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Constitutional Law—CRIMINAL LAW—PRETRIAL DETAINEES MAY BE SUBJECTED TO CONDITIONS OF CONFINEMENT REASONABLY RELATED TO LEGITIMATE GOVERNMENT OBJECTIVES—*Bell v. Wolfish,* 99 S. Ct. 1861 (1979).

Pretrial detainees[1] brought a class action[2] challenging the constitutionality of numerous practices and conditions of confinement at the federally operated Metropolitan Correction Center (MCC)[3] in New York City. The challenged practices and conditions included: (1) housing two inmates in rooms intended for single occupancy (double-bunking), (2) prohibiting the receipt of hardback books not mailed directly from the publisher, (3) prohibiting the receipt of packages from outside the institution, and (4) conducting visual body-cavity searches of pretrial detainees following contact visits.[4]

The district court enjoined these and other MCC practices and conditions on various constitutional grounds, including the pretrial detainees' right to be presumed innocent.[5] The United States Court of Appeals for the Second Circuit affirmed the district court's ruling in part and held that the MCC had failed to make a showing of "compelling necessity" sufficient to justify the substantial infringement of privacy caused by double-bunking.[6]

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1. Pretrial detainees are "unconvicted individuals awaiting trial, held at the MCC [Metropolitan Correction Center] because they could not post bail." Wolfish v. Levi, 573 F.2d 118, 122 n.6 (2d Cir. 1978). The term is also used to include those accused of nonbailable offenses. *See* Bail Reform Act § 3(a), 18 U.S.C. § 3146 (1976).

2. The action originated when inmate Louis Wolfish, proceeding pro se, sought a writ of habeas corpus. A week later, on Dec. 2, 1975, the action was declared a class action on behalf of all persons confined at the Metropolitan Correction Center in New York City. Wolfish v. Levi, 573 F.2d 118, 122 (2d Cir. 1978).

3. The MCC is a short-term custodial facility designed primarily to house persons detained in custody prior to trial for federal criminal offenses. In addition, the MCC confines some convicted inmates awaiting transfer to other facilities and others awaiting trial under writs of habeas corpus. The facility also houses witnesses in protective custody and persons incarcerated for contempt. *Id.* at 122 n.6.

4. The amended petition also decried the following: (1) a prohibition against the use of personal typewriters, (2) the monitoring of personal mail, (3) arbitrary disciplinary procedures, (4) inadequate prisoner classification, (5) poor ventilation, (6) inadequate and unsanitary food, (7) improper restrictions on religious freedom, and (8) a requirement that detainees not be present during room inspections by officials. *Id.* at 123 n.7.

5. The district court in two opinions and in a series of orders enjoined 20 MCC practices on constitutional and statutory grounds. *See* United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114 (S.D.N.Y. 1977); United States *ex rel.* Wolfish v. United States, 428 F. Supp. 333 (S.D.N.Y. 1977).

6. Wolfish v. Levi, 573 F.2d 118, 126 (2d Cir. 1978). The double-bunking issue involved an alleged due process violation and was the issue emphasized by the majority opinion. This Note, therefore, will focus on the double-bunking issue and the court's due process test for pretrial detention.

In *Bell v. Wolfish*[7] the United States Supreme Court reversed. The Court, examining for the first time the constitutional rights of pretrial detainees,[8] held that neither the due process clause nor the presumption of innocence doctrine provides the source for a compelling necessity standard.[9] The majority held that in evaluating conditions of pretrial confinement that allegedly involve deprivations of liberty without due process of law the proper inquiry should be whether such conditions or practices amount to punishment of the detainee.[10] Conditions or practices are unconstitutional if detention facility officials intend by them to punish detainees.[11] Punitive intent may be inferred if prison practices are not "reasonably related" to governmental interests; but if they are reasonably related, the practices do not constitute punishment.[12]

I. Background

The federal judiciary has traditionally taken a "hands-off" approach to the problems of prison administration.[13] In recent years, however, the courts have become increasingly involved in litigation brought by inmates challenging various conditions of their confinement.[14]

In 1974 the Supreme Court instructed courts to discharge their duty to protect individual rights when a prison regulation offends a "fundamental constitutional guarantee."[15] In a case decided the same year the Court stated that there is no longer an

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7. 99 S. Ct. 1861 (1979).

8. The Supreme Court raised the issue in *Gerstein v. Pugh,* 420 U.S. 103, 125 n.27 (1975), but did not resolve it. *See id.* at 126-27 (Stewart, J., concurring).

9. 99 S. Ct. at 1869-71.

10. *Id.* at 1872-74.

11. *Id.* at 1873-74.

12. *Id.*

13. For a history of the hands-off doctrine, see Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts,* 72 YALE L.J. 506 (1963). *See also* Note, *Constitutional Rights of Prisoners: The Developing Law,* 110 U. PA. L. REV. 985 (1962).

