The Constitutional Right of Pretrial Detainees: A Healthy Sense of Realism?

Bell v. Wolfish[1] represents the United States Supreme Court's first opportunity to delineate the scope of the constitutional rights retained by pretrial detainees.[2] In *Bell*, detainees housed at the Metropolitan Correctional Center, a federally operated detention facility, brought a class action suit challenging the constitutionality of a variety of the conditions of their confinement. The ultimate issue in the case was the nature and scope of the rights retained by an individual once he is detained by the government pending trial on a criminal charge. To resolve that issue, the Court first had to decide what the appropriate standard was for reviewing a detention official's decision to impose particular restrictions upon pretrial detainees.

Before approaching the Court's resolution of these issues, some of the relevant background authority will be discussed in Section I. The Supreme Court has decided several prisoner's rights cases, some of which will be considered below. While both prisoners and detainees have been incarcerated by the government, they have been incarcerated for different reasons. The convicted prisoner has been incarcerated for punishment, while the detainee has been incarcerated because either the offense with which he is charged is not bailable or he has been unable to pay the bail that was set. Since the purposes behind the individual's incarceration should play a significant role in the treatment he receives while imprisoned or detained, the objectives of the bail system will be examined in Section II. Section III will review the various approaches the circuit courts have taken with respect to the standard of review to be applied to detention facility officials' decisions regarding the conditions and practices of pretrial detention. The facts and holding of *Bell*, the majority's rationale, and the approaches advocated by the dissents will be set out in Section IV, which will also analyze the majority opinion in light of relevant precedent and the objectives of the bail system.

I. The Prisoner's Rights Cases

Bell v. Wolfish[3] was the first case to be considered by the United States Supreme Court dealing with the constitutional rights of pretrial detainees. The Court had, however, previously decided numerous cases dealing with the rights of convicted prisoners.

American courts have traditionally been reluctant to become involved

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1. 441 U.S. 520 (1979).

2. Throughout this Comment the term "prisoner" will be used only with reference to those who have been incarcerated as punishment for having committed a crime. The term "detainee" is reserved for those who have been charged with a crime but have not yet had a trial.

3. 441 U.S. 520 (1979).

in the complexities of penal administration.[4] The courts viewed this area to be within the responsibility of the executive branch of the government. Most judges felt it was not within their authority to question the discretionary decisions of prison officials. This "hands-off" approach prevailed in American jurisprudence until the late 1960s.

The Supreme Court took an affirmative step toward changing this attitude in *Lee v. Washington*.[5] In that case the Court affirmed the lower court's ruling applying the equal protection clause to invalidate particular Alabama statutes requiring racial segregation in prisons and jails.

In *Cruz v. Beto*[6] the Court recognized the applicability of the first amendment guarantee of freedom of religion in the prison context. The Court acknowledged that while prison authorities "must be accorded latitude in the administration of prison affairs,"[7] prisoners are persons whose constitutional rights must be enforced by the federal courts.

Procunier v. Martinez,[8] decided in 1974, is also illustrative of this trend. The primary issue was whether the prison's mail censorship rule violated the first amendment rights of the prisoners.[9] The Court pointed out that "a healthy sense of realism"[10] required the recognition that courts are not well equipped to handle the pressing problems of prison administration. Nonetheless, valid constitutional claims must be heard, and, if fundamental constitutional rights are impinged by a particular regulation or practice, the federal courts must act.

In *Martinez*, however, the Court did not deal directly with the prison-

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4. Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841, 842-44 (1971).

5. 390 U.S. 333 (1968) (per curiam).

6. 405 U.S. 319 (1972) (per curiam).

7. *Id.* at 321.

8. 416 U.S. 396 (1974).

9. Director's Rule 2401 provided:

> The sending and receiving of mail is a privilege, not a right, and any violation of the rules governing mail privileges either by you or by your correspondents may cause suspension of the mail privileges.

Director's Rule 1201 provided:

> INMATE BEHAVIOR: Always conduct yourself in an orderly manner. Do not fight or take part in horseplay or physical encounters except as part of the regular athletic program. Do not agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence.

The term "unduly complain" and "magnify grievances" covered statements made in the inmates' personal letters. Director's Rule 1205 provided:

> The following is contraband:
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> . . . .
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> d. Any writings or voice recordings expressing inflammatory political, racial, religious or other views or beliefs when not in the immediate possession of the originator, or when the originator's possession is used to subvert prison discipline by display or circulation.

Rule 1205 also provides that writings

> not defined as contraband under this rule, but which, if circulated among other inmates, would in the judgment of the warden or superintendent tend to subvert prison order or discipline, may be placed in the inmate's property, to which he shall have access under supervision.

10. 416 U.S. 396, 405 (1974).

er's rights. It turned instead to a more narrow question: are the first amendment rights of those outside the institution who communicate with inmates violated by this rule?[11] This question was answered with a conditional "yes"; the mail could not be censored unless two conditions were met. The first required that the rule "further an important or substantial governmental interest unrelated to the suppression of expression."[12] Such interests included security, order, and rehabilitation. The other condition was that the restriction of speech be no more than was necessary to protect the government's interest. Applying this standard to the regulation in issue, the Court held it invalid.

The *Martinez* Court went on to state that even under a valid regulation, the decision to withhold or censor a letter must be accompanied by notice and the inmate must be allowed an opportunity to protest the decision.[13] This was based upon the Court's decision that freedom of communication is a "liberty" interest within the meaning of the fourteenth amendment due process clause.

A regulation prohibiting attorneys from using paralegals and law students to conduct inmate interviews was also struck down in *Martinez*.[14] The Court held that this regulation violated the due process clause since it restricted the prisoners' access to the courts.

Pell v. Procunier,[15] also decided in 1974, reflects the Court's growing apprehension of becoming involved in the problem of prison administration. The inmates in *Pell* challenged the constitutionality of a regulation in the California Department of Corrections Manual[16] that prohibited "press and other media interviews with specific individual inmates."[17] The Court upheld the constitutionality of the regulation, stating that only those first amendment freedoms consistent with the status of a prisoner as a prisoner or with the goals of the corrections system are retained upon incarceration.[18]

In *Pell*, the Court held the institution's goals of maintaining security and avoiding administrative problems required that such interviews be limited.[19] The Court declared that "[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."[20] Thus,

11. *Id.* at 408.
12. *Id.* at 413.
13. *Id.* at 418.
14. *Id.* at 419.
15. 417 U.S. 817 (1974).
16. CALIFORNIA DEPT. OF CORRECTIONS MANUAL § 415.071.
17. Pell v. Procunier, 417 U.S. 817, 819 (1974).
18. *Id.* at 822.
19. *Id.* at 826.
20. *Id.* at 827.

the burden of proving the excessiveness of a restriction of first amendment freedoms was placed upon the prisoner. The Court admitted that the courts must continue to protect fundamental freedoms,[21] but when freedom of speech is at issue such intervention is to be limited to those situations in which there is no alternative method of communication and "discrimination in terms of content is involved."[22]

Another important opinion concerning the scope of the constitutional rights retained by prisoners is *Wolff v. McDonnell*.[23] Prisoners had charged that the prison's disciplinary proceedings violated due process because good-time credits[24] could be revoked and solitary confinement could be imposed without giving the prisoner a prior hearing. They also alleged that the legal assistance program fell below constitutional standards and that rules relating to the inspection of attorney-client mail violated the first amendment.

