The Burger Court Opinion Writing Database

Bell v. Wolfish

441 U.S. 520 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

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

CHAMBERS OF
THE CHIEF JUSTICE

March 29, 1979

Dear Bill:

Re: 77-1829 Bell v. Wolfish

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

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

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

April 19, 1979

Re: 77-1829 - Bell v. Wolfish

Dear Bill:

This is to confirm my early informal join.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

7 March 1979

Memorandum to the Conference

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

W.J.B.Jr.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 27, 1979

RE: No. 77-1829 Bell v. Wolfish

Dear John:

Will you please join me in your dissent.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 7, 1979

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

Dear Bill,

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

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

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 10, 1979

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

Dear Bill,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

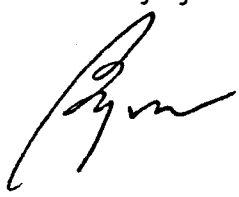
March 15, 1979

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

Dear Bill,

I am in essential agreement with your memorandum.

Sincerely yours,



Mr. Justice Rehnquist

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 5, 1979

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

Dear Bill,

I am still with you.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

cmc

No. 77-1829

Bell v. Wolfish

20 APR 1979

MR. JUSTICE MARSHALL, dissenting.

The Court holds that the Government may burden pretrial detainees with almost any restriction, provided detention officials do not proclaim a punitive intent or impose conditions that are "arbitrary or purposeless." Ante, at 7. As if this standard were not sufficiently ineffectual, the Court dilutes it further by according virtually unlimited deference to detention officials' justifications for particular impositions. Conspicuously lacking from this analysis is any meaningful consideration of the most relevant factor, the impact that restrictions may have on inmates. Such an approach is unsupportable

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

From: Mr. Justice Marshall

Circulated: 25 APR 1979

Recirculated: _____

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1829

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

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

[April —, 1979]

MR. JUSTICE MARSHALL, dissenting.

The Court holds that the Government may burden pretrial detainees with almost any restriction, provided detention officials do not proclaim a punitive intent or impose conditions that are "arbitrary or purposeless." *Ante*, at 7. As if this standard were not sufficiently ineffectual, the Court dilutes it further by according virtually unlimited deference to detention officials' justifications for particular impositions. Conspicuously lacking from this analysis is any meaningful consideration of the most relevant factor, the impact that restrictions may have on inmates. Such an approach is unsupportable given that all of these detainees are presumptively innocent and many are confined solely because they cannot afford bail.[1]

[1] The Bail Reform Act, 18 U. S. C. § 3146, to which the Court adverts *ante*, at 2, provides that bail be set in an amount that will "reasonably assure" the defendant's presence at trial. In fact, studies 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. See, *e. g.*, American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release 1-2 (1968); W. Thomas, Bail Reform in America 11-19 (1976). See also National Advisory Commission on Criminal Justice Standards and Goals, Corrections 102-103 (1973); National Association of Pretrial Service Agencies, Performance Standards and Goals for Pretrial Release and Diversion 1-3 (1978).

7, 10-14
footnotes renumbered

7 MAY 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–1829

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

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

[April —, 1979]

MR. JUSTICE MARSHALL, dissenting.

The Court holds that the Government may burden pretrial detainees with almost any restriction, provided detention officials do not proclaim a punitive intent or impose conditions that are "arbitrary or purposeless." *Ante,* at 7. As if this standard were not sufficiently ineffectual, the Court dilutes it further by according virtually unlimited deference to detention officials' justifications for particular impositions. Conspicuously lacking from this analysis is any meaningful consideration of the most relevant factor, the impact that restrictions may have on inmates. Such an approach is unsupportable given that all of these detainees are presumptively innocent and many are confined solely because they cannot afford bail.[1]

[1] The Bail Reform Act, 18 U. S. C. § 3146, to which the Court adverts *ante,* at 2, provides that bail be set in an amount that will "reasonably assure" the defendant's presence at trial. In fact, studies 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. See, *e. g.,* American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release 1–2 (1968); W. Thomas, Bail Reform in America 11–19 (1976). See also National Advisory Commission on Criminal Justice Standards and Goals, Corrections 102–103 (1973); National Association of Pretrial Service Agencies, Performance Standards and Goals for Pretrial Release and Diversion 1–3 (1978).

7, 12, 14

10 MAY 1979

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1829

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

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

[April —, 1979]

MR. JUSTICE MARSHALL, dissenting.