14. In 1972 the Supreme Court twice reversed dismissals of prison suits, rejecting the lower courts' application of the abstention doctrine and ordering trials on the merits. *See* Cruz v. Beto, 405 U.S. 319, 321 (1972); Haines v. Kerner, 404 U.S. 519, 520 (1972). The number of such cases continued to increase in spite of the emphasis 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 reform." The Court in *Procunier* also noted that courts are "ill suited to act as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints." *Id.* at 405 n.9.

15. Procunier v. Martinez, 416 U.S. 396, 405-06 (1974); *accord,* Johnson v. Avery, 393 U.S. 483, 486 (1969).

"iron curtain drawn between the Constitution and the prisons of this country."[16] These and other rulings were the impetus behind a number of lower court cases dealing with the constitutional rights of both sentenced prisoners and pretrial detainees.[17]

A. *Pretrial Detainees and Punishment*

As the judiciary became more involved in defining the rights of pretrial detainees, issues often centered on whether conditions of confinement amounted to "punishment," which cannot be constitutionally administered until after a determination of guilt.[18] The leading case defining punishment was *Kennedy v. Mendoza-Martinez.*[19] In *Kennedy* the Supreme Court examined a statute that automatically divested persons of citizenship who left or remained outside the United States during national emergencies to avoid military service. In finding the sanction punitive, and therefore unconstitutional, the Court listed the guidelines that have traditionally been applied to determine whether an act of Congress is penal or regulatory. The guidelines included whether the sanction (1) involves an affirmative disability or restraint; (2) has historically been regarded as punishment; (3) operates to promote the traditional aims of punishment—retribution and deterrence; (4) has an alternative purpose assignable to it; and (5) appears excessive in relation to the alternative purpose.[20]

In contrast to these guidelines, the Supreme Court has also recognized that confinement in an institution necessarily brings with it a withdrawal or limitation of certain rights and privileges.[21] The Court accordingly has granted prison administrators wide-ranging deference to adopt policies necessary to preserve

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16. Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

17. *See, e.g.*, Norris v. Frame, 585 F.2d 1183, 1187 (3d Cir. 1978); Fano v. Meachum, 520 F.2d 374, 376 (1st Cir. 1975).

18. *See* notes 32-42 and accompanying text *infra*. One of the earliest statements concerning pretrial confinement comes from Blackstone, not the courts:

> [T]his imprisonement, 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, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only . . . .

4 W. BLACKSTONE, COMMENTARIES 297 (Oxford 1769).

19. 372 U.S. 144 (1963).

20. *Id.* at 168-69.

21. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 822 (1974); Price v. Johnson, 334 U.S. 266, 285 (1948).

internal order and security.[22] The resulting problem of how to determine whether a prison practice is punitive, and therefore unconstitutional, or whether it falls within the discretion granted detention officials, has been dealt with differently by the courts.[23]

Part of the difficulty exists because of the conflicting interests at stake. Pretrial incarceration can have strong effects upon a detainee. It deprives him not only of his liberty, but of his ability to support himself and his dependents. It casts him in an aura of guilt, and may cost him his job.[24] Additionally, one study suggests that pretrial detainees are more likely to be convicted or to receive prison sentences than defendants who remain free while they await trial.[25] This disparity, according to at least one commentator, cannot be accounted for by a comparison of the freed and detained defendants' prior records, bail amounts, employment histories, or counsel's competence.[26]

The competing concern is that detainees pose a serious threat to the internal security of a facility.[27] Referring to detention centers that house pretrial detainees, one court stated: "In some respects, the difficulty in maintaining order, discipline, and security in such a setting far exceeds that in facilities for convicted persons . . . ."[28] Some judges feel that because pretrial detainees are likely to be recidivists or persons charged with serious crimes, they should be subjected to even greater restrictions that those imposed on regular inmates.[29]

B. *Sources of the Right to Be Free from Punishment*

Prior to 1977 many courts assumed that the eighth amendment prohibition against "cruel and unusual" punishment was

22. *See, e.g.*, Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 128 (1977); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

23. Indeed, a conflict existed among the circuits. This is one reason the Supreme Court granted certiorari in the instant case. 99 S. Ct. at 1866.

24. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 114 (1974); Commonwealth *ex rel.* Hartage v. Hendrick, 439 Pa. 584, 601, 268 A.2d 451, 459 (1970) (Roberts, J., dissenting). *See generally* Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 2 WIS. L. REV. 441, 450-59 (1978).

25. Ares, Rankin, & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. REV. 67, 84-86 (1963).

26. Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641, 655 (1964).

27. 99 S. Ct. at 1878 n.28.

