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FIFTH AMENDMENT—RIGHTS OF DETAINEES

Bell v. Wolfish, 99 S. Ct. 1861 (1979).

INTRODUCTION

In *Bell v. Wolfish*,¹ the United States Supreme Court examined for the first time the question of what protection the Constitution affords persons being detained in prison pending trial.² The Court held that the pretrial detainee's right to liberty under the due process clause of the fifth amendment prohibited the imposition of restrictions amounting to punishment.³ A restriction would be found to constitute punishment if it was not rationally related to a legitimate government objective or if a punitive intent was shown behind its imposition.⁴ The scope of this test for punishment was limited, however, by the Court's holding that ensuring the pretrial detainee's presence at trial was not the only legitimate government objective and that substantial deference must be given to the prison administrator's judgment in determining whether a restriction was rational.⁵

The Court in *Wolfish* addressed five practices by prison officials that had been challenged by pretrial detainees. The detainees complained that they were being housed by twos in cells designed for one person.⁶ In addition, detainees were prohibited from receiving hardcover books from sources other than publishers or book clubs⁷ and could not receive any packages except for one at Christmas.⁸ Finally, the prison administrators were searching the pretrial detainees' cells in their absence, and the detainees were subjected to body-cavity searches after they had visits where they were not

separated from visitors by a partition. All five practices were alleged to violate the detainees' due process right to liberty. The publisher-only rule, the single-package rule, the cell searches, and the body-cavity searches also were alleged to violate specific constitutional guarantees other than the due process clause. Applying the appropriate tests for these additional guarantees, the Court found that the four practices did not violate the relevant constitutional provisions.⁹ The Court then applied its "punishment" standard to all of the practices and ruled that the pretrial detainees' right to liberty had not been violated.¹⁰

I

The action in *Wolfish* was brought to contest conditions at the Metropolitan Correction Center (MCC), a federally operated detention facility in New York City.¹¹ When MCC opened in 1975 "it represented the architectural embodiment of the best and most progressive penological planning."¹² However, shortly after the facility opened, there was a substantial increase in the number of pretrial detainees which resulted in overcrowding of the inmates.¹³ In November 1975, less than four months after MCC opened, the action in *Wolfish* was brought by writ of habeas corpus.¹⁴

The district court awarded the inmates relief from four practices on cross motions for summary judgment.¹⁵ Several additional practices were

⁹ 99 S. Ct. at 1880, 1882, 1883, 1885.

¹⁰ *Id.* at 1875-76, 1886.

¹¹ *See id.* at 1866.

¹² *Wolfish v. Levi*, 573 F.2d 118, 121 (2d Cir. 1978).

¹³ 99 S. Ct. at 1867.

¹⁴ *Id.* The Supreme Court indicated that the issue of using a writ of habeas corpus to challenge confinement conditions was not before it and therefore the Court did not rule on the issue. *Id.* at 1867 n.6.

¹⁵ The court prohibited double celling and struck down the publisher-only rule and the confiscation of property from a pretrial detainee without providing a receipt.

In addition, the court held that inmates could seal outgoing mail subject only to electronic inspection or opening of it only if probable cause could be shown; incoming legal mail could be searched without good cause but only in the inmate's presence; and incoming nonlegal mail could be searched without good cause outside the inmate's presence, but it could be read only

¹ 99 S. Ct. 1861 (1979).

² These persons are referred to as pretrial detainees. Under the Bail Reform Act, 18 U.S.C. § 3146 (1977), defendants are to be detained only if no less drastic means exist to ensure their presence at trial. However, Justice Marshall points out in his dissent: "[S]tudies indicate that bail determinations frequently do not focus on the individual defendant but only on the nature of the crime charged and that, as administered, the system penalizes indigent defendants." 99 S. Ct. at 1887 n.1 (Marshall, J., dissenting).

³ 99 S. Ct. at 1872.

⁴ *Id.* at 1874.

⁵ *Id.* at 1874, 1875 n.23.

⁶ Subsequently referred to as double celling.

⁷ Subsequently referred to as the publisher-only rule.