The Court in *Wolff* first held that while lawful incarceration limits the rights of prisoners, some of the protections of the due process clause do remain.[25] "There is no iron curtain drawn between the Constitution and the prisons of this country."[26] These rights are, however, "subject to restrictions imposed by the nature of the regime to which they [prisoners] have been lawfully committed."[27] The Court called for a "mutual accommodation" between constitutional provisions and the goals of the institution.[28] The Court also held that since the state had created the right to good-time credit, the prisoner was entitled to it if he met all the requirements set out in the statute.[29] The Court characterized this entitlement to good-time credit as a "liberty" interest that could not be denied without notice and a hearing. The Court also recognized the prisoners'

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21. *Id.*

22. *Id.* at 826.

23. 418 U.S. 539 (1974).

24. Provision for good-time credits is made by NEB. REV. STAT. § 83-1, 107 (Cum. Supp. 1972):
(1) The chief executive officer of a facility shall reduce for parole purposes, for good behavior and faithful performance of duties while confined in a facility the term of a committed offender as follows: Two months on the first year, two months on the second year, three months on the third year, four months for each succeeding year of his term and pro rata for any part thereof which is less than a year. In addition, for especially meritorious behavior or exceptional performance of his duties, an offender may receive a further reduction, for parole purposes, not to exceed five days, for any month of imprisonment. The total of all such reductions shall be deducted:
(a) From his minimum term, to determine the date of his eligibility for release on parole; and
(b) From his maximum term to determine the date when his release on parole becomes mandatory under the provisions of section 83-1, 111.
(2) Reductions of such terms may be forfeited, withheld and restored by the chief executive officer of the facility after the offender has been consulted regarding the charges of misconduct. No reduction of an offender's term for especially meritorious behavior or exceptional performance of his duties shall be forfeited or withheld after an offender is released on parole.

25. 418 U.S. 539, 555 (1974).

26. *Id.* at 555-56.

27. *Id.* at 556.

28. *Id.*

29. *Id.* at 557.

"liberty" interest in freedom from disciplinary confinement and held that the same procedures used in good-time revocation were required before imposition of solitary confinement.[30]

The *Wolff* Court further held that allowing the inmate to be present during the inspection of mail from his attorney would be sufficient to meet constitutional mandates.[31] Further proceedings were ordered on the adequacy of the legal assistance program.[32]

The question whether the due process clause prohibits a prisoner from being transferred without a prior hearing to another institution at which conditions were inferior was presented in *Meachum v. Fano*.[33] The Court held that no such hearing was required because the inmates had no constitutionally protected "liberty" interest.[34] The prisoners' asserted interest in not being transferred was found to be neither expressly protected by the Constitution[35] nor created by state law.[36] The Court held, in effect, that no matter how grievous the loss inflicted upon the transferred prisoner, no process is due because he is not entitled to remain where he is.[37]

The Court took a major step toward returning to the "hands-off" approach in *Jones v. North Carolina Prisoners' Labor Union*.[38] Certain regulations promulgated by the North Carolina Department of Corrections were challenged as violative of the free speech, association, and equal protection rights of the inmates' labor union.[39] The Court held that the first and fourteenth amendments do not apply to prisoners' labor unions.[40]

The Court declared that the fact of imprisonment itself limits the inmates' freedom to associate with outsiders and that the needs of the institution require limitations on their rights to associate with each other.[41] Thus, regulations alleged unconstitutionally to restrict freedom of association are subject to a test similar to that applied to restrictions of freedom of speech in *Pell*.[42] The regulation need only be "rationally related to the reasonable . . . objectives of prison administration."[43] The burden of proof in this context, as in *Pell*, is on the prisoner to show that "officials have exaggerated their response to these considerations."[44]

30. *Id.* at 571-72 n.19.

31. *Id.* at 580.

32. *Id.*

33. 427 U.S. 215 (1976).

34. *Id.* at 224.

35. *Id.* at 225.

36. *Id.* at 228.

37. The Court's holding in these latter two cases is consistent with the development of due process adjudication not only in the prisoner's rights context but as applied generally. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 502-50 (1978).

38. 433 U.S. 119 (1977).

39. *Id.* at 121.

40. *Id.* at 136.

41. *Id.* at 126.

42. 417 U.S. 817 (1974).

43. Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 129 (1977).

44. *Id.* at 128.

Thus the Court's attitude toward the propriety of intervening into the realm of prison administration has not been static. Traditionally the Court had chosen to ignore the cries of the prisoners in deference to the officials charged with their care. Recently a new trend had developed, one by which the Court had begun to listen to the complaints of the imprisoned. *Jones*,[45] however, marked a return to the days in which the Court chose to keep its "hands-off."

II. BAIL AND DETENTION

There is a vital difference between a convicted prisoner and a detainee. The prisoner is incarcerated because he has been found guilty of a crime by a court of law. The detainee is incarcerated because there is probable cause that he has committed a crime[46] and, because of the nature of the particular crime or because of his poverty, he has not been released on bail. Since the convicted prisoner was found guilty of a crime, he has been incarcerated for punishment. The detainee, however, has been incarcerated for other reasons.

The eighth amendment prohibits the imposition of excessive bail.[47] In *Carlson v. Landon*,[48] however, the Court expressly stated that bail need not be set in all cases.[49] Congress and the state legislatures may define those classes of cases in which bail will be allowed. Thus, bail is not required in those instances in which the accused, if found guilty, may be punished by death.[50] This does not, however, mean that only those charged with capital crimes are detained in lieu of bail. In fact, the vast majority of those detained are not charged with capital crimes; they are detained simply because they cannot afford the bail that was set.[51]

Bail statutes usually state that the purposes of bail are (1) securing the attendance of the accused at trial and (2) preventing his punishment before conviction.[52] These statutes, of course, reflect the legislative point of view. Many of these statutes provide no guidelines to aid judges in setting the proper amount of bail. Even when such guidelines are provided, they may not be followed because judges often view the goals of the bail system from a perspective different from that of state legislatures and Congress.

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45. 433 U.S. 119 (1977).

46. Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

47. The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

48. 342 U.S. 524 (1952).

49. *Id.* at 546.

50. *Id. See also* the Bail Reform Act of 1966, 18 U.S.C. § 3146 (1976); FED. R. CRIM. P. 46(c).

51. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 629 (1979). Table 6:20 indicates that bail was set for 81% of those jailed pending trial. But for their inability to pay this bail, these persons would have been freed. Those for whom no bail was set constituted only 17% of the detainee population. *Id.*

52. P. WICE, BAIL AND ITS REFORM: A NATIONAL SURVEY, SUMMARY REPORT (1973) [hereinafter cited as LEAA SURVEY].

Among the objectives that judges feel the bail system should fulfill are (1) punishment, (2) preventive detention, (3) rehabilitation, and (4) rapid disposition of cases.[53] First, a judge who feels the defendant is guilty may set a very high bail to insure that the defendant suffers at least a temporary economic hardship and perhaps even incarceration.[54] Second, bail may be set excessively high in an effort to see that the accused is detained so that society can be protected from any crimes he might commit if released. A third objective is rehabilitation. The judge may feel that requiring the accused to spend time in detention before a hearing will frighten him into good behavior upon his subsequent release.[55] This is particularly true with respect to young first offenders. Finally, bail is used to force rapid disposition of cases. A magistrate may use the threat of setting bail at a high rate as a tool in acquiring an immediate guilty plea.[56]

The defendant's financial status, which will determine the amount of bail he can afford to pay, is rarely considered by the magistrate when setting the amount of bail.[57] It is ironic that this particular factor does not play a more central role since it is the most common determinant of an accused's ability to obtain pretrial release. It is particularly disturbing in light of the Supreme Court's holding in *Stack v. Boyle*[58] that "the fixing of bail for any *individual* defendant must be based upon standards relevant to the purpose of assuring the presence of *that* defendant."[59]

Of all persons charged with serious misdemeanors or felonies, approximately twenty percent are detained in lieu of bail.[60] "In terms of the number of persons affected per year, pretrial custody accounts for more incarceration in the United States than does imprisonment after sentencing."[61] A detainee may spend as much as eight months in jail prior to trial.[62] The costs of such detention must be borne by the detainee, his family, and the public. "In most instances, the financial, human, and social costs of the detention far outweigh any benefit the public receives from total confinement."[63]

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53. *Id.* at 5-6.

54. *Id.* at 5.

55. *Id.* at 6.

56. *Id.* This threat often works because where a fine is imposed it frequently will be less than the bail that would have been set, and where a prison term is imposed, it is very likely that the physical condition of the prison will be better than that of the jail where he would have been detained pending trial.

57. *Id.* at 14.

58. 342 U.S. 1 (1951).

59. *Id.* at 5 (emphasis added).

60. LEAA SURVEY, *supra* note 52 at 22.

61. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS: CORRECTIONS 102, 109 (1973) [hereinafter cited as CORRECTIONS]. *See* McGinnis v. Royster, 410 U.S. 263, 281 (1973) (Douglas, J., dissenting) ("In New York City as of 1964, 49% of those accused were imprisoned before trial, while only 40% were imprisoned after conviction.").

62. A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PRE-TRIAL RELEASE 3 (1968).

63. CORRECTIONS, *supra* note 61, at 99.

Thus, it can be seen that the bail system is not what it should be. Justice Jackson stated in *Stack v. Boyle*:[64]

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty.[65]

Unfortunately for many detainees, the system is not administered in this "spirit." It is often administered by judges with other goals in mind.

III. THE STANDARDS APPLIED TO THE CONDITIONS OF PRETRIAL DETENTION IN THE COURTS OF APPEALS

Bell v. Wolfish[66] is the first case in which the Supreme Court has considered the standard of review to be used in determining the scope of the constitutional rights of pretrial detainees. The courts of appeals, however, have faced the issue numerous times. Some of their more recent decisions are discussed below.

The Seventh Circuit examined the rights of detainees in *Duran v. Elrod*.[67] The detainees in the Cook County House of Correction and the Cook County Jail alleged that the inadequate recreational facilities, lack of visiting privileges, and inability to earn money for their defense constituted the infliction of cruel and unusual punishment and a denial of due process. The court of appeals reversed the district court's dismissal and remanded for further findings. The court said that the state's "sole permissible interest"[68] was to ensure the detainee's presence at trial. The court then held that any restriction that is not "*reasonably related* to this sole stated purpose of confinement would deprive a detainee of liberty or property without due process."[69] The court did acknowledge that internal security and limited finances are relevant to the issue.[70] It limited the use of the cruel and unusual punishment clause to simply "defining that which may *never* be imposed on *any* inmate."[71] The treatment of detainees must be held to a higher, more stringent standard because they have not yet been adjudicated guilty of a crime and thus may not be punished at all.[72]

In *Smith v. Shimp*[73] the Seventh Circuit gave greater meaning to their

64. 342 U.S. 1 (1951).
65. *Id.* at 7.
66. 441 U.S. 520 (1979).
67. 542 F.2d 998 (7th Cir. 1976).
68. *Id.* at 999.
69. *Id.* at 1000 (emphasis added).
70. *Id.* at 1001.
71. *Id.* at 999-1000 (emphasis added).
72. *Id.* at 1000.
73. 562 F.2d 423 (7th Cir. 1977).

standard by holding that "jail security directly serves [the] interest [in ensuring the detainee's presence at trial]."[74] In that case detainees were challenging the facility's practice of spot-checking their mail. The court stated that "if unmonitored use of the mail presents a *substantial threat* to jail security, the burden imposed on the detainees' freedom to communicate private matters is justified."[75] If a "less *burdensome means*"[76] of preserving the interest in security was available, however, the practice would be unconstitutional.

The Fifth Circuit considered detainees' rights in *Miller v. Carson*,[77] in which violations of numerous constitutional provisions were alleged.[78] The court began by recognizing that detainees are to be presumed innocent.[79] It stated that "[a] government may hold a citizen without showing that he had done wrong, but it may not punish him without proof."[80] The appropriate test in the Fifth Circuit is whether "the conditions placed on the detainee are *more restrictive than are necessary* to assure his presence at trial or to preserve security."[81] If so, the detention is, in fact, punishment in violation of the due process clause. Applying this test, the court held that the due process clause had been violated.[82]

The Fourth Circuit established its standard of review in *Patterson v. Morrisette*.[83] The conditions that were the basis of the suit were not discussed. The court simply set out the standard to be used upon remand. This standard required that when

> in confinement [the detainee] can only be deprived of the constitutional rights a [bailed] defendant awaiting trial enjoys to the extent such denial is *required* to insure that he appears at trial and to restrain him from endangering or disrupting the security of the institution in which he is detained, or to deter him, if his conduct has already caused such danger or disruption, from repeating such conduct.[84]

Feeley v. Sampson[85] marked the First Circuit's first contact with the issue of a detainee's constitutional rights. Although the court first declared that due process would be violated by any condition or restriction "without

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74. *Id.* at 425-26.
75. *Id.* at 426 (emphasis added).
76. *Id.* (emphasis added).
77. 563 F.2d 741 (5th Cir. 1977).
78. *Id.* at 744.
79. *Id.* at 750.
80. *Id.* at 746 (footnote omitted).
81. *Id.* at 750 (emphasis added).
82. *Id.* at 746.
83. 564 F.2d 1109 (4th Cir. 1977) (per curiam).
84. *Id.* at 1110, *quoting* Collins v. Schoonfield, 344 F. Supp. 257, 265 (D.Md. 1972) (emphasis added).
85. 570 F.2d 364 (1st Cir. 1978).

reasonable relation to the state's purpose"[86] in producing the detainee at trial, this is not the standard it in fact applied. Later in the opinion,[87] the court stated that it would apply the same standard as "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*."[88] This test is further restricted by the court's statement 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."[89] This court disregards relevant authority in the other circuits, basing its opinion instead upon numerous cases dealing with the standard to be applied when restrictions of the rights of convicted prisoners are at issue.[90] The court deferred to the judgment of the jail authorities, barring only arbitrary and capricious abuses of power.