28. Thomas v. State, 39 Md. App. 217, 227 n.11, 384 A.2d 772, 779 n.11 (1978).

29. DiMarzo v. Cahill, 575 F.2d 15, 20-21 (1st Cir.) (Campbell, J., concurring), *cert. denied*, 99 S. Ct. 312 (1978).

directly applicable to pretrial detainees.[30] In 1977, however, the Supreme Court held in a different context that the eighth amendment is designed to protect only those persons convicted of crimes.[31] Courts, therefore, have had to look elsewhere to find the source of a pretrial detainee's right to be free from punishment.

1. *The presumption of innocence*

One of the fundamental tenets of the American criminal system is that a person is presumed innocent until proven guilty.[32] Many courts have considered this principle to be the source of a pretrial detainee's right to be free from punishment.[33] For example, in *Conklin v. Hancock*,[34] the court stated: "Petitioner is a pretrial detainee and not a convict. Under the Constitution, he is presumed to be innocent of the pending and untried criminal charges against him. He cannot be subject to any punishment . . . ."[35]

At least one court has rejected the use of the presumption of innocence doctrine in cases involving pretrial detainees,[36] although the Supreme Court, at least until *Bell v. Wolfish*, had implied that its use in such a context might be appropriate.[37]

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30. *See, e.g.*, Johnson v. Lark, 365 F. Supp. 289, 302 (E.D. Mo. 1973); Jones v. Wittenberg, 323 F. Supp. 93, 99 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

31. Ingraham v. Wright, 430 U.S. 651, 664 (1977).

32. *See, e.g.*, Coffin v. United States, 156 U.S. 432, 453 (1895).

33. *See, e.g.*, Campbell v. McGruder, 580 F.2d 521, 529 (D.C. Cir. 1978); 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).

34. 334 F. Supp. 1119 (D.N.H. 1971).

35. *Id.* at 1121.

36. Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1080 n.1 (3d Cir. 1976) ("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."). *See also* Campbell v. McGruder, 580 F.2d 521, 568 (D.C. Cir. 1978) (MacKinnon, J., concurring in part, dissenting in part) (pretrial detainee's presumption of innocence sufficiently rebutted by competent evidence to justify his confinement).

37. *See* McGinnis v. Royster, 410 U.S. 263 (1973); Stack v. Boyle, 342 U.S. 1 (1951). In *McGinnis* the unavailability of rehabilitation programs to a pretrial detainee made it difficult for him to receive "good time" credit. The Court said, "[I]t would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with the presumption of innocence." 410 U.S. at 273. In *Stack* the Court stated that the right to reasonable bail before trial "serves to prevent the infliction of punishment prior to conviction," and "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." 342 U.S. at 4.

2. *Substantive rights under the due process clause*

The courts have also considered the due process clause[38] as a source of an unconvicted person's substantive right[39] to be free from many restraints of confinement. For example, in *Jones v. Wittenberg*[40] the court held that the crowded conditions that existed in a county jail violated the detainees' due process rights. In ordering the alleviation of the crowded conditions, the court said, "Obviously, no person may be punished except by due process of law."[41] In many analogous situations the Supreme Court has applied this general principle that punishment can only follow a determination of guilt.[42] In addition, the due process clause, along with the equal protection clause,[43] has been relied upon to protect detainees from less tolerable conditions of confinement than those provided for convicted criminals.[44]

C. *Standards of Review in Detainee Cases*

The courts that have dealt with the problems of pretrial confinement have had little difficulty in agreeing that detainees should not be punished. The more difficult problem has been to determine what constitutes punishment. A disparity has arisen as courts have attempted to set a standard by which to determine

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38. The due process clause is found in both the fifth and fourteenth amendments. The fifth amendment applies here because the MCC is a federal facility. It reads in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

39. The due process clause supplies not only a "procedural guarantee against the deprivation of 'liberty,' but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State." Kelley v. Johnson, 425 U.S. 238, 244 (1976).

40. 323 F. Supp. 93 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

41. 323 F. Supp. at 100. *See also* Norris v. Frame, 585 F.2d 1183, 1187-88 (3d Cir. 1978) (detainee deprived of liberty without due process when drug treatment discontinued); Rhem v. Malcolm, 507 F.2d 333, 336-37 (2d Cir. 1974) (detainees protected from punishment as a matter of due process).

42. *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165-67, 186 (1963) (statute stripping draft evaders of citizenship held unconstitutional); Wong Wing v. United States, 163 U.S. 228, 237 (1896) (a judicial trial is required before aliens may be subjected to punishment at hard labor). For instances where the Court recognized that regulatory restraints may be imposed without due process of law, see Flemming v. Nestor, 363 U.S. 603, 613-14 (1960), and De Veau v. Braisted, 363 U.S. 144, 160 (1960).