⁸ Subsequently referred to as the single-package rule.

struck down after trial.¹⁶ Some of the practices were ordered discontinued as arbitrary and capricious administrative restrictions, and therefore prohibited by the Administrative Procedure Act.¹⁷ Most of the practices, however, were struck down because they violated the due process clause. The district court found that, to protect the pretrial detainees' right to liberty, it was necessary to prohibit any restriction which went beyond the minimum necessary to confine the detainees unless the restriction was justified as a "compelling necessity."¹⁸

On appeal, the Second Circuit found that the Administrative Procedure Act did not give the district court the authority to strike down restrictions using an arbitrary and capricious standard. The court ruled that under the Bureau of Prisons Act, Congress gave the Attorney General final discretion in administering prisons.¹⁹ The portion of the district court's ruling that conflicted with that authority was reversed.²⁰ The majority of the rest of the lower court's opinion was affirmed by the appellate court.²¹ To ensure that pretrial de-

it those conditions were met. *See* United States *ex rel.* Wolfish v. Levi, 428 F. Supp. 333, 343-44 (S.D.N.Y. 1977).

¹⁶ The district court ordered relief on the issues of classification of inmates, length of confinement, special diets for Muslims, access to law libraries, typewriter possession, commissary procedures, overcrowding, visiting hours, locking of the visitors' bathrooms, attorney visits, codefendant visits, telephone service, forwarding of mail, body-cavity searches, room searches, confiscation of inmate property, rules on receiving packages, uniforms, food preparation, and procedures for guards to follow when dealing with members of the opposite sex. *See* United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114 (S.D.N.Y. 1977).

¹⁷ 5 U.S.C. § 706 (1976).

¹⁸ 439 F. Supp. at 124.

¹⁹ 573 F.2d at 125; *see* 18 U.S.C. § 4042 (1976). The Administrative Procedure Act states that an agency action is not reviewable if the action "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1976).

²⁰ The court of appeals ruled that there was no authority to intervene on the issues of locking the visitors' bathroom, telephone service, visiting hours, and commissary procedures. *Wolfish v. Levi*, 573 F.2d 118, 125-26 & n.16 (2d Cir. 1978).

²¹ After determining that prison administrators had a legitimate security interest that justified the requirement that the detainees wear uniforms and the restriction preventing them from owning typewriters, the appellate court reversed the district court's ruling on those issues. *Id.* at 132, 133.

The court of appeals remanded for reconsideration of the holdings limiting an inmate's stay at MCC to no more than 60 days and limiting the number of occupants in the dormitory to 10. The court also remanded for

tainees were treated as innocent until proven guilty, the court of appeals found that under the due process clause "pretrial detainees may be subjected to only those 'restrictions and privations' which 'inhere in their confinement itself or are justified by compelling necessities of jail administration.'" ²²

II

The Supreme Court in *Wolfish* rejected the "compelling necessity" standard used by the court of appeals and the district court. The Court held that the lower courts' reliance on the presumption of innocence as the source of the pretrial detainees' right to be free from restrictions was misplaced because the presumption of innocence was only a burden of proof standard in criminal trials.²³ While noting that the presumption had an important role in the criminal justice system, the Court indicated that it was inapplicable to the determination of pretrial detainees' rights and could not support the compelling necessity standard.²⁴

The general standard introduced by the Court to protect pretrial detainees' right to liberty prohibited any restriction which constituted punishment of the detainee.²⁵ The Court found that the government had the authority to detain a person to ensure his presence at trial, but it did not have the authority to punish him prior to an adjudication of guilt.²⁶ While acknowledging that detention itself resulted in a loss of choice and privacy, the Court found that these losses were not punishment.²⁷

To determine whether a condition or restriction experienced by a pretrial detainee constituted punishment, Justice Rehnquist, writing for the majority, indicated that the appropriate test would be the one used in *Kennedy v. Mendoza-Martinez*²⁸ to

reconsideration the district court's ruling prohibiting double celling of convicted inmates because the court found that there was a lesser standard of constitutional protection for convicted prisoners. *Id.* at 127, 129.

