

BELL
v.
WOLFISH

No. 77-1829

Cert to CA2
(Kaufman, Timbers, Meskill)

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SUMMARY

This is a sprawling case involving pre-trial detention procedures at a modern federal facility in NY. I did the pool memo in the case, and have decided to rely on that rather than repeat the facts and decisions below again here. I have set out the manifold contentions of the parties, however, at some length.

CA2 held a range of pre-trial detention procedures unconstitutional, using a "strict scrutiny" approach under which restrictions had to be justified by "compelling necessity." I think this approach was wrong; the question is what to put in its place. The SG proposes a three-tiered standard of review. Under it, "strict scrutiny" would be applied to restrictions on detainees' "fundamental liberties," such as 1st Amend rights; "middle-level" review (heightened ends/means scrutiny) would be applied to restrictions significantly affecting detainees' retained privacy interests; and "minimal rationality" would be applied to other restrictions. Resps basically urge the standard adopted by CA2: "compelling necessity" must be shown to justify all substantial restrictions.

The SG's approach seems relatively sound; the only question is whether it will be workable. I fear that the "middle tier" would quickly get out of hand. Whatever standard the Court decides to adopt, the key considerations to my mind are (1) that prison officials must be allowed to assert cost constraints and administrative feasibility as justifications for restrictions--CA2 said these must be ignored completely; and (2) substantial deference must be accorded the views of prison officials in matters of jail security and order, just as is done in cases involving rights of convicted inmates.

As far as the five practices specifically challenged are concerned, I think it may be best for this Court not to decide their validity here. I would prefer to see the case remanded, to let the DC conduct these highly factual inquiries under the proper constitutional standard. If the

Court wishes to decide the merits of these practices, I believe that four of the five are quite clearly constitutional under the test I would recommend, and CA2 would thus be reversed on those four. CA2 may have been right on the visual body-cavity inspections; this issue is mostly evidentiary, however, and I would want to have a good look at the record before making up my mind.

In this case, the first group is represented by the practice of "double-calling," with its attendant overcrowding. The second group includes practices that are directed at abusing prison security and order. This group is represented here by the "pub-lisher-only" rule, the "no-package" rule, the room searches, and the body-cavity inspections. The SG suggests that different constitutional tests should apply to these two groups of practices.

(a) Living Conditions. As far as practices affecting living conditions are concerned, the SG accepts CA2's distinction between pre-trial detainees and convicted criminals. Convicts have been deprived of their "liberty" by trial and conviction. Convicts then have an generalized "liberty interest"; under this Court's cases, convicts are entitled only to their 8th Amendment rights to minimal decency and humane treatment, and to some protection for specific constitutional rights whose loss is not implicit in incarceration - but Amendment freedoms, for example. Pre-trial detainees, however, stand on a different footing. Since they have not been constitutionally deprived of their liberty by conviction, they retain "significant liberty interests" insofar as these interests have not been eliminated by conviction. Pre-trial detainees, obviously, are entitled to the same threshold protections afforded convicts. The question here is how much more they are entitled to by virtue of their unconvicted status.

CA2 reversed this question in an earlier opinion. It said that pre-trial detainees must be afforded no less protection than the civil rights of unconvicted persons. The SG, however, would not go so far. It would

I. CONTENTIONS

A. The Proper Constitutional Test.

(1) The Govt. The SG divides up the MCC practices at issue here into two groups. The first group includes practices that affect the general living conditions of pre-trial detainees--housing, food, clothing, and the like. In this case, the first group is represented by the practice of "double-celling," with its attendant overcrowding. The second group includes practices that are directed to ensuring prison security and order. This group is represented here by the "publisher-only" rule, the "no-package" rule, the room searches, and the body-cavity inspections. The SG suggests that different constitutional tests should apply to these two groups of practices.

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CA2 answered this question in an extreme fashion. It said that pre-trial detainees must be accorded as far as possible the same rights as unincarcerated individuals. Accordingly, concluded CA2, due process

requires that detainees "be subjected only to those restrictions and privations which inhere in their confinement itself or which are justified by compelling necessities of jail administration." The SG accepts CA2's premise that detainees' liberty interests "are essentially equivalent" to those of other citizens. The SG disagrees with CA2's conclusion, however, that all "restrictions" on detainees must therefore be justified by "compelling necessity." This Court, says the SG, has not mandated such a high level of scrutiny even for the liberty interests of ordinary citizens.

In analyzing restrictions on liberty under the Due Process Clause, this Court has long adhered to a "two-tiered" approach. Ordinarily, the Due Process Clause does not give citizens freedom from all forms of Govt restriction; rather, it protects them only from arbitrary and purposeless Govt action. Cases in this tier--many of which occur in the area of economic regulation--have given rise to the "rational relation" or "minimal scrutiny" standard of review. When Govt restrictions impact upon a fundamental liberty, however, this Court has consistently required that the restrictions be justified by "compelling interests." Among the "fundamental" liberties thus protected are 1st Amendment freedoms, the right to vote, the right of interstate travel, and freedom of choice in matters affecting marriage and family life. The list of fundamental freedoms, however, is sharply limited: this Court has refused to invoke strict scrutiny when considering restrictions on such important rights as education (San Antonio School Dist v Rodriguez), employment (Massachusetts v Murgia), and decent housing (Lindsey v Normet).

The SG contends that this two-tiered approach should be applied, in broad outline, to restrictions on detainees' liberty interests.

