Constitutional Limitations on the Conditions of Pretrial Detention

American jails are populated primarily not by persons convicted of crime, but by defendants awaiting trial who cannot purchase their freedom with bail. The sole basis for detention under current law is to ensure appearance at trial; if preventive detention for "dangerous" persons becomes law, another potentially large group will be subjected to detention pending trial. In jail, these detainees are subjected to the most severe deprivations and the crudest indignities which exist in the entire penal system. In a recent sampling of convicted prisoners, twelve of thirteen preferred the penitentiary to the jail in which they were held before trial.

Until recently, there had been no challenge to the internal administration of either prisons or jails. Because they feel it to be beyond their special expertise, judges are reluctant to inject themselves into the operation of a detention system. This past February, however, a federal district court scrutinized the Arkansas Penitentiary System and concluded that the whole system "as it exists today . . . is unconstitutional." While conditions in Arkansas prisons may be worse than those

1. Although preventive detention exists de facto under current practice, explicit authorization would almost certainly increase the number of persons confined prior to trial.


3. Prisoners have been bringing suits challenging their imprisonment for a long time, in considerable numbers, but they were rather consistently denied relief either on jurisdictional grounds or on the merits until quite recently. See, e.g., McCleskey v. Maryland, 387 F.2d 72, 74 (4th Cir. 1966); Childs v. Peglow, 221 F.2d 487, 489 (4th Cir. 1963), cert. denied, 376 U.S. 990 (1964); Hatfield v. Bailleux, 259 F.2d 632 (9th Cir. 1961), cert. denied, 368 U.S. 862; Williams v. Steele, 194 F.2d 32, 34 (4th Cir. 1952); Siegel v. Ragan, 180 F.2d 785 (7th Cir.), cert. denied, 339 U.S. 990 (1950). The first case to state the other side of the argument, and to stand alone for years, was Collin v. Reichard, 143 F.2d 443 (6th Cir. 1944). For a discussion of the changing trends in the law and in the policy of the Federal Bureau of Prisons regarding several aspects of imprisonment, see Barkin, The Impact of Changing Law upon Prison Policy, THE PRISON JOURNAL 3 (spring-summer 1963) [hereinafter cited as BAPMN]. Although only two years old, the article itself shows how quickly the law has progressed since then. Barkin disapproves of "jailhouse" lawyers, (id. at 18), but see Johnson v. Avery, 393 U.S. 483 (1969); he considers menu planning one area in which prison administrators will be free of judicial scrutiny in the foreseeable future, but see Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1968).

4. Holt v. Sarver, 38 U.S.L.W. 2462, 2463 (E.D. Ark. Feb. 18, 1970). This decision was the latest in a line of cases in which the court has tried to prod the Arkansas prison system to reform itself. See Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1955); Jackson v. Bishop, 266 F. Supp. 804 (E.D. Ark. 1967), rev'd in part 404 F.2d 571 (8th Cir. 1968); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969). In all of those cases it was found that unconstitutional practices were being carried on at the penitentiary, and injunctive relief was granted.
in other prison systems, they can hardly be worse than those found in most pretrial facilities.\(^5\) No court has yet developed standards to evaluate pretrial incarceration, but the practice—"as it exists today"—is vulnerable to serious challenge on constitutional grounds.\(^6\) This Note examines these constitutional arguments in light of the existing conditions in pretrial detention facilities.

I.

Each day, about one hundred thousand people in the United States are being detained pending trial;\(^7\) in some states, over one third of those imprisoned are detainees rather than convicts.\(^8\) The average period of detention ranges in different jurisdictions from six weeks to eight months.\(^9\) In New York, so many detainees have been held for more than three months that the Second Circuit has held en banc hearings to investigate.\(^10\)

The important determinants of the conditions of the detainee's con-

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6. The Sixth Amendment, although of great importance for pretrial detainees, is not discussed at length here. The right to a fair trial with the assistance of counsel, and the freedoms needed to exercise that right, have already been guaranteed pretrial detainees, at least in principle. See, e.g., Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951); In re Snyder, 62 Cal. App. 697, 217 P. 777 (1923); In re Rider, 50 Cal. App. 797, 95 P. 965 (1920). However, the conditions in jails often make this guarantee meaningless. The arguments made here attack this aspect of the problem and will thus have indirect, but important, effects on the Sixth Amendment rights of detainees.

7. This is an extrapolation from the fragmentary and incomplete reporting of facts about detainees. In California on a random day in 1967 there were 9000 detainees in jail; Task Force Report 24-25. In New York City on April 1, 1970, there were 8,146 persons in detention; N.Y. Times, Apr. 2, 1970, at 1, col. 7. Philadelphia had an average daily population of 1,628 detainees on March 1, 1968; The American Foundation Institution of Corrections, The Philadelphia Detention Center: An Evaluation After Four Years of Use 13 (1968) [hereinafter cited as Phila. Detention Center]. It has been estimated that in 1965, approximately 88,000 juveniles were held in jails throughout the country, Interview on March 20, 1970 with Mr. Mark S. Richmond, Assistant Director, Community Services Division, U.S. Bureau of Prisons, and Mr. R. A. Miller, Director, Jail Services, U.S. Bureau of Prisons, on file at the Yale Law Journal [hereinafter cited as Interview].

8. In Connecticut, 1,300 out of 3,000 jail and prison inmates in March, 1970 were pretrial detainees, according to State Commissioner of Corrections, Ellis McDougall. In California, in 1967, 9,000 of 25,000 persons in jails were detainees. Task Force Report 25.