²² *Id.* at 124, (quoting *Rhem v. Malcolm*, 507 F.2d 333, 336 (2d Cir. 1974)).

²³ 99 S. Ct. at 1870.

²⁴ *Id.* at 1871.

²⁵ *Id.* at 1871, 1872.

²⁶ *Id.* at 1872. The Court noted that it did not mean to overrule historical exceptions to the rule that punishment can only follow a finding of guilt by trial or a plea. An example of such an exception is the power to punish for contempt of court without a trial. *Id.* at 1872 n.17.

²⁷ *Id.* at 1873.

²⁸ 372 U.S. 144 (1963). The statute in *Mendoza-Martinez* provided that persons who crossed the border to evade

determine if a statute was punitive. The test, as set out in *Kennedy*, required inquiry into

"[w]hether 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."²⁹

After reciting this test, Justice Rehnquist provided a summation of it. He stated that a condition or restriction did not constitute punishment if there was no showing of a punitive intent behind its imposition and if the restriction was rationally related to a legitimate government objective.³⁰ In determining whether a restriction met the rational relationship test, Rehnquist indicated that deference should be given to the judgment of prison administrators.³¹ Rehnquist's summation of the *Mendoza-Martinez* test is significant because it omits several of the factors of the original test and provides a much narrower definition of punishment.

Utilizing this new standard, the first condition which the Court examined was the practice of double celling. The Court's analysis of this issue is confusing because they did not cite any of the *Mendoza-Martinez* factors nor did they attempt to show that the practice was a rational response to a legitimate government objective. Rather, it distinguished the more modern conditions found at MCC from the conditions in cases dealing with older, traditional jails where lower courts had ruled certain minimum space standards were required.³² Acknowledging that severe overcrowding for an extended length of time might amount to punishment, the Court nevertheless ruled that because the pretrial detainees at MCC were only in their cells seven hours a day and nearly all of them were

released within sixty days, the practice of double celling was not unconstitutional.³³

The Court next addressed the four challenged security measures. Unlike double celling, these practices were alleged to violate other specific constitutional guarantees in addition to the due process clause. It was therefore necessary to apply the appropriate tests to determine whether the restrictions violated either the specific constitutional provisions invoked or the due process clause. Before applying the tests, however, the Court noted that in its cases involving the rights of convicted inmates it had established principles for dealing with restrictions that were alleged to violate specific constitutional guarantees.³⁴ The Court had held that convicted inmates retained some rights, but those rights were limited because of the inmates' incarceration. Therefore, restrictions which infringed constitutional guarantees had to be balanced against the prison administrator's objective of maintaining security. Furthermore, deference was to be afforded to prison administrators in this balancing process. The Court held that these principles now applied to pretrial detainees also.³⁵

Using these principles, the majority found that the four security practices did not violate the constitutional guarantees which they were alleged to infringe. Noting that the publisher-only rule operated without regard to the content of the prohibited books and that there were alternative ways of obtaining reading material, the Court held that the rule was a rational response to a legitimate security problem and did not violate the first amendment.³⁶ Holding that the court of appeals had improperly substituted its judgment for that of the prison administrators in determining that

³³ *Id.* at 1876. Although the average stay at the detention facility was only 60 days and the named plaintiffs had left the institution, the Court ruled that the case was not moot because there was still a live controversy between the administrators and the remaining members of the class. Because of the short average stay in the institution, the Court noted that this was a case which could be repeated but would never be reviewed if it was required that the named plaintiffs still be in the institution. *Id.* at 1867 n.5. *See, e.g.,* *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975). *Cf. Roe v. Wade*, 410 U.S. 113, 124-25 (1973) (pregnancy litigation will survive beyond length of pregnancy).

³⁴ 99 S. Ct. at 1877 (citing *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 129 (1977); *Meachum v. Fano*, 427 U.S. 215, 225 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974); *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

³⁵ 99 S. Ct. at 1877, 1878.

³⁶ *Id.* at 1880-81.

the draft were automatically divested of their citizenship. The Court ruled that this statute was unconstitutional because the forfeiture of citizenship in this context was punishment which was inflicted without due process of law. *Id.* at 167-70.

