Journal of Criminal Law and Criminology

Volume 71
Issue 3 *Fall*

Article 3

Fall 1980

The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration

Ira P. Robbins

0091-4169/80/7103-0211$02.00/0
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 71, No. 3
Printed in U.S.A.

THE CRY OF *WOLFISH* IN THE FEDERAL COURTS: THE FUTURE OF FEDERAL JUDICIAL INTERVENTION IN PRISON ADMINISTRATION

IRA P. ROBBINS*

I. INTRODUCTION

In *Bell v. Wolfish*,[1] the United States Supreme Court held that, with respect to conditions or restrictions having no specific constitutional source for protection, a pretrial detainee in a federal correctional center has a right under the due process clause of the fifth amendment to be free from any punitive conditions or restrictions during detention.[2] The Court further held that all of the challenged practices and conditions were valid because they were rationally related to the legitimate nonpunitive purposes of the detention center.[3] Thus, the correctional facility could place two detainees in a cell built for one,[4] prohibit receipt of books and magazines except directly from publishers ("publisher-only" rule),[5] limit gift packages to one package of food at Christmas,[6] conduct unannounced searches of the living areas outside of the inmates' presence,[7] and conduct visual anal and genital searches for contraband after every contact visit, without probable cause.[8]

Apart from its impact on the rights of detainees,[9] *Wolfish* has virtually blocked any potential expansion of prisoners' rights by the Supreme Court for the near future. The purpose of this Article is to examine the lower federal court decisions rendered in the period since *Wolfish* to determine whether judicial relief remains available in the federal system for prisoners' claims. To do so, it will be necessary first to explore the evolution of judicial intervention in correctional reform during the 1970s and the relationship of *Wolfish* to earlier Supreme Court decisions influential in defining the scope of judicial intervention in prison administration.

II. BACKGROUND

Until the past ten to fifteen years, a majority of state and federal courts followed a policy of declining jurisdiction over most litigation involving prisons. This policy, now generally referred to as the "hands-off" doctrine,[10] originally reflected the view that a convicted prisoner was a "slave of the State,"[11] without enforceable rights. Despite the eventual rejection of the slave theory, courts continued to apply the hands-off doctrine strictly, absent exceptional circumstances raising questions of cruel and unusual punishment.[12] Even when exceptional circumstances existed, the courts often invoked the doctrine. As a practical matter, then, prisoners had no judicial forum for relief.[13]

* Professor of Law, The American University, Washington College of Law; A.B., University of Pennsylvania, 1970; J.D., Harvard University, 1973.

The author is grateful to Ms. Janet Litt, a third-year student at The American University, Washington College of Law, for her valuable assistance in the preparation of this Article.

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

[2] *Id.* at 535.

[3] *Id.* at 538–41, 560–61.

[4] *Id.* at 541.

[5] *Id.* at 550.

[6] *Id.* at 553–55.

[7] *Id.* at 557.

[8] *Id.* at 560.

[9] Prior to *Wolfish*, a few lower federal courts had ruled that pretrial detainees were subject only to those restrictions which were a natural product of confinement or were necessary to ensure the presence of the detainees at their trial. *See, e.g.*, Norris v. Frame, 585 F.2d 1183 (3d Cir. 1978); Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), *rev'd sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979).

[10] Commentators believe the term "hands-off doctrine" originated in Fritch, Civil Rights of Federal Prison Inmates (1961) (document prepared for the United States Dept. of Prisons).

[11] Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

[12] *See* Berger, *Withdrawal of Rights and Due Deference: The New Hands-Off Policy in Correctional Litigation*, 47 U.M.K.C. L. REV. 1, 2 (1978).

[13] *See generally* Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the Hands-Off Doctrine*, 1977 DET. COLL. L. REV. 795, 796 (1977). Language employed by the courts to express the hands-off doctrine remained consistent through the years:

> We do not think it right to interfere with the jailer in the exercise of the discretion vested in him, as to the security of the prisoners. Ex parte Taws, 23 F. Cas. 725 (1809).
>
> The courts have no function to superintend the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there. State *ex rel.* Renner v. Wright, 188 Md. 189, 51 A.2d 668 (1946) (quoting Sarshik v. Sanford, 142 F.2d 676 (5th Cir. 1944)).
>
> Courts are without power to supervise prison

A. RATIONALES FOR THE HANDS-OFF DOCTRINE

Courts and commentators have offered several rationales for nonintervention: separation of powers; federalism; judicial inexpertise; subversion of prison discipline; the flood of litigation;[14] fear of creating instability in prison management;[15] and conserving the public fisc.[16] The first four of these considerations are discussed below.

The separation of powers rationale consists of two theories. First is the basic argument that control over prison management lies exclusively with the legislative branch of government.[17] A corollary to this reasoning is the delegation doctrine, by which federal and state statutes delegate exclusive responsibility for administration of prisons to the executive branch of government, including wide discretion over routine prison matters.[18] In viewing the prison as an administrative agency, courts applied the traditional "arbitrary and capricious" standard of review,[19] which gave much protection—in fact, conferred a presumption of validity—to the officials' discretionary powers.[20]

This theory has been subject to criticism for treating prisons far more deferentially than other administrative agencies,[21] for circular reasoning,[22] for incorrectly imputing to legislatures the intent to protect correctional discretion from review,[23] and for abandoning judicial responsibility for ensuring achievement of the goals underlying court imposed sentences.[24] Two commentators have argued that courts act not in conflict with affirmative legislative and executive programs but because of the vacuum created by legislative and executive inaction or neglect.[25]

Federal courts also frequently cited principles of federalism as the basis for refusing to review prisoners' claims on the merits.[26] Yet in other kinds of institutional litigation, federal courts have shown proper respect for state considerations, without refusing jurisdiction, by maintaining a deliberate pace of litigation, seeking substantial guidance from state officials, and coordinating enforcement of decrees with the state defendants.[27]

---

administration or to interfere with the ordinary rules and regulations.... No authorities are needed to support that statement. Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954).

Responsible prison administration is not subject to judicial review in the absence of actions constituting clear abuse or caprice upon the part of prison officials. Breier v. Raines, 221 Kan. 439, 440, 559 P.2d 813, 814 (1977).

[14] *See* Haas, *supra* note 13, at 821–29.

[15] *See* Procunier v. Martinez, 416 U.S. 396, 408 (1974). *See also* Kaufman, *Prison: The Judge's Dilemma*, 41 FORDHAM L. REV. 495, 507 (1973).

[16] *See* Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 506–07 (1980). Typically, courts refuse to accept lack of funds as an excuse for noncompliance with federal constitutional standards. Probably the strongest—and most often cited—statement on this point is the following:

Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a penitentiary system, it is going to have to be a system that is countenanced by the Constitution of the United States.

Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). *Accord*, Pugh v. Locke, 406 F. Supp. 318, 330 (M.D. Ala. 1976), *aff'd and remanded sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *remanded with instructions sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) ("a state is not at liberty to afford its citizens only those constitutional rights which fit comfortably within its budget"). *See also* Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 201 (8th Cir. 1974); Lora v. Board of Educ., 456 F. Supp. 1211, 1292–93 (E.D.N.Y. 1978); Vest v. Lubbock County Comm'rs Court, 444 F. Supp. 824, 834 (N.D. Tex. 1977); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 725–26 & nn.71–72 (1978).

[17] Siegel v. Ragen, 180 F.2d 785 (7th Cir.), *cert. denied*, 339 U.S. 990 (1950); State v. McCray, 267 Md. 111, 297 A.2d 265 (1972).

[18] Hill v. Estelle, 537 F.2d 214 (5th Cir. 1976); Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964); *See* Powell v. Hunter, 172 F.2d 330 (10th Cir. 1949).