10. N.Y. Times, Apr. 2, 1970, at 35, col. 4. The issue was brought up in a case in which the appellant claimed that he had been denied his right to a speedy trial because he had been detained over a year pending trial. United States ex rel. Frizer v. McMann, No. 473 (2d Cir., Apr. 1, 1970). The court discovered that 2,200 people then in detention in the city had been awaiting trial for more than 3 months. It ordered briefs from the district attorney's office, the local and state bar associations, and legal defense groups for the en banc hearings to be held later in the spring.
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finement are the facilities in which he is kept, the personnel who supervise him, the provisions he is given, the work and recreational programs offered him, and the communications which he is permitted to make.\textsuperscript{11} The nature of the building may make for a miserable stay, regardless of how the detainee is treated.\textsuperscript{12} Detainees are generally held in jails rather than prisons. Built by counties and cities, which are relatively poor governmental entities, jails are often remnants of the last century,\textsuperscript{13} when more retributive penal theories dictated harsh conditions.\textsuperscript{14} Jail cells are very small and almost always locked.\textsuperscript{15} When the jail becomes crowded, detainees have to share a cell with as many as seven others.\textsuperscript{16} Cell assignments are often made at random, even when misdemeanants as well as detainees are kept in the jail.\textsuperscript{17} These jails contain little besides the cells. They have no workshops or recreation rooms inside, and no exercise area outside.\textsuperscript{18} The heating and lighting are bad and the sanitary facilities primitive:

11. The facts presented here on these areas are not an average of the best and worst that pretrial facilities offer, but are striking examples of abuses which exist throughout the system. Any one jail may not exhibit all of the problems, or it may suffer from some of them in less severe form than noted here.


13. Imprisonment was not a common form of punishment until the 19th century; before that, serious crimes were punished by death or physical suffering, minor ones by a fine or a day in the stocks. Each town's jail held everyone who was awaiting trial and sentence. When imprisonment became popular as a punishment, jails became too crowded and the states stepped in to build facilities. They were for those convicted prisoners with long sentences, who did not have to be near the court and their home, as pretrial detainees did. Counties and towns continued to use their old facilities for pretrial detainees and short term prisoners. The North Carolina Jail Study Commission, A Challenge to Excellence: Local Jails in North Carolina 3-4 (1969) [hereinafter cited as N.C. Jail Comm'N].

14. The conditions of life in jails have been denounced for several decades, though to little avail. For a sample of the reports on jails, see Illinois State Charities Commission, First Annual Report (1911); E. Abbott, The One Hundred and One County Jails of Illinois and Why They Ought to be Abolished (1916); J. Fishman, Crucibles of Crime (1923); L. Robinson, Jails (1944).

15. In some New York detention centers, prisoners are locked in their cells at all times except for one hour when they can exercise in the "pen-like corridor on which their cells front." A Study of the Administration of Bail in New York City, 105 U. PA. L. REV. 693, 725 (1958).

16. Interview, supra note 7.

17. TASK FORCE REPORT 168; N.C. JAIL COMM'N 29-30; Interview, supra note 7. Juveniles and adults are often assigned to cells together. TASK FORCE REPORT 24. Only seven of one hundred North Carolina counties have separate facilities for juveniles. Seventy-three of the counties house juveniles in the same cells as adults. Women are held in open cells in full view of male guards and prisoners. N.C. JAIL COMM'N 28-29. See NEW ROLES FOR JAILS: GUIDELINES FOR PLANNING 16 (M. Richmond, ed. 1959) [hereinafter cited as NEW ROLES FOR JAILS]. Some detainees are held in prisons, where they are segregated from the rest of the population. Ironically, this means that they receive far worse treatment than the other inmates. In jails, where there are few or no rehabilitative or innovative programs, mixing of convicts and detainees is detrimental for detainees; in prisons, however, the separation means that detainees suffer lack of access to the services, facilities, and programs offered to the convicts there.

18. Interview, supra note 7.
One New England state, for example, reports four jails having a total of 899 cells without sanitary facilities. The construction of many existing local institutions predated inside plumbing and electricity; they still have slop buckets, bullpens, and unshaded electric bulbs dangling from exposed fixtures.\textsuperscript{19}

The jailhouse staff, paid at an extremely low rate,\textsuperscript{20} are seldom qualified to operate these inadequate jail facilities. In four states, the staff are hired by a state-wide civil service agency, and job placement is based on an educational requirement and a merit system.\textsuperscript{21} In the other states the guards are local or county officers, who often need no qualifications to be appointed and who can be fired at any time.\textsuperscript{22} In many small counties, the jobs are awarded as political patronage by the elected sheriff. Some sheriffs, who are also law enforcement officers, assign the jobs to the road deputies whose work on the highways has been least satisfactory.\textsuperscript{23}

The lack of preparation for managing a jail is seldom remedied by a training program for wardens and guards during their period of employment.\textsuperscript{24} Nor, in most cases, do the guards serve long enough to learn from experience. When they are political appointees, every election puts their jobs in jeopardy. The patronage system, poor pay and bad working conditions help to cause a complete turnover of jail personnel in this country every five years.\textsuperscript{25} The changeover after an election is accompanied by such rancor that outgoing jailors have been known to throw away their keys and destroy their records.\textsuperscript{26}

Besides the physical condition of the jail and the quality of its staff, detainees suffer from a lack of food, clothing, medicine, and exercise. In one third to one half of all jails, the diet fails to meet minimum daily caloric and nutritional health requirements;\textsuperscript{27} many jails serve only two meals per day, and those serving three may provide a dough-

\textsuperscript{19} TASK FORCE REPORT 166.
\textsuperscript{20} The salary is often a supplement to a retired man's social security income. Only in New York and Los Angeles do the salaries average from $8,000 to $10,000 a year. Interview, supra note 7.
\textsuperscript{21} Those states are Alaska, Connecticut, Delaware, and Rhode Island. N.C. JAIL COM'MN 7; Interview, supra note 7.
\textsuperscript{22} In 53% of the states, there is no education requirement for wardens or guards; in the remainder a high school diploma is required. TASK FORCE REPORT 165; NEW ROLES FOR JAILS 18.
\textsuperscript{23} Interview, supra note 7. TASK FORCE REPORT 164; MATTICK & AIKMAN 112.
\textsuperscript{24} In 38% of the institutions, they do receive training—but only in the use of firearms and the censorship of correspondence. TASK FORCE REPORT 165.
\textsuperscript{25} Interview, supra note 7. TASK FORCE REPORT 164, MATTICK & AIKMAN 112, 116-17.
\textsuperscript{26} Interview, supra note 7.
\textsuperscript{27} Interview, supra note 7. The dietary conditions in jails violate the standards set by the American Correctional Association over a decade ago. THE AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 434-35 (1959).
nut for breakfast, a dry bologna sandwich for lunch, and a vegetable stew for dinner. Dieticians are extremely rare in jails, and the cook may be the sheriff's wife. In a few states, the fee system still operates; as a supplement to his salary, the sheriff is given a fund for the prisoners' food and can keep for himself the money remaining unspent. Unless a detainee brings clothes when he enters the jail, he wears the clothes he came in with until his release, since most jails do not have institutional clothing.

