Trapped: Judicial Review of Municipal Agencies' Sick Leave Policies

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INTRODUCTION

Paid sick leave[1] is a significant benefit to public employees. But accompanying that benefit is the potential for abuse and fraud, with taxpayer dollars on the line. Municipal agencies walk a tightrope when taking steps to curb abuse. Certain agencies, particularly police departments, have very generous sick leave benefits. Concerned about abuse of those benefits, these agencies also have highly restrictive policies governing employees' conduct while on sick leave. These policies prevent employees from leaving their homes for nonemergency reasons without a supervisor's permission.

To illustrate the restrictions contained in these policies, consider the sick leave policy governing New York Police Department (NYPD) officers. The policy requires officers to obtain "[p]ermission ... in advance from the Communications Desk Supervisor" for all nonemergency departures from their residences.[2] Furthermore, even if permission is granted, officers must "state the reason for leaving, name of destination, the address, telephone number, and how long he/she will be out."[3] Even further still, if an officer "is out of his/her sick location for more than three (3) hours, [the officer must] again call the Communications Desk Supervisor and make notification as to his/her present location and how much longer he/she will be out."[4] And as a final example of the Department's supervision of officers on leave, an officer is required to "be available for sick investigation between the hours of 9:00 AM and 8:00 PM to a Department supervisor, a Department physician, the [ ] Medical Department, in person, or via phone at his/her reported location."[5] In short, the officers on sick leave are heavily supervised, and their movement is restricted. In one extreme

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1 This Comment uses the term "sick leave" to encompass leave for both injury and illness, since they are often lumped together under the same policy in the cases at issue.

2 *Capasso v Metropolitan Transportation Authority*, 198 F Supp 2d 452, 457 (SDNY 2002).

3 Id.

4 Id.

5 Id.

case, an NYPD officer was not only confined to his residence but was also prohibited from sitting outside in his yard![6]

These restrictions can prevent employees on leave from, for example, attending religious services, going to family and political functions, and traveling, unless they first obtain permission. On numerous occasions, public employees have challenged the constitutionality of these policies, and some have succeeded. The current state of the law regarding these challenges is unsettled on multiple fronts—most importantly on the standard of review that courts should use to evaluate the policies' constitutionality. This Comment proposes a framework for future decisionmakers and commentators to follow in evaluating the constitutionality of sick leave policies.

This Comment proceeds in three parts. Part I explores the factual background behind the litigation. Part II describes the current state of the law, focusing on two splits among the courts. The first is over the threshold question of whether courts should evaluate these policies under rational basis review or strict scrutiny. The second is a further split within the rational basis courts: whether formal written guidelines on how the policy is to be applied are constitutionally required to prevent arbitrary application of the policy. Part III highlights the importance of the choice between rational basis and strict scrutiny, and advocates a modified form of rational basis.

I. BACKGROUND

This Part examines the factual background underlying the constitutional challenges to municipal agencies' sick leave policies. Before examining the circuit split, it is crucial to understand what the policies are, why they are in place, and how employees have challenged them.

A. Anatomy of a Sick Leave Policy

Sick leave policies are encountered by employees of all kinds, in all sectors. While the details of such policies vary greatly, the core of a sick leave policy is a set of guidelines setting forth how employees may take time off from work when ill or injured. There are numerous ways to implement sick leave: "annual" plans giving employees a fixed number of days per year, "carryover" plans allowing employees to accumu-

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6 *Crudele v New York City Police Department*, 2004 WL 1161174, *3 n 2 (SDNY).

late unused sick leave from year to year (often with a limit), and "cash-in" plans allowing employees to trade in unused sick leave for pay.[7]

The advantages of a formal sick leave policy are clear: equality in providing all employees of a given type with a set number of days available for leave, clarity in specifying employer expectations ex ante, and safety in encouraging sick or injured employees to take time off to recover.

Because of the constitutional issues involved, this Comment is limited to the public employment context, where sick leave policies are widespread. The details vary, and the policies are usually subject to compliance with a host of federal legislation—such as the Americans with Disabilities Act,[8] the Family and Medical Leave Act,[9] and the Fair Labor Standards Act[10]—in addition to any relevant state legislation or municipal ordinance. The application of these statutes is complicated and fact-specific, but this Comment sets the statutes aside and focuses instead on the requirements put in place by public employers to help ensure employees are using sick leave honestly.

The requirements put in place by public employers to oversee sick leave differ in severity. For example, some agencies require employees to obtain a physician's certificate to justify unscheduled sick leave.[11] A common, but less restrictive, requirement is that employees must provide an explanation for why they took leave.[12] Finally, a small minority of municipal agencies have no restrictions at all.[13]

But other municipal agencies have atypically harsh sick leave requirements. Most public employees would be surprised to encounter a policy requiring the following:

> Employees on injury leave must remain at their residence at all times except for matters that relate to their injury.... Each time it is necessary for an employee to leave [his or her] residence to

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7 See US Department of Labor, Bureau of Labor Statistics, *Employee Benefits in State and Local Governments, 1998* 23 (2000) (providing definitions of major plan types).