"When conditions of confinement not affecting fundamental constitutional guarantees are challenged under due process, it is the reasonableness

of the practices that must be considered in determining whether they should be sustained, and the reasonableness must be assessed in light of valid govt objectives." "Valid govt objectives," moreover, in this case must include considerations of cost and administrative feasibility. Once it is conceded that pre-trial detention is legitimate--and no one questions that here--the Govt necessarily has a legitimate interest in running the institution of pre-trial detention at reasonable cost and in an administratively feasible manner. Normally, therefore, "the basic requirement of due process is satisfied if the condition or practice is reasonable in light of valid govt objectives in maintaining jail security and order and of substantial considerations of fiscal economy and administrative feasibility." Only when confinement conditions "infringe a specific fundamental constitutional guarantee," such as free speech or the right to prepare one's defense, should a "compelling necessity" test be applied.

The SG's approach seems consciously similar to that adopted by Judge Bazelon in Campbell v. Magruder. This approach differs from CA2's primarily in allowing cost and administrative practicability to be considered, so long as the restrictions involved do not infringe fundamental liberties. CA2, in dismissing such considerations across the board, relied, as the SG notes, mainly on the "presumption of innocence." But the presumption of innocence, says the SG, is really only a procedural rule that allocates the burden of proof at trial (citing a CA3 case). Even if the presumption does have a substantive component--in the sense of shielding against infliction of punishment prior to conviction--the presumption would only invalidate punitive restrictions. Regulatory restrictions on detainees, designed not to punish them, but merely to run pre-trial detention feasibly, do not run afoul of the presumption. CA2's theory really proves too much, for if the presumption of innocence were given literal force the Govt could not subject detainees

to any restrictions at all.

Having propounded a general two-tiered approach to restrictions on detainees' liberty, the SG proceeds to qualify it. The SG is troubled by this Court's decision in Moore v. City of East Cleveland, 431 US 494 (1977). In that case, the Court held invalid a single-family zoning ordinance that defined "family" narrowly, interfering with the living arrangements of an extended family. Writing for the plurality (WJB, TM, LFP, HAB), Justice Powell used what the SG calls a "middle-tier" test. LFP distinguished the interests at stake in Moore from straight "family-privacy" rights, such as those in issue in Roe v. Wade, whose restriction could be justified only by compelling necessity. Moore demanded a heightened, but lesser, level of review, under which "the court must examine carefully the importance of the government interests advanced and the extent to which they are secured by the challenged regulation." According to the SG, Moore reflects a move away from the two-tiered classification of liberty interests into "fundamental" and "non-fundamental." Under Moore's middle-level review, "particularly careful scrutiny" of the State's objectives must be conducted; "compelling interests," however, are not required.

The SG suggests that Moore's middle-level scrutiny may be appropriate when considering restrictions imposed on pre-trial detainees' privacy. Detainees, despite their confinement, undoubtedly retain some privacy interests; given the inevitable limitations imposed by the fact of confinement, however, their privacy interest is diminished from the "fundamental" level involved, say, in Roe v Wade. The SG suggests that detainees, like the plaintiffs in Moore, may possess one of "a narrow category of interests that, although not fundamental, are so profoundly anchored in the traditions of our society that their restriction must be examined with particular care by the courts." Applying "middle-level scrutiny" to detainees' privacy interests, the SG proposes the following standard of review: "In the context of pretrial detainees' housing con-

ditions significantly affecting personal privacy, due process is satisfied if the conditions of confinement are carefully examined and found to satisfy a minimum threshold of decency and humane treatment [the 8th Amendment standard] and to be reasonable in light of the government's substantial administrative and fiscal concerns."

In sum, then, the SG proposes a three-tiered standard of review for conditions of detainees' confinement not relating to jail security and order: (1) a compelling-interest test for restrictions on fundamental liberties specifically guaranteed by the Constitution; here, fiscal and administrative concerns are irrelevant; (2) a heightened ends/means scrutiny for significant restrictions on detainees' privacy; administrative and cost justifications would be relevant here, but would be "carefully examined," with consideration of possible alternatives; (3) a "rational relation" test for restrictions affecting neither fundamental freedoms nor privacy; cost and administrative factors presumably would be dispositive here.

(b) Jail Security and Order. The SG recommends a different standard for testing the constitutionality of restrictions imposed on detainees for the purpose of ensuring security and order. Even CA2 recognized that the Govt has a compelling interest in maintaining security and order in the jails. And rightly so. Once the institution of pre-trial detention is conceded to be valid, it follows that there is a compelling necessity for security; without it, it would be impossible to achieve the basic purpose of detention (production of detainees for trial), as well as to ensure inmates' safety. Thus, says the SG, an institutional restriction should be upheld if it is reasonably related to the central objective of maintaining security and order, even if the restriction infringes detainees' privacy or fundamental freedoms. In assessing whether restrictions are "reasonably related" to security, moreover, "substantial deference" must be accorded the views of expert prison officials. Those views should be controlling unless the court

finds "substantial evidence" that the officials are wrong.