The detainee is generally not given a medical examination when he is admitted to jail; injuries, chronic and contagious diseases, and drug and dental problems often go untreated unless they erupt into an emergency. Even then, help is not readily available. Instead of having a doctor on the staff of the jail, the sheriff contracts for services with the county medical department, whose doctor may live forty or fifty miles away and be reluctant to come, knowing that he will get no fee from his patient.

The need for some physical activity and recreation is recognized in all correctional literature, but such activity is almost never provided in jails. In a typical jail, the only gymnasium is the corridor which runs along the cell block; the only inmates allowed out of their cells are those who are considered docile by the guards and who have a special skill, such as cooking or haircutting; and the only ones who get outdoors are the "trusties" who wash the sheriff's car.

Detainees are also circumscribed in their communication with the outside world. No written material comes in uncensored. Detainees generally cannot obtain the reading matter they request; their choice is limited to the books sent over by the county library, if it cooperates in a program with the jail. Mail is censored with the detainee's "consent;" if a prisoner does not sign the consent form provided under federal postal law, his mail is returned or held until he is released.

28. Interview, supra note 7.
29. Interview, supra note 7. N.C. JAIL COMM'N 50.
30. Interview, supra note 7.
31. Id.
32. Id.
34. Interview, supra note 7.
35. Interview, supra note 7; Foote, supra note 33, at 1144; A Study of the Administration of Bail in New York City, supra n.15, at 723.
36. Interview, supra note 7.
37. UNITED STATES DEPARTMENT OF JUSTICE, RULES AND REGULATIONS GOVERNING CUSTODY AND TREATMENT OF FEDERAL PRISONERS IN NONFEDERAL INSTITUTIONS 2 (1969) [here-
If he does sign, his mail is opened, inspected for contraband, and scanned for content. A consenting detainee may ordinarily correspond with his lawyer and his family; to correspond with anyone else, he must get the special permission of the warden. In some states, the warden may be overridden by the state commissioner of corrections.38

Oral communication is restricted even more stringently. A detainee is typically allowed no more than three phone calls when he is being arraigned,39 he may call his lawyer, his family and his employer. Once in jail, the detainee has no access at all to a telephone. Visits to the jail are permitted only to the detainee’s family and his lawyers.40 Visiting hours are often inconvenient, and when visits do take place, the detainee and his visitor are separated by a wall, with only a small window or screen through which to see one another and a telephone device with which to communicate.41

The detainee is given no protection from these deprivations by federal or state governments. The federal regulations authorize certain deprivations, but set no minimum standards for treatment.42 Only forty per cent of the states set any standards for jails, and these focus on construction and health.43 Officials in nineteen states are authorized to conduct inspections, but only six states provide subsidies for needed improvements which are recommended as a result of such inspections.44

Thousands of innocent persons undergo the deprivations which result from inadequate facilities, supervision, provisions, and opportunities for communication for months before the adjudication of the charges against them is begun. The small segment45 who return to

39. Interview, supra note 7.
40. Even this is not always true. The federal rules for use by local jails holding federal prisoners allow the warden to refuse to permit a visit if he thinks it will “not be in the best interest of society or might endanger the security of the institution.” FEDERAL REGS. 2. 41. TASK FORCE REPORT 24-25; Interview, supra note 7; A Study of the Administration of Bail in New York City, supra n.15, at 723; Foote, supra note 33, at 1144-45.
42. FEDERAL REGS, supra note 37.
43. TASK FORCE REPORT 80.
44. Id.
45. Many of those who are detained will not be convicted of crime; of those who are found guilty of crime, many will not return to an institution to serve a sentence. Instead they will be fined, placed on probation, or serve a suspended sentence. Out of 200,000 persons found guilty in New York last year, only one in ten went to prison after conviction. N.Y. TIMES, Mar. 28, 1970, at 29, 30, col. 1. In Philadelphia, in 1967, only 8.1% of the detainees were sentenced to institutions. PHILA. DETENTION CENTER 17. In the District of Columbia, approximately 10-15% of those held in detention return to a panel institution after adjudication of the charges. Interview on May 25, 1970, with Dr. Stuart Adams, Director, Office of Planning and Research, D.C. Department of Corrections.
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prison after conviction at trial may be surprised to find their punishment less severe than the pretrial detention they suffered when they were theoretically "presumed innocent.""46

II.

The equal protection clause requires that those similarly classified in a statutory or administrative scheme be similarly treated, and that classifications bear a reasonable relation to a legitimate state purpose.47 In terms of the treatment accorded them, the state has placed citizens detained pending trial in a single class with those sentenced to jail following conviction for a crime.48 If the state's only purpose in jailing convicts were to maintain custody, this classification might be reasonable in its operation.49 But a determination of guilt triggers the legitimacy of state purposes other than custody.50 Detainees, on the other hand, are presumed innocent of any acts which justify punitive or mandatory rehabilitative measures. To classify detainees with convicts for purposes of determining the conditions of detention is, therefore, unreasonable.

In terms of the state's legitimate purposes, citizens detained pending trial are part of a class of arrested persons, in whom the state's only declared interest is to ensure appearance at trial.51 Some of those arrested are released on bail; others are detained, either because they cannot afford the bail set for them52 or because they are accused of a

46. See note 2 supra.


48. Interview, supra note 7; Task Force Report 24-25. Though even were this the case, deprivations imposed upon inmates would have to be tested by the requirements of due process.

50. See, e.g., the three-fold definition of punishment set forth by Herbert Packer in The Limits of the Criminal Sanction (1968): retribution, deterrence from further criminal activity, and rehabilitation.