43. *Compare* Hamilton v. Love, 328 F. Supp. 1182, 1191 (E.D. Ark. 1971) (equal protection demands that pretrial conditions of confinement be "superior" to those for sentenced prisoners) *with* Rhem v. Malcolm, 507 F.2d 333, 336 (2d Cir. 1974) (equal protection clause protects detainees from "worse" conditions than imposed on sentenced prisoners). *Bell v. Wolfish* did not involve the equal protection issue.

44. *See, e.g.*, United States *ex rel.* Tyrrell v. Speaker, 535 F.2d 823, 827 (3d Cir. 1976).

the constitutionality of practices and conditions of pretrial confinement.

1. Compelling necessity or least restrictive alternative test

A majority of federal courts have held that pretrial detainees should not be subjected to any hardships or restrictions except those justified by the "compelling necessities" of jail administration, or that are "absolutely requisite" for the purpose of confinement.[45] This standard relies in part on a line of Supreme Court cases holding that where certain "fundamental rights" are involved, limiting such rights may be justified only by a "compelling state interest."[46] In applying this rule, however, many courts have required that a compelling necessity exist to justify every condition of confinement, whether it infringes a fundamental interest or not.[47]

The courts applying the compelling necessity standard frequently have used a "least restrictive alternative" test as well. This doctrine requires that each deprivation imposed on detainees be the least restrictive alternative available to maintain order and security.[48] The practical results of this doctrine have been (1) a prohibition against subjecting pretrial detainees to harsher conditions than those imposed on convicted criminals,[49] and (2) a rule that pretrial detainees can be deprived of their

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45. The compelling necessity standard was the majority rule until the instant case. It was followed by the Second, Third, Fourth, Fifth, Ninth, and District of Columbia Circuits, and district court cases in the Sixth and Eighth Circuits. *See* Rhem v. Malcolm, 507 F.2d 333, 336 (2d Cir. 1974); Norris v. Frame, 585 F.2d 1183, 1187-88 (3d Cir. 1978); Patterson v. Morrisette, 564 F.2d 1109, 1110 (4th Cir. 1977) (by implication); Miller v. Carson, 563 F.2d 741, 747 (5th Cir. 1977); Inmates of San Diego County Jail v. Duffy 528 F.2d 954, 956 (9th Cir. 1975); Campbell v. McGruder, 580 F.2d 521, 531 (D.C. Cir. 1978); Ahrens v. Thomas, 434 F. Supp. 873, 897-98 (W.D. Mo. 1977), *aff'd in relevant part,* 570 F.2d 286 (8th Cir. 1978); Jones v. Wittenberg, 323 F. Supp. 93, 100 (N.D. Ohio 1971) *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

46. *See, e.g.,* Roe v. Wade, 410 U.S. 113, 155 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

47. *See generally* Comment, *Pre-Trial Detention: Constitutional Standards,* 28 ARK. L. REV. 129 (1974); Note, *Discipline in Jails: The Due Process Rights of Pretrial Detainees,* 54 B.U.L. REV. 796 (1974); Note, *Constitutional Limitations on the Conditions of Pretrial Detention,* 79 YALE L.J. 941 (1970).

48. *See, e.g.,* Hamilton v. Love, 328 F. Supp. 1182, 1192 (E.D. Ark. 1971). *Cf.* Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.")

49. *See, e.g.,* Martinez Rodriguez v. Jimenez, 409 F. Supp. 582, 593-94 (D.P.R. 1976); Dillard v. Pitchess, 399 F. Supp. 1225, 1234 (C.D. Cal. 1975).

liberty only to the extent necessary to ensure their presence at trial.[50]

2. The due process balancing approach

Another test applied by the courts involves a balancing approach.[51] This approach requires a court to weigh the detainee's rights against the state's interest in maintaining internal order and security at the institution.[52] Courts sometimes use this balancing test along with other review doctrines. For example, in *Taylor v. Sterrett,*[53] the Fifth Circuit applied a balancing process,[54] a least restrictive alternative test,[55] and a strict scrutiny analysis.[56]

3. The reasonable relation standard

A recent doctrine requiring that conditions of pretrial confinement be only "reasonably related" to government interests emerged partly because not all constitutional rights are "fundamental."[57] This movement away from the blanket strict scrutiny approach began with two Supreme Court cases involving the rights of convicted prisoners[58] and later was adopted by the

50. *See, e.g.,* Duran v. Elrod, 542 F.2d 998, 999 (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).

51. *See, e.g.,* Brenneman v. Madigan, 343 F. Supp. 128, 137 (N.D. Cal. 1972). *Cf.* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) ("[T]hrough the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has strûck between that liberty and the demands of organized society.").

52. *See, e.g.,* Campbell v. McGruder, 580 F.2d 521, 531 (D.C. Cir. 1978); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 686 (D. Mass. 1973), *aff'd,* 494 F.2d 1196 (1st Cir.), *cert. denied,* 419 U.S. 977 (1974).