The District of Columbia Circuit Court of Appeals considered the rights of detainees in *Campbell v. McGruder*.[91] The D.C. Circuit began its analysis of the proper standard by acknowledging the difficulty of the task and observing that the ultimate goal, "that the pretrial detainee 'be used with the utmost humanity' "[92] must be kept in mind regardless of this difficulty.[93] The court declared that the government's main purpose in confining the detainee is assuring his appearance at trial,[94] but this was not considered to be its only cognizable interest. The court noted the government's interest in its "ability to manage the institution of pretrial detention in an administratively feasible manner."[95]

The court recognized that the detainee's interest is his liberty.[96] It stated that this liberty derives from the presumption of innocence[97] and that "[t]he presumption of innocence is a shield that prevents 'the infliction of punishment prior to conviction.' "[98] The court went on to point out the difficulty in distinguishing pretrial detention from punishment and con-

86. *Id.* at 369 (emphasis added).

87. *Id.* at 371.

88. *Id.* (emphasis added).

89. *Id.* (emphasis added).

90. *Id.* at 371-79.

91. 580 F.2d 521 (D.C. Cir. 1978).

92. *Id.* at 528, *quoting* 4 W. BLACKSTONE, COMMENTARIES* 300.

93. *Id.* at 527-28.

94. *Id.* at 528.

95. *Id.* at 529.

96. *Id.*

97. The presumption of innocence is a shorthand phrase used by many courts to denote the proper attitude to be assumed when considering the rights of those who have been brought into the criminal justice system but who have not yet been adjudicated guilty.

98. 580 F.2d 521, 529 (D.C. Cir. 1978), *quoting* Stack v. Boyle, 342 U.S. 1, 4 (1951).

cluded that not only was this incarceration punishment, but "as the restrictions of the jail accumulate, the detainee's punishment becomes more severe."[99]

The court found that the proper test required a *balancing* of these conflicting interests.[100] The court then listed and described five guidelines for the administration of this standard. First, the presumption of innocence requires that each restriction be evaluated "to determine if it is *justified by substantial necessities* of jail administration. To evaluate these necessities [it] 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 pretrial detention at a feasible cost."[101] Second, the presumption requires that the institution's responsibilities as a caretaker be properly discharged. Those conditions that are harmful to the detainee's physical or mental health must be "subjected to the *closest scrutiny* and can be justified only by the *most compelling necessity*."[102] Third, those conditions that may adversely affect the outcome of the defendant's trial "are constitutionally suspect" and can be justified only by the *most compelling necessity*.[103] Fourth, the length of time that the defendant is detained was held relevant in determining the responsibilities of the institution. Finally, if the conditions are such as to independently violate the Constitution, no balancing should take place.

The Third Circuit's most recent decision dealing with the rights of detainees is *Norris v. Frame*.[104] There the court reaffirmed its earlier statement that " 'the only legitimate state interest in the detention of an accused who cannot raise bail is in guaranteeing his presence at trial.' "[105] The court held that "[a]dditional restrictions imposed on detainees are defensible only when they can be justified by the requirements of prison administration, or are inherent in the nature of confinement."[106]

The Second Circuit's most recent case dealing with the constitutionality of restrictions imposed upon pretrial detainees was *Bell v. Wolfish*.[107] *Bell* was not, however, this court's first contact with the issue. It had considered the question several times previously.[108] *Detainees of Brooklyn House of Detention v. Malcolm*[109] is the decision in which the standard applied by the district and appellate courts in *Bell* was first formulated.

99. *Id.* at 530.
100. *Id* at 531.
101. *Id.* (emphasis added).
102. *Id.* (emphasis added).
103. *Id.* at 532 (emphasis added).
104. 585 F.2d 1183 (1978).
105. *Id.* at 1187, *quoting* Tyrrell v. Speaker, 535 F.2d 823, 827 (3rd Cir. 1976).
106. *Id.*
107. 441 U.S. 520 (1979).
108. *See* Rhem v. Malcolm, 527 F.2d 1041 (2d Cir. 1975); Detainees of Brooklyn House of Detention v. Malcolm, 520 F.2d 392 (2d Cir. 1975); Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974).
109. 520 F.2d 392 (2d Cir. 1975).

There the court stated: "In providing for their detention, correctional institutions must be more than mere depositories for human baggage and any deprivation or restriction of the detainees' rights beyond those which are necessary for confinement alone, must be justified by a compelling necessity."[110] Inadequate financial resources is not a sufficient reason for denying a detainee's constitutional rights.[111]

These decisions were all decided before the Supreme Court granted certiorari in *Bell v. Wolfish*.[112] All the courts of appeals that had considered the issue had recognized that the detainee had a liberty interest that could be infringed upon by some kinds of restrictions imposed by the administrators of the facility in which he was housed.[113] All had recognized that the state had an interest in ensuring the detainees' presence at trial. Most also recognized the state's interest in maintaining jail security.[114] In two circuits the courts expressly allowed cost to be considered;[115] in the Second Circuit, however, cost was expressly held to be an insufficient excuse for deprivation of constitutional rights.[116] In two circuits the restriction must be justified by compelling necessity;[117] another requires that the restriction be justified by or be inherent in the confinement;[118] and one requires only that it not be arbitrary or capricious or that it be reasonably related to the government's interest, with deference to be given to administrators.[119]

IV. *Bell v. Wolfish*

A. *Facts and Holding*

Pretrial detainees housed at the Metropolitan Correctional Center,[120] a federally operated custodial facility, brought this class action lawsuit challenging a variety of conditions and practices at MCC as violative of their constitutional rights. The district court enjoined more than twenty practices that took place at MCC on statutory and constitutional grounds.[121] The court of appeals affirmed on many of these issues.[122]

Only five of these conditions and practices were at issue before the Supreme Court. The first was the practice of assigning two detainees to a room designed for only one. This "double-bunking" was alleged to deprive

110. *Id.* at 397.
111. *Id.* at 399.
112. 441 U.S. 520 (1979).
113. *See* text accompanying notes 67-111 *supra.*
114. *See* text accompanying notes 67-103 *supra.*
115. *See* text accompanying notes 67-72 and 91-103 *supra.*
116. *See* text accompanying notes 109-11 *supra.*
117. *See* text accompanying notes 91-103 *supra.*
118. *See* text accompanying notes 67-84 *supra.*
119. *See* text accompanying notes 104-06 *supra.*
120. Hereinafter referred to as MCC.
121. United States *ex rel.* Wolfish v. Levi, 428 F. Supp. 333, 439 F. Supp. 114 (1977).

the detainees of their liberty in violation of the due process clause of the fifth amendment. The second was the prohibition against the receipt of hard-cover books unless mailed by bookstores or the publisher. This "publisher-only" rule, it was urged, violated the inmates' first amendment rights. The third restriction challenged was the rule denying the inmates the right to receive packages of food or personal belongings except at Christmas. The fourth practice in question was the facility's requirement that inmates not be present during routine room searches. Finally, the rule requiring inmates to submit to strip searches complete with visual body cavity inspections after every contact visit[123] was challenged. The court of appeals failed to state which constitutional provisions were violated by these latter three practices. For purposes of review the Supreme Court assumed the court had based its holding on those issues upon the fifth amendment due process clause and the fourth amendment search and seizure provision.