[19] *See* Bethea v. Crouse, 417 F.2d 504 (10th Cir. 1969); Douglas v. Sigler, 386 F.2d 684 (8th Cir. 1967); Smalley v. Bell, 484 F. Supp. 16 (W.D. Okla. 1979); Breier v. Raines, 221 Kan. 439, 559 P.2d 813 (1977); Sanchez v. Hunt, 329 So. 2d 691 (La. 1976).

[20] "People perceive remedies as arbitrary... when they do not really believe that the wrong to which the remedy is addressed constitutes a serious evil." Eisenberg & Yeazell, *supra* note 16, at 515.

[21] *See,* Haas, *supra* note 13, at 800; Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 515 (1963).

[22] The circular argument runs that administrative decisions are not subject to judicial review because they are administrative decisions and are therefore not subject to review. Note, *supra* note 21, at 515.

[23] *See* Kimball & Newman, *Judicial Intervention in Correctional Decisions: Threat and Response*, 14 CRIME & DELINQUENCY 1, 8 (1968).

[24] Haas *supra* note 13, at 802.

[25] Eisenberg & Yeazell *supra* note 16, at 496.

[26] Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); Siegel v. Ragen, 180 F.2d 785. *Contra*, Fox v. Sullivan, 539 F.2d 1065, 1068 (5th Cir. 1976) (federal courts cannot avoid determining whether prisoners' civil rights have been violated).

[27] *See* Eisenberg & Yeazell, *supra* note 16, at 506.

Concomitant with the separation of powers doctrine was the courts' acknowledgement of their lack of expertise to administer prison affairs.[28] Critics have considered this to be one of the weakest arguments, for courts have interfered with the operation of other institutions previously thought beyond judicial expertise.[29]

Finally, courts predicted that anything less than a total hands-off approach would undermine the prisons' disciplinary systems,[30] and foresaw prisoners intentionally violating rules to defy the guards, courts invalidating essential means for controlling prisoners, and guards hesitating to act decisively because of confusion over what practices would be judicially acceptable.[31] This argument waned simply because of its indiscriminate use by courts in cases in which the challenged practice bore only an attenuated relationship to this subversion of discipline rationale.[32] In addition, judicial intervention has been seen as a means of relieving tensions created by excessive or arbitrary conditions and practices justified solely on grounds of discipline.[33]

Other principles also played important roles in preserving the hands-off doctrine. One was the traditional distinction drawn by courts between rights and privileges. In prison law, courts often labelled all features of prison existence as privileges, and consequently denied review.[34] A second policy was the notion that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[35] As will be seen, these principles retained their vitality despite the demise of the traditional hands-off doctrine.

B. EROSION OF THE HANDS-OFF DOCTRINE IN LOWER FEDERAL COURTS

During the 1960s, the Supreme Court expanded the rights of criminal defendants, but generally ignored constitutional problems in correctional law.[36] However, the few relevant decisions rendered by the Supreme Court, together with the emergence of the entitlement doctrine in administrative law, paved the way for increasing intervention by the lower federal courts.

The hands-off doctrine suffered a major setback when, in *Cooper v. Pate*,[37] the Supreme Court recognized a state prisoner's right to bring an action under § 1983 of the Civil Rights Act of 1871[38] against prison officials for first amendment violations. For some time thereafter the hands-off doctrine receded, while the courts chipped away at the other doctrines supporting denial of jurisdiction. The first doctrine to fall was the rights-privileges distinction of administrative law.

Beginning with *Goldberg v. Kelly*,[39] the distinction gradually faded as the Supreme Court acknowledged the legitimacy of entitlements created by state law,[40] contract,[41] or mutual understanding from consistent practice.[42] Once shown the existence of an entitlement, the Court balanced the interests of the plaintiff and the defendant institution to determine necessary procedural safeguards for that entitlement. This analysis eventually carried over into prison law, first in the lower court decisions,[43] then later in the Supreme Court's landmark decision of *Wolff v. McDonnell*.[44]

With the increasing awareness of individual rights came a direct assault on the withdrawal of privileges doctrine in *Coffin v. Reichard*:[45] "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication,

[28] Procunier v. Martinez, 416 U.S. 396, 407 (1974); Novak v. Beto, 453 F.2d 661, 670 (5th Cir. 1971), *cert. denied sub nom.* Sellars v. Beto, 409 U.S. 968 (1972).

[29] *See* Haas, *supra* note 13, at 809–10. *See generally* Berger, *supra* note 12; Eisenberg & Yeazell, *supra* note 16.

[30] *See* Ortega v. Ragen, 216 F.2d 561; Novak v. Beto, 453 F.2d 661; Note, *supra* note 21, at 521:

> The objection is not formulated in terms of a fear that the court will hold a regulation deemed essential to be void; rather, it is asserted that mere assumption of jurisdiction over the subject matter will of itself undermine prison authority and thwart the authorities' efforts to fulfill the task of custody.

[31] Haas, *supra* note 13, at 811; Note, *supra* note 21, at 521.

[32] *See* Haas, *supra* note 13, at 811–13.

[33] *See generally* Berger, *supra* note 12.

[34] Childs v. Pegelow, 321 F.2d 487 (religious practices); Siegel v. Ragen, 180 F.2d 785 (Illinois law deprives all but liberty, life and property, including access to law library); Powell v. Hunter, 172 F.2d at 331 (earned good time credit).

[35] Price v. Johnston, 334 U.S. 266, 285 (1948). *See also* cases cited in note 34 *supra*.

[36] Berger, *supra* note 12, at 1.

[37] 378 U.S. 546 (1964) (per curiam).

[38] 42 U.S.C. § 1983 (1974).

[39] 397 U.S. 254 (1970).

[40] *Id.*

[41] Perry v. Sindermann, 408 U.S. 593, 601 (1972).

[42] *Id.* at 601–03.

[43] *See, e.g.*, Clements v. Turner, 364 F. Supp. 270 (D. Utah 1973).

[44] 418 U.S. 539, 555–56 (1974) (*inter alia*, establishing some basic rights of procedural due process for prisoners) ("There is no iron curtain drawn between the Constitution and the prisons of this country").

[45] 143 F.2d 443 (6th Cir. 1944).

taken from him by law."[46] That this statement reflected the embryonic stage of a fundamental change in the lower federal courts' attitude toward prison litigation was demonstrated by the number of later cases which echoed the same theme. Without expressly abandoning the hands-off doctrine after *Cooper v. Pate*, lower federal courts modified it by accepting jurisdiction over particular abuses involving constitutional infringements which had broad implications for various aspects of prison life. A classic example of this approach is *Edwards v. Duncan*,[48] which held that a federal prisoner had a cause of action for deprivation of medical care and harassment by officials who sought to discourage the prisoner from filing his suit. Noting that the district court's dismissal of the plaintiff's claim was based on the hands-off doctrine, the court of appeals stated: "The hands-off doctrine operates reasonably to the extent that it prevents judicial review of deprivations which are necessary or reasonable concomitants of imprisonment. Deprivations of reasonable medical care and of reasonable access to the courts are not among such concomitants, however."[49]

Aware of the need for providing some access to the courts for violation of prisoners' constitutional rights, some courts also reversed the trend of prior decisions[50] by ruling that the plaintiffs could use habeas corpus proceedings to seek relief.[51] In short, although the Supreme Court had not yet pronounced the death sentence upon the hands-off doctrine, the lower federal courts were beginning to assume its eventual demise.[52]

[46] *Id.* at 445.

[47] *See, e.g.*, Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972).

[48] 355 F.2d 993 (4th Cir. 1966).

[49] *Id.* at 994. *See also* Washington v. Lee, 390 U.S. 333 (1968) (per curiam).

[50] *See* text accompanying note 13 *supra*.

[51] *See* State v. McCray, 267 Md. 111, 297 A.2d at 280 (1972) for citations. Ironically, *McCray* strictly adhered to the hands-off doctrine despite a thorough discussion of its erosion.