53. 532 F.2d 462 (5th Cir. 1976) (the issues of the case revolved around censorship of inmate mail).

54. *Id.* at 468, 472.

55. *Id.* at 470 n.11.

56. *Id.* Strict scrutiny and compelling necessity often are used synonymously by the courts in detainee cases. *See* Feeley v. Sampson, 570 F.2d 365, 379 (1st Cir. 1978) (Coffin, C.J., dissenting).

57. Fundamental interests have included the right to have an abortion, to distribute contraceptives, and to adopt children. *See* note 93 *infra.* Examples of basic personal interests falling outside the ambit of strict scrutiny are employment, education, and housing. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-13 (1976); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-35 (1973); Lindsey v. Normet, 405 U.S. 56, 74 (1972). *See generally* Note, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance,* 57 B.U.L. REV. 462 (1977).

58. Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974). In *Jones* a prison inmate labor union brought a civil rights action

First Circuit. In *Feely v. Sampson*[59] the First Circuit refused to correct alleged overcrowded conditions at a county jail because the conditions were reasonably related to the institution's interest in maintaining security. The court declared that only those "[r]estrictions or conditions of confinement that are without reasonable relation to the state's purpose in confining the detainee . . . violate due process."[60] This standard of review is in accordance with a line of Supreme Court cases holding that "[a]t 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."[61] It also follows the reasoning of section 3(a) of the Bail Reform Act[62] that allows a judge to impose conditions on pretrial release that he deems to be "reasonably necessary."

II. INSTANT CASE

In *Bell v. Wolfish* the Supreme Court held that in evaluating conditions or restrictions of pretrial confinement that implicate deprivation of liberty without due process of law, the proper inquiry is whether those conditions amount to punishment of the detainee.[63] The Court denounced the use of the "presumption of innocence" doctrine as a source of a pretrial detainee's right to be free from punishment,[64] and held that the proper source of this

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challenging regulations prohibiting the solicitation of inmates to join the union, barring all meetings, and refusing delivery of union publications mailed in bulk to inmates. The restrictions were upheld because they were "rationally related to the reasonable . . . objectives of prison administration." 433 U.S. at 129. In *Pell* inmates and journalists challenged the constitutionality of a prison regulation forbidding inmate interviews with media representatives except as authorized by prison officials. The Court upheld the regulation and declined to apply strict scrutiny. 417 U.S. at 827.

59. 570 F.2d 364 (1st Cir. 1978).

60. *Id.* at 369 (footnote omitted). Chief Justice Coffin filed a strong dissent advocating the adoption of the compelling necessity standard. He said, "I have found only three pretrial detainee cases which appear to provide support for the majority's standard." *Id.* at 378 (Coffin, C.J., dissenting) (citations omitted).

61. Jackson v. Indiana, 406 U.S. 715, 738 (1972). *Jackson* involved a state statute that allowed judges to commit defendants found incompetent to institutions where they remained until adjudged sane. This practice was held unconstitutional as violative of both due process and equal protection. *See also* McNeil v. Director, Patuxent Inst., 407 U.S. 245, 260 (1972).

62. 18 U.S.C. § 3146 (a) (5) (1976).

63. 99 S. Ct. at 1872.

64. *Id.* at 1870. The Court conceded that the presumption of innocence plays an important role in the criminal justice system. It allocates the burden of proof in trials and serves as an admonishment to the jury to judge the accused solely on the evidence produced at trial. The Court held, however, that the presumption of innocence doctrine is

right is the due process clause.[65]

The Court also repudiated the compelling necessity standard as a means of evaluating conditions of pretrial confinement allegedly violating the due process clause,[66] and held that if conditions or practices are "reasonably related" to a legitimate state interest, there is no punishment; a different result would occur if it can be shown that detention officials expressly intended to punish detainees.[67]

A court may infer the punitive intent of officials if a restriction is not reasonably related to a legitimate governmental purpose.[68] The Court added, however, that any inference of a punitive intent will be dispelled if restraints are reasonably related to the institution's interest in effectively managing the facility.[69]

Applying this reasonable relationship test to the conditions and practices allegedly violating due process in the instant case, the Court found they did not constitute punishment in violation of pretrial detainees' rights. There was a rational basis for each of the challenged rules and no punitive intent was shown to exist.[70]

In his dissenting opinion Justice Marshall argued that the proper test should be whether the interests of the government outweigh the deprivations suffered by any given restriction.[71] He also advocated the adoption of the compelling necessity standard when conditions infringe fundamental interests.[72] The main concern in Justice Stevens' dissenting opinion was that the majority's test for punishment will be so difficult to meet that it will leave detainees with virtually no protection.[73]

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not applicable to a determination of the rights of detainees. *Id.* at 1871.

65. *Id.* at 1872.