²⁹ 99 S. Ct. at 1873 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-69 (footnotes omitted)).

³⁰ 99 S. Ct. at 1873-74.

³¹ *Id.* at 1875 n.23.

³² *Id.* at 1876 & n.27.

packages were not a sanitary and security problem, the Court ruled that the single-package rule was rational and did not violate the protection of property under the due process clause of the fifth amendment.³⁷ Finally, the Court held that the cell and body-cavity searches were not unreasonable and did not violate the fourth amendment proscription of unreasonable searches and seizures because the serious security concerns of prison administrators outweighed the pretrial detainees' diminished expectation of privacy.³⁸

The Court next applied the due process standard it had developed to the four security practices. If the practices constituted punishment, they would violate the pretrial detainees' right to liberty under the due process clause even though they did not violate any other specific constitutional guarantee. The Court found, however, that the four practices were not the equivalent of punishment because they were rational responses to the legitimate security objectives of the prison.³⁹

Four Justices dissented from the majority's opinion. Justice Powell dissented only on the issue of body-cavity searches. Viewing the practice as a serious intrusion on the inmates' privacy, Powell indicated that he would require a showing of a reasonable suspicion before allowing the searches.⁴⁰

Justice Marshall dissented vigorously, arguing that the majority's "punishment standard" was inappropriate. He did not think it was helpful to claim to protect a pretrial detainee from punishment when, in his view, pretrial incarceration alone was indistinguishable from punishment.⁴¹ The test the majority used to determine whether a restriction was punishment was also faulty according to Justice Marshall. He argued that by omitting several factors in its restatement of the *Mendoza-Martinez* test "the Court contracts a broad standard sensitive to the deprivations imposed on detainees, into one that seeks merely to sanitize official motives and prohibit irrational behavior."⁴²

In Justice Marshall's view, the proper standard for determining whether a restriction or condition violated the due process clause would be a balancing of the governmental interests served against the individual deprivations suffered.⁴³ In applying a balancing test to the challenged practices, he in-

dicated that he would remand to the lower court the decision on double celling because that issue had been decided on summary judgment without giving the government sufficient opportunity to express its need for the practice.⁴⁴ Because the four security practices infringed on fundamental rights guaranteed by specific constitutional provisions, under a balancing test they needed to be justified by a compelling governmental interest. Marshall indicated that the government had failed to meet this burden and, therefore, he would affirm the court of appeals decision concerning those four practices.⁴⁵

Justice Stevens, joined by Justice Brennan, also dissented. While agreeing with the majority that the due process clause protects a pretrial detainee from punishment,⁴⁶ Justice Stevens found the Court's test for punishment defective. He argued that the requirement that a restriction merely have a rational basis provided little protection against punishment. He also argued that a restriction could be punitive without a showing of punitive intent.⁴⁷ Thus, Justice Stevens considered the majority's test for punishment to be too permissive.⁴⁸

A more appropriate test for punishment in Justice Stevens' view would "allow a court to infer that punishment has been inflicted by evaluating objective criteria."⁴⁹ The criteria that he developed required an examination of whether the restriction involved an actual restraint of the pretrial detainee which had historically been considered punishment, whether there was a classification system to separate more dangerous detainees from those who were less dangerous, and whether there was a significant disparity between the harm to the detainee and the importance of the government objective served by the restriction.⁵⁰

Using his criteria for punishment, Justice Stevens indicated that he would remand the question of double celling to the lower courts because it had been decided on summary judgment and there were insufficient facts from which to determine whether it was a punishment.⁵¹ He would, however, have affirmed the court of appeals ruling striking down the four security restrictions since each one

³⁷ *Id.* at 1882.

³⁸ *Id.* at 1883, 1885.

³⁹ *Id.* at 1886.

⁴⁰ *Id.* (Powell, J., dissenting).

⁴¹ *Id.* at 1889 (Marshall, J., dissenting).

⁴² *Id.* at 1887.

⁴³ *Id.* at 1891.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1892-94.

⁴⁶ *Id.* at 1895 (Stevens, J., dissenting).

