation of privacy that a detainee retained necessarily would be of a diminished scope. *Id.*, at 143. Assuming, *arguendo,* that a pretrial detainee retains such a diminished expectation of privacy after commitment to a

[36] The District Court did not extend its ruling to convicted inmates because, for them, "the asserted necessities need not be 'compelling,'" and since the warden's explanation of the problems posed was "certainly not weightless," the practice passed the constitutional test for sentenced inmates. 439 F. Supp., at 150.

corrections facility, we nonetheless find that the room search rule does not violate the Fourth Amendment.

It is difficult to see how the detainee's interest in privacy is infringed by the room search rule. No one doubts that room searches represent an appropriate security measure and neither the District Court nor the Court of Appeals prohibited such searches. And even the most zealous advocate of prisoners' rights would not suggest that a warrant is required to conduct such a search. Detainees' drawers and beds and personal items may be searched, even after the lower courts' rulings. Permitting detainees to observe the searches does not lessen the invasion of their privacy; its only conceivable beneficial effect would be to prevent theft or misuse by those conducting the search. The room search rule simply facilitates the safe and effective performance of the search which all concede may be conducted. The rule itself, then, does not render the searches "unreasonable" within the meaning of the Fourth Amendment.[37]

D

Inmates at all Bureau of Prisons facilities, including the MCC, are required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution.[38]

Strip search

[37] It may be that some guards have abused the trust reposed in them by failing to treat the personal possessions of inmates with appropriate respect. But, even assuming that in some instances these abuses of trust reached the level of constitutional violations, this is not an action to recover damages for damage to or destruction of particular items of property. This is a challenge to the room search rule in its entirety, and the lower courts have enjoined enforcement of the practice itself. When analyzed in this context, proper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of the detainees. *Jones* v. *North Carolina Prisoners' Labor Union, supra,* at 128.

[38] If the inmate is a male, he must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities

Corrections officials testified that visual cavity searches were necessary not only to discover but also to deter the smuggling of weapons, drugs and other contraband into the institution. App. 70–72, 83–84. The District Court upheld that strip search procedure but prohibited the body cavity searches, absent probable cause to believe that the inmate is concealing contraband. 439 F. Supp., at 147–148. Because petitioners proved only one instance in the MCC's short history where contraband was found during a body cavity search, the Court of Appeals affirmed. In its view, the "gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility." 573 F. 2d, at 131.

Admittedly, this practice instinctively gives us the most pause. However, assuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility, see *Lanza* v. *New York, supra; Stroud* v. *United States,* 251 U. S. 15, 21 (1919), we nonetheless conclude that these searches do not violate that Amendment. The Fourth Amendment prohibits only unreasonable searches, *Carroll* v. *United States,* 267 U. S. 132, 147 (1925), and under the circumstances, we do not believe that these searches are unreasonable.

The test of reasonableness is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it and the place in which it is conducted. *E. g., United States* v. *Ramsey,* 431 U. S. 606 (1977); *United States* v. *Martinez-*

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of female inmates also are visually inspected. The inmate is not touched by security personnel at any time during the *visual* search procedure. 573 F. 2d, at 131; Brief of Petitioners 70, 74 n. 56.

Fuerte, 428 U. S. 543 (1976); *United States* v. *Brignoni-Ponce,* 422 U. S. 873 (1975); *Terry* v. *Ohio,* 392 U. S. 1 (1968); *Katz* v. *United States,* 389 U. S. 347 (1967); *Schmerber* v. *California,* 384 U. S. 757 (1966). A corrections facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record, App. 71–76, and in other cases. *E. g., Ferraro* v. *United States,* — F. 2d — (CA6, filed Dec. 15, 1978) (No. 78–5250); *United States* v. *Park,* 521 F. 2d 1381, 1382 (CA9 1975). That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.[39]

We do not underestimate the degree to which these searches

[39] The District Court indicated that in its view the use of metal detection equipment represented a less intrusive and equally effective alternative to cavity inspections. We noted in *United States* v. *Martinez-Fuerte,* 428 U. S. 543, 556–557, n. 12 (1976), that "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." However, assuming that the existence of less intrusive alternatives is relevant to the determination of the reasonableness of the particular search method at issue, the alternative suggested by the District Court simply would not be as effective as the visual inspection procedure. Money, drugs, and other nonmetallic contraband still could easily be smuggled into the institution. Another possible alternative, not mentioned by the lower courts, would be to closely observe inmate visits. See Dept. of Justice, Federal Corrections Policy Task Force, Draft Federal Standards for Corrections (June 1978). But MCC officials have adopted the visual inspection procedure as an alternative to close and constant monitoring of contact visits to avoid the obvious disruption of the confidentiality and intimacy that these visits are intended to afford. That choice has not been shown to be irrational or unreasonable.