The SG derives this standard of review from this Court's cases involving the rights of convicts, such as Jones v. NC Prisoners' Labor Union, 433 US 119 (1977), and the explicit premise of the SG's argument is that, as far as security restrictions are concerned, convicts and detainees should be treated the same. The need for security, says the SG, is the same in each case, and detainees and convicts pose substantially similar risks. Indeed, detainees may impose greater risks, since detainees are likely to include many who cannot get bail because of the heinousness of their crimes or because of past escape efforts. Numerous CAs have held that, when institutional security is the justification for a given restriction, even though fundamental rights may be affected, there is no basis for distinguishing detainees from convicted inmates. E.g., Feeley v Sampson, 570 F2d 364, 373 (CA1 1978); Main Road v. Aitch, 565 F2d 54, 57 (CA3 1977); US v. Hearst, 563 F2d 1331, 1345 n.11 (CA9 1977). Even CA2 below seemed to realize that deference must be accorded the views of prison experts, although that court unfortunately honored its dictum more in the breach than in the observance.

(2) Resps. (a) Living Conditions. Resps basically urge the approach of CA2 below: in view of the presumption of innocence, the Govt must justify by compelling necessity all substantial restrictions and privations imposed on detainees. The presumption of innocence, says resp, has a substantive component: no one may be punished until proven guilty. In view of this presumption, pre-trial detainment consistently with due process can result in no restrictions greater than absolutely necessary to accomplish the purpose of detainment (production of the accused for trial) and to achieve the collateral purpose of maintaining security and order. As Blackstone said in his Commentaries, detainees may be subjected to no "needless fetters" nor to "hardships other than such as

are absolutely requisite for the purposes of confinement only." Any other restrictions by definition constitute "punishment" and are thus unconstitutional absent a showing of "compelling necessity."

Resps then answer the Govt's objections to the breadth of CA2's test. To the SG's contention that only fundamental liberties should call the "compelling interest" test into play, resps reply that pre-trial detainees have a fundamental due-process right not to be punished prior to conviction. Thus, any restriction not inherent in the fact of confinement or essential to security inevitably abridges detainees' fundamental rights. Second, the SG contends that CA2's test improperly requires all "restrictions and privations" on detainees to satisfy a rigorous constitutional standard. Resps reply that the SG has misread CA2's test: that court obviously did not mean that every detail of jail routine must be subjected to strict scrutiny; indeed, CA2 itself rev'd the DC on such trivial restrictions as access to typewriters, access to lavatory keys, commissary requests, telephones, and the like. Resps admit that CA2 didn't define "substantial," but say there is no need for the Court to worry about that here, since all five MCC practices at issue in this case clearly involve "substantial" restrictions. In sum, say resps, CA2 rightly held that all substantial restrictions on detainees' liberties must be justified by compelling necessity, unless those restrictions are inherent in confinement itself or essential to maintenance of jail security.

Resps next confront the Govt's argument that administrative and fiscal concerns must be taken into account. If CA2 was correct in holding that all substantial restrictions must be justified by "compelling necessity," of course, cost and administrative factors must be ignored across the board; this Court has always held that such factors cannot justify infringing constitutional rights under strict scrutiny.

But even accepting the Govt's suggestion that a Moore-type middle-level scrutiny should be applied to certain detainee interests, such as privacy, resp thinks that fiscal and administrative factors are still irrelevant. Generally speaking, these factors are cognizable only in "minimum rationality" review. In "middle-level" review in the equal-protection area, this Court has held consistently that "administrative convenience" must be rejected as a justification. Resp here relies on sex discrimination cases, such as Craig v Boren, 429 US at 198; Califano v. Goldfarb, 430 US at 205; Frontiero v Richardson, 411 US at 690-91, and concludes that cost and convenience factors should be equally irrelevant in "middle-level" review here. Cost and convenience factors, resp says, are especially suspect when other methods are available to achieve the desired objectives, the situation that assertedly prevails in this case.

(b) Security and Order. Resps agree with the SG that the Govt has a compelling interest in maintaining security and order. They disagree, however, about the role of cost and administrative factors in this inquiry, and about the deference to be accorded to the views of prison officials. First, say resps, it is important to distinguish between the Govt's need to preserve security per se and the administrative/cost factors that may underlie a particular "security" rule. The Govt, for example, has a legitimate need to make sure that contraband does not get into jails, and to this end it may inspect books and packages that enter the prison. But this doesn't mean that the Govt must have a "no-packages" or "publisher-only" rule. The reason for these rules is not security per se, but rather the Govt's reluctance to spend the time and money needed to check each book and package that came into the jail. Thus, while the Govt has a compelling interest in maintaining security, it does not have a compelling interest in keeping rules that are based on cost and administrative convenience.

Second, resps reject the SG's contention that convicts and detainees are to be treated alike. Relying on Jones and other convict cases, the SG argues that courts must defer to the views of expert prison officials absent "substantial evidence" that their response to a particular security problem is "exaggerated." Resps find Jones inapposite because (1) it involved convicts, not detainees; (2) it involved a danger of concerted action (a prisoners' union) not present here; and (3) it involved a state prison, where federalism concerns about undue judicial interference loomed larger. Accordingly, say resps, far less deference should be accorded the opinions of prison officials in this case.

B. The MCC Practices at Issue.

(1) Double-Celling and Overcrowding. (a) The Govt suggests that the double-celling of detainees in this case had a sufficient impact on "personal dignity and privacy" to call "middle-level" review into play. Thus, the Govt's justifications for the practice, including fiscal and administrative considerations, must be "carefully examined." Both the DC, which granted resps' motion for summary judgment on this issue, and the CA, however, refused to consider any administrative or cost justifications. Hence, the courts below ignored (1) the unexpectedly large and sudden increase in the number of persons awaiting trial; (2) the MCC's substantial efforts to stem the flow of inmates; (3) the need to keep detainees nearby for the convenience of the courts; (4) the cost of providing additional facilities for the overflow; and (5) the inconvenience to all concerned of relocating detainees outside NYC in widely scattered destinations. Because the DC and the CA declined to consider these factors, there was insufficient evidence to award resps summary judgment under the SG's recommended standard of review. The proper course, therefore, is to vacate CA2's opinion on this score and remand to the DC for further findings.