⁴⁷ *Id.* at 1898.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1899.

⁵⁰ *Id.*

⁵¹ *Id.* at 1903-04.

of the restrictions constituted punishment under his objective criteria test.⁵²

III

The Supreme Court used an ineffective standard in *Wolfish* that does not provide adequate protection of the rights of pretrial detainees. The Court found that the presumption of innocence was inapplicable to the determination of the rights of pretrial detainees because it was only a burden of proof standard for criminal trials. This ruling severely limits the protection provided by the presumption of innocence.

An examination of the cases cited by the Court as support for its rejection of the presumption of innocence rule in this situation reveals that the issues involved in those cases were completely unrelated to the question of whether the presumption of innocence provided any protection of pretrial detainees' rights.⁵³ For example, the issue in *In re Winship*⁵⁴ was whether a criminal conviction based on a preponderance of the evidence standard was valid. The Court reversed the conviction and found that guilt must be proven beyond a reasonable doubt to comply with the due process clause. The issue in *Estelle v. Williams*⁵⁵ was whether allowing a defendant to stand trial while wearing a prison uniform undermined the presumption of innocence and the requirement that guilt be proven beyond a reasonable doubt. The Court refused to reverse the conviction because the defendant had failed to object at trial and there was no evidence that he was compelled to wear the uniform.

Finally, in *Taylor v. Kentucky*⁵⁶ the issue was whether a conviction was improper where the trial court refused to instruct the jury on the presumption of innocence after it had instructed them on the reasonable doubt standard for the burden of proof. Acknowledging that the presumption and the reasonable doubt standards were "logically similar,"⁵⁷ the Court held, nevertheless, that the jury should have been instructed on both principles to overcome an inference of guilt left by the prosecutor's closing remarks. The examination of these cases shows that all three were limited to questions of whether a defendant had been granted sufficient

protection of his rights with regard to presumption of innocence at trial.

Because *Winship*, *Estelle*, and *Taylor* dealt only with defendants' rights at trial, there was no reason for the Court in deciding them to discuss whether the presumption of innocence provided any protection of pretrial detainees' rights in confinement. There is certainly no reason to infer from the Court's failure to discuss the issue in those cases that it was limiting the presumption of innocence to protecting defendants' rights only at trial. The Supreme Court in *Wolfish* appears to make that inference, however, and relies on it to support its ruling that the presumption of innocence provides no protection of the rights of pretrial detainees. Because the inference is unsound, the Court's ruling is left without satisfactory support.

The question in *Wolfish* concerns what protection should be afforded citizens who are incarcerated while awaiting trial. The source of the protection of these citizens is the fifth amendment, which clearly states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."⁵⁸ Any decision concerning the rights of pretrial detainees must turn on an interpretation of this amendment and not on an interpretation of the presumption of innocence. Thus, the Court's discussion of the presumption of innocence is essentially irrelevant.

Because of the unsatisfactory support the Court in *Wolfish* offers for its rejection of the compelling necessity standard, it is proper to reconsider the appropriateness of that standard. The compelling necessity standard was not a creation of the *Wolfish* lower courts. The Supreme Court has used such a standard in examining state statutes which are alleged to infringe on the fundamental rights of citizens.

Two cases illustrate the Court's use of a compelling necessity standard. In *Roe v. Wade*,⁵⁹ the Court examined a state statute prohibiting abortion. The statute was alleged to violate the due process clause because of its invasion of a woman's fundamental right to privacy. Explaining its due process standard, the Court indicated that "[w]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'"⁶⁰ The statute was struck down because the state's interest in protecting the mother's health and the

⁵² *Id.* at 1903.

⁵³ See *Taylor v. Kentucky*, 436 U.S. 478 (1978); *Estelle v. Williams*, 425 U.S. 501 (1976); *In re Winship*, 397 U.S. 358 (1970).

⁵⁴ 397 U.S. 358, 368 (1970).

⁵⁵ 425 U.S. at 512-13.

⁵⁶ 436 U.S. at 479.

⁵⁷ *Id.* at 484, 490.

⁵⁸ U.S. CONST. amend. V.