may invade the personal privacy of inmates. Nor do we doubt, as the District Court noted, that on occasion a security guard may conduct the search in an abusive fashion. 439 F. Supp., at 147. Such abuse cannot be condoned. The searches must be conducted in a reasonable manner. *Schmerber* v. *California, supra,* at 771–772. But we deal here with the question whether visual body cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.[40]

IV

There was a time not too long ago when the federal judiciary took a completely "hands-off" approach to the problem of prison administration. In recent years, however, these courts largely have discarded this "hands-off" attitude and have waded into this complex arena. The deplorable conditions and draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered

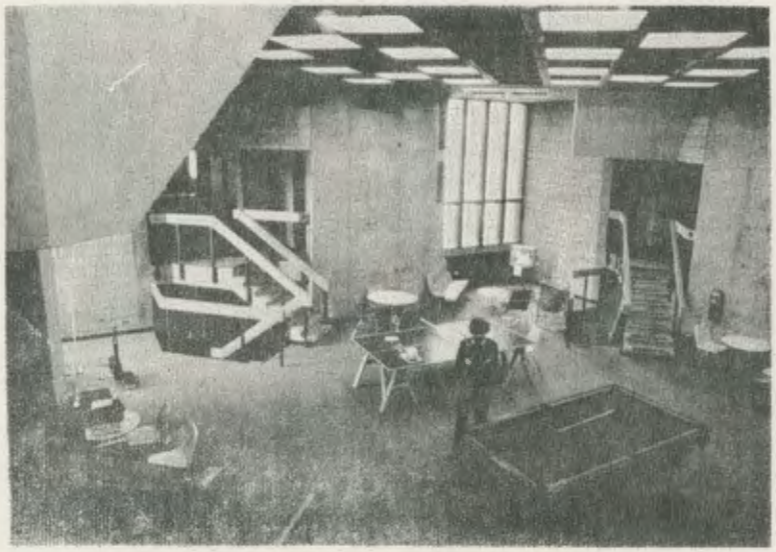
[40] We note that several lower courts have upheld such visual body cavity inspections against constitutional challenge. See, *e. g., Daughtery* v. *Harris,* 476 F. 2d 292 (CA10), cert. denied, 414 U. S. 872 (1973); *Hodges* v. *Klein,* 412 F. Supp. 896 (NJ 1976); *Bijeol* v. *Benson,* 404 F. Supp. 595 (SD Ind. 1975); *Penn El* v. *Riddle,* 399 F. Supp. 1059 (ED Va. 1975).

is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan? This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution, or in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.

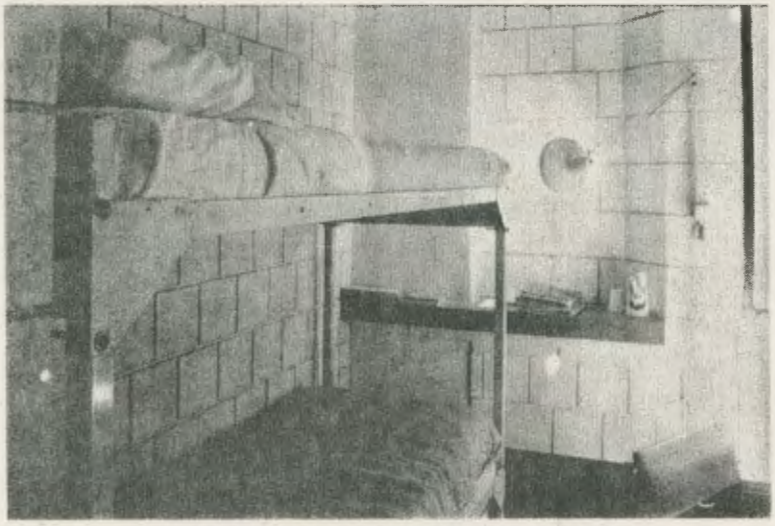
The judgment of the Court of Appeals is, accordingly, reversed and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

APPENDIX*



MCC multipurpose room.



Double-bunked room housing pretrial detainees.