52. In Griffin v. Illinois, 351 U.S. 12, reh. denied 351 U.S. 938 (1956), the Supreme Court held that defendants cannot be effectively denied the right to an appeal because of their indigence; the state had to provide a record of their trial to assure them a fair hearing on appeal. For those detainees who are in jail solely because they are too poor to afford the bail set for them, the decision is directly relevant. They are suffering unnecessary deprivations in comparison to bailed persons, with whom they share the same status in the criminal process, on the very basis which was found impermissible in Griffin. This argument, taken to an extreme, attacks the whole principle of release on a financial basis; it can be used instead, however, to attack the conditions suffered by those who have no money rather than as an argument directed toward the abolition of bail.
capital crime. The only basis for according different treatment to detainees than to bailees is that maintaining custody of the former is felt to be necessary to ensure their appearance at trial. Where preventive detention is legalized, another basis will become cognizable: detention is necessary for "dangerous" defendants to prevent the commission of other crimes before trial. But whether arrested persons are detained for their risk of nonappearance or for their risk of pretrial recidivism, the only distinction between detainees and bailees for purposes of treatment is the presence or absence of a necessity for custody.

The only cases which raise this equal protection question directly are the lower court cases in which detainees were put into line-ups from which the victim of crime was to identify his assailant. Detainees rested their equal protection claim upon an asserted common classification with bailees. One district court upheld that claim, and though contrary decisions on line-ups have been reached since then, the principle of the decision has not been vitiated:

55. The line-up to which the accused objected was for a crime for which he had not been arrested. Normally, a person cannot be put in a line-up unless there is probable cause to arrest him for that crime. A bailee may be asked to take part in a line-up, but if he refuses, the police must obtain sufficient evidence to arrest him. Butler v. Crumlish, 229 F. Supp. 565 (E.D. Pa. 1964). In the District of Columbia, however, a bailed person may be called in involuntarily for a line-up when he has not been arrested. Adams v. United States, 399 F.2d 574, 578-79 (D.C. Cir. 1968).


58. See, e.g., United States ex rel. Frist v. Nardini, 380 F.2d 150 (3rd Cir. 1968); Rigney v. Hendrick, 365 F.2d 710 (3rd Cir.), cert. denied, 388 U.S. 975 (1966); Morris v. Crumlish, 293 F. Supp. 498 (E.D. Pa. 1965). The reasons set forth for the exemption of line-ups from the equal protection principle are two. (1) Arrest is only a matter of ob-
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The constitutional authority for the state to distinguish between criminal defendants by freeing those who supply bail pending trial and confining those who do not, furnishes no justification for any additional inequality of treatment beyond that which is inherent in the confinement itself.5

Once the proper classification is established, the action of the state toward the group must be evaluated to ensure that it is reasonably related to the legitimate governmental end.6 A line of cases holds that where a person has not been convicted of a crime, any deprivation of his liberty by the state must be the least restrictive means of achieving the purpose of the deprivation. Civil commitment, sequestration, and medical quarantine are examples of such deprivations.6

In one civil commitment case, the District of Columbia Circuit ordered investigation of an alternative to hospitalization for an old lady; the state's interest in treating her so that she would not be dangerous to herself or others could be achieved in a less restrictive way.6 The same court held that in order to transfer an involuntary mental patient to a ward with tighter security, a hospital must show that it is not restricting him more than necessary to protect the community.6

The principle of the least restrictive alternative consistent with the legitimate purposes of a commitment inheres in the very nature of civil commitment, which entails an extraordinary deprivation of liberty... A statute sanctioning such a drastic curtailment of...
the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivation without due process of law.\textsuperscript{44}

In summary, all restrictions on detainees must be reasonably related to the state purpose of holding them until trial; the means used must be no more restrictive than is required to accomplish that limited purpose. Many of the current conditions are invalidated under this principle.\textsuperscript{45}

Thus, though custody makes legitimate some restrictions on detainees, the principles of equal protection and due process make many restraints on their conduct impermissible. For example, jailers typically deny detainees free visiting rights on the ground that they might continue to deal with past associates in crime. Yet the state has no valid claim to regulate detainees' morality by imposing heavy restrictions on such First Amendment rights.\textsuperscript{46} For convicts, rehabilitation is an adjunct of imprisonment; for detainees, it may be merely an overly restrictive form of regulation. The strict controls on physical movement and the lack of exercise space in jails are other examples of conditions which are overly restrictive.

\textsuperscript{44} Id. at 623-24. In support of this principle, the court cited Aptheker v. Secretary of State, 378 U.S. 500 (1964); and Shelton v. Tucker, 364 U.S. 479 (1960).

\textsuperscript{45} Purely procedural due process is also a limitation on the treatment of detainees. Compliance with due process procedural fairness is required whenever governmental action will deprive an individual of substantial liberties. Greene v. McElroy, 360 U.S. 474 (1959) (government employee may not be dismissed without hearing with safeguards of confrontation and cross-examination); Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), cert. denied 368 U.S. 930 (1961) (due process requires that notice and a fair hearing be afforded before a student is expelled from a tax-supported college). The Supreme Court in the recent case of Goldberg v. Kelly, 38 U.S.L.W. 4223 (March 23, 1970) reviewed the elements of minimal due process which must be afforded the individual when governmental action of this sort is taken.


This procedural regularity is equally applicable and important to detainees. If a detainee demonstrated that he was a serious security risk or if he violated rules essential for an orderly institution, the authorities would have to heed procedural rules before taking action to inflict particularly restrictive conditions on him. Such proceedings would increase the accuracy and fairness of the system and would reduce the uncertainty and tension which current ad hoc discipline produces.

The federal government has taken some steps in this direction by laying out rules for discipline of federal detainees in local jails. Discipline may take only four forms, and fair procedures must precede its imposition. The discipline may be (1) restricted activity; (2) reduced diet; (3) solitary confinement; and (4) docking of good time. (Time in detention is credited against eventual sentence in the federal system, though not in most states.)