(b) Resps argue that there was sufficient evidence for summary judgment on this issue, and spend most of their argument relating the facts. The cells here were explicitly designed for one person (quoting the architect of the MCC). The cells were 75 sq. ft., which left 37.5' per inmate; this amount of room is less than other CAs have found proper. Resps quote several penology studies recommending single-celling with a minimum of 60' to 80' per person. The Bureau of Prisons, moreover, has promulgated Draft Standards recommending at least 50' of living space per inmate; although the Govt disclaims the Draft Standards as not representing constitutional minima, the Standards still represent guidelines for decent facilities. The cells, resps continue, each had an open toilet, forcing inmates to urinate and defecate within a few feet of each other. Because of the furniture added to accommodate the second inmate, there was virtually no space in which to walk around. The use of bunk beds placed the top bed about one foot from an air vent in the ceiling; to avoid cold drafts, the top inmate often would block the vent, causing the air in the room to become stale. Since inmates were not assigned according to perceived aggressiveness, double-celling subjected inmates to considerable personal danger. Double-celling, moreover, put pressure on the multi-purpose rooms, destroying the whole point of the modular system. Based on these facts, resps conclude, there was no triable issue and summary judgment was proper.

In response to the SG's position, resps answer that there is no need to remand for consideration of cost/administrative factors: since housing restrictions on detainees' privacy must be justified by "compelling necessity," such factors are irrelevant. Even if such factors should be deemed relevant, moreover, the SG's argument is suspect. In this case, the MCC complied with the DC's order to eliminate double-celling without difficulty: the MCC simply moved some 130 convicted inmates to other facilities. The Govt, in fact, told the DC that it

could comply in 60 days. The Govt never sought a stay of the DC order, nor did it seek to use the "emergency provision" in that order which would allow double-celling for 10 days upon certification of necessity. Given this, the Govt's assertions of fiscal constraints and administrative infeasibility are questionable.

(2) "No-Packages Rule." (a) The Govt argues first that CA2 failed to identify the constitutional right that was infringed by this rule. The right to receive packages is not a fundamental freedom, nor is it a privacy interest meriting "careful examination" under "middle-level" review. Accordingly, it should be judged under a "rational relation" test. Since, according to un rebutted testimony in the DC, the "no-packages" rule was reasonably related to the need for security, given the administrative/cost constraints under which MCC was operating, the rule should have been sustained. Even if this rule is judged under "middle-level" review, continues the SG, it still should pass muster: the DC refused to give proper deference to the views of MCC officials, and simply substituted its judgment for theirs.

(b) Resps suggest that the Due Process Clause protects their right to receive personal property from outside the prison. Under the presumption of innocence, the deprivation of property detainees suffer should be no greater than security needs absolutely dictate; otherwise, the deprivation amounts to punishment. Resps cite Fuentes v Shevin and similar cases for the proposition that even a temporary deprivation of property raises due-process concerns. As far as justification for the rule goes, resps note that the SG has abandoned the theories, urged below, that the "no-packages" rule was necessary to prevent fighting among detainees, and, in the case of food packages, to ensure proper sanitation. Abandonment of these theories was wise, say resps, since they were untenable: food and personal property can be purchased in the MCC commissary, and logically should have caused the same "fighting"

and "sanitation" problems. The only justification the SG urges here, resps say, is the need to prevent introduction of contraband. Yet the Govt's security needs can be met by allowing limited introduction of packages, with inspection by MCC officials. The Govt's objection really boils down to administrative convenience: the MCC can't (or won't) afford the manpower to do the searches. Resps note that other jails have formulated regulations allowing receipt of packages on a limited basis. This was all CA2 ordered the MCC to do here.

(3) The "Publisher-Only" Rule. (a) The Govt notes that, at the time this case started, the regulation at issue allowed receipt of books only from publishers and book clubs. The regulation has since been amended to allow receipt of books directly from bookstores. In addition, the Bureau of Prisons has proposed to allow receipt of paperback books, magazines, and other soft-covered material from any source. Accordingly, The SG asks this Court to review CA2's holding only insofar as it may require the MCC to allow receipt of hard-covered books from sources other than publishers, bookstores, and book clubs. In this respect, says the SG, CA2 was wrong. First of all, the "publisher only" rule effected no meaningful interference with 1st Amendment rights; strict scrutiny was therefore inappropriate. Second, even if 1st Amendment rights were implicated, the rule was designed to ensure security; hence, the burden was on resps to show by "substantial evidence" that the rule was an "exaggerated response" to the perceived problem. This resps failed to do.

(b) Resps counter that, given the twice-altered contours of the "publisher-only" rule, this issue should be remanded to the DC for further consideration. If detainees are indeed allowed to receive paperback books from any source, the DC may well reconsider its initial conclusion that regulations permitting receipt of all reading matter are necessary. If the Court chooses to reach the merits, resps argue that detainees have a 1st Amendment right in getting information (citing Red

Lion); that the infringement of detainees' fundamental right was serious, since there were no meaningful alternative channels of getting reading matter; and that the security problem assertedly caused by hard-bound books ultimately reduces to the Govt's refusal to inspect them on arrival.