The district court felt that the presumption of innocence and the fact that detainees were "held only to ensure their presence at trial"[124] required the application of the test set out by the Second Circuit in *Detainees of Brooklyn House of Detention v. Malcolm.*[125] This test requires that pretrial detainees may be subjected to only those restrictions and deprivations which inhere in their confinement itself or which are justified by *compelling necessities* of jail administration.[126] Applying this standard, it enjoined the enforcement of the "publisher-only" rule and the practice of "double-bunking" on motions for partial summary judgment.[127] The other conditions and practices in issue in the Supreme Court as well as a variety of others were enjoined after trial.[128] The Second Circuit, applying the same standard, affirmed the district court's ruling on those issues of relevance to this Comment.[129]

The Supreme Court rejected the compelling necessity standard and formulated, instead, a type of rational basis test of its own. All the restrictions and practices were held to meet this test. The lower courts were reversed on all issues.

B. *The Majority Rationale*

The issues to be decided in *Bell* dealt with the nature and scope of a

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122. Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978).

123. A contact visit is a visit between an inmate and an outsider during which they are allowed to touch each other.

124. United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 124 (S.D.N.Y. 1977).

125. 520 F.2d 392 (2d Cir. 1975). *See* text accompanying notes 108-09 *supra.*

126. United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 124 (S.D.N.Y. 1977), citing Detainees of Brooklyn House of Detention v. Malcolm, 520 F.2d 392, 397 (2nd Cir. 1975).

127. Wolfish v. Levi, 428 F. Supp. 333 (1977).

128. Wolfish v. Levi, 439 F. Supp. 114 (1977).

129. Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978).

detainee's constitutional rights and the appropriate standard to be applied in determining whether these rights have been violated. The majority opinion began by analyzing the "double-bunking" practice because it was "alleged only to deprive pretrial detainees of their liberty without due process of law."[130]

The Court pointed out that it could not find a source in the Constitution for the compelling necessity standard applied by the lower courts.[131] The presumption of innocence, the Court said, is an insufficient foundation to rely upon in formulating a test of the constitutionality of pretrial detention conditions.

The Court held that the due process clause requires only that an individual not be punished prior to an adjudication of guilt.[132] It does not require that he be free from discomfort, as such a freedom is not encompassed within the term "liberty."[133] The standard to be used in determining whether the dictates of due process are being met is "whether those conditions amount to punishment of the detainee."[134] To implement this standard, the term "punishment" had to be defined. The Court attempted to do so by setting out the traditional tests of punitive intent first set forth in *Kennedy v. Mendoza-Martinez*:[135]

> "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."[136]

After setting out these guidelines, however, the Court chose to give effect to only the last two: " '[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].' "[137] These guidelines constitute the Court's two-prong punitive intent test.

The first prong of this test is limited in its applicability by the fact that any restriction that is not "arbitrary or purposeless" can be said to be rationally connected to a legitimate goal.[138] In determining whether a particular restriction is arbitrary or purposeless the courts were admon-

130. Bell v. Wolfish, 441 U.S. 520, 530 (1979).

131. *Id.* at 532.

132. *Id.* at 535.

133. *Id.* at 534.

134. *Id.* at 535.

135. 372 U.S. 144 (1963).

136. Bell v. Wolfish, 441 U. S. 520, 537-38, *quoting* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

137. *Id.* at 538.

138. *Id.* at 539.

ished not to substitute their judgment for that of the administrators.[139]

While it is true that ensuring the detainee's presence at trial is a legitimate goal, justifying restraints during detention, the Court held that it is not the only one. "[T]he 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."[140] Any measure that can be characterized as for security purposes is within the meaning of "management of the facility."[141] The Court expressly avoided any further clarification of the alternative purposes that would be constitutionally permissible.[142] Nor did the Court provide any guidance concerning how the second prong of the test is to be implemented. The Court expressly stated that comparisons with professional recommendations and practices at other institutions are not to take place.[143]

Applying this two-prong test to the practice of "double-bunking," the Court found no violation of due process to have occurred.[144] The Court admitted that the rooms were small,[145] but considered the fact that the detainees were locked in their rooms for only seven hours a day, coupled with the fact that most were released from the institution within sixty days, sufficient to make the treatment constitutional.[146] The Court did not believe that the ability to comply with the district court order to cease "double-bunking" was at all relevant in determining the reasonableness of the practice.[147]

The majority then set out four principles that it would consider when evaluating the constitutionality of the other four practices. The first was that neither convicted prisoners nor detainees "forfeit all constitutional protection by reason of their . . . confinement."[148] The second was "that these rights are . . . subject to restrictions and limitations."[149] The third was that "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."[150] The fourth principle required that deference be shown to detention facility officials even when they, in fact, have no expertise.[151]

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139. *Id.* at 540 n.23.
140. *Id.* at 540.
141. *Id.*
142. *Id.*
143. *Id.* at 543 n.27.
144. *Id.* at 542.
145. *Id.* at 543.
146. *Id.*
147. *Id.* at 542-43 n.25.
148. *Id* at 545.
149. *Id.*
150. *Id.* at 546.

The Court then analyzed the four remaining practices at issue in light of these principles to determine whether they constituted independent constitutional violations. All of these practices were held to be constitutional. The Court then applied the punitive intent test to determine if any of these practices constituted punishment. The Court held that they did not.

C. *Separate Opinions*

Mr. Justice Powell agreed with the majority except that he felt that "some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case."[152]

Mr. Justice Marshall attacked the majority's standard as ineffectual and pointed out its failure to consider what he felt to be "the most relevant factor, the impact that restrictions may have on inmates."[153] Justice Marshall felt that the majority's "due process-punishment" test might have been useful if effect had been given to all of the *Kennedy* tests.[154] The failure to do so, however, "contract[ed] a broad standard, sensitive to the deprivations imposed on detainees, into one that seeks merely to sanitize official motives and prohibit irrational behavior."[155]

Justice Marshall advocated instead "[a] test that balances the deprivations involved against the state interests assertedly served. . . . The greater the imposition on detainees, the heavier burden of justification the Government would bear."[156] At the least, Justice Marshall would "require a showing that a restriction is substantially necessary to jail administration."[157] If, however, the restriction implicates fundamental interests or "inflicts significant harms," the restriction must meet a more stringent test: it must serve "a compelling necessity of jail administration."[158] Applying this standard, Justice Marshall would remand on the question of "double-bunking" because no real factual inquiry was made prior to granting summary judgment.[159] He would affirm the lower courts on all other issues.[160]

Mr. Justice Stevens wrote a dissenting opinion in which Mr. Justice Brennan joined. Justice Stevens viewed the majority's holding that " 'under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law' "[161] as a

151. *Id.* at 547.
152. *Id.* at 563.
153. *Id.*
154. *Id.* at 564.
155. *Id.* at 565.
156. *Id.* at 569-70.
157. *Id.* at 570.
158. *Id.*
159. *Id.* at 572.
160. *Id.* at 572-80.
161. *Id.* at 580.