66. *Id.* at 1870-71.

67. *Id.* at 1873-74.

68. *Id.* at 1874.

69. *Id.* at 1875.

70. *Id.* at 1885-86. When confronted with the room search and body-cavity search issues, the Court applied the traditional test of whether the search was unreasonable within the meaning of the fourth amendment. *Id.* at 1883-84. This Note, however, focuses only on the Court's due process standard of review.

71. *Id.* at 1890-91 (Marshall, J., dissenting).

72. *Id.* at 1890.

73. *Id.* at 1898 (Stevens, J., dissenting). Justice Stevens argued that the presumption of innocence is applicable to pretrial detention. Referring to the majority's holding that it is not applicable, Justice Stevens said, "I cannot believe the Court means what it seems to be saying." *Id.* at 1896-97 n.11.

III. Analysis

The Supreme Court in *Bell v. Wolfish* resolved the question of how to evaluate the conditions of pretrial confinement. It reversed the prior majority rule requiring that a compelling necessity exist to justify practices and conditions of detention,[74] and adopted the reasonable relationship standard. The subjective intent of detention authorities was held to be an important consideration when applying this standard.

This Note will analyze the test laid down by the Court to review conditions of pretrial confinement and the implications that this will have in future detainee cases. It will also discuss tests consistent with *Bell v. Wolfish* that are still available to courts.

A. *The* Wolfish *Test for Conditions of Confinement*

1. *Rejection of the compelling necessity rationale*

The Court's rejection of the compelling necessity test was justified for two reasons. First, the Court's policy has been that prison officials should be given "wide-ranging" deference in the making and implementing of practices in their institutions, and that compelling necessity should apply only when fundamental rights are involved.[75] The reasonable relationship doctrine provides the means for courts to now accomplish this policy. Second, the application of the compelling necessity doctrine to all conditions of confinement was an invitation for detainees to challenge any condition or practice, however minor.[76] The recent and unprecedented increase in detainee litigation illustrates the problem. The reasonable relationship standard should remove some of the incentive for bringing frivolous complaints.

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74. *See* note 45 *supra*.

75. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 405 (1974); Roe v. Wade, 410 U.S. 113, 155 (1973). It is unclear whether the circuit court's compelling necessity standard applied to all conditions of confinement or just those infringing a fundamental right. *Compare* Brief for Respondents at 38-39, Bell v. Wolfish, 99 S. Ct. 1861 (1979) (the circuit court only required substantial deprivations to be justified by a compelling interest) *with* Brief for Petitioner at 46 (the circuit court required a compelling necessity for all restrictions of confinement). *See also* Note, *Standard of Judicial Review for Conditions of Pretrial Detention,* 63 MINN. L. REV. 457, 480-81 (1979) (*Wolfish v. Levi* requires courts to determine which conditions inhere in confinement before applying the compelling necessity standard).

76. *See* note 4 *supra*.

2. The punitive intent requirement

The Court's promulgation of punitive intent as an additional consideration for courts under the reasonable relation test is of questionable merit[77] and gave two of the dissenters difficulty.[78] But since under the Court's test intent may be inferred by the courts when challenged practices are not reasonably related to legitimate government objectives,[79] the reasonable relationship test arguably stands alone, independent of the punitive intent requirement. In any event, a revised version of the least restrictive alternative doctrine should enable detainees to more easily prove intent.

The Supreme Court recognized the least restrictive alternative doctrine in *Shelton v. Tucker*,[80] where the Court held that governmental purposes "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[81] The Court in the instant case, however, skirted the doctrine by rejecting the use of the compelling necessity rationale[82] and by finding the rights involved not fundamental. The Court did recognize, however, that when extremely harsh detention practices are employed in lieu of less restrictive alternatives, courts may find that the intent of the officials was punitive.[83] This punitive intent would render the practice unconstitutional.

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77. *See, e.g.*, Feeley v. Sampson, 570 F.2d 364, 380 (1st Cir. 1978). *See also* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 32-33 (1968) (allowing the characterization of punishment to turn on the intent of the administrator would encourage hypocrisy and self-deception).

78. 99 S. Ct. at 1887-88 (Marshall, J., dissenting); *id.* at 1897-99 (Stevens, J., dissenting).

The element of punitive intent has not been used to review conditions of pretrial confinement; it has been used to review legislative acts. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (Nationality and Immigration Act); Flemming v. Nestor, 363 U.S. 603 (1960) (Social Security Act); De Veau v. Braisted, 363 U.S. 144 (1960) (New York Waterfront Commission Act).

79. 99 S. Ct. at 1874.

80. 364 U.S. 479 (1960).

81. *Id.* at 488 (footnote omitted). *See also* Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973); S. KRANTZ, THE LAW OF CORRECTIONS AND PRISONER'S RIGHTS 226 (1973).