(4) Room Searches. (a) The Govt begins by noting that the room searches were concededly legitimate--inmates have no "privacy interest" capable of invalidating random searches of their cells. Yet once it is conceded that the searches were proper, resps' claim to a constitutionally-protected interest fails: the 4th Amendment does not entitle anyone to observe a legitimate search of his premises. Since resps' thus had no 4th Amendment or privacy interest, a "minimal rationality" test must be applied. Under this test, administrative convenience is enough to justify exclusion of inmates during routine room inspections. Detainees' presence causes tensions and arguments, risks attempts to destroy or conceal contraband, and causes inspections to be much more time-consuming.

(b) Resps start by noting that there were really two kinds of room searches in the MCC. First, there were formal shakedowns of cells by block; during these searches, the block was cordoned off and all inmates were excluded. (The point of exclusion here was apparently to keep inmates from passing contraband from room to room, one step ahead of the search party). Second, there were informal, random searches of individual cells; inspecting officers had discretion to let inmates observe these latter searches, although permission was granted rarely. Resps say that they did have a constitutionally-protected interest in observing the searches; although they purport to base their claim on the 4th Amendment, they really make a due-process argument, saying that search procedures that gratuitously invade privacy or insult dignity are "punitive." In any event, resps contend that the Govt had no need to exclude inmates completely. CA2 held only that detainees should be

allowed to watch "from a reasonable distance"--this needn't even be from inside the cell. If detainees were thus removed from the room, they could hardly dispose of contraband during the search. If inmates became argumentative, they could always be taken from the area completely. Finally, resps say that the MCC encountered no problems with letting inmates watch informal searches where permission was granted; this assertedly belies any real security problems.

(5) Visual Body-Cavity Inspections. (a) CA2 held that visual body-cavity inspections violate the 4th Amendment absent probable cause to believe that the inmate is concealing contraband. The SG argues that CA2 ignored the testimony of at least one prison official that such inspections were necessary after contact visits; notes DC decisions in SDNY and NJ upholding such searches under these circumstances; and contends that CA2's finding that the searches were of "little actual utility" ignored evidence of their deterrent value.

Ordinarily, says the SG, it is unnecessary to inquire into less restrictive alternatives where security regulations are at issue. In this instance, however, where the challenged search implicates notions of personal dignity and decency, some inquiry into alternatives under a "middle-level" review may be proper. But in determining the availability of alternative measures, the evaluations of correctional officers must be accorded deference absent "substantial evidence" that they have over-reacted. Here, the record revealed no sufficient alternatives to visual inspections. The DC suggested metal detectors; yet they wouldn't detect concealed drugs. Another alternative would be close monitoring of visiting rooms; but the rooms often contained 20-30 people and MCC simply lacked the staff to monitor a group this size. Moreover, there was a lot to be said for unsupervised visits, and monitoring typically creates hostility of other sorts. All in all, it cannot be said

that MCC's decision to allow intimate and largely unsupervised contact visits, with a thorough visual inspection thereafter, was unreasonable or beyond the discretion of correctional officials.

(b) Resps argue first that detainees have a 4th Amendment right to be secure in their persons against unreasonable searches. Resps then summarize the nature of the searches here. Inmates were required to expose their genitals, anus, and (for women) vaginal areas to inspection; in the course of exposing these areas, inmates were forced to assume humiliating postures. The inspections (due to time pressure) were often conducted in the presence of other inmates, and were often accompanied by sadistic, homosexual, and threatening remarks from the inspecting officers. Moreover, there was no showing that such inspections were necessary for security purposes. There was only one case in which an inmate was found to have concealed something in one of the searched areas. Such inspections, further, could not possibly be said to have any deterrent value. Detainees wore one-piece jumpsuits; in order to hide anything during a visit, they would usually have to remove the jumpsuit as far as the waist, which activity would be easily observed. Given the monitoring of the visiting room (resps don't agree that monitoring was lax), it would be hard to insert contraband in one's anus or vagina in any event. Inmates can't use the visiting room lavatory, so they can't go in there to hide things. Visitors are inspected before coming into the visiting room, so contraband can be discovered that way. After the visit, inmates undergo a thorough strip-search (CA2 approved of this), which would deter most efforts to hide contraband. Under CA2's opinion, finally, visual inspections of body cavities could still be conducted when officers had probable cause to suspect concealment. Given all this, resps conclude, CA2's holding that automatic visual inspections violated the 4th Amendment was correct.

C. Views of Amici.

(1) Amicus NAACP Legal Defense Fund supports resps in urging affirmance. Although amicus seems pretty sure that the MCC practices at issue are undesirable, amicus has a hard time arguing that they are unconstitutional. Amicus makes three major points:

(a) First, amicus urges the Court to be wary of upholding detainee restrictions by blanket deference to claims of "jail security." Although this case involves a modern federal correctional center staffed by expert penologists, the Court's reasoning will affect lower courts' considerations of all pre-trial detainment cases--including those involving ramshackle country jails. Most of the jails in this country lack the features of the MCC: for the most part, they have minimal budgets and are staffed, not by experts, but by local sheriffs. In such cases, deference to "correctional officers' expertise" would be inappropriate. Amicus lists numerous cases in which DCs have struck down outlandish practices, even though these practices were claimed to enhance "security." Amicus fears that a broad holding by this Court would set back these efforts. Even in this case, amicus says, the MCC's claims of "security" should be carefully scanned. For the most part, the challenged practices were necessitated, not by "security," but by jailers' reluctance to go to the trouble of adopting less convenient procedures. Visiting, for example, can be made safe by monitoring, without the humiliation of anal and genital inspections; packages can be allowed after being searched. Amicus concludes this argument by saying, "Nor should this Court be deterred by the notion that, although the restrictions enjoined below are undesirable, petrs should not be requited to abandon them as a matter of constitutional law." Amicus does not, however, make any constitutional arguments or suggest any constitutional test; it argues simply that reform of deplorable jail conditions can only come at the instance of the courts.