positive step away from the strictures imposed upon due process adjudication by the entitlement theory. To Justice Stevens, "[t]he due process guarantee is individual and personal. . . . [A]n innocent person [must] be treated as an individual human being and be free of treatment which, as to him, is punishment."[162]

Justice Stevens characterized the majority's test as "unduly permissive."[163] He would use a more objective test.[164] He, too, would evaluate punitive intent by reference to the *Mendoza-Martinez*[165] tests, but like Justice Marshall, and unlike the majority, he would apply the first two as well as the last two.[166] Applying this standard, Justice Stevens would remand on the constitutionality of the "double-bunking"[167] and affirm the lower courts on all other issues.[168]

V. *Bell v. Wolfish*: A Healthy Sense of Realism

A. *Analysis of the Court's Reasoning*

The majority approached the question of the constitutionality of the "double-bunking" practice first because it was "alleged only to deprive pretrial detainees of their liberty without due process of law in contravention of the Fifth Amendment."[169] The other four practices were then analyzed in terms of individual provisions of the Constitution to determine if they were independently violative of the Constitution. Once they were analyzed in those terms, they were then analyzed in terms of the test set out by the majority in the first part of the opinion to determine if they violated the detainees' interest in liberty. The Court's analysis of these four practices as independent constitutional violations is not discussed in this Comment. Discussion will instead be centered on the majority's formulation of the standard to be applied when only a "liberty" interest is at issue.

The majority began its analysis of the appropriate standard by relegating the presumption of innocence to the status of a mere procedural tool.[170] It is to be used to assign the burden of proof in a criminal trial and to admonish the jurors to determine a defendant's innocence or guilt based only on the evidence produced at that trial. The majority was willing to admit that the presumption of innocence "plays an important role in our criminal justice system,"[171] but refused to allow it to play any role at all in

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162. *Id.* at 584.
163. *Id.* at 585.
164. *Id.* at 586.
165. 372 U.S. 144 (1963).
166. Bell v. Wolfish, 441 U.S. 520, 588 (1979) (Stevens, J., dissenting).
167. *Id.* at 596.
168. *Id.* at 589.
169. *Id.* at 530.
170. *Id.* at 533.
171. *Id.*

establishing the constitutional rights of detainees. This position is not supported by the majority opinion's discussion, nor is it supportable.

The presumption of innocence is a doctrine "not predicated upon any express provision of the federal constitution, but upon ancient concepts antedating the development of the common law."[172] It is more than just a procedural tool. It is, in fact, not a presumption at all in the strict evidentiary sense of that term. While it is true that it is the foundation upon which the decision to allocate the burden of proof in a criminal trial is based, that is not the only role this important doctrine has played in the development of our law.

Eighty-five years ago the Supreme Court observed "[t]he principle that there is a presumption of innocence . . . lies at the foundation of the administration of our criminal law."[173] The operation of the bail system and the management of detention facilities come under the rubric of "administration of our criminal law." The Court has acknowledged this in two opinions. Almost twenty years ago, in *Stack v. Boyle*,[174] the Court recognized that the presumption of innocence was not only a procedural tool but also that it had particular relevance to the administration of the bail system and the treatment to be accorded detainees. After *Bell*, it is doubtful that the presumption will have relevance to either.

The majority then pointed out that the initial decision to detain is not at issue in *Bell*.[175] While it is true that the constitutionality of detention was not to be decided here, it was important for the Court to take into consideration the fact that the bail system was not being administered according to the goals set out in bail statutes or by the Court itself in *Stack v. Boyle*.[176] Were the system administered according to these goals of ensuring the detainee's presence at trial and preventing punishment prior to a determination of guilt, a large part of the problems in detention today would be alleviated. The most obvious way to avoid overcrowding and excessive use of government funds for housing detainees is by placing fewer persons in detention. Many bail statutes, including the Bail Reform Act of 1966,[177] under which the detainees in *Bell* were held, provide for a variety of release provisions in lieu of setting bail. Unfortunately many judges have lost sight of the statutory goals and have embossed the system with their own design. The majority's failure to look at the realities of the bail system must account, at least in part, for its failure to accord the pretrial detainee greater constitutional rights.

The majority then turned to fashioning its own standard of review.

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172. Reynolds v. United States, 238 F.2d 460, 463 (9th Cir. 1956).
173. Coffin v. United States, 156 U.S. 432, 453 (1895).
174. 342 U.S. 1 (1951).
175. 441 U.S. 520, 533 (1979).
176. 342 U.S. 1 (1951).
177. 18 U.S.C. § 3146 (1976).

The Court stated that "the Due Process Clause protects a detainee from certain conditions and restrictions of pretrial detainment."[178] When the only interest at stake is deprivation of liberty, however, the majority limited the due process clause to protecting the detainee from *only* those conditions that amount to punishment.[179] The Court based this freedom from punishment upon the fact that the detainee has not yet been found guilty of a crime. Thus, while the Court refused to indulge in a presumption that the detainee is innocent, it did admit that he may not yet be deemed guilty.

According to the majority, however, the detainee's interest in freedom from discomfort is of insufficient weight to merit constitutional protection. The Court stated "that a detainee's desire to be free from discomfort . . . simply does not rise to the level of those fundamental liberty interests delineated in cases such as *Roe v. Wade*, . . . *Eisenstadt v. Baird*, . . . *Stanley v. Illinois*, . . . *Griswold v. Connecticut*, . . . [and] *Meyer v. Nebraska*."[180] In fact the detainee's liberty interest is even more worthy of protection.

In *Ingraham v. Wright*[181] the Court stated: "The Due Process Clause of the Fifth Amendment . . . was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown."[182] The cases cited by the Court in *Bell* as recognizing "fundamental liberty interests" were those concerning the individual's privacy interest in matters of family planning or custody and education of children. While the common law of England had not expressly provided individuals such protections it recognized the need for protecting the detainee:

> Upon the whole, if the offense be not bailable, or the party cannot find bail, he is to be committed to the county goal by the *mittimus* of the justice . . . ; there to abide till delivered by due course of law. . . . But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and the trial, a prisoner ought to be used with the the utmost humanity, and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only.[183]

Thus, from the beginning, the majority in *Bell* allowed the detainee only limited protection of his constitutional rights. In limiting his interest to freedom from punishment the Court allows the detainee to "be loaded with needless fetters [and] subjected to other hardships" so long as these do not rise to the level of punishment.

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178. 441 U.S. 520, 533 (1979).
179. *Id.* at 535.
180. *Id.* at 534-35 (citations omitted).
181. 430 U.S. 651 (1977).
182. *Id.* at 672-73.
183. 4 W. BLACKSTONE, COMMENTARIES* 300.

Based upon its holding that a detainee may not be punished, the majority stated the appropriate test to be "whether those conditions [or restrictions] amount to punishment of the detainee."[184] To implement this test the term "punishment" had to be defined. The Court first pointed out that there is a difference between punitive measures and regulatory restraints.[185] Regulatory restraints are constitutional; punitive measures imposed prior to an adjudication of guilt are not. The Court then cited three cases in which this distinction was made.