*Photographs appended to Affidavit of David Hirsch, dated Oct. 18, 1976, filed in No. 75 Civ. 6000, SDNY.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 8, 1979

SUPPLEMENTAL MEMORANDUM TO THE CONFERENCE

Re: No. 77-1829 Bell v. Wolfish

With the difference in views expressed at the Conference in this case, my memorandum did not, and I am quite sure could not, attempt to fashion some magic elixir which would resolve all of these differences and produce a unanimous opinion for the Court. I think that the major points raised by John and Bill in their memoranda of March 7th in response to my printed memorandum in this case represent basic differences of opinion as to the proper resolution of the constitutional questions presented by this case. But I do agree that they are quite correct in observing that the printed memorandum did not discuss the question of whether the security restrictions constitute "punishment", and that my memorandum probably should deal with that issue. The reason it did not was because both the District Court and the Court of Appeals examined these practices only in terms of the specific First and Fourth Amendment claims raised by the plaintiffs, and in their briefs before this Court the plaintiffs do not in

general cast their attack on the security practices other than in terms of violations of the First and Fourth Amendments to the Constitution.

But since my printed memorandum does analyze the "double bunking" issue in terms of punishment, and John and Bill both raise the question of whether these other practices might also constitute punishment, I agree that there should be a treatment of this issue in the memorandum, and will shortly circulate a brief addition to it that will opine that these practices, like "double bunking", do not constitute punishment.

There is no suggestion below or by respondents that these restrictions were employed by MCC officials with an intent to punish the pretrial detainees. Absent a showing of such intent, the test is, I believe, as stated in Part IIB of my memorandum, whether the restriction is "reasonably related to a legitimate governmental objective." Insuring the security of the institution is a legitimate governmental goal, whether the institution houses pretrial detainees, sentenced inmates, or both. And in my view, all of the restrictions struck down by the Court of Appeals and challenged here by the government were reasonable responses to legitimate security concerns on the part of MCC officials.

As to the question of how "punishment" is to be defined, other than making the principal criterion intent and saving, as

my memorandum does, drastic examples such as dungeons and shackles, I do not think any other more subjective test can be reconciled with our decided cases. As Potter suggests in his circulation of March 7th, those cases hold in one instance that the voting in a foreign election by a United States citizen may be constitutionally used by Congress as a basis for revoking his citizenship, Perez v. Brownell, 356 U.S. 44 (1958), but that Congress has no similar authority to divest the citizenship of one who departs or remains outside of the jurisdiction of the United States in time of war or national emergency for the purpose of evading or avoiding training in service. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). The analysis of the Court in the latter case, which I have described in my printed memorandum in this case, turned on the conclusion that the revocation of citizenship for evading service was imposed by Congress with intent to punish, and Perez was distinguished as involving a statute providing for "loss of citizenship for noncriminal behavior instead of as an additional sanction attaching to behavior already a crime, and congressional expression attending [its] passage lacked the overwhelming indications of punitive purpose which characterize the enactments here." 372 U.S. 144, 170, fn. 30. Since the objective consequences -- loss of citizenship -- are identical in each of the two cases, intent must as a general matter be regarded as

a crucial element in determining what constitutes "punishment." Admittedly detention is traditionally employed in many cases in order to punish, but the plaintiffs do not even challenge the government's right to detain for the short periods involved in this case.

Sincerely,

Copies to the Conference

ea

I largely agree with this - as it reflects my previously expressed views.

SUPPLEMENTAL MEMORANDUM

TO: Mr. Justice Powell

FROM: Eric

DATE: 3-9-79

RE: Bell v. Wolfish, No. 77-1829

I have now managed to get through WHR's tome in this case as well as the responding memoranda. In general, WHR's analysis seems consistent with your vote at conference: The restrictions imposed on pretrial detainees are impermissible if they constitute punishment, which is defined largely in terms of

the intent behind the particular restriction. Absent an intent to punish, a detainee may be subject to such rules and conditions as are reasonably related to the government's legitimate interests in his confinement and the necessities of jail administration.

Unsurprisingly, WHR has applied this test in a manner that reverses the court of appeals outright. Although you voted to reverse in most respects, you felt that certain of the MCC practices were unreasonable unless modified at least to some extent. In particular, you believed that body cavity searches must be founded upon a reasonable suspicion, and that the near-total ban on packages was unwarranted. (You were willing to reverse on the receipt-of-books rule, but only as it was modified by the prison after this case was litigated in the lower courts.)

Unless I have missed something objectionable in WHR's memorandum, I think you could join his opinion except with respect to the two points mentioned above. As to these, a brief concurrence stating that your analysis of the reasonableness test yields a different result would not be difficult to write.

PS's memorandum in support of WHR's position seems basically correct to me. WJB also has circulated a memorandum, which I am quite sure you will not want to join: To the extent he thinks the challenged MCC practices "harm" inmates, I think he is far wide of the mark, with the possible exception of the cavity search problem; further, saying that punishment is a "question of law" does not, as WJB seems to suggest, mean that considerable deference to prison officials on what constitutes

"reasonableness" is unwarranted. JPS's "invasion of dignity" approach to the problem seems unacceptable to me; it is hopelessly subjective and promises only deepening federal-court involvement in the administration of prisons.

not a legal standard & impossible to apply

March 10, 1979

77-1829 Bell v. Wolfish

Dear Bill:

Those of us who are "tapped" to write a memorandum know from experience that we commence without a constituency, and this certainly was your situation in this case.