[52] *See, e.g.*, Pearson v. Townsend, 362 F. Supp. 207 (D.S.C. 1973) (denial of due process rights by disciplinary board); Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied sub nom.* Hall v. Inmates of Suffolk County Jail, 419 U.S. 977 (1974) (cruel and unusual punishment); Brenneman v. Madigan, 343 F. Supp. 128 (conditions for pretrial detainees constituted cruel and unusual punishment). *Cf. In re* Jordan, 7 Cal. 3d 930, 500 P.2d 873, 103 Cal. Rptr. 849 (1972) (rules which allowed officials to examine contents of letters to lawyers ruled unconstitutional).

C. ROLE OF THE SUPREME COURT IN CREATING A NEW HANDS-OFF DOCTRINE

Although earlier decisions such as *Cooper v. Pate* and *Johnson v. Avery*[53] broke down the jurisdictional barriers for prisoner's claims and signalled an end to the traditional hands-off doctrine, the opinions of the Supreme Court in the mid-1970s more fully defined the still deferential relationship between the judiciary and the prison administrators.

In *Procunier v. Martinez*,[54] involving broad censorship of inmates' correspondence, the Supreme Court upheld the district court's jurisdiction to review the first amendment issue. The Court admitted its lack of expertise in prison matters, but believed its responsibility for addressing constitutional violations was an overriding consideration.[55] In order to decide on the constitutionality of the prison regulations, the Court attempted to balance the interests of the individual and state by establishing certain guidelines:

> Censorship of prisoner mail is justified if the following criteria are met. First, the regulation or practice in question must further an important or substantial government interest unrelated to the suppression of expression.... Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.[56]

Prisoners achieved a significant victory when the Court invalidated the regulations as being intended for suppression of expression without any alternative legitimate purpose and as overly broad even if a legitimate goal existed.[57] In hindsight, it may have been a Pyrrhic victory, for *Martinez* expressly declined to rule that prisoners had any communication rights, and instead based its holding on the outsiders' first amendment rights which had been infringed by the regulations.[58] As a result, the somewhat modified hands-off doctrine and its companion, the withdrawal of privileges doctrine, remained a serious barrier to the expansion of prisoners' rights after *Martinez*.

The new hands-off policy assumed more shape in *Pell v. Procunier*,[59] which upheld regulations pro-

[53] 393 U.S. 483 (1969) (right of access to the courts).

[54] 416 U.S. 396 (1974).

[55] *Id.* at 405.

[56] *Id.* at 413. The court derived this test from the four-step reasoning utilized in United States v. O'Brien, 391 U.S. 367 (1968), to analyze restrictions on "symbolic speech."

[57] 416 U.S. at 415, 416.

[58] *Id.* at 408.

[59] 417 U.S. 817 (1974).

hibiting face-to-face interviews between the press and individual inmates specifically requested by the press representatives. In an opinion written by Justice Stewart, the Court distinguished *Pell* from *Martinez* by pointing out that, in *Martinez*, the state had failed to show any legitimate purpose for the regulations. Here, recent incidents had led officials to believe that the narrowly drawn regulation was vital to institutional security. Also, alternative means for communication remained open to the inmates and members of the press, so that the first amendment rights of all affected individuals were not completely suppressed, as in *Martinez*.[60] It is important, in light of *Wolfish*, that the Court in *Pell* placed great emphasis on deference to the prison director's professional judgment in determining the necessity for such a regulation.[61] Even here, though, notions of judicial deference were balanced with potential infringements on the constitutional protections which the Court believed were retained by the inmates.[62]

Also related to the emergence of a new hands-off approach was *Meachum v. Fano*,[63] in which the Court held that a state prisoner was not entitled to a hearing when transferred to another prison, absent a state law or practice which conditioned the transfer on proof of misconduct or other specified events. The Court found that transfers often required no more than the prison administrator's judgment as to what would best serve institutional security or the inmate's welfare.[64] By making the scope of constitutional liberty interests subject to state determination, the Court avoided any review of the basis for that determination, and diminished the usefulness of the entitlement doctrine for prison litigation.[65]

One commentator characterized the pattern in correctional litigation prior to *Wolfish* as "something akin to a holding action."[66] With the assistance of *Jones v. North Carolina Prisoners' Labor Union, Inc.*,[67] *Wolfish* broke the holding pattern by reviving many aspects of the hands-off doctrine long thought dead or dying.

[60] *Id.* at 826.
[61] *Id.* at 825.
[62] *Id.* at 827.
[63] 427 U.S. 215 (1976).
[64] *Id.* at 225.
[65] *See generally* Comment, *No Due Process Due Prisoners in Intrastate Transfers: Due Process Imprisoned with the Entitlement Doctrine*, 38 U. PITT. L. REV. 561 (1977). *See also* Berger, *supra* note 12, at 8-9.
[66] Berger, *supra* note 12, at 5.
[67] 433 U.S. 119 (1977).

III. ANALYSIS OF *JONES AND WOLFISH*

In *Jones*, state prison officials issued regulations which permitted membership in the prisoners' union but prohibited inmates from soliciting other inmates for membership, banned all union meetings and barred delivery of union publications mailed to the prison in bulk. A three-judge district court, though not disputing the officials' sincere belief in the union's potential threat to prison discipline and control, nevertheless invalidated the regulations because of the officials' failure to substantiate this fear.[68] In an opinion by Justice Rehnquist, the Supreme Court reversed, concluding that the district court had neither appropriately deferred to the decisions of prison administrators nor sufficiently appreciated the peculiar and restrictive circumstances of confinement.[69]

Jones has been viewed as a significant departure from decisions such as *Pell* and *Martinez*.[70] However, in light of *Wolfish*, *Jones* does not appear to be a departure as much as a logical extension of the earlier rulings, with the complementary doctrines of withdrawal of privileges and judicial deference playing a more important role.[71] First, Justice Rehnquist extinguished the doctrine of retained rights which had appeared in *Martinez* and *Pell*, albeit weakly, by making preeminent the supposition that "the fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the first amendment, which are implicit in incarceration."[72] He judged the restrictions to be reasonably related to the legitimate penological objectives, particularly because the first amendment associational rights virtually eliminated by the regulations were deemed inevitable victims in an institutional setting.[73]

Next, Justice Rehnquist expanded notions of judicial deference to prison officials that had appeared in *Pell* and *Martinez* as one of several considerations for determining the reasonableness of first amendment infringements.[74] For example, relying

[68] North Carolina Prisoners' Labor Union v. Jones, 409 F. Supp. 937, 944 (E.D.N.C. 1976) (three-judge district court), *rev'd*, 433 U.S. 119 (1977).
[69] 433 U.S. at 125.
[70] *Id.* at 139-40 (Marshall, J., dissenting); Note, *Jones v. North Carolina Prisoners' Labor Union, Inc.: The "Hands-Off Doctrine" Revisited*, 14 WAKE FOREST L. REV. 647 (1978).
[71] *See* Berger, *supra* note 12, at 12, 13.
[72] 433 U.S. at 125.
[73] *Id.* at 130, 132.
[74] *See* Note, *supra* note 70, at 658-60.

on broad propositions found in *Pell*, he emphasized that first amendment infringements need only further a legitimate institutional interest,[75] and that the evaluation of whether a matter is detrimental to prison management lies so appropriately within the bounds of administrative discretion as to require the courts' deference to officials' judgment unless substantial evidence shows an exaggerated response.[76] Absent from the opinion are any references to *Pell's* requirements for a limitation on first amendment rights only as to time, place, and manner[77] or its consideration of whether alternative means of communication were available.[78] Instead, *Jones* shifted the burden of proof away from the state by compelling the plaintiff to rebut the officials' general speculations as to the union's possible disruption to orderly administration: "[i]t is enough to say that they [the prison officials] have not been conclusively shown to be wrong in this view."[79] The sweeping language of *Jones*, the Court's refusal to scrutinize the asserted state interests, and its shifting of the burden of proof to the plaintiff despite a first amendment infringement emphatically laid the groundwork for almost absolute judicial deference to many aspects of prison life.