These cases, *Kennedy v. Mendoza-Martinez*,[186] *Flemming v. Nestor*,[187] and *DeVeau v. Braisted*,[188] all dealt with the issue whether particular legislative acts were punitive in nature or merely regulatory. They all support the idea that the purpose behind the statute is determinative.[189] If Congress intended to punish these persons, the act will be characterized as punitive. If there was no intent to punish, there was no punishment.[190]

The Court in *Mendoza-Martinez* recognized the difficulties inherent in determining the legislative intent behind any particular statute. It therefore set out several factors to consider in determining whether the purpose behind a statute is punishment. These same factors were set out by the Court in *Bell*, where they were characterized as "useful guideposts." Apparently, all of these "guideposts" were not equally useful since the Court chose to give effect to only the last two in formulating its test of punitive intent.[191]

Unless the detainee can show "expressed intent to punish on the part of detention facility officials,"[192] the determination of whether the detainees' constitutional rights have been violated 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]."[193] Since the likelihood of a detainee being able to show an express punitive intent is very small, the determination whether a constitutional provision has been violated will nearly always turn upon the answers given to these two questions. Thus, these two questions constitute the majority's two-prong punitive intent test.

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184. Bell v. Wolfish, 441 U.S. 520, 535 (1979).

185. *Id.* at 537.

186. 372 U.S. 144 (1963).

187. 363 U.S. 603 (1960).

188. 363 U.S. 144 (1960).

189. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963); Flemming v. Nestor, 363 U.S. 603, 613-14 (1960); DeVeau v. Braisted, 363 U.S. 144, 160 (1960).

190. In an earlier opinion, not cited by the Court in *Bell*, the Supreme Court had recognized that "the severity of the disability imposed . . . is relevant to this decision." Trop v. Dulles, 356 U.S. 86, 96 n.18 (1958).

191. 441 U.S. 520, 538 (1979).

192. *Id.* at 538.

193. *Id.*

To make the first prong of the test useful the Court must answer two questions. The first is which "alternative purposes" will satisfy the test. The second is what is the meaning of "rationally connected." The Court answers the second of these questions by pointing out that "a restriction or condition is not reasonably related to a legitimate goal if it is arbitrary or purposeless."[194] Apparently then, any restriction or condition that is less than arbitrary or purposeless is "rationally connected." Add to this the fact that judges are not to substitute their judgments for those of administrators and this part of the test becomes meaningless.

The permissible "alternative purposes" to which this restriction must be rationally connected are never fully delineated. The Court did not feel the need to do so:

> 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.[195]

The second prong of the Court's punitive intent test is "[w]hether [the restriction] appears excessive in relation to the alternative purpose assigned [to it]."[196] This would appear to require a comparison of the practices and restrictions imposed in this institution with those imposed in similar institutions where the same objectives are sought. Instead, the Court discourages such comparison by pointing out that it would serve no purpose since the particular facts in each case differ.[197]

In recognizing that the due process clause prohibits the punishment of a detainee, the Court appeared to score a major victory for the detainee. It did not. In fact, this was a major loss. First, restrictions on detainees that do not rise to the level of independent constitutional violations and that do not rise to the level of punishment, however that term is defined, are not cognizable under the due process clause. In contrast, the tests applied by many of the lower courts and the tests applied by Justice Marshall would have considered restrictions to have violated the detainees' right to liberty when they were not necessary to the attainment of the goals of the bail system. The detainees' rights were further narrowed by the Court's construction of the term "punishment" to include only those restrictions or practices imposed with punitive intent.

As Justice Marshall pointed out, it is extremely unrealistic to make the detention administrators' intent the central element in determining the

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194. *Id.* at 539.
195. *Id.* at 540.
196. *Id.* at 538.
197. *Id.* at 543 n.27.

constitutionality of the restrictions they impose.[198] He cited two main reasons. First, the intent behind legislative acts like those in question in *Mendoza-Martinez*,[199] *Flemming*,[200] and *DeVeau*[201] is much more easily discerned than the intent behind the administrative decisions of detention officials. Second, those officials may honestly, but mistakenly, believe that institutional security requires a particular restriction.

It is, therefore, highly unlikely that the detainee could prove an express punitive intent on the part of detention facility administrators. This inability of the detainee to prove an express intent to punish will require that he prove that (1) there is no alternative purpose to which the restriction can rationally be connected or (2) the restriction is excessive in relation to the alternative purpose assigned to it. To carry this burden the detainee must, in effect, prove that no purpose other than punishment can possibly be ascribed to the restriction in issue without even the benefit of evidence of how the same security need is met at similar institutions.

The majority then described four principles to be considered in deciding the constitutionality of the other four practices in issue. Although this Comment is not concerned with the details of the Court's analysis of these practices as independent constitutional violations, these principles are illustrative of the attitude with which the Court approached the case as a whole.

The first principle was "that [since] convicted prisoners do not forfeit all constitutional protections by reason of their confinement in prison . . ., pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights."[202] The second principle was that "these rights [of both prisoners and detainees] are . . . subject to restrictions and limitations."[203] The third was that "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."[204] The Court then cited *Jones v. North Carolina Prisoners' Labor Union*[205] for the proposition that "even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in light of the central objective of prison administration, safeguarding institutional security."[206] The majority cited *Pell v. Procunier*[207] in support of its final principle: "in the absence of substantial

198. *Id.* at 565.
199. 372 U.S. 144 (1963).
200. 363 U.S. 603 (1960).
201. 363 U.S. 144 (1960).
202. Bell v. Wolfish, 441 U.S. 520, 545 (1979).
203. *Id.* at 545.
204. *Id.* at 546.
205. 433 U.S. 119 (1977).
206. Bell v. Wolfish, 441 U.S. 520, 547 (1979).
207. 417 U.S. 817 (1974).

evidence in the record to indicate that the officials have exaggerated their response to these considerations, [the preservation of internal security, order and discipline and the maintenance of institutional security] courts should ordinarily defer to their expert judgment in such matters."[208] This is true, said the Court, even in those cases in which the "expert" has no background in corrections but has acquired his position "only by Act of Congress or of a state legislature."[209] This was in part because of the Court's view that the "operation of our correctional facilities is peculiarly the province of the Legislative and Executive branches."[210]

These four principles reflect the majority's narrow view of the constitutional rights of pretrial detainees. Although the Court began by pointing out that detainees have "*at least* those rights . . . enjoyed by convicted prisoners,"[211] it ends by pointing out that they, in fact, have *no more* than those same rights. Both *Jones* and *Pell*, the two cases the Court cites in support of its last two principles, applied a rational basis test in the prison context and required extensive deference to administrators.[212] This same test is applied here in the detention context although it is clothed in an apparently more complex style. The two-prong punitive intent test described by the Court in *Bell* requires only that the restriction or condition have a rational relationship to a purpose other than punishment and that deference is to be accorded to detention administrators in determining what purpose is to be assigned to any particular restriction. Thus, not only has the "hands-off" approach returned to examinations of the constitutional rights of convicted prisoners, but it has been extended to cover questions concerning the constitutional rights of pretrial detainees.