\textsuperscript{46} The only legitimate state interests in limiting visits are those of security and administration; there is a danger of passage of contraband, and staff time is required to supervise visits. Even those considerations do not justify current restrictions, however. See pp. 955-56 infra.
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It is a fundamental tenet of the American criminal system that a person is presumed innocent until proven guilty;\(^7\) he is not to be punished before he is tried and convicted of a crime.\(^6\) This applies as strongly to pretrial detainees as to bailees and those who have not been accused of a crime. Accordingly, if the restrictive conditions under which detainees are held constitute punishment, subjecting detainees to those conditions violates the due process of law guaranteed by the Fifth and Fourteenth Amendments\(^9\) and the proscription against cruel and unusual punishment of the Eighth Amendment.\(^70\)

The Supreme Court has considered the question whether a sanction constitutes punishment in cases involving deportation or deprivation of citizenship.\(^71\) The purpose behind the government's imposition of the sanction is the most important determining factor.\(^72\) In cases like pretrial detention, where the purpose of any particular deprivation cannot be gleaned from legislative history, the court looks to the purpose which the sanction serves in practice.\(^73\) Unconstitutionality is established if the real aims prove to be the traditional punitive ones of retribution and deterrence.\(^74\) This interpretation is reinforced if the sanction is imposed on a group with an unusual objectionable ideol-

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\(^{67}\) U.S. Const. amend. V, VI. The "presumption of innocence" is often used to refer to standards or rules of evidence, and is shorthand for the fact that the prosecution must prove guilt beyond a reasonable doubt. See Wilson v. United States, 292 U.S. 593, 599-70 (1914). It is used in a more general sense here, as a statement of the Fifth Amendment guarantee that a person will not be punished or deprived of life or liberty until he is found deserving of such deprivation through a process guaranteeing him due process of law. See Ares, Rankin & Sturz, The Manhattan Bail Project: An Interim Report in the Uses of Pre-trial Parole, 38 N.Y.U.L. Rev. 67, 69 (1963).

\(^{68}\) This imprisonment, as has been said is only for safe custody, and not for punishment; therefore, in this dubious interval between commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, nor subjected to other hardships than such as are requisite for the purpose of confinement only.

4 W. Blackstone, Commentaries 300.

\(^{69}\) One of the few exceptions to the principle that punishment can only follow a determination of guilt by due process of law, with Fifth and Sixth Amendment guarantees, is punishment imposed for contempt of court. Historically, this punishment can be summarily imposed by the court without jury trial; the power to vindicate its authority in this way is said to inhere in a court of justice. For a discussion of the historical roots and policy arguments surrounding this anomalous principle, see United States v. Barnett, 376 U.S. 681 (1964). The Supreme Court has since limited this power by holding that any person who receives a contempt sentence over six months in length has a right to a jury trial. Cheff v. Schnackenberg, 384 U.S. 799-80 (1966).

\(^{70}\) The Eighth Amendment applies to the states through the Fourteenth Amendment. Robinson v. California, 370 U.S. 600 (1962).


ogy or other undesirable characteristics, toward whom the legislature is likely to have a punitive orientation. Detainees, impoverished and charged with crime, certainly fit this characterization.

Even if the sanction can be interpreted as punishment, the court may permit it if there is an alternative governmental purpose in relation to which the sanction is not excessive. With pretrial detainees, there exists a legitimate alternative purpose of maintaining custody, but any restrictions beyond those necessary for that purpose are excessive.

Besides the purpose of the sanction, courts look to its effect, to determine whether it involves an affirmative disability and whether the disability has historically been regarded as punishment. In the deportation and deprivation of citizenship cases, the Court was preoccupied with showing that those sanctions were as severe as imprisonment. Obviously, no such argument needs to be made about detention in jail.

The Fourth Circuit has held that prisoners suffer "superadded" punishment over and above that of the regular routine of prison life when they are subjected to certain particularly onerous restrictions. It found certain deprivations severe enough to be called punishment:

Prisoners in "C" building are not permitted to work and earn money; they are allowed only two meals a day, and are deprived of radio, television, and movie privileges; they do not have access to the library and are not permitted to attend educational classes; they are allowed to bathe only once a week, as opposed to daily bathing allowed other prisoners.

75. This aspect of the problem received lengthy consideration in all the cases, since the sanctions were often aimed at groups susceptible to identification as Communists or unpatriotic draftdodgers. Flemming v. Nestor, 363 U.S. 603, 613, 629-30 (1960) (Douglas, J., dissenting). It is often subsumed in the question of whether the sanction is punishment, since it must be so characterized before it can be a bill of attainder. See, e.g., Trop v. Dulles, 356 U.S. 86, 92-99 (1958) (Opinion of Warren, C.J.).

76. Id. at 168-69.
78. When we speak here of detention in jail, we mean only those conditions above and beyond the fact of custody itself, since it is valid, and not punitive, merely to confine detainees. However, the difference between custody in its most mild sense and life in jail today is great enough that the conditions of detention come well within the Court's meaning when it refers to "imprisonment" as punishment.
79. Landman v. Peyton, supra note 65; Howard v. Smyth, supra note 65; Sostre v. Rockefeller, supra note 65 (slip opin. at 14).

Acceptance of the fact that incarceration because of inherent administrative problems may necessitate the withdrawal of many rights and privileges does not preclude recognition by the courts of a duty to protect the prisoner from unlawful and onerous treatment . . . that, of itself, adds punitive measures to those legally meted out by the court.

Jackson v. Godwin, 400 F.2d 529, 532 (5th Cir. 1968).
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Every day detainees suffer restrictions exactly like these. If these conditions, imposed over the normal routine of prison life, constitute punishment in and of themselves, they must be labeled punishment when imposed upon persons merely detained.

If the incidents of detention amount to punishment, then that detention violates the Fifth Amendment, because its imposition has not been preceded by a procedure comporting with due process. The only procedure which detainees have gone through is the bail hearing, at which it has been determined that they could not afford or were not eligible for bail. Nothing about guilt has been established. Detention under such circumstances is so clearly disproportionate that it violates not only due process, but also the Eighth Amendment proscription against cruel and unusual punishment.

III.

Detainees can best bring these constitutional arguments before a court by filing class actions for injunctive and declaratory relief. If an action is brought instead by an individual detainee, he may lack the resources or the interest to pursue the suit until judgment or he may be released, in which case his action becomes moot and the court loses jurisdiction. Courts may be more willing to grant declaratory relief