⁵⁹ 410 U.S. 113, 116 (1973).

⁶⁰ *Id.* at 155.

life of the fetus did not become sufficiently compelling to overcome a woman's right to privacy until after the end of the first trimester.⁶¹

In *Bates v. City of Little Rock*,⁶² the Court addressed a state statute requiring the NAACP to disclose its membership list. Because the state's interest in determining the membership of the organization was not compelling enough to outweigh the infringement on the members' right of association, the statute was struck down as violative of due process.⁶³ As these cases indicate, a compelling necessity test is appropriate when fundamental rights of ordinary citizens are infringed.⁶⁴

Because the Court has used the compelling necessity standard in examining infringements of fundamental rights, it would be consistent to apply this standard in examining infringements on the fundamental rights of unconvicted citizens who are incarcerated while awaiting trial. An examination of the appellate court cases that have applied the compelling necessity standard indicates that the standard is sensitive to protecting the rights of these pretrial detainees. In *Campbell v. McGruder*,⁶⁵ the District of Columbia Court of Appeals recognized that the government had a legitimate security interest in ensuring the detainees' presence at trial, but held that the pretrial detainee had a right to be free from punishment. Finding that confinement was indistinguishable from punishment, the court held that each additional restriction increased the severity of the punishment and, therefore, needed to be justified as a "substantial necessity" of jail administration.⁶⁶ Using this standard, the court found that overcrowding of detainees was unconstitutional and affirmed several injunctive orders offering relief to pretrial detainees.⁶⁷ This case shows how a court can use the compelling necessity standard to ensure that additional liberty rights of pretrial detainees are not infringed without good reason.

⁶¹ *Id.* at 162-63.

⁶² 361 U.S. 516 (1960).

⁶³ *Id.* at 524, 527.

⁶⁴ See generally Note, *Of Interests Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U.L. REV. 462 (1977).

⁶⁵ 580 F.2d 521 (D.C. Cir. 1978).

⁶⁶ *Id.* at 531.

⁶⁷ *Id.* at 540, 551-52. The injunctions required that pretrial detainees be provided clean clothing and bed linen, that a security classification system be established to prevent excessively harsh confinement and allow contact visits, that procedures be developed for the psychiatric examination and transfer of mentally ill detainees, and that procedures for the use of physical restraints be developed. *Id.* at 544, 548, 550, 551.

*Norris v. Frame*⁶⁸ demonstrates how the compelling necessity standard protects liberty rights of pretrial detainees which prison administrators might not be inclined to preserve. In *Norris*, the court of appeals reversed a district court dismissal of a suit in which it was alleged that the refusal of the jail administration to allow a pretrial detainee to continue in an approved methadone treatment program violated the detainee's right to liberty. The court held that because the detainee had established a liberty interest in his continuance in the treatment program, the jail administrators would have to justify the deprivation of this liberty by showing that it was necessary for proper jail administration.⁶⁹ Thus the compelling necessity standard used in *Norris* ensured that liberty enjoyed by the citizen before he was detained could not be removed simply because a jail administrator did not feel it was worthy of protection.

As *Campbell* and *Norris* indicate, the compelling necessity standard has much appeal. The standard is consistent with the Court's approach in examining due process challenges to other regulations which infringe on fundamental rights. In addition, a compelling necessity test would ensure that the pretrial detainee receives the same level of protection of rights which other unconvicted citizens are provided by the due process clause. Although his confinement would still be a significant deprivation, the detainee would not be subjected to further deprivations of the type to which a convicted person might be subjected.

In contrast to the compelling necessity standard, the punishment standard adopted by the Court in *Wolfish* seems to make little distinction between the protection provided pretrial detainees and the protection provided convicted persons by the due process clause. The Court's punishment standard results in a loss of virtually all additional liberty rights once a citizen is detained. Further infringements on his liberty only need be rationally related to a legitimate government objective and no longer need be justified by compelling government necessity. As previously shown,⁷⁰ the Court's attempt to justify this lower standard of review, based on relegating the presumption of innocence to a burden of proof standard, is unsound.