Wolfish presented an opportunity to consider several unresolved issues. Contrary to the more typical suits involving long-established practices in antiquated facilities, the Metropolitan Correctional Center, an innovatively designed federal detention center,[80] had been in operation for only four months when inmates brought this suit in district court.[81] In an exhaustive opinion, Judge Frankel held that numerous practices at the facility were unconstitutional.[82] The Supreme Court was to review the district court's injunctions prohibiting double-bunking in a cell admittedly built for one inmate, enforcement of the "publisher-only" rule, limitations on packages received by inmates, unannounced search of inmates' cells outside of their presence, and visual body cavity searches without probable cause.

Before addressing the plaintiff's particular complaints, Judge Frankel advanced several arguments favoring judicial intervention. As a general matter, he noted that the federalism-based reluctance of federal courts to interfere with state matters was inapposite, since the plaintiffs were federal prisoners. According to Frankel, nonintervention here would appear even more ludicrous, considering the federal courts' recent activism in state prisoner litigation.[83] He next addressed the standard argument that federal statutes extended to prison officials the comprehensive control and almost complete discretion over federal prisoners.[84] Employing the implication doctrine developed in *J. I. Case v. Borak*[85] and later cases, he reasoned that the officials' statutory powers implied certain duties, the enforcement for which implicitly lay with the inmates, as the intended beneficiaries of those duties.[86]

Turning to the underlying policies governing the constitutional issues, Judge Frankel stated three major principles, two of which were later rebuffed by the Supreme Court: that judgments of prison officials, "unless made arbitrarily or in conflict with particular rights given by Constitution or statute, are entitled to respect and probable finality";[87] that prisoners retain "all the rights of an

[75] 433 U.S. at 125.

[76] *Id.* at 128.

[77] 417 U.S. at 826.

[78] *Id.* at 824, 826. *See also* note 56 and accompanying text *supra.*

[79] 433 U.S. at 132.

[80] For a comprehensive description of the facility, see United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 119-21 (S.D.N.Y. 1977), *aff'd, in part, rev'd in part* 573 F.2d 118 (2d Cir. 1978), *rev'd sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979).

[81] *Id.* The suit was brought on behalf of all detainees and prisoners who were confined at the Metropolitan Correctional Center. The issues that eventually reached the Supreme Court concerned only the rights of detainees.

[82] Justice Rehnquist noted that the district court had enjoined 20 practices of the facility. 441 U.S. at 523.

[83] Judge Frankel stated that "[i]t is at least implicit that our duties are less constricted with respect to federal prisoners." 439 F. Supp. at 122.

[84] *See* text accompanying note 18 *supra.*

[85] 377 U.S. 426 (1963). However, the vitality of *Borak* must be questioned in light of recent Court decisions denying implied private rights of action. *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), and cases discussed therein.

[86] 439 F. Supp. at 122:

> The powers import *duties*, ... and these obligations (to take care, protect, classify, provide suitable quarters, and instruct) are not misconceived or distorted if we describe them as intended to "benefit" those locked up under federal authority. It is no long step from that to infer that some rights—at least against arbitrary, capricious, or unauthorized treatment—accrue to the prisoners for whose management the statutes were written (emphasis in original).

The opinion also refers to the Administrative Procedure Act as support for permitting broader judicial responsibility with federal prisons. *Id.* Because the considerations permitting greater judicial intervention in federal prisoner cases are beyond the scope of this Article, the discussion of this issue has been omitted.

[87] *Id.* at 124.

ordinary citizen except those expressly, or by necessary implication, taken from him by law";[88] and that pretrial detainees, presumably innocent, are not subject to deprivation of any rights beyond those necessary to confinement, unless officials show a compelling necessity.[89]

Though rejecting Judge Frankel's statutory basis for judicial intervention,[90] the Second Circuit affirmed that the detainees had been denied due process of law.[91] It upheld the district court's requirement for the compelling necessity test in connection with restrictions on detainees, but cautioned temperance in light of the admonishment in *Martinez* concerning the courts' inability to deal with many problems in prison administration.[92]

In *Wolfish*, an opinion again written by Justice Rehnquist, the Supreme Court reversed the Second Circuit.[93] The Court adopted a separate standard of review for challenged conditions implicating not a specific constitutional right, but only a liberty interest under the fifth amendment: the proper inquiry is "whether those conditions amount to punishment."[94] The compelling necessity test was therefore inappropriate. Moreover, the Court found the detainees' presumption of innocence to be pertinent only for purposes of allocating the burden of proof at the detainees' trials.[95] The Court was not as concerned with the effect of conditions[96] as with the question of punitive intent on the part of the officials. To assess punitive intent, Justice Rehnquist adapted the guidelines established in *Kennedy v. Mendoza-Martinez*[97] for determining whether a legislative act was punitive or a permissible regulatory restraint. Rather than discuss these factors, however, he moved on to the central theme of the opinion: even though a condition may be punitive in nature, it may still be permissible if rationally related to an alternative, legitimate penological objective.[98] Contrary to the views expressed by the lower courts, the government's interest in ensuring a detainee's presence at trial was only one of several possible legitimate penological interests justifying constitutional restrictions.[99] Of critical importance to the post-*Wolfish* courts was the Court's admonition:

> 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, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."[100]

Applying this analysis, the Court concluded that the circumstances surrounding the double-bunking at the facility—sharing toilet facilities and a sleeping place in a seventy-five square foot cell for sixty

[88] *Id.*

[89] *Id.* Only the first principle was left intact—and strongly so—by the Court.

[90] Wolfish v. Levi, 573 F.2d at 125. The court of appeals criticized the district court for justifying its involvement with trivial matters solely on the basis of statutory jurisdiction.

[91] *Id.* at 126, 129, 130.

[92] *Id.* at 124:

> Accordingly, once it has been determined that the mere fact of confinement of the detainee justifies the restrictions, the institution must be permitted to use reasonable means to insure that its legitimate interests in security are safeguarded.

[93] Bell v. Wolfish, 441 U.S. 520.

[94] *Id.* at 535.

[95] *Id.* at 533.

[96] "[I]t suffices to say that this desire to be free from discomfort simply does not rise to the level of those fundamental liberty interests delineated in cases such as *Roe v. Wade*...." *Id.* at 534.

[97] *Id.* at 537–38 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963)):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

[98] *Id.* at 538 (also quoting *Mendoza-Martinez*):

> Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."

[99] *Id.* at 540:

> It is enough simply to recognize that in addition to ensuring the detainees' presence at trial, the effective management of the detention facility... is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.