82. The least restrictive alternative doctrine and the compelling necessity standard are often used together. *See, e.g.*, Feeley v. Sampson, 570 F.2d 364, 379 (1st Cir. 1978) (Coffin, C.J., dissenting).

83. 99 S. Ct. at 1874 n.20.

B. *Alternative Considerations for Detainees and Courts after* Wolfish

Although *Bell v. Wolfish* represents the first attempt by the Supreme Court to clarify the law regarding pretrial confinement, it was not exhaustive. The holding was narrow; many issues were left unresolved, and still others were not addressed at all.

1. *Narrowness of the holding*

One of the important facts that strongly influenced the Court was the relatively short period of time that pretrial detainees spent at the MCC.[84] The Court had recently considered length of confinement important when deciding whether prison conditions meet constitutional standards.[85] A district court also recently held that the "frequent and substantial periods of time that inmates are allowed to be out of their cells" is an additional factor to be considered when evaluating prison conditions.[86] This is a significant point because it narrows the implications of the holding and may leave the gate open for lower courts to invalidate practices and conditions similar to those found at the MCC when detainees are incarcerated over extended periods of time,[87] even if the practices are reasonably related to governmental interests.

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84. Over half of the unsentenced detainees remained less than 10 days at the MCC, three-quarters were released within a month, and more that 85% were released within 60 days. Wolfish v. Levi, 573 F.2d 118, 129 n.25 (2d Cir. 1978). The Court in the instant case emphasized this fact by referring to it six times in the opinion. *See* 99 S. Ct. at 1866 n.3, 1875-76, 1881-82, 1886.

85. *See* Hutto v. Finney, 437 U.S. 678, 686-87 (1978) ("A filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months.").

86. Rutherford v. Pitchess, 457 F. Supp. 104, 109 (C.D. Cal. 1978). This distinction is important because detainees at the MCC were only confined in their cells at night. During the rest of the time, they could move freely about the common areas. *See* 99 S. Ct. at 1875.

87. One study showed the average length of time from arrest to the end of trial (not sentencing) of all felonies in eight jurisdictions to be as follows:

Jurisdiction	Days
Rhode Island	377 days
Milwaukee	229 days
Detroit	224 days
District of Columbia	222 days
Indianapolis	186 days
Cobb County, Ga.	171 days
Los Angeles	125 days
New Orleans	116 days

Pretrial Release or Detention: Hearings on H.R. 547 Before the Subcomm. on the Judiciary of the House Comm. on the District of Columbia, 95th Cong., 1st Sess. 121 (1977) (prepared testimony of William A. Hamilton, Institute of Law and Social Research).

In view of this consideration, courts may find it helpful to establish short-term maximum limits during which pretrial detainees may be confined prior to trial.[88]

2. *Heightened scrutiny for lengthy confinement*

The problem that the Court left unsolved is how to determine when length of confinement becomes so long that it necessitates a finding of unconstitutionality. A reasonable approach to this problem is simply to increase the degree of judicial scrutiny as the length of confinement increases. This method seems to best satisfy the Court's emphasis on length of confinement. It also accords with a recent Supreme Court case requiring a heightened degree of scrutiny for rights that are "deeply rooted in this Nation's history" but that are not classified as fundamental.[89] The essence of this "sliding scale" approach to judicial review is that conditions of confinement may, as the weeks and months pass, violate constitutional guarantees, requiring a substantial degree of necessity to justify them.

3. *Other means available to challenge conditions of confinement*

The majority opinion carefully pointed out that the test of whether conditions of confinement amount to punishment is applicable only in cases alleging deprivation of liberty without due process of law.[90] The Court followed this rule by applying different standards of review to the issues involving the first and fourth amendments.[91] This narrows the holding and leaves open many avenues by which future detainees may challenge the conditions of their confinement. The Court did not expressly reject the use of the compelling necessity standard when a more specific

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88. *See, e.g.*, National Advisory Commission on Criminal Justice Standards and Goals, Task Force Report, Courts 68 (1973) (the period from arrest to the beginning of trial should not be longer than 60 days in felony prosecutions and 30 days in misdeameanor prosecutions). *Cf.* Hutto v. Finney, 437 U.S. 678, 685-87 (1978) (prisoner's length of stay in isolated confinement limited to 30 days).

89. Moore v. City of East Cleveland, 431 U.S. 494, 498-99, 503 (1977). *See also* Campbell v. McGruder, 580 F.2d 521, 531 (D.C. Cir. 1978); Brief for Petitioner at 34, Bell v. Wolfish, 99 S. Ct. 1861 (1979); Brief for Respondents at 40 n.39.

90. 99 S. Ct. at 1872.