In addition, when examining the specific constitutional rights alleged to be infringed by the four security restrictions, the Court actually cited its

⁶⁸ 585 F.2d 1183 (3d Cir. 1978).

⁶⁹ *Id.* at 1189.

⁷⁰ See text accompanying notes 52-56 *supra*.

cases dealing with convicted prisoners' rights as support for the ruling that these specific constitutional rights of pretrial detainees were also limited.⁷¹ It appears that the Court did not see the need to provide any greater protection of pretrial detainees' rights than it had provided convicted prisoners' rights. An examination of some of the Court's decisions on the rights of convicted prisoners demonstrates the limited protection afforded their constitutional rights.

In *Pell v. Procunier*,⁷² inmates at a California prison challenged a regulation prohibiting them from having interviews with members of the news media. Noting that incarceration properly put limitations on the inmates' rights, the Court found that the inmates' first amendment rights did not outweigh the prison administrator's security interests.⁷³ In *Jones v. North Carolina Prisoners' Labor Union*,⁷⁴ inmates at a North Carolina prison challenged regulations which prevented them from promoting their union. Again noting that incarceration limited the constitutional rights of prisoners, the Court held that the prison administrator's security interest outweighed the limited first amendment rights of the prisoners.⁷⁵ These cases illustrate that even when dealing with fundamental first amendment rights, the Court provides convicted prisoners little protection from prison regulations.

The Court in *Wolfish* held that pretrial detainees may not be punished,⁷⁶ yet it afforded them insufficient protection from punishment. The punishment standard used by the Court provides the detainee with less protection of liberty than is granted an unincarcerated citizen by the compelling necessity standard. The other constitutional rights of detainees are subject to the same limitations as the rights of convicted prisoners, even though the detainees have not been convicted of any crime. These limitations on the constitutional rights of pretrial detainees are distressing because,

⁷¹ 99 S. Ct. at 1877.

⁷² 417 U.S. 817, 819 (1974).

⁷³ "We start with the familiar proposition that '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" *Id.* at 822-24 (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)).

⁷⁴ 433 U.S. 119 (1977).

⁷⁵ "In a prison context, an inmate does not retain those First Amendment rights that are 'inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" *Id.* at 129-30 (quoting *Pell v. Procunier*, 417 U.S. at 822).

⁷⁶ 99 S. Ct. at 1872.

as Justice Stevens points out, "[t]he withdrawal of rights is itself among the most basic punishments that society can exact."⁷⁷ Thus, while claiming to protect pretrial detainees from punishment, the Court actually permits a withdrawal of the detainees' rights which is in itself punishment.

The Court in *Wolfish* provides pretrial detainees with only one protection which it does not provide convicted inmates. Pretrial detainees may not be subjected to restrictions on their liberty which are imposed with a punitive intent. Even this protection is meager, however. As Justice Marshall pointed out, the intent behind a restriction will not be a matter of public record and the Court will not be able to read a legislative history to determine if the intent behind the restriction is punitive.⁷⁸ Furthermore, the Court is hesitant to infer a punitive intent from a restriction. While noting that throwing a pretrial detainee in a dungeon would be rationally related to the government objective of ensuring the detainee's presence at trial, the Court indicated that it would infer a punitive intent from such a practice because of the many less harsh alternatives available to achieve the same purpose.⁷⁹ Yet when the Court considered the single-package rule, it refused to infer a punitive intent even though it had been shown that less harsh alternatives were used at other institutions.⁸⁰ This inconsistency indicates that it will be difficult to get the Court to infer a punitive intent from any restriction.

If the punitive intent protection is difficult to invoke, it is likely that pretrial detainees will be subjected to the same restrictions as convicted inmates. The Court's holding in *Wolfish* that pretrial detainees' rights are subject to the same limitations as are convicted prisoners' rights is illogical. It would seem to be generally accepted that incarceration and the restrictions inherent in it constitute punishment of convicted prisoners. It is difficult, therefore, to understand how the Court can find that subjecting pretrial detainees to the same restrictions does not constitute punishment of them. These restrictions do in fact constitute punishment, and by allowing pretrial detainees to be subjected to them, the Court is severely undermining the due process clause. The unconvicted detainees are being punished without due process of law.