[100] *Id.* at 540–41 n.23 (quoting Pell v. Procunier, 417 U.S. at 827).

days—did not constitute a violation of the detainees' rights to due process.[101]

Before addressing the security regulations affecting specifically guaranteed constitutional rights, Justice Rehnquist summarized four governing principles articulated in earlier decisions: convicted prisoners do not forfeit all constitutional protections;[102] incarceration brings about the withdrawal or limitation of rights and privileges;[103] maintaining security and preserving internal order and discipline may require limitation or withdrawal of retained constitutional rights as well;[104] and courts should give wide-ranging deference to prison officials' judgment, owing to their expertise as well as to the legislative delegation of operational authority to the executive branch.[105] Having grounded its analysis in precedent, the Court proceeded to uphold each of the challenged practices as a rational response to valid institutional concerns for security and orderly administration.[106]

In his dissent, Justice Marshall attacked several points of the majority opinion which, not unexpectedly, were later to play a determinative role in lower federal court decisions. After first denouncing the minimal protection afforded detainees' liberty interests under the punishment test, and the Court's misapplication of its own test based on the *Mendoza-Martinez* guidelines, Justice Marshall criticized the Court's failure to enforce seriously the second step of its analysis—determining whether a particular imposition was rationally related to a nonpunitive purpose.[107] In any event, he believed that the *Mendoza-Martinez* guidelines were inappropriate in this situation, for "the Due Process Clause focuses on the nature of the deprivations, not on the persons inflicting them."[108] He accused the Court of so blindly deferring to administrative judgments on the rationality of the restrictions as to have delegated to prison officials the judicial responsibility for determining whether detainees had been punished.[109]

Justice Marshall then advocated a balancing test for determining the reasonableness of all restrictions, regardless of whether the affected rights were implicitly or expressly guaranteed by the Constitution.[110] In his view, the first amendment claim regarding the "publisher-only" rule required some consideration as to less restrictive alternatives.[111] The limitation on packages, justified partly on grounds of creating administrative burdens, was seen as overly broad. Accepting, arguendo, the majority's evaluation that less restrictive regulations adopted in other institutions did not necessarily define the constitutional minimum, Justice Marshall still believed them to be effective in casting doubt upon the government's asserted justifications.[112] As to the most serious issue, body cavity searches, he charged that the Court ignored an examination of the particular facts in favor of absolute deference to administrative convenience, based on unsubstantiated claims of institutional security.[113]

The *Wolfish* majority's adoption of the *Mendoza-Martinez* punishment test for evaluating implied constitutional rights, together with the majority's wide-ranging deference to prison officials even with respect to explicit constitutional rights, accelerates the clearly marked trend towards a presumptive validity for prison regulations that began in *Jones*. Assuming the inappropriateness of the punishment test,[114] it is in the Court's application of that test and of the general balancing test previously used for determining the constitutionality of prison regulations that *Wolfish*, buttressed by *Jones*, signals the overall approach to be taken for inmate complaints. As in *Jones*, the Court deftly avoided the nuances of the precedents from which it derived its guiding principles. *Pell* is particularly illustrative

[101] *Id.* at 543.

[102] *Id.* at 545.

[103] *Id.* at 545–46 (citing Price v. Johnston, 334 U.S. 266, 285 (1948)).

[104] *Id.* at 546, 547 (citing Pell v. Procunier, 417 U.S. at 823).

[105] *Id.* at 547, 548.

[106] For a complete summary of *Bell v. Wolfish*, see *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 99 (1979). *See also* Note, *Fifth Amendment—Rights of Detainees*, 70 J. CRIM. L. & C. 482 (1979).

[107] 441 U.S. at 565 (Marshall, J., dissenting).

[108] *Id.* at 567.

[109] *Id.* at 568.

[110] *Id.* at 571: "As the substantiality of the intrusion on detainees' rights increases, so must the significance of the countervailing governmental objectives." On the basis of this balancing test, Marshall would have remanded on the issue of double-bunking, because he did not believe that the "compelling necessity" test was appropriate. *Id.* at 571, 572.

[111] *Id.* at 574. Significantly, he does not rely on any first amendment prisoner cases decided by the Supreme Court.

[112] *Id.* at 575.

[113] *Id.* at 578.

[114] *Id.* at 568, 569 (Marshall, J., dissenting). *See The Supreme Court, 1978 Term, supra* note 106, at 105–06.

of this process. In *Pell*, a first amendment case, Justice Stewart reiterated the familiar language on withdrawal of privileges, but he qualified this with the corollary principle that "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[115] He also stated that institutional security was the central penological goal. However, rather than simply accept at face value the purported concerns for institutional security, he seriously evaluated whether under the specific circumstances the existence of an alternative means of communication protected the plaintiff's first amendment rights before upholding the prison regulations.[116] Nevertheless, *Wolfish* quoted *Pell* for the proposition that courts should defer to the officials' judgment absent substantial evidence of an exaggerated response on their part.[117] In context, *Pell* viewed this principle as merely one of several relevant factors for consideration.[118]

Wolfish departed significantly even from *Jones* when the Court deferred so completely to administrative discretion that it ignored the facts of the record before it. For example, circumstances at the facility made it almost impossible to smuggle contraband after contact visits—visitors and their packages were searched by metal detector, by fluoroscope, and by hand before they entered the visiting room; contact visits were closely monitored and restricted to a glass-enclosed room; and prisoners wore one-piece jumpsuits at all times.[119] The Court still upheld the validity of body cavity searches for contraband. In reaching this decision, the Court referred to the considerations of the fourth amendment balancing test—specifically, the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.[120] In fact, however, the Court considered only that "a detention facility is . . . fraught with serious security dangers."[121]

By overlooking the particular facts and giving weight only to purported institutional interests, *Wolfish* has, in effect, shifted the burden of proof to the inmate in all challenges to prison practices and has imposed a presumptive validity on administrative judgments. The result is the "granting of virtually unreviewable discretion to correctional officials on questions involving the constitutional rights of inmates,"[122] and a withdrawal of rights without balancing the actual reasonable needs of the institution with the intrusion on the inmates' asserted constitutional interests.

Jones and *Wolfish* have thus established a new hands-off doctrine: the Court will not deny jurisdiction, but the negative results based on the principle of wide-ranging deference to administrative discretion will now achieve the same result as the previously discredited jurisdictional bar.[123]

IV. Impact of *Wolfish*

Lower federal courts have generally shown a favorable reaction to *Wolfish*'s deferential approach, but are not following blindly in the Supreme Court's steps. Characteristic of many decisions is a respect for the complex issues requiring more than a general pronouncement or total deference to even genuine institutional concerns. For this reason, *Wolfish* has not created an absolute bar to consideration of constitutional violations deemed worthy of vindication, although the courts differ greatly on which rights sufficiently warrant judicial intervention.

A. Implied Constitutional Rights

In attempting to evaluate the proper scope of rights not explicitly granted to detainees by the Constitution, courts have focused on *Wolfish*'s punishment test and the following passage:

[115] 417 U.S. at 822.

[116] *Id.* at 823–28.

[117] 441 U.S. at 540–41 n.23. *See* text accompanying note 100 *supra*.

[118] 417 U.S. at 827.

[119] 441 U.S. at 577–78 (Marshall, J., dissenting). The only incident of smuggling merely proved to the Court the efficacy of the body cavity searches. *Id.* at 559.

[120] *Id.* at 559 (citing United States v. Ramsey, 431 U.S. 606 (1977); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Schmerber v. California, 384 U.S. 757 (1966)).

[121] 441 U.S. at 559. *See also id.* at 559 n.40, where the Court dismissed any less restrictive alternatives as "simply . . . not . . . as effective."

[122] Berger, *supra* note 12, at 20.

[123] *Id. See also The Supreme Court, 1978 Term*, *supra* note 106, at 108:

> The Court in *Bell v. Wolfish* failed to recognize that its constitutional duty to uphold the due process rights of citizens must take precedence over its reluctance to immerse the judiciary in the operation of detention centers. This failure suggests that the Court will hesitate to infer the presence of impermissible punishment unless faced, in its own words, with a case of "loading a detainee with chains and shackles and throwing him in a dungeon."