91. For example, the detainees alleged that the room search and the body-cavity search practices violated the fourth amendment, so the Court discussed whether the searches were "unreasonable" within the meaning of that amendment. *Id.* at 1883. This required the Court to balance the need for the search against the invasion of personal rights. *Id.* at 1884.

constitutional guarantee than "due process" is involved.[92] In fact, the Court implied that such a test would apply when fundamental liberty interests are affected.[93] The dissenting opinion of Justice Marshall, however, appears to refute this implication.[94]

4. A proposed classification method

In determining the constitutionality of pretrial detention practices, courts should give consideration to the individual characteristics of detainees. The degree of judicial scrutiny employed by a court should be less where dangerous detainees are involved and more in the case of relatively innocuous persons. The Supreme Court has recognized in an analogous situation that justice generally requires courts to consider individual characteristics when determining prison sentences.[95]

This method of protecting individual rights could begin when the detainee is first incarcerated by separating detainees who pose a threat to security from those who should be accorded leniency.[96] Such a system could also include a separation of sentenced offenders from persons awaiting trial.[97] Referring to a similar

92. The due process 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." *Id.* at 1871.

93. *Id.* The Court stated that the detainees' desire to be free from discomfort "does not rise to the level of those fundamental liberty interests" delineated in cases such as Roe v. Wade, 410 U.S. 113 (1973) (abortion laws affect a fundamental right); Eisenstadt v. Baird, 405 U.S. 438 (1972) (law prohibiting distribution of contraceptives is unconstitutional); and Stanley v. Illinois, 405 U.S. 645 (1972) (a hearing is required before giving motherless children to the state instead of to the unwed fathers). *Id.* at 1871. *But see* 99 S. Ct. at 1900 (Stevens, J., dissenting) (the practices challenged here do affect fundamental rights).

94. By advocating the use of the compelling necessity standard for fundamental interests, Justice Marshall seemed to imply that the majority had held otherwise. 99 S. Ct. at 1890 (Marshall, J., dissenting).

95. Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (individualizing sentencing determinations requires the court to consider the character and record of the individual offender and the circumstances of the particular offense). *Cf.* Bail Reform Act § 3(a), 18 U.S.C. § 3146(b) (1976) (judges imposing conditions of pretrial release should consider the offense, the weight of the evidence, family ties, etc.).

96. *E.g.*, S. KRANTZ, *supra* note 81, at 226. *See also* Campbell v. McGruder, 580 F.2d 521, 546-47 (D.C. Cir. 1978) (appellate court affirmed order that detention facility officials classify pretrial detainees to determine inmates requiring maximum security, and those who should be allowed contact visits); Rhem v. Malcolm, 507 F.2d 333, 338 (2d Cir. 1974) (classification system applied by interviewing the detainees).

97. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 24 (1967). This report recognized that separation of detainees from convicted prisoners, along with appropriate improvement of conditions, is an important step to improve the treatment of detainees.

practice, the Colorado Supreme Court has noted that states have the right to "deny contact visitation to individual detainees who present a threat to the security of the institution and . . . to all detainees in certain emergency situations . . . ."[98]

C. A Return to the Hands-Off Doctrine

The Court in the instant case not only identified the sources of a detainee's constitutional rights and the tests used to protect them, but also clarified its position concerning judicial intervention into prison affairs. The message of the Court's opinion is that the judiciary is to retreat towards the traditional "hands-off" policy.[99] This retreat is now occurring in the lower courts.[100] The exceptions to this rule occur when specific constitutional rights are infringed,[101] or when there is a clear showing that prison officials have "exaggerated their response" to maintain security.[102]

IV. Conclusion

The Supreme Court's rejection of compelling necessity as a due process standard of review in pretrial detainee cases reversed a trend followed by a majority of lower courts. The reasonable relationship standard adopted by the Court limits judicial involvement in prison affairs and provides detention facility authorities with greater freedom to implement security policies.

While pretrial detainees may find it more difficult to meet the Court's standard for proving violations of due process, the less restrictive alternative doctrine is still available to prove the punitive intent behind challenged prison conditions. In addition, more lengthy periods of confinement than those involved in the instant case may justify application of a more enhanced scrutiny analysis. Finally, individual traits and characteristics of detainees should be important factors for determining the constitutionality of prison practices.

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98. Wesson v. Johnson, 579 P.2d 1165, 1168 (Colo. 1978) (civil rights action on behalf of pretrial detainees in county jail who were denied all contact visits).

99. 99 S. Ct. at 1886. After commending federal courts for condemning sordid prison conditions, the majority stated, "But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations." *Id.*

100. *See, e.g.*, Cender v. Johnson, Civ. No. 78-3307 (S.D.N.Y. July 27, 1979) (court dismissed complaint under *Bell v. Wolfish*).

101. 99 S. Ct. 1871.

102. *See id.* at 1875 n.23, 1878-79, 1880, 1882, 1886.