I have now read your memorandum with some care, and can join Parts I and II quite happily.

As to the other four comparatively minor issues, you and I took a different view at the Conference with respect to the "body cavity searches" and the near total ban on packages. I continue to think that a cavity search is unreasonable in the absence of some reasonable ground for suspicion, and I would think that there has been no adequate showing why packages could not be examined without an undue burden on the prison authorities. The present package rule seems unduly restrictive. In sum, I can join all of your opinion except with respect to the cavity search and the package restriction, as to which I am inclined to write along the foregoing lines.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 15, 1979

Re: No. 77-1829 - Bell v. Wolfish

Dear Bill,

I am in essential agreement with your memorandum.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 29, 1979

Dear Bill:

Re: 77-1829 Bell v. Wolfish

I am in general agreement with your memorandum. total My reservation is as to the relative ease of substituting segregation of visitors to make it impossible to hand deliver drugs, etc. This is S.O.P. in many institutions. However, I am not sure our personal preferences in how prisons should be run should prevail.

I'll be interested in what is written on this score.

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 2, 1979

Re: No. 77-1829 - Bell v. Wolfish

Dear Bill:

I am in general agreement with your memorandum as recirculated. My only reservation has to do with the visual body cavity search. I really could go either way on this aspect of the case. Facial validity, however, is the issue before us, and I am content with your conclusion that this is not facially invalid.

I add my thanks, to those of the others, for your taking on a nonconstituency assignment such as this.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

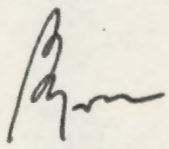
April 5, 1979

Re: No. 77-1829 - Bell v. Wolfish

Dear Bill,

I am still with you.

Sincerely yours,



Mr. Justice Rehnquist

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 10, 1979

Re: No. 77-1829, Bell v. Wolfish

Dear Bill,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 10, 1979

Re: No. 77-1829 - Bell v. Wolfish

Dear Bill:

Please join me in your formal opinion.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 19, 1979

Re: 77-1829 - Bell v. Wolfish

Dear Bill:

This is to confirm my early informal join.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

ea

MEMORANDUM

TO: Mr. Justice Powell

FROM: Eric

DATE: 4-21-79

RE: TM's dissenting opinion in Bell v. Wolfish
No. 77-1829

TM's dissenting opinion in this case is unsurprising. He advocates heightened levels of judicial scrutiny of restrictions on pretrial detainees that, in my opinion, would deeply and unwisely enmesh the Court in jail administration. I therefore do not recommend that you join.

TM does have a point that WHR's analysis is exceptionally deferential, however. The last time we talked about this case, you were inclined to write a brief concurrence disagreeing with WHR's result on the packages restriction and the body cavity search. I don't feel particularly strongly about the former, but I would recommend that you cast your vote in favor of requiring at least some level of cause, probably "reasonable suspicion," to justify the anal and genital searches. WHR apparently has his five votes, so your vote will not affect the holding of the Court.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 23 APR 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1829

Griffin B. Bell et al., Petitioners
v.
Louis Wolfish et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April —, 1979]

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I join the opinion of the Court except the discussion and holding with respect to body cavity searches. In view of the serious intrusion on one's privacy occasioned by such a search, I think at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case. I therefore dissent on this issue.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 27, 1979

RE: No. 77-1829 Bell v. Wolfish

Dear John:

Will you please join me in your dissent.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A B.	L. F. P.	W. H. R.	J. P. S.
							1/22/79	
general agreement w/ WHR 3-29-79	join JPS 4/27/79	join WHR 4-10-79	agree with WHR 3/15/79	dissenting op. 4/20/79 1st draft 4/25/79	generally agrees with WHR	1st Draft Cor opinion 4/23/79	memo 3/6/79	1st draft of dissent 4-24-79 2nd Draft
join WHR 4/19/79			still with WHR 4/5/79	2nd draft 5/7/79 3d draft	4/2/79 join WHR 4/10/79		supp memo 3/8/79	4/26/79 3rd draft 4/30/79
				5/10/79			2nd draft 3/12/79 3rd draft	4th draft 5/2/79 5th draft
							4/4/79 4th draft 4/18/79	5/10/79
							5th draft 5/2/79	
				77-1829 Bell v. Wolfish				