The Court holds that the Government may burden pretrial detainees with almost any restriction, provided detention officials do not proclaim a punitive intent or impose conditions that are "arbitrary or purposeless." *Ante,* at 7. As if this standard were not sufficiently ineffectual, the Court dilutes it further by according virtually unlimited deference to detention officials' justifications for particular impositions. Conspicuously lacking from this analysis is any meaningful consideration of the most relevant factor, the impact that restrictions may have on inmates. Such an approach is unsupportable given that all of these detainees are presumptively innocent and many are confined solely because they cannot afford bail.[1]

[1] The Bail Reform Act, 18 U. S. C. § 3146, to which the Court adverts *ante,* at 2, provides that bail be set in an amount that will "reasonably assure" the defendant's presence at trial. In fact, studies 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. See, *e. g.,* American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release 1-2 (1968); W. Thomas, Bail Reform in America 11-19 (1976). See also National Advisory Commission on Criminal Justice Standards and Goals, Corrections 102-103 (1973); National Association of Pretrial Service Agencies, Performance Standards and Goals for Pretrial Release and Diversion 1-3 (1978).

April 2, 1979

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

Dear Bill:

I have one minor suggestion about the memorandum, as recirculated, and submit it to you for your consideration. On page 39, you state that "absent a showing of an expressed intent to punish . . . the determination whether a particular restriction constitutes punishment . . . depends on whether that restriction is reasonably related to a legitimate nonpunitive governmental objective." Is this formulation somewhat incomplete? At page 16, it is said that a restriction must not only be "rationally" related to a legitimate purpose in order to escape the "punishment" label, but it must also not appear "excessive in relation to the alternative purpose assigned [to it]." Would it be advisable to make this latter point again when the test is reiterated on page 19?

done

Sincerely,

HAB

Mr. Justice Rehnquist

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 2, 1979

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

Dear Bill:

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

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

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 10, 1979

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

Dear Bill:

Please join me in your formal opinion.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 10, 1979

77-1829 Bell v. Wolfish

Dear Bill:

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

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

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

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

From: Mr. Justice Powell

Circulated: 23 APR 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–1829

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

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

[April —, 1979]

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

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

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

From: Mr. Justice Rehnquist

Circulated: 5 MAR 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1829

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

[March —, 1979]

Memorandum of MR. JUSTICE REHNQUIST.

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

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

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

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 8, 1979

SUPPLEMENTAL MEMORANDUM TO THE CONFERENCE

Re: No. 77-1829 Bell v. Wolfish

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

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

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

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

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

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

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

Sincerely,

Copies to the Conference

REVISIONS THROUGHOUT

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

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 12 MAR 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1829

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

[March —, 1979]

Memorandum of MR. JUSTICE REHNQUIST.

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

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

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

Pp 1, 14, 28, 39

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

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 4 APR 1979

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1829

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

[March —, 1979]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

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

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

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

1,2,3 12,13,15,18,35,37,38

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

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 18 APR 1979

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1829

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

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

[March —, 1979]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Over the past five Terms, this Court has in several decisions considered constitutional challenges to prison conditions or practices by convicted prisoners.[1] This case requires us to examine the constitutional rights of pretrial detainees—those persons who have been charged with a crime but who have not yet been tried on the charge. The parties concede that to ensure their presence at trial, these persons legitimately may be incarcerated by the Government prior to a determination of their guilt or innocence, *infra*, at 12–13 and n. 15; see 18 U. S. C. §§ 3146, 3148, and it is the scope of their rights during this period of confinement prior to trial that is the primary focus of this case.

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

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

pp 3, 13-14, 17, 19 Appendix (omitted)

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

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 2 MAY 1979

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1829

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

[March —, 1979]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Over the past five Terms, this Court has in several decisions considered constitutional challenges to prison conditions or practices by convicted prisoners.[1] This case requires us to examine the constitutional rights of pretrial detainees—those persons who have been charged with a crime but who have not yet been tried on the charge. The parties concede that to ensure their presence at trial, these persons legitimately may be incarcerated by the Government prior to a determination of their guilt or innocence, *infra*, at 12–13 and n. 15; see 18 U. S. C. §§ 3146, 3148, and it is the scope of their rights during this period of confinement prior to trial that is the primary focus of this case.

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

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

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 7, 1979

Re: 77-1829 - Bell v. Wolfish

Dear Bill:

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

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

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

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

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

Respectfully,

Mr. Justice Rehnquist

Copies to the Conference

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

From: Mr. Justice Stevens

Circulated: APR 24

1st DRAFT Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 77-1829

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

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

[April —, 1979]

MR. JUSTICE STEVENS, dissenting.

This is not an equal protection case.[1] An empirical judgment that most persons formally accused of criminal conduct are probably guilty would provide a rational basis for a set of rules that treat them like convicts until they establish their innocence. No matter how rational such an approach might be—no matter how acceptable in a community where equality of status is the dominant goal—it is obnoxious to the concept of individual freedom protected by the Due Process Clause. If ever accepted in this country, it would work a fundamental change in the character of our free society.