⁷⁷ *Id.* at 1900 (Stevens, J., dissenting).

⁷⁸ *Id.* at 1888 (Marshall, J., dissenting).

⁷⁹ 99 S. Ct. at 1874 n.20.

⁸⁰ See *United States ex rel. Wolfish v. Levi*, 439 F. Supp. at 152.

The result of *Wolfish* will probably be that pretrial detainees' rights are afforded no more protection than convicted inmates' rights, but it may be possible to limit the effects of the decision. One possible way to limit *Wolfish* is to distinguish it on its facts. The institution involved in *Wolfish* had been recently constructed and was quite modern in design. The Court noted this and indicated that cases which dealt with older, traditional jails were inapplicable because of the factual distinction.⁸¹ It is difficult to understand why the Court did not overrule some of those cases because they addressed the rights of pretrial detainees and turned on standards different than the one the Court rejected and not on their facts.⁸² Nevertheless, because the Court did not overrule them, pretrial detainees in other actions may be able to argue that the conditions at the facilities where they are detained constitute punishment because the jails are old and poorly maintained.

It also may be possible to limit the scope of the Court's decision on double celling. The Court acknowledged that overcrowding for an extended length of time might constitute punishment,⁸³ but found that double celling at MCC was not unconstitutional because the detainees were not kept in their cells or in the institution very long. Pretrial detainees who are subjected to double or triple celling for an extended period of time might be able to argue that they are being punished. Unfortunately, the Court was unclear about exactly what standard it was applying when it decided the double celling issue, so it is difficult to predict what standard it would apply to another overcrowding

argument or what the chances of success of such an argument might be.

It might be possible to argue that there is a punitive intent behind a restriction if less harsh alternatives are available to accomplish the same purpose. As discussed earlier,⁸⁴ however, the success of this argument is questionable. The chances of success may be increased by bringing in a prison administrator to testify to the availability of less harsh alternatives to the challenged restriction. This tactic might provide an effective counter to the deference otherwise given to the administrator whose practices are being challenged. The chances of success may be increased still more if it can be shown that actual harm to the detainee results from the practice.

Restrictions of pretrial confinement that are alleged to violate specific constitutional provisions other than the due process clause protection of liberty must be subjected to the standard of review appropriate to those specific provisions. If the practices fail the tests of the specific constitutional provisions, the restrictions must be struck down even though they may have been permissible under the Court's more lenient due process standard. Unfortunately, protecting pretrial detainees' rights under the standards of the relevant constitutional provisions will be more difficult because the Court in *Wolfish* held that these rights are limited upon incarceration⁸⁵ even though the detainee has not been convicted of a crime.

CONCLUSION

The protection afforded pretrial detainees' rights by the *Wolfish* decision is insufficient. The Court now permits the fundamental rights of unconvicted citizens to be severely limited. This limitation of rights is an infliction of punishment without due process of law because the detainee has not yet been convicted of a crime, but it is permissible under the Court's ineffective standard. Because it may be possible to limit *Wolfish*, the full effect of the decision will not be known until more challenges to the conditions of pretrial confinement are brought. It seems probable, however unfortunate, that in the future the rights of pretrial detainees will be afforded no greater protection than the rights of convicted prisoners.

⁸¹ The Court distinguished *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978) (holding that overcrowding constituted punishment in violation of detainees' due process rights); *Battle v. Anderson*, 564 F.2d 388 (10th Cir. 1977) (overcrowding of convicted prisoners violated eighth amendment protection against cruel and unusual punishment); *Chapman v. Rhodes*, 434 F. Supp. 1007 (S.D. Ohio 1977) (overcrowding of convicted prisoners constituted cruel and unusual punishment); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973) (the totality of conditions constituted punishment of pretrial detainees in violation of due process clause).

⁸² See *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973). Both cases employed a balancing test similar to the compelling necessity standard.

⁸³ 99 S. Ct. at 1875.

⁸⁴ See text accompanying note 78 *supra*.

⁸⁵ 99 S. Ct. at 1878.