> A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose .... Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.[124]

Although the "nonpunitive intent" standards would not be an appropriate defense against suits brought by state or federal prisoners on eighth amendment grounds, courts have relied heavily on *Wolfish*'s deferential attitude in rejecting prisoners' claims that had not been specifically grounded in the Constitution.[125] As in *Wolfish*,[126] many of the decisions in this area do not closely scrutinize the rationality of the officials' actions if plaintiffs have not shown substantial evidence of an exaggerated response.[127]

On the basis of this standard, courts have ruled that state officials have no constitutional obligation to provide methadone or alcoholic treatment programs or eye examinations for detainees, absent a showing of the already high standard of "deliberate indifference to serious medical needs of prisoners."[128] The Third Circuit in particular stressed the legitimacy of the officials' concern for preventing disruptions caused by inmates who might seek illegal access to methadone.[129]

Wolfish also has had substantial impact on the highly litigated issue of overcrowding. With the exception of *Ramos v. Lamm*,[130] which declared conditions at a state facility to be unconstitutional, recent cases have followed *Wolfish* in rebuffing claims of overcrowding or complaints regarding the size of the cell.[131] The courts' reluctance to interfere in this matter absent egregious circumstances is best demonstrated in *Jordan v. Wolke*,[132] which held constitutional a ninety square foot cell for four detainees that was joined by a day room containing 350 square feet. While acknowledging the average floor space per inmate to be smaller than that challenged in *Wolfish*, the court did not believe that fact to be a material distinction sufficient to show punitive intent or genuine hardship.[133] In contrast, the dissent did find significant distinctions. Unlike *Wolfish*'s correctional facility, the jail was composed of traditional cells with bars and extremely stark surroundings, and there was no room to walk in the cell if the other occupants were present.[134] A contrary result was reached in *Burks v. Teasdale*,[135] which affirmed the district court's order eliminating overcrowded conditions in the Missouri State Penitentiary. The Eighth Circuit, though approving of the deferential spirit of *Wolfish*,[136] nevertheless found conditions in the state facility to be so distinguishable from the federal facility of *Wolfish* as to warrant judicial intervention.[137]

When compelled to address issues that involve implied constitutional rights, federal courts appear to be adopting the *Wolfish* emphasis on withdrawal of rights and deference to administrative discretion as the focal point of any analysis. Arguably, the right to a drug treatment program and a reasonably sized cell would promote rehabilitation and orderly management of an institution as effectively as other rights being given more serious consideration by the courts, yet many courts have chosen

[124] Bell v. Wolfish, 441 U.S. at 538. *See* note 99 *supra*.

[125] *See, e.g.*, Lynott v. Henderson, 610 F.2d 340 (5th Cir. 1980) (ban of visit by married woman justified for maintaining orderly administration in view of husband's threats to sue if she were permitted to visit).

[126] *See* text accompanying notes 107–09 *supra*.

[127] *See, e.g.*, Gray v. Lee, 486 F. Supp. 41 (D. Md. 1980) (prohibition against interest-bearing prison account is based on substantial interest in preventing the free-flow of currency inside the penal institution and is not an exaggerated response. Court will defer to officials' judgment).

[128] Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979); Pace v. Fauver, 479 F. Supp. 456, 460 (D.N.J. 1979); Holly v. Rapone, 476 F. Supp. 226, 231 (E.D. Pa. 1979) (all citing Estelle v. Gamble, 429 U.S. 97 (1976)).

[129] Inmates of Allegheny County Jail v. Pierce, 612 F.2d at 761.

[130] 485 F. Supp. 112 (D. Colo. 1979).

[131] Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980) (state detainees); Bono v. Saxbe, 620 F.2d 609 (7th Cir. 1980) (50 square foot cell for inmates in "Control Unit"); Smith v. Sullivan, 611 F.2d 1039 (5th Cir. 1980) (district court's limitation on population premature; remanded for further hearings); Epps v. Levine, 480 F. Supp. 50 (D. Md. 1979) (50 square foot cell for two detainees with extremely limited time out of cell held not punitive or clearly in excess of legitimate governmental interests of security and order).

[132] 615 F.2d 749.

[133] *Id.* at 753.

[134] *Id.* at 754–55.

[135] 603 F.2d 59 (8th Cir. 1979) (double-celling in 65 square foot cell unconstitutional in these circumstances).

[136] *Id.* at 62.

[137] *Id.* at 62–63 n.5: "We think that a good deal may depend on the type of institution involved, the nature of the inmates, and the nature of the confinement itself. *Cf. Bell v. Wolfish.*"

to demarcate the bounds of permissible judicial intervention at this point. Although this line-drawing appears somewhat arbitrary, the courts' treatment of these matters reflects the pattern seen in all public institutional litigation: the ranking of certain social goals above others and a tendency to defer to administrative expertise when dealing with matters distantly related to immediate wrongs which caused judicial intervention initially.[138]

B. STRIP SEARCHES AND *WOLFISH*

Wolfish resolved a conflict among the circuits[139] when it upheld the right to conduct nonabusive visual body cavity inspections on less than probable cause.[140] Although the Sixth Circuit has treated this holding as a jurisdictional bar to complaints concerning strip searches,[141] other courts have shown some sensitivity in balancing the purported institutional interests against the serious invasion of the inmates' personal rights. In *Hurley v. Ward*,[142] the Second Circuit disagreed with the district court's injunction against visual body cavity searches of all state inmates without probable cause, but upheld the injunction as it pertained to the specific plaintiff, who had conclusively demonstrated abusive procedures directed at him. Though decided before *Wolfish*, this case recognized that the Supreme Court required particular deference to the exercise of informed judgment by state prison officials.[143] Following the Supreme Court's decision in *Wolfish*, the district court, on review, distinguished *Hurley* on its facts—the plaintiff was routinely subjected to strip searches though there had been no contacts with nonprison personnel and even when he had been manacled and constantly observed throughout the incident triggering the search—and paid obeisance to *Wolfish* only to the extent of modifying the order to permit routine visual body cavity searches after contact visits with outside personnel.[144]

Although generally responsive to the officials' needs to ensure security and maintain a stable administration, the Seventh Circuit in *Bono v. Saxbe*[145] could not accept the reasonableness or rationality of strip searches before and after noncontact visits with family and friends. *Wolfish's* rationale was inapposite since it pertained to searches following contact visits. Rather than simply ban this procedure, however, the court remanded to give officials an opportunity to show a rational relationship to the legitimate goal of security.[146]

Hurley and *Bono* portend a reluctance to disturb procedures designed to promote security unless absolutely necessary by insisting on a case-by-case review, and then providing officials with every opportunity to defend themselves. For instance, the *Bono* court chose to remand the case without questioning why the officials had chosen not even to discuss this major issue in their court papers. Ironically, this individualized approach will probably increase litigation, rather than reduce it.

C. CONSTITUTIONALLY PROTECTED RIGHTS NOT ADDRESSED BY *WOLFISH*

The courts' applications of *Wolfish* with respect to rights specifically guaranteed by the Constitution differ markedly, depending on their willingness to accept the standard justifications of security, orderly administration, and discipline asserted by prison officials. One court, dissatisfied with the blanket statement given by officials, described the dilemma experienced by every court:

> The Court's task is not an easy one. While deferring to the jail administration, the Court must still ensure that the administration's response to problems is "reasonable". The Court must be especially alert when the alleged justification for an administration decision is institutional security, because literally any restraint could be justified on the ground of increased security. A naked man in chains in a bare cell poses no risk. From that point on, every increase in freedom brings at least some decrease in security. Every decision in a prison environment involves the weighing of lesser or greater restraint against the increased or diminished chances of contraband or escape. While the Court may not substitute its judgment as to the proper balance of these factors, it must be satisfied that the balance struck by jail authorities is reasonable. The ambit of the administrators' discretion and judgment may be wide—but it is not unbounded. The Court is not to usurp the role of the jailer. But it cannot abandon its role as a proper forum for adjudication of the rights of prisoners. The final judgment as to what is reason-

[138] *See* Eisenberg & Yeazell, *supra* note 16, at 509, 515.
[139] 441 U.S. 520, 524 n.2 (1979).
[140] *Id.* at 560.
[141] Pierce v. Jago, 615 F.2d 1362 (6th Cir. 1980) (unpublished opinion) (complaint of visual cavity search on less than probable cause is unsubstantial; federal law gives officials total discretion).
[142] 448 F. Supp. 1227 (S.D.N.Y.), *rev'd in part*, 584 F.2d 609 (2d Cir. 1978), *modified on remand*, No. 77 Civ. 3847 (S.D.N.Y. November 9, 1979).
[143] 584 F.2d at 611 (citing Procunier v. Martinez, 416 U.S. 396, 405 (1974)).
[144] No. 77 Civ. 3847, slip op. at 1.
[145] 620 F.2d 609 (7th Cir. 1980).
[146] *Id.*, at 617.