(b) Amicus argues secondly that, while the courts below enjoined the MCC practices on constitutional grounds, the same result can be reached on a non-constitutional basis. The federal courts, says amicus, have inherent power to correct conditions under which persons awaiting trial in the federal courts are detained. Just as the courts have power to grant bail, and to set conditions on receipt of bail, so too they should have power to determine the conditions under which detainees are held in lieu of bail. The DC's supervisory power, amicus suggests, would let it eliminate unreasonable MCC practices regardless of constitutionality.

(c) Finally, amicus argues that the challenged practices were properly enjoined because they violated the Atty Gen's statutory duty to "provide suitable quarters" for detainees. 18 USC § 4042. Amicus notes that the Bureau of Prisons has proposed new Draft Standards for detention conditions. These Standards recommend (1) single occupancy of cells, with double-celling occurring only if each inmate has 60' of living space; (2) visual body-cavity inspections only when jailers have "reasonable suspicion" that inmates are hiding contraband; (3) receipt of books and packages from any source. If these Standards are enacted, amicus suggests, the Atty Gen would be bound by them. Accordingly, the Atty Gen has in effect already determined that the challenged MCC practices are inconsistent with the duty to provide inmates with "suitable quarters." CA2 rejected a similar argument below, finding that, absent a showing of a specific statutory violation by the Atty Gen, it lacked jurisdiction to consider matters "committed to agency discretion by law."

(2) Amicus ACLU Natl Prison Project likewise supports resps in urging affirmance or, alternatively, that the case be DIG'd. Amicus doesn't make any legal arguments; it just says that pre-trial detainment is a national disgrace and that if the courts don't do something

about it, nobody will. Amicus lays great emphasis on the "irony" that the Justice Dept has consistently opposed double-celling, publisher-only rules, and the like when it has intervened in lawsuits against state and local jails. Only when its own federal institutions are attacked does the SG sing a different tune. Amicus says that the challenged MCC practices are inconsistent with recognized professional standards (citing the Draft Standards and numerous penological studies); hence, there is no question but that they were improper, and the case should be DIG'd.

D. The SG's Reply.

The SG replies to the two new arguments made by NAACP: He argues initially that these arguments were not made in the courts below nor were they briefed by the parties in this Court; hence, they shouldn't be considered. In any event, the arguments are wrong. First, the federal courts have no "inherent power" to dictate confinement conditions for detainees. True, the federal courts can grant bail and set conditions thereon, but they do this pursuant to statutory authority (the Bail Reform Act); no similar statutory authority exists for determining jail conditions. Indeed, the federal prisons by statute are controlled by the Executive Branch via the Bureau of Prisons; any "inherent powers" of the courts has thus been statutorily displaced by delegation to the Executive. Second, the Atty Gen has not "bound himself" by the Draft Standards as a definition of "suitable quarters" for detainees. The Standards expressly state that they embody administrative goals; they explicitly state that they confer no legal rights and no causes of action on anyone. In any event, the Standards are still in draft form, having been issued for public comment only; since they haven't been promulgated, they do not have the force of law and could under no circumstances "bind" the Atty Gen.

II. DISCUSSION

A. The Proper Constitutional Test.

The Court's major task in this case, I think, is the enunciation of an appropriate and workable standard of review; the application of that standard to specific pre-trial detainment practices can probably be left to the lower courts.

1. Living Conditions. CA2's "compelling necessity" test should be rejected. The premise of CA2's approach is that any restrictions greater than absolutely necessary to ensure detainees' trial availability and jail security are "punitive," hence violative of the presumption of innocence, hence justifiable only by "compelling necessity." Yet it is simply not true that all "non-essential" restrictions are "punitive." Limitations on detainees' access to telephones, for example, are not absolutely essential to either objective of pre-trial detainment, but such limitations could hardly be labeled "punitive." CA2's rationale proves too much. Nor is it possible to save CA2's theory by adding a gloss (as resps do) that only substantial restrictions are punitive. This gloss, first of all, doesn't fit with the theory, for under CA2's theory the thing that makes restrictions "punitive" is not their burdensomeness, but their inessentiality. This gloss, moreover, is unworkable: restrictions will be "substantial," or not, depending on the moods of judges.