Nor is this an Eighth Amendment case.[2] That provision of the Constitution protects individuals convicted of crimes from punishment that is cruel and unusual. The pretrial detainees whose rights are at stake in this case, however, are innocent men and women who have been convicted of no crimes. Their claim is not that they have been subjected to cruel and unusual punishment in violation of the Eighth Amendment, but that to subject them to any form of punishment at all is an unconstitutional deprivation of their liberty.

[1] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amend. XIV.

[2] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U. S. Const., Amdt. VIII.

Stylistic Changes
pp. 2, 6, 13-14

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

From: Mr. Justice Stevens

Circulated: _____

2nd DRAFT Recirculated: APR 26 79

SUPREME COURT OF THE UNITED STATES

No. 77-1829

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

[April —, 1979]

MR. JUSTICE STEVENS, dissenting.

This is not an equal protection case.[1] An empirical judgment that most persons formally accused of criminal conduct are probably guilty would provide a rational basis for a set of rules that treat them like convicts until they establish their innocence. No matter how rational such an approach might be—no matter how acceptable in a community where equality of status is the dominant goal—it is obnoxious to the concept of individual freedom protected by the Due Process Clause. If ever accepted in this country, it would work a fundamental change in the character of our free society.

Nor is this an Eighth Amendment case.[2] That provision of the Constitution protects individuals convicted of crimes from punishment that is cruel and unusual. The pretrial detainees whose rights are at stake in this case, however, are innocent men and women who have been convicted of no crimes. Their claim is not that they have been subjected to cruel and unusual punishment in violation of the Eighth Amendment, but that to subject them to any form of punishment at all is an unconstitutional deprivation of their liberty.

[1] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amend. XIV.

[2] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U. S. Const., Amdt. VIII.

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

From: Mr. Justice Stevens

Circulated: _____

Recirculated: APR 30 '79

pp. 1-3

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1829

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

[April —, 1979]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, dissenting.

This is not an equal protection case.[1] An empirical judgment that most persons formally accused of criminal conduct are probably guilty would provide a rational basis for a set of rules that treat them like convicts until they establish their innocence. No matter how rational such an approach might be—no matter how acceptable in a community where equality of status is the dominant goal—it is obnoxious to the concept of individual freedom protected by the Due Process Clause. If ever accepted in this country, it would work a fundamental change in the character of our free society.

Nor is this an Eighth Amendment case.[2] That provision of the Constitution protects individuals convicted of crimes from punishment that is cruel and unusual. The pretrial detainees whose rights are at stake in this case, however, are innocent men and women who have been convicted of no crimes. Their claim is not that they have been subjected to cruel and unusual punishment in violation of the Eighth Amendment, but that to subject them to any form of punishment at all is an unconstitutional deprivation of their liberty.

[1] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amend. XIV.

[2] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U. S. Const., Amdt. VIII.

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

P. 13

From: Mr. Justice Stevens

Circulated: _____

Recirculated: MAY 3 79

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1829

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

[April —, 1979]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, dissenting.

This is not an equal protection case.[1] An empirical judgment that most persons formally accused of criminal conduct are probably guilty would provide a rational basis for a set of rules that treat them like convicts until they establish their innocence. No matter how rational such an approach might be—no matter how acceptable in a community where equality of status is the dominant goal—it is obnoxious to the concept of individual freedom protected by the Due Process Clause. If ever accepted in this country, it would work a fundamental change in the character of our free society.

Nor is this an Eighth Amendment case.[2] That provision of the Constitution protects individuals convicted of crimes from punishment that is cruel and unusual. The pretrial detainees whose rights are at stake in this case, however, are innocent men and women who have been convicted of no crimes. Their claim is not that they have been subjected to cruel and unusual punishment in violation of the Eighth Amendment, but that to subject them to any form of punishment at all is an unconstitutional deprivation of their liberty.

[1] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amend. XIV.

[2] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U. S. Const., Amdt. VIII.

p. 2

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

From: Mr. Justice Stevens

Circulated: _____

Recirculated: MAY 10 '79

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1829

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

[May —, 1979]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, dissenting.

This is not an equal protection case.[1] An empirical judgment that most persons formally accused of criminal conduct are probably guilty would provide a rational basis for a set of rules that treat them like convicts until they establish their innocence. No matter how rational such an approach might be—no matter how acceptable in a community where equality of status is the dominant goal—it is obnoxious to the concept of individual freedom protected by the Due Process Clause. If ever accepted in this country, it would work a fundamental change in the character of our free society.

Nor is this an Eighth Amendment case.[2] That provision of the Constitution protects individuals convicted of crimes from punishment that is cruel and unusual. The pretrial detainees whose rights are at stake in this case, however, are innocent men and women who have been convicted of no crimes. Their claim is not that they have been subjected to cruel and unusual punishment in violation of the Eighth Amendment, but that to subject them to any form of punishment at all is an unconstitutional deprivation of their liberty.

[1] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amend. XIV.

[2] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U. S. Const., Amdt. VIII.