> able or not lies here. Whether a particular restriction is reasonably related to the security or other legitimate objective of a jail facility depends upon the aim of the restriction, given the situation faced by administration of the particular institution, and the magnitude of the restriction as weighed against the desirability of the goal. It is almost impossible to decide that issue removed from the actual conditions of the particular jail house.[147]

The courts' dilemma in applying *Wolfish* has been particularly acute when determining specific constitutional rights not addressed by *Wolfish*. One open question is whether there is a constitutional right to contact visits.[148] Since *Wolfish*, two courts have upheld the prohibition against contact visits for detainees as a reasonable response to the institution's security interest and as rationally related to the prison's legitimate goals of preserving security and order. Mirroring *Wolfish*, the courts dismissed the existence of less restrictive alternatives to a total ban as irrelevant.[149] A third court held the ban against visitation by the children of detainees and prisoners unconstitutional, viewing with skepticism the officials' judgment that such visitation was not in the best interests of the children.[150]

Courts also appear to be relying heavily on *Wolfish* in first amendment cases. Perhaps they view *Wolfish*'s stress on the validity of concerns for security as the finishing touch on the trend to substantially restrict the inmates' first amendment rights which began with *Jones*. Or it may simply be attributable to the variety of claims being brought to the courts. Since *Wolfish*, the courts have seen few situations in which the relationship between the contested prohibition and the legitimate penological goals was clearly tenuous.[151] Two federal prisoner cases have held that prison regulations prohibiting correspondence with inmates at other facilities[152] and barring distribution of a political publication[153] were reasonable both in their scope and purpose. Each decision made reference to *Wolfish*'s deferential legal standard, but relied mainly on the test established in *Procunier v. Martinez*[154] that gave broad discretion to officials to impose censorship. The combination of *Wolfish* and *Martinez* has thus led to inevitable results.

State prisoners' claims have fared no better, with the exception of *St. Claire v. Cuyler*.[155] In *St. Claire*, the district court ruled that the prohibition against the wearing of a Muslim hat (kufi) was an exaggerated response to the purported need for efficient administration of the prison and protection of the public interest, even if *Wolfish* were applicable, and it was not.[156] Similarly unreasonable was the bar against attendance at chapel service because the plaintiff had been placed in segregation for wearing his hat. The court also ignored *Jones* by applying the least restrictive means test.[157]

A unique problem containing first amendment issues was posed to a Pennsylvania federal district court: does a long-term inmate who is a child molester and who has been segregated in the maximum-security housing unit for his own safety hold the same rights as regular inmates? As to the first amendment claims, the court answered, not entirely.[158] It found that the plaintiff's access to religious services and other activities outside of the unit would require two guards and result in a strain on the facility's manpower. The court noted, however, that the defendants asserted no security justification for limiting the frequency of the plaintiff's religious exercise or access to reading material. Therefore, the prison was required to arrange for visits by the chaplain and delivery of legal and educational material to the plaintiff's cell.[159]

Of particular interest is the two-sided argument advanced by the officials in defending the claims in this case. First, they contended that the plaintiff's fears were subjective, so that he waived his

---

[147] Valentine v. Englehardt, 474 F. Supp. 294, 300-01 (D.N.J. 1979).

[148] 441 U.S. at 559-60 n.40.

[149] Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754; Jordan v. Wolkie, 615 F.2d 749 (7th Cir. 1980).

[150] Valentine v. Englehardt, 474 F. Supp. at 301.

[151] In fact, only one among the several cases discussed below, *St. Claire v. Cuyler*, might be characterized in this manner. 481 F. Supp. 732 (E.D. Pa. 1979). *See also*, 482 F. Supp. 257 (E.D. Pa. 1979).

[152] Schlobohm v. United States Attorney General, 479 F. Supp. 401 (M.D. Pa. 1979) (wide range of legitimate reasons: transfer for safety reasons frustrated by correspondence from first prison to new prison; conduit for planning escapes or disrupting of prison's operations).

[153] Goodson v. United States., 472 F. Supp. 1211 (E.D. Mich. 1979) (federal law has delegated the responsibility of deciding appropriate reading material to Bureau of Prisons; courts cannot interfere).

[154] 416 U.S. 396, 413 (1974) (restriction must promote a substantial interest unrelated to suppression of expression; and the regulation must be no greater than is necessary to protect that interest).

[155] 481 F. Supp. 732. *Cf.* Chapman v Jago, 615 F.2d 1359 (6th. Cir. 1980) (summary denial of right to attend services for inmate in segregation because of security problems).

[156] 481 F. Supp. at 739 n.13.

[157] *Id.* at 739.

[158] Wojtczak v. Cuyler, 480 F. Supp. 1288 (E.D. Pa. 1979).

[159] *Id.* at 1300-01.

rights as a regular inmate when he chose segregation. The court rebutted this argument with examples of incidents in which convicted child molesters, typically despised by the rest of the prison population, had been attacked. Basing much of its reasoning on the entitlement doctrine, the court stated:

> Prison authorities may not condition the rights, privileges or opportunities of a prisoner who is objectively in danger of violent assault upon his renunciation of his Eighth Amendment right to be protected reasonably from violence directed at him by other inmates, except to the extent the *Wolfish*-grounded security considerations allow.[160]

Alternatively, the officials expressed fear of disruptions if the plaintiff were permitted more privileges than the other inmates in the unit.[161] Not only did the court believe anticipation of prisoner resentment to be an exaggerated response to security interests, but it also found that the granting of privileges to selected inmates in the housing unit was commonplace and without incident.[162]

The courts appear to have remained receptive to claims of cruel and unusual punishment, whether the claims are challenges to individual practices or are complaints based on the totality of the circumstances. Whether *Wolfish*'s recognition of the need for judicial supervision over eighth amendment claims[163] has induced this receptivity is difficult to ascertain; it is clear, though, that the deferential spirit of *Wolfish* has tempered many of the recent decisions in this area.[164]

Two eighth amendment cases decided on the basis of the totality of the circumstances reached contrary results. *Ramos v. Lamm*[165] alluded to the deference required by *Wolfish*, but held that the conditions of the entire facility were cruel and unusual punishment.[166] In *Smith v. Sullivan*,[167] a Texas district court which had imposed a limitation on the prison population and ordered a weekly report on improvements of conditions was chided by the Fifth Circuit for premature intervention and involvement with minutiae. The court of appeals remanded for reconsideration in light of *Wolfish*.

Litigation over use of mechanical restraints and tear gas highlights the courts' struggle, in the aftermath of *Wolfish*, to accommodate the legitimate concerns of safety and security while preventing cruel and unusual punishment. A particularly good example is *Spain v. Procunier*,[168] which held that (1) the use of tear gas was appropriate if (a) used in nondangerous quantities, (b) no more convenient or safe control method was available, and (c) feasible steps were taken to protect those inmates who were not the object of the tear gas; (2) as to the specific plaintiffs, the prison had to cease using neck chains while the plaintiffs were in the prison's confines and possibly even out of prison, but the use of other mechanical restraints, *e.g.*, leg manacles or waist chains, while outside of the prison, was permissible; and (3) denial of fresh air and regular outdoor exercise for the specific plaintiffs constituted cruel and unusual punishment. In *Spain*, the state argued that judicial interference was inappropriate in light of the dangerous nature of the plaintiffs. Though sympathetic to the problems associated with keeping dangerous men in safe

---

> The question ... as framed by Justice Rehnquist for the [*Wolfish*] majority, was whether conditions at the [Metropolitan Correctional Center] "amount[ed] to punishment of the detainee" in violation of Fifth Amendment due process. [441 U.S. at 535.] For a convicted inmate, on the other hand, confinement in a penal institution *is* punishment, and it is the execution of that confinement which is subject to the Eighth Amendment's prohibition of cruel and unusual punishment.