The SG's suggested "three-tier" standard of review seems quite reasonable, and is sensitive to the equities. I agree completely that restrictions of a relatively trivial nature must be judged by a "rational relation" test. I likewise agree that restrictions on fundamental liberties--insofar as such liberties have not been lost owing to the fact of confinement and the necessities of jail security--should be judged under a "strict scrutiny" approach. I would add a caveat, however, that

restrictions of the "fundamental" variety must be significant before "strict scrutiny" is brought into play. For example, I would not say that the MCC's restrictions on detainees' receipt of books sufficiently implicated 1st Amendment interests, or that its restrictions on room searches sufficiently implicated 4th Amendment interests, to call for a "compelling necessity" approach. The difficulty with the SG's proposed test is the middle tier. The SG gets this tier from Moore v City of East Cleveland, but it is not obvious why that case--involving vastly different interests--should be brought in here. Moreover, it is not clear what sorts of interests "middle-level" review should apply to. The SG seems to invoke it to assess restrictions on privacy, be it through housing conditions or body-cavity inspections; I wonder whether he would apply it to non-privacy interests as well. This middle-tier, of course, possesses great capacity for expansion, and may well give courts a roving license to strike down whatever they please--especially if they look to equal protection (sex and illegitimacy) cases for guidance as to the meaning of "middle-tier" review. In those cases, of course, "middle-level" scrutiny had tremendous bite, and most jail practices would probably succumb to it. The SG's approach, in short, while fair-minded, may be too confusing and uncertain to be workable. I have never been a great fan of multiple-tiered equal protection scrutiny, especially when the building begins to assume skyscraper proportions.

Whoever catches this opinion to write will have to do some careful crafting in order to produce a workable test. Although I don't pretend to have found the answer yet, I think that any test must allow for some consideration of administrative feasibility and cost constraints upon jail operations. If a jail, like the MCC, simply has more detainees than it can handle, what is it supposed to do? It cannot build new facilities overnight, and it cannot be expected to put detainees up in hotels. If

conditions beyond its control thrust adversity upon it, the jail will simply have to allow some temporary overcrowding. If the jail takes reasonable steps to deal with this problem fairly, it should not be held to have acted unconstitutionally. The SG's formula on this score strikes me as fair: administrative and cost constraints should be examined carefully, and, if legitimate, should be sufficient to justify the restrictions in question. Where "fundamental liberties" are involved, of course, administrative and cost factors should be accorded little weight; in the case of all other restrictions, however, they should be given serious consideration.

2. Security and Order. I basically agree with the SG here. First of all, I think that detainees and convicts should be treated the same as far as security goes. As the SG says, both pose the same risks and the need for security in each case is identical. Practically, I think it would be hard to mandate differing levels of security precautions for detainees and convicts when both are housed in the same institution. In the case of convicts, of course, the law seems established that substantial deference must be accorded prison authorities in security matters. As PS wrote in Pell v Procunier, 417 US 817, 827 (1974), considerations as to security "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." And as WHR said in Jones v. NC Prisoners' Labor Union, 433 US 119, 128 (1977), unless there is "a showing that [prison officials'] beliefs [as to the need for security] were unreasonable, it was error for the [DC] to conclude that [those officials] needed to show more. In particular, the burden was not on [the officials] to show affirmatively that the Union would be 'detrimental to proper penological objectives' or would constitute 'a present danger to security

and order.'...The necessity and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations." The invocation of 1st Amendment liberties, WHR said, "does not change this analysis." Id. at 129. Once prison officials had concluded that the presence of a Union would be "detrimental to order and security," it was "enough to say that they [had] not been conclusively shown to be wrong in this view." Id. at 132. If detainees and convicts are indeed to be treated the same as far as security goes, the standards of Pell and Jones would govern this case.

In the case of security regulations, as in the case of living conditions, I think administrative convenience and cost factors have an important role to play. As resps and amici observe, many of MCC's "security" rules would not be necessary if it had the money and manpower to adopt more liberal procedures. But this observation is not necessarily enough to condemn those rules out of hand. If jails are to be run effectively, guards simply cannot spend all their time sifting through packages looking for microscopic quantities of heroin.

3. Summary. If I had to enunciate a concise standard of review for cases of this sort, I might say something like this: "In scrutinizing restrictions on detainees' liberty, the court should carefully examine the practice in question, together with the cost, security, and administrative justifications given for it. If, after this analysis, the court finds the practice reasonably related to a legitimate purpose, the practice should be sustained. Only when 'fundamental liberties,' i.e., specific rights guaranteed by the Constitution, are significantly infringed should strict scrutiny be applied."

B. The Practices Challenged.

I don't think the Court should spend much time on the five prac-

practices specifically challenged here. The better course, I think, would be to announce the proper standard of review, then remand to the DC to let it conduct the analysis. In many instances, the parties dispute about evidentiary matters; such disputes could best be resolved in a trial court. In each case, the courts below ignored asserted cost/administrative justifications (not enough guards to monitor visiting rooms, not enough guards to inspect books and packages, etc.); on remand, they could be directed to factor such considerations into the equation.

On the merits, I think the double-celling was constitutionally permissible owing to the temporary and unforeseen overcrowding. The room-search argument seems frivolous, as does the package argument--in each case, resps simply have no constitutional right to base a claim on. The MCC's rules in these respects may not have been ideal, but I don't think they were unconstitutional. As to the publisher-only rule, I think a remand is essential, given the changes the Bureau of Prisons has effected or proposed in it; if these changes are made, a watered-down rule, applicable only to some hard-bound books, would seem plainly valid. The most difficult issue is the body-cavity inspection; the Govt's evidence as to the necessity for this seems to reduce to the testimony of one witness, and this may be a thin reed. I would be reluctant to decide this question on this record, especially given the uncertainty as to the extent of visiting-room monitoring and MCC's manpower shortages.

III. CONCLUSION

The decision below should be reversed, and the case should be remanded for consideration of the challenged practices under the proper constitutional test.