81. See pp. 942-47 supra; Foote, supra note 33, at 1144; Task Force Report 24-25.
82. There might be a jurisdictional problem, if all prisons were federal or state-run and all detention facilities were local or county institutions, in requiring the standards in the latter group to be higher than those in the former; counties and cities could claim that within their system, detainees were receiving the best treatment they could provide, and that comparison to a system with different priorities was unjustified. Strictly speaking the factual grounds on which such an argument must be based are not present, since the federal government does run some detention facilities; more fundamentally, however, we are here suggesting the comparison as a general principle, not as an exact formula to be applied to all county and local decisions about detainees.
83. The Eighth Amendment applies to detainees in two ways. Punishment is cruel and unusual by an absolute standard if it violates basic canons of decency. Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966); Sostre v. Rockefeller, supra note 65 (slip opin. at 15-16). Conditions in some jails violate that standard. Punishment is also cruel and unusual if it is totally out of proportion to the wrong toward which it is directed. Weems v. United States, 217 U.S. 349 (1910); Kasper v. Britain, 245 F.2d 92, 96 (6th Cir. 1957). In one recent case, indefinite commitment to punitive segregation was found to be so disproportionate to the prisoner's behavior that it constituted cruel and unusual punishment. Sostre v. Rockefeller, supra. Detainees have not yet been found guilty of any act; therefore the punishment is totally disproportionate. It is plausible to argue that they are being punished solely for their status; this was found to be an impermissible basis for punitive action in Robinson v. California, 370 U.S. 660 (1963).
84. 28 U.S.C. §§ 2201-2202 (1964). Convicts have also been bringing suits under 42 U.S.C. § 1983 to complain of invasion of their civil rights. See, e.g., Sostre v. Rockefeller, supra note 65; Morris v. Travisono, supra note 65; for a discussion of remedies for convicted prisoners, see Jacob, supra note 65, at 248-62.
than habeas corpus because the appropriate remedy is not to release the detainee but to cure the infirmities in the detention system.

It may be difficult for the court to specify the appropriate remedy without involving itself in the day-to-day supervision of the prison system. Some method must be found which will avoid the disruption of the system and the waste of judicial energy which this involvement would cause. One approach which courts have taken with success, both in mental health cases and in the recent prison cases of Holt v. Sarver and Morris v. Travisono, is to issue a general mandate and to retain jurisdiction, requiring administrators to submit plans and reports on the actions taken in response to the mandate. The court might go one step beyond this by issuing guidelines for the jail officials—setting forth the remedial steps to be taken in a timetable. It would also be helpful for the United States Bureau of Prisons to take the lead in formulating guidelines just as the Department of Health, Education and Welfare has done to help implement school desegregation. Ad-

87. See, e.g., People v. Bargy, case no. Cr. 32784 (Wayne Cty. Circuit Ct., Jan. 12, 1970) and Nason v. Superintendent of Bridgewater State Hospital, 233 N.E.2d 308, 653 Mass. 604 (1968), both cases in which courts ordered major changes in the provision of treatment to involuntarily committed mental patients. In Nason, the court referred the case to a special commissioner with the power of an auditor, whose findings were to be final. The court then reviewed and acted upon that report, taking into account changes made during the inquiry. The court ordered that the county court retain jurisdiction. 233 N.E.2d at 914.
88. If progress is slow in coming, the guidelines should specify “triggering dates” after which the court will step in to supervise personal practices as well as other aspects of detention. This technique is validated by judicial experience in achieving constitutionally required reforms in prisons. For example, in the Arkansas prison cases, the court first required that rules be issues to cover the limited permissible use of whipping, which the guards had been administering at will. Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965). Then, when the rules were not obeyed, the court outlawed whipping under any circumstances. Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967). Having now determined that the guards, particularly those prisoner “trusties,” are largely unaffected by its restrictions, the court has declared that their replacement by more qualified personnel is constitutionally mandated. Holt v. Sarver, 38 U.S.L.W. 2462 (E.D. Ark. Feb. 18, 1970). While courts have observed the principle that prison administrators are not relieved of their responsibilities “by personal ignorance of abuses practiced” (Talley, supra at 692) by their subordinates, such observations alone do not bring about change. The only viable alternative to the “trigger” device is to hold jail officials in contempt if guidelines are not complied with, and this is less attractive because it tends to confuse the need for changes in the system with the question of official accountability.
89. The Department of Health, Education, and Welfare guidelines for plans for desegregation of schools cover assignment of pupils, faculty hiring and dismissal policy, and desegregation of school services, activities, and facilities. They require that the schools keep records of the changes, and there is a periodic reporting requirement, 45 C.F.R. § 181 (Supp. 1968). For cases in which the courts have reviewed and supervised the application of these guidelines and the local plans drawn up in conformity with them, see, e.g., Green v. County School Board of New Kent County, 391 U.S. 420 (1968); Henry v. Clarksdale Municipal Separate School District, 409 F.2d 682 (5th Cir. 1969); Franklin v. Quitman County Board of Education, 288 F. Supp. 509 (1968).
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ministrators of state and municipal detention centers would be pressured to follow its example.

Courts passing on detainees' suits will have the delicate job of weighing the detainees' valid claims against serious objections raised by jail administrators. All these objections can be traced to the one problem of insufficient resources; administrators will claim that they do the best they can with what they have, but given their resources, the restrictions they impose are necessary, in light of security and administrative needs, to hold detainees until trial.90 A very small percentage of determined troublemakers can disrupt the whole jail routine; the lack of professional staff to administer classification procedures and the difficulty of assessing an individual's attitude in a short period of time mean that maximum security is required for everyone to preclude the possibility of trouble.91 It is arguable that preserving custody of detainees with the present level of resources (1) necessitates all differences in treatment between them and bailees, (2) cannot be done by any less restrictive means, and (3) serves the purpose of ensuring the defendants' appearance at trial. In view of these considerations, the administrators' actions seem less excessive.

In one sense, the argument is substantial; providing a normal civilian life for detainees would mean providing so many facilities, services and personnel that it would create an intolerable burden on the resources of the state. In another sense, however, the argument is preposterous; maintaining secure custody requires only a large, controllable space, not censorship of mail or confinement in a tiny, locked cell. Not only are resources misspent on unnecessary restrictions like censorship; even if all resources were spent properly, they might be inadequate. If the level of resources is always taken as given, it can justify anything—even depriving detainees to the point of starving them, were the level lower.92

90. In Jordan v. Fitzharris, supra n.83, the testimony of the prison authorities shows that understaffing and lack of money lay behind the deplorable conditions in the prison. 257 F. Supp. at 680-81. The same was true in Holt v. Sarver, supra note 88. See also TASK FORCE REPORT 166; MATTICK & AUKMAN 113. This problem, of course, cannot be blamed mainly on the administrators themselves; the legislature and the public are unwilling to commit resources to the care of prisoners, a group low on the list of social priorities. However, it is true that in the past many administrators were quite content with the status quo and did little to attract more money to the jails. Now, many of them are trying to institute experimental programs which would not be expensive, but are chafing under the financial limitations which curtail their efforts to reform their institutions.