Id. at 153 n.19 (emphasis in original).

[160] *Id.* at 1306.

[161] These privileges included leaving his cell more than one hour per day and furnishing his cell with a chair or desk.

[162] 480 F. Supp. at 1296, 1298. Defendants justified denial of a chair on grounds that it might be used as a weapon. The court noted that the defendants had provided the plaintiff with a sledgehammer and other heavy tools as part of his employment with the housing unit. *Id.* at 1298.

[163] 441 U.S. 520, 535 n.16 (1979).

[164] *See generally* Kaufman, *Foreword*, in 2 PRISONERS' RIGHTS SOURCEBOOK: THEORY, LITIGATION, PRACTICE ix–xi (I. Robbins ed. 1980). "[F]or the foreseeable future [wide-ranging deference to prison officials] is to be the hallmark of prisoners' rights cases." *Id.* at xi.

[165] 485 F. Supp. 122 (D. Colo. 1979).

[166] The court distinguished *Wolfish* as follows:

[167] Smith v. Sullivan, 611 F.2d 1039 (5th Cir. 1980). The areas addressed by the district court concerned exercise programs, education and rehabilitation, medical treatment, food service, personnel, and ventilation and lighting. *Cf.* Bono v. Saxbe, 620 F.2d 609 (7th Cir. 1980), which remanded for a determination of whether poor lighting in cells of the "Control Unit" was truly justified by the defendants' claim that the inmates would use extra light bulbs as weapons.

[168] 600 F.2d 189 (9th Cir. 1979). *Cf.* Bono v. Saxbe, 620 F.2d 609 (handcuffing of inmates in the "Control Unit" whenever outside of cell is permissible); Roudette v. Jones, 101 Misc. 2d 136, 420 N.Y.S.2d 616 (Sup. Ct. 1979) (prison regulations concerning use of physical restraints for security held constitutional, but constant use of restraints whenever the plaintiffs were out of cells was abuse of regulations).

custody under humane conditions, the court reminded the state of the federal court's ultimate duty to eliminate cruel and unusual punishment, citing *Wolfish* as support.[169] Hesitant to encroach on administrative discretion where the officials' fear of violence was genuine, the Ninth Circuit granted relief against certain practices only as they applied to the plaintiffs, except for its general prohibition against using lethal amounts of tear gas. Even then, the court would not have held in favor of the plaintiffs but for the fact that they had already been subjected to neck chains and lack of exercise for such a lengthy period of time (four-and-one-half years).[170]

In *Stewart v. Rhodes*,[171] prison officials of a state facility used mechanical restraints to tie disruptive inmates to their beds. Often the inmates remained tied down in the same straddled position for several days, unclothed, without sheets and lying in their own waste. Defendants called this practice a "control measure" for inmates who had caused disturbances, assaulted guards, flooded cells, attempted escapes or suicide, and set fires.[172] Believing that the defendants could find less drastic means for controlling behavior, the court granted a preliminary injunction until they submitted proposed guidelines for future use of restraints.[173]

Of interest is the important role played in *Spain* and *Stewart* by the complementary doctrines of deference and withdrawal of privileges. The *Spain* court, unwilling to extend its holding beyond specific practices affecting particular plaintiffs, glossed over the question of which rights, if any, were retained by prisoners, for the reason that "whatever rights one may lose at the prison gates ... the Eighth Amendment most certainly remains in force."[174] In undertaking to change a major policy, the *Stewart* court, in contrast, declared that, despite *Wolfish*, inmates were not stripped of all constitutional rights, and proceeded to pay more than lip service to a balancing test between the plaintiff's constitutional rights and the institution's need for security.[175]

[169] 600 F.2d at 194.
[170] *Id.* at 197, 199.
[171] 473 F. Supp. 1185 (S.D. Ohio 1979).
[172] *See id.* at 1190–93.
[173] *Id.* at 1193, 1194.
[174] Spain v. Procunier, 600 F.2d 189, 193–94.
[175] 473 F. Supp. at 1187 (citing Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974)). The court also held that the practice of racial segregation at the reception center was unconstitutional. Defendants had argued the appropriateness of deference, because segregation was necessary at the reception center due to insufficient information on the new inmates, many of whom had been transferred to the facility for race-related incidents. The court was not persuaded—the defendants had no basis for comparison, since the center had been segregated for ten years. *Id.* at 1189.

D. THE ROLE OF STATE COURTS

Possibly *Wolfish* will spur litigants to seek a more favorable forum in the state courts. The scarcity of state cases involving *Wolfish* issues at this point limits the usefulness of any prediction. However, one important pro-prisoner case has recently come down in *De Lancie v. Superior Court*.[176] Without guidelines or probable cause, officials conducted electronic surveillance within the county jail, randomly monitoring and recording private conversations among detainees and between detainees and their visitors. The information was used by law enforcement agencies in criminal proceedings against the detainees and others. The defendants claimed that detainees posssessed no reasonable expectation of privacy. The court held this practice to be a violation of the state-afforded constitutional right to privacy, and remanded to give the defendants an opportunity to show a compelling governmental necessity for monitoring every room of the facility.[177]

Notable is the court's rebuff of *Wolfish*. First, it maintained the distinction between the detainee and the prisoner.

> [U]nlike the sentenced inmate, the singular objective underlying pretrial detention is to assure the presumptively innocent detainee's presence at trial.... Though subject to the physical restraint on liberty incident to confinement, the detained citizen does not automatically forfeit his basic civil rights as soon as the jailhouse door clangs shut. *Cf. Bell v. Wolfish.*[178]

Second, it required surveillance to be operated in the least intrusive manner, since privacy is a specifically protected state constitutional right, and cited *Cooper v. Pate* in support.[179] Finally, having

[176] 97 Cal. App. 3d 519, 159 Cal. Rptr. 20 (1979), *hearing granted by California Supreme Court.*

[177] 97 Cal. App. 3d at 530–31, 159 Cal. Rptr. at 27:

> While it can be rationally argued that the detainee's (and visitor's) right of privacy within the context of private expression may be reasonably burdened in furthering necessary objectives of institutional security and public safety, we cannot conceive—*without more*—of any compelling need to engage in such wholesale, indiscriminate intrusion into the area of a detainee's private conversation, particularly in the visiting room (emphasis in original).

[178] *Id.* at 26.
[179] *Id.* at 26–27.

noted *Wolfish*'s policy of withdrawal of rights, the court remarked: "As a matter of general policy, state prison inmates are accorded private visitation rights governed by applicable rules and regulations subject to restriction only as may be necessary *in individual instances* to maintain institutional security and safety and to prevent introduction of unauthorized substances."[180]

V. Conclusion

The number of pro-institution cases decided in the past year-and-a-half and the very few unqualifiedly pro-inmate decisions occurring during the same period suggest that the cry of *Wolfish* has been heard and welcomed in the federal courts. Yet the reluctance to intrude on prison management and acquiescence in the prisons' withdrawal of important interests were already deep-seated in prisoner cases prior to *Wolfish*.[181] One problem in determining *Wolfish*'s impact at this time is that, with the exception of some eighth amendment claims, few of the complaints are clearly substantial constitutional violations. Doubtless *Wolfish* has weighted the already precarious constitutional balancing test in favor of the institutional interests, but the decisions do not yet indicate a willingness to ignore the facts before the courts. In short, the courts have not yet bestowed upon the prisons' asserted justifications the presumptive validity that *Wolfish* seemed to invite.

[180] *Id.* at 26 n.7 (emphasis in original).

[181] *See* text accompanying notes 53–67 *supra*.