B. *Why This Decision?*

Several factors played a part in the majority's decision in *Bell*. The first was the Court's belief that detention facility officials have greater experience and expertise in the area of detention administration than do judges.[213] The second factor was the Court's view that, even in those cases in which the administrator does not in fact have greater expertise and experience than the judge, the judge should not interfere because the administration of detention facilities has been entrusted to the legislative and executive branches of government.[214] The Court apparently felt that it would be overstepping the jurisdiction of the federal courts to undertake review of this type of decision when made by the other branches of government. A third factor, one not mentioned by the Court, may very well have been a desire to decrease the caseload of the federal courts.

208. *Id.* at 827.
209. Bell v. Wolfish, 441 U.S. 520, 548 (1979).
210. *Id.* at 547 n.29.
211. *Id.* at 545 (emphasis added).
212. *See* discussion accompanying notes 38-45 *supra*.
213. Bell v. Wolfish, 441 U.S. 520, 547 (1979).
214. *Id.* at 547 n.29.

Approximately one of every eight cases filed in the federal courts of appeals are prisoner's rights cases.[215] It would, under these circumstances, be reasonable to assume that an opinion narrowly construing the rights of detainees would cause a substantial decrease in the federal court caseload.

Another factor that the Court may have considered in deciding *Bell* is the impact that this decision would have on the administration of detention facilities across the United States. Because conditions at most detention facilities across the country are decidedly worse than those at MCC,[216] to have held the restrictions and practices at MCC unconstitutional would have meant that nearly every detention center in the United States was violating the constitutional rights of pretrial detainees on a daily basis. The Court simply could not bring itself to make such a sweeping holding.

C. *What This Opinion Means To Detainees*

> When the history of our criminal justice system is chronicled, no doubt one of its most sobering pages will describe the sad state of this nation's prisons and jails. Whether it be in filthy, narrow cells of an Alabama penitentiary or in overcrowded dormitories in a Bronx house of detention, we have quartered individuals, both convicted or merely accused of crimes, major and minor, under conditions that shock the conscience of civilized men.[217]

Bell v. Wolfish strikes a severe blow to those who advocate humane treatment of those detained in the jails of this country. It marks a return to the "hands-off" approach of fifteen years ago. It is true that the government has a valid interest in maintaining the internal security of detention facilities. This interest, however, must not be allowed to abrogate totally all the constitutional rights of those who must be detained. These persons are to be presumed innocent until proven guilty in a court of law. They must be accorded treatment that does not infringe upon their right to be as free as possible while the state pursues its one legitimate interest in detention: securing the accused's appearence at trial. Before *Bell* many federal courts would have allowed this freedom. Now they cannot.

The Court's near-total deference to the decisions of detention officials fails to recognize that "power corrupts" and that even well-meaning persons sometimes overestimate the exigencies of a situation. "[T]he Due Process Clause [was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."[218] By failing to apply the due process clause "to protect the fragile values" of these detainees, the Court has abdicated the

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215. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, MANAGEMENT STATISTICS FOR U.S. COURTS 12 (1976).

216. *See* Feeley v. Sampson, 570 F.2d 364, 366-68 (1st Cir. 1978), Miller v. Carson, 563 F.2d 741, 744-45 (5th Cir. 1977).

217. Wolfish v. Levi, 573 F.2d 118, 120 (2d Cir. 1978).

218. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

judiciary's traditional role of determining guilt and innocence and allowed this role to be taken by detention administrators and, all too often, by individual prison guards.

The realities of detention conditions should be sufficient evidence that the executive and legislative branches are not properly performing their duties. The facilities in which detainees are housed are often worse than those provided for convicted prisoners.[219] "Inadequate ventilation, poor lighting, fetid aromas, noise, sickening food, dirty blankets, leaky roofs, and lax security characterize many jails"[220] in this country. Overcrowding is also common, resulting in many detainees sleeping on the floor. These horrid physical conditions are a constant threat to health and safety. Were the legislative and executive branches of government acting responsibly toward these detainees, the courts would not need to review their decisions. Since the other branches are not fulfilling their duty in this regard, the courts must act responsibly to see that these conditions are improved.

D. *Alternative Approaches*

The better approach is that advocated by Justice Marshall. He rightly noted that "the Due Process Clause focuses on the nature of deprivations, not on the persons inflicting them. . . . [I]t is the effect of conditions of confinement, not the intent behind them, that must be the focal point of constitutional analysis."[221]

Marshall favored a balancing test. At the least he would require the detention officials to show that the condition or practice is "substantially necessary to jail administration."[222] If, however, the restriction "inflicts significant harms" or implicates fundamental interests, administrators must show that it "serves a compelling necessity of jail administration."[223]

This standard requires both the detainee and the detention officials to prove their cases. Marshall recognized that the detainee has liberty interests other than freedom from punishment but was realistic in his approach to protecting these interests. He acknowledged that the government has an interest in "the security and administrative needs of the institution as well as . . . fiscal constraints."[224] Unlike the majority, however, Marshall would require proof that these needs are in fact the basis for imposing a particular restriction. He is unwilling to presume that these reasons alone underlie all detention facility decisions. In fact, when he applies this test to the conditions at issue in *Bell*, they all fail.[225]

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219. CORRECTIONS, *supra* note 61, at 99, 102 (1973); THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION JUSTICE, TASK FORCE REPORT: CORRECTIONS 24, 25 (1967).

220. LEAA SURVEY, *supra* note 52 at 22.

221. Bell v. Wolfish, 441 U.S. 520, 567 (1979).

222. *Id.* at 570.

223. *Id.*.

224. *Id.* at 570-71.

225. *Id.* at 572-73.

Other steps could also have been taken. Detainees could be given greater access to lawyers to decrease the federal courts' caseload. These attorneys could serve as a screening device for the courts. In this way fewer trivial suits would be filed. Also, grievance procedures could be set up within the detention facility to handle many of those complaints that do not rise to the level of constitutional violations even under the balancing test but which do create needless discomfort for an individual detainee.

VI. CONCLUSION

This Comment has sought both to analyze the Court's holding and rationale in *Bell v. Wolfish*, and to place this opinion in perspective. In reaching this goal it has been necessary to examine the Supreme Court's prior disposition of prisoner's rights cases, to distinguish the status of a detainee from that of a convicted prisoner, and to review the standards applied by the various courts of appeals who have considered these questions.

Blackstone stated over 200 years ago that "a detainee ought to be used with the utmost humanity, and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only."[226] It is a sad commentary on the current state of American jurisprudence to admit that today's standard is less than the one applied at the time this country was founded. This is particularly discouraging since our forefathers attempted to make provisions against such infringements of a citizen's liberty by including protections in the Constitution and by providing for each of the three branches of government to serve as a check on the others.

In *Bell*, the majority shows a complete abdication of judicial responsibility. This is made especially clear by the requirement that courts defer even to those administrators whose expertise is based solely upon the fact that they were appointed to their positions of authority. While administration of penal and detention facilities is admittedly within the realm of the executive and legislative branches of our government, it is the responsibility of the judiciary, and the judiciary alone, to determine who will and who will not be punished. Detainees have not yet been determined to be guilty and thus in need of punishment. The judiciary must not let this important decision be taken over by the other branches of government.

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226. 4 W. BLACKSTONE, COMMENTARIES* 300.