91. Interview, supra note 45.

92. This extreme example illustrates another framework within which the duties of jail officials are often cast. The distinction is drawn between negative restrictions and affirmative duties; it is said to be permissible to require the former to be lifted, but more difficult to demand that the latter be put into effect. Although this sounds logically neat, it is not even seriously urged by jail administrators themselves; they admit that
Constitutional decisions in analogous areas have begun to challenge the claim of inadequate resources. In *Rouse v. Cameron*, the D.C. Circuit held that the scarcity of resources is an insufficient justification for the state’s failure to fulfill its promise to treat mental patients whom it has confined against their will:

Continuing failure to provide suitable and adequate treatment cannot be justified by lack of staff or facilities. As the Fourth Circuit Court of Appeals said of the right to treatment under Maryland’s defective delinquent statute, “deficiencies in staff, facilities, and finances... would undermine... the justification for the law and ultimately the constitutionality of its application.”

Nor has the argument from scarce resources been persuasive in the prison area itself. In finding that prisoners must be allowed to exercise certain rights, courts have implicitly rejected jailers’ arguments based on the drain on resources which any change in procedures would entail.

The principles which have led courts to set standards for the confinement of convicts have even greater force in their application to conditions of pretrial detention. The state has the same interest in preserving the custody of convicts that it has in detainees, and a certain degree of control over their actions is justified. Although further control over convicts is justified by the additional state interests in retribution, deterrence of future criminal activity and rehabilitation, these interests are lacking in the case of detainees, and no other offsetting justifications for control of detainees have been adduced. At a minimum, then, the state or jailer must never be allowed more control over...

there are many affirmative duties, such as feeding the inmates, that they have an obligation to fulfill. Evaluation of the point at which they feel that they must do no more is much more honestly stated in terms of available resources.

93. 373 F.2d 451 (D.C. Cir. 1966).
94. Id. at 457.
95. Court action has resulted in the expenditure of extra funds when the courts have ordered prison officials to upgrade the condition of the solitary cells and of the services provided prisoners there, as in Jordan v. Fitzharris, *supra* n.83, and Wright v. McMann, 387 F.2d 519 (2d Cir. 1967). In Landman v. Peyton, *supra* n.65, the court strongly urged the prison authorities to change their handling of the maximum security units; it mentioned conferences for airing grievances, frequent inspections, and training for the guards. 370 F.2d at 140-41. All these changes would cost money; although they have not yet been constitutionally required, the court suggests that if the changes are not made voluntarily, it will so order. Last year, the District of Columbia Circuit remanded a case in which Muslim prisoners claimed that they had a right to pork-free meals, the court held that in order to be justified in refusing to comply with that request, the prison authorities would have to show compelling reasons. The court suggested it would not consider the extra staff time and expense required to adjust the menu for such a compelling reason.
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detainees than convicts. Accordingly, any prison practice which is unconstitutional as applied to those convicted of crime would a fortiori be unconstitutional if imposed on those who are only accused of crime.

Moreover, the difference in the legitimate state interests in convicts and detainees suggest that detainees must be treated better. Censoring convicts' mail and limiting the volume and destination of the mail they send have been held valid on grounds of retribution and deterrence from involvement with past associates in crime. Neither of these grounds applies to detainees. If the justification of maintaining custody is lacking, the practice must be discontinued. For the same reasons, guidelines for the treatment of detainees should ease all the restrictions which convicts suffer except those justified by custody alone.

One of the most important objects of such guidelines should be to improve jail facilities. This effect may also be one of the most difficult to achieve. First, immediate provisions should be made to house detainees separately from convicts. Beyond that, guidelines should set minimum levels of space per detainee, provide for the necessary common rooms (such as visiting halls), and specify the steps which must be taken to phase out the old maximum security jailhouses and to replace them with modern, well-equipped structures with varying levels of security.

96. The court in Tyler v. Ciccone, 229 F. Supp. 684 (W.D. Mo. 1969), prohibited the application of the rules on mailing and publishing manuscripts to an inmate who had not yet been tried for a crime. The court said:

Regulations of the type here challenged, to be valid as applied even to convicts, must be consistent with constitutional safeguards, authorized by statute, and relevant to the lawful functions and security of the prison. . . . While the Constitution authorizes forfeiture of some rights of convicts, it does not authorize treatment of an unconvicted person (who is necessarily presumed innocent of pending and untried criminal charges) as a convict. Unconvicted persons charged with crime are entitled to the rights of free speech and to do business accorded to all unconvicted citizens. The challenged regulation . . . deprived the unconvicted inmate of fundamental constitutional rights and cannot therefore be enforced against him. 299 F. Supp. at 687-88.

97. Separation of detainees from convicted prisoners has been long recognized as an essential first step in bettering the treatment of detainees. TASK FORCE REPORT 24. To be meaningful, it must be accompanied by provision of services and conditions of confinement which are appropriate for persons presumed innocent.

98. Security is an operational term which takes in all characteristics of the institution which keep it peaceful and secure, including physical layout, walls, use of guns, or conceivably, lack of desire by the inmates to leave the surroundings. Therefore, the fact that the living space is dormitories does not in itself mean that the prison is more progressive or less severe than those with cells. However, old buildings rarely had dormitories (with mixed single rooms and shared living quarters and common rooms), so they are at least a sign that old methods are being discarded, and that the hardship of extremely restricted living space is alleviated. ACA MANUAL 332-333. Interview, supra note 7. Maximum security has been found unnecessary for 80% of the jail population under the most extreme circumstances. MYRL ALEXANDER, JAIL ADMINISTRATION 284 (1957). “Maximum security in most jails is needed for no more than one or two cells. The other cells could and should be minimum security accommodations.” N.C. JAIL COMM'SN, supra note 13, at 5. The arrangement ought to have some private rooms and some multi-person
-Even more important than buildings, and an aspect of detention somewhat more easily governed by guidelines, is the staff which is ultimately responsible for implementing the court-ordered changes. Personnel must be greatly increased in number and dramatically upgraded in quality. To attract properly qualified persons, civil service procedures should be substituted for politics and patronage in staff selection, and salary levels should be increased over the present average of under $5,000 a year. The self-administering course now in use by the Federal Bureau of Prisons should be taken as a model for the minimum level of acceptable training.