1/12/79

AGL

MEMORANDUM

TO: HAB
FROM: AGL
RE: WHR's supplemental memo in Bell v Wolfish, circ. March 8, 1979
DATE: March 8, 1979

I think WHR's supplemental memo is very solid: it highlights the key issues in the case and, to my mind, resolves them correctly. I think a revision along the lines WHR envisions would improve the opinion, and would provide a doctrinal link between this case and previous prisoner cases. The theory, in brief, is this: (1) restrictions on detainees are OK unless they're punishment; (2) "punishment" means that the restriction is not "reasonably related to a legitimate governmental objective"; (3) prison security is a legitimate governmental objective; (4) in determining whether or not restrictions are "reasonably related" to this objective, deference should be given to the views of correctional authorities. WHR's theory harmonizes the "convict" cases with this "detainees" case quite well.

I agree with WHR that the disagreements with his memorandum expressed by WJB and JPS go to the heart of the case; the disagreements are so vast, that there is no hope that WJB and JPS can be brought aboard WHR's opinion. Unless you (or perhaps LFP) would prefer some sort of middle solution, it seems as though you may have to chose between the polar opposites on the table thus far.

MEMORANDUM

TO: HAB
FROM: AGL
RE: Bell v Wolfish, No. 77-1829
DATE: March 8, 1979

I have read WHR's memo, together with the memos written by JPS, PS, and WJB. I think WHR has done a very good job. I would recommend that you join the WHR memorandum as an opinion, as PS has stated that he will do.

(1) JPS's ideas, in my view, are way off base. Given this Court's past cases, the purpose behind a restraint must be the key in determining whether the restraint constitutes "punishment." JPS's idea that less emphasis should be given to intent "and more to the question whether a practice invades the basic dignity of an individual" is completely unworkable. JPS's idea that it is "punishment" to deny detainees the rights to receive hard-back books from relatives, to deny them the right to receive packages, etc., seems plain wrong to me. Obviously, the purpose of these restrictions is to ensure security, not to punish. Moreover, viewed objectively, the restraints do not make out "punishment" under the Mendoza-Martinez standards set out in WHR's memo at 15-16.

(2) WJB's ideas largely track JPS's. WJB's suggestion that detainees' rights can be founded on the "presumption of innocence" is wrong, I think; WHR treats this issue well at 11. WJB's suggestion that the existence of "mental harm" can be an element in ascertaining the existence of punishment is, I think, an invitation to the slippery slope. Any detainee could say that his inability to receive packages caused him "psychological harm" and thus constituted punishment. WJB, I believe, is unfaithful to this Court's past prison cases in downpeddling the deference to be accorded prison officials. Once one accepts WHR's premise, at 24 n.27, that there is no distinction between detainees and convicts as far as jail security and order go, all the prison cases are directly on point. These cases plainly state that considerable deference must be accorded jail authorities in security matters, and I think WHR correctly applies this rule to this case.

Originally, I had thought it might be better to have this Court enunciate the proper test, then remand to let the DC apply it to the five practices at issue. I have come to agree with WHR, however, that this would be unsatisfactory. The best way for this Court to show the lower courts what it means is for this Court to apply its test itself. I can well imagine the DC and CA2 worming around on remand trying to come out the same way despite this Court's opinion. Since, as I said in my bench memo, the outcome of each issue on the merits is clear enough, I now think it is best for this Court to decide the five issues. The only one that gives me any pause is the body-cavity inspection. As WHR says, however, the challenge here is to the rule on its face, not as applied; I would have a hard time saying that this rule is facially invalid. WHR includes a warning that jail officials will be expected to "keep their trust" in applying this rule properly. I think that's all this Court can do in this posture of the case.

In sum, I recommend that you join WHR. There might be some value in getting a note around fairly soon, so that everybody will know how the lines are being drawn.

MEMORANDUM

TO: HAB
FROM: AGL
RE: Bell v Wolfish (WHR's 2d draft circulated March 12)
DATE: March 16 1979

The basic purpose of WHR's revision was to apply the "punishment" analysis, used in Part II to assess the validity of "double-bunking," to assess the validity of the security measures discussed in Part III as well. The revision is largely contained in a new Part IV. I think WHR's analysis (which follows the analysis in his memo of March 8) is theoretically sound, and is thoroughly consistent with the analysis in Part II.

I have one criticism. On page 39, WHR says that, "Absent a showing of an expressed intent to punish on the part of detention facility officials, the determination whether a particular restriction constitutes punishment in the constitutional sense ordinarily depends on whether that restriction is reasonably related to a legitimate nonpunitive governmental objective." This formulation seems incomplete. As WHR has said earlier, a restriction must not only be "rationally related" to a legitimate purpose in order to escape the "punishment" label; it must also not "appear[] excessive in relation to the...purpose assigned [to it]." Draft at 16. I think it might be useful to make this latter point again when the test is reiterated on page 39. After all, placing detainees in a dank dungeon may be "rationally related" to the objective of ensuring their presence at trial; it is the "excessiveness" of this form of restriction, not its irrationality, that is telling.

LFP has said that he'll go along with WHR, except as to the no-package rule and the body-cavity inspections. I think the "no-package" rule is definitely OK, and thus part company with LFP there. Like everybody else, I have trouble with the body-cavity inspections, but am inclined to think that WHR is right in concluding that the rule is not invalid on its face. However, I would not be terribly perturbed if the Court were to affirm CA2 on this count. If you were to agree with LFP on this one, I suspect WHR might modify his discussion to get the two of you aboard. LFP, then, might agree to drop his opposition on the "no-package" point. I really hope the Court can avoid splintering too badly on this case.

are all's well above