Along with improvements in staff, the guidelines should require that more attention be given to the basic personal needs of detainees. For example, each system housing more than a few hundred inmates should have a professional dietician, and smaller systems should employ a standard food program designed to assure balanced nutrition in the jailhouse diet. Each jail should have adequate medical facilities and personnel, on either a contract or full-time basis. The guidelines should specify how the staff can use the various public or volunteer services which are available in the community to assist detainees in overcoming the social, legal and personal problems created by detention.

Guidelines for eliminating restrictions on First Amendment rights should be the easiest to formulate, and also the easiest for the state to follow, since they would require a minimal sacrifice of resources. Detainees should be allowed to receive incoming mail of all sorts—books and periodicals as well as letters—without censorship. Jailers claim that some reading material may incite to riot, but it is most unlikely that anything detainees read would threaten the order of the con-

living quarters. To utilize properly this variety in the level of security, classification procedures must be used to assign detainees to the suitable area. The Federal Bureau of Prisons has formulated and is testing a questionnaire that will gather the relevant facts for this determination; the questionnaire is simple and can be administered during the booking process. Such a procedure would identify the few persons who need single rooms and high level security. If transfers are warranted, they can be made later. The present random and uninformd assignment procedure often makes a dormitory fearful because of one or two unruly individuals. Interview, supra note 45.

99. In addition to an absolute rise in number of personnel, a change in the proportion of guards to other staff must take place. More professional and skilled positions must be created; health care personnel, dieticians, social workers, and community resources counselors are examples of the job designations which need emphasis. See MATTICK & AKMAN 112.

100. TASK FORCE REPORT 165.
101. For a description of the Bureau of Prisons correspondence course, see the ACA MANUAL 52.
102. The doctor, or some health personnel, should be located close enough to the jail that entrance examinations can be administered on a regular basis.
103. Interview, supra note 7.
trolled environment of the jail. The only control on incoming mail should be an inspection for contraband such as escape tools or narcotics.

Similarly, there is no need to limit outgoing mail, and provision should be made for detainees to purchase writing materials and stamps. Each detainee should also be provided with a secure locker in which to keep his personal belongings, open to inspection only on “probable cause.”

The guidelines should also provide for removing the many restrictions on visits and calls. Personal visits can be supervised to prevent passage of contraband, but detainees must be allowed to see whomever they want. There are security and administrative problems with the presence of contraband in jail, and the staff time required to monitor visits would be great. Therefore, guidelines on this point would have to be carefully and reasonably drawn. Likewise, there is no reason for an absolute prohibition on telephone calls; instead, an adequate number of pay phones should be available in each jail. The hours for visits and calls should be extended to include weekend hours and evening hours during the week.

If guidelines like these are followed, it will be impossible to handle the present flow of detainees without expending more resources. The state could reduce the number of detainees held to ensure their appearance at trial; release on recognizance programs suggest that if there is proper screening and supervision an extremely small percentage of those

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104. In a jail setting, First Amendment rights should not be restricted unless there is a clear and present danger to the security of the institution from the reading matter in question. It is hard to believe that such would ever be the case. For a discussion of this standard, see, e.g., Abrams v. California, 250 U.S. 616 (1919) (Holmes, J. and Brandeis, J., dissenting); Whitney v. California, 274 U.S. 357 (1927); Dennis v. United States, 341 U.S. 494 (1951). For a good discussion of freedom of expression in prison, see Sostre v. Rockefeller, supra note 65 (slip opinion at 27-32).

105. On mail addressed to public officials, see Barkin, supra note 3, at 15-16; Sostre v. Rockefeller, supra note 65 (slip opinion at 22-26).

106. At present, detainees are not allowed to have money in jail; it is “contraband” which is held for them until they are released. (By “contraband” we mean anything that the jail rules, or the sheriff, does not permit the inmates to possess; it usually includes escape tools, money, and narcotics.) The ban on money seems an unreasonable limitation on detainees; they cannot buy supplies or services they may need. Although there is danger of manipulation of some detainees by others if money is available, it should be permitted for a trial period. If it proves too disruptive, then detainees should at least be able to have an account in the jail where he can deposit funds and buy stamps or make phone calls.

107. Visits and calls are particularly necessary to effective preparation for trial. At present, detainees are far more likely than bailies to be convicted and to serve longer sentences. This remains true when all other variables are held constant. See Rankin, The Effect of Pre-trial Detention, 39 N.Y.U.L. Rev. 641 (1964). Much of this prejudice stems from their inability to communicate freely with their lawyers and potential witnesses. If their rights were more carefully protected in jail, some of this prejudice might be alleviated.
released fail to appear at trial.\textsuperscript{108} The state could also rechannel the approximately six dollars a day per man which it now spends to hold people in detention\textsuperscript{109} to hire additional court personnel and to improve scheduling in order to move detainees through the system faster.

The administrative burden will be aggravated if the preventive detention laws bring a new influx of detainees. For these people too, the state will be allocating to detention resources which it might spend to assure speedier trials. In the interim, however, and for those who even under optimal circumstances will be detained for some period of time, correctional authorities will have to make major changes in the operation of their institutions so that individuals who are presumed innocent are confined under conditions which meet constitutional standards.

\textsuperscript{108} When cities and states have begun to use release without bail, on the defendant's own recognizance, they have found that no more than a few percent of those released fail to appear; the percentage is lower than for those defendants freed on bail bond. O'Reilly and Flanagan, Men in Detention 2 (1967). There are some indications that as the release on recognizance programs lose their novelty, they tend to be inadequately staffed, funded, and supervised, and to show somewhat higher non-appearance rates than did the early, well-funded programs. Even so, the percentage who do not show is often less than the default rate on bond or non-secured cash release.

\textsuperscript{109} The cost per detainee per day varies from jurisdiction to jurisdiction. In Chicago, it is $3.12 per day; \textit{Id.} at 10. In North Carolina, on the average it is $3.00-$9.00 a day. N.C. Jail Comm'n, supra note 13, at 19. In New York, it was in excess of $4 a day in 1958. The total cost of detention services in New York in fiscal 1954-55 was over $5 million. A Study of the Administration of Bail in New York City, supra note 15, at 723.