8 Americans with Disabilities Act of 1990, Pub L No 101-336, 104 Stat 327, codified at 42 USC § 12101 et seq (2000).

9 Family and Medical Leave Act of 1993, Pub L No 103-3, 107 Stat 6, codified at 29 USCA § 2611 et seq (2008).

10 Fair Labor Standards Act of 1938, Pub L No 75-718, 52 Stat 1060, codified at 29 USCA § 201 et seq (2008).

11 See Debbie Tomblin and Robin Salter, *Alabama Local Government Sick Leave Survey* *9–12 (Feb 2005), online at http://www.auburn.edu/outreach/cgs/AllDocuments/Personnel_SickLeaveReportpages(12805).pdf (visited Aug 29, 2008) (reporting results of a statewide survey of Alabama municipalities and finding that 57.1 percent required a doctor's certificate).

12 Id (finding 47.3 percent of Alabama municipalities required such explanations).

13 Id (finding 15 percent of Alabama municipalities had no restrictions).

> go to a hospital, or visit a doctor or secure medicine, they must notify the [ ] Police Department Communications Section and leave notice with the Communications officer as to the doctor's name and address that they are going to visit (hospital, drug store, etc.). Upon returning home, they will again notify the Communications Section by phone of their return.[14]

Yet this example is only one of many police department[15] leave policies that places a "stay-at-home" requirement on officers on leave.[16] And because police departments have to enforce this requirement, officers are also subject to unannounced telephone calls or in-home visitations by a supervisor. For example, one police department policy has a window of up to twelve hours in which officers may be visited, unannounced, by a supervisor.[17]

B. Agencies' Rationales

Police departments,[18] concerned with preventing fraudulent use of sick leave, offer several justifications for the stay-at-home requirement. The first is that they want to protect the public fisc.[19] If officers take

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14 *Pienta v Village of Schaumburg*, 710 F2d 1258, 1262 (7th Cir 1983) (setting forth the requirements of General Order No 79-59 of the Schaumburg Police Department's Standard Operating Procedure Code).

15 Part I.D explores why the stay-at-home requirement mainly occurs within police departments.

16 For additional police department policies with a stay-at-home requirement, see, for example, *Crain v Board of Police Commissioners of the Metropolitan Police Dept of the City of St. Louis*, 920 F2d 1402, 1406 n 4 (8th Cir 1990) ("A Member of the [St. Louis Police] Department reporting sick or injured shall not leave his residence or place of confinement except for the purpose of obtaining medical attention or treatment."); *Crudele v New York City Police Department*, 2004 WL 1161174, *1 (SDNY). (describing a policy that forbids an officer from leaving his or her residence, unless: (1) the officer has permission from the "sick desk" to attend a medical appointment; or (2) the officer has obtained a pass from the district surgeon); *Serge v City of Scranton*, 610 F Supp 1086, 1087 (D Pa 1985) ("[The sick leave policy] requires plaintiffs to remain at home except when they receive medical treatment. When they leave their homes for a doctor's appointment, they must notify the Superintendent of Police.").

17 See *Voorhees v Shull*, 686 F Supp 389, 391 (EDNY 1987):

> Between the hours of 9:00 am and 5:00 pm on a day he was regularly scheduled to have a tour of duty, and between the hours of 9:00 am and 9:00 pm on a day he was regularly scheduled to have a 4:00 pm to 12:00 pm [sic] tour of duty, an employee on sick leave may be visited by a supervising officer.

For another example of a policy in which officers are subject to sick leave investigation, see text accompanying note 5.

18 The following discussion focuses on the arguments advanced by police departments in the case law, but many of the rationales apply to municipal agencies generally.

19 See, for example, *Pienta*, 710 F2d at 1260; *Monahan v City of New York Department of Correction*, 10 F Supp 2d 420, 424 (SDNY 1998).

taxpayer-funded compensation for personal benefit rather than for a legitimate sickness or injury, the police department is harmed economically. The economic harm, though difficult to quantify, comes from increased overtime costs as some officers work longer hours to fill the gap created by officers on leave.[20] Because police departments need to preserve the peace and respond to problems that may arise, a task which requires a minimum number of officers on duty at any given time, one officer's use of sick leave places an increased burden on other officers to work longer hours to fill the manpower need.[21]

Police departments also argue that a stay-at-home requirement improves public safety. Their general argument is that preventing sick leave abuse increases "discipline, *esprit de corps*, and uniformity" among the ranks, which in turn leads to a more effective police force.[22] One type of uniformity is an even distribution of hours that reduces overtime burdens, as noted above. Another type of uniformity is making sure that officers are subject to the same rules and expectations. Police departments might worry that if officers see others frequently take compensated time off without legitimate reasons, they will be more likely to do the same. So sick leave abuse could have a corrosive effect within a department beyond the initial few officers who exploit the sick leave policy.

The stay-at-home requirement has the effect of curtailing abuse of short-term leave, which is taken for a variety of reasons.[23] For example, an officer wishing to take an extended four-day weekend vacation could call in sick on a Thursday and Friday (or on a Monday and Tuesday) and enjoy the long weekend while collecting full compensation. Without a well-enforced stay-at-home requirement, police departments worry that this type of short-term leave abuse would almost certainly go undeterred, since the attractiveness of fully compensated

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20 See generally Dwayne Orrick, *Controlling Abuse of Sick Leave*, Police Chief Mag (Mar 2004), available online at http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=252&issue_id=32004 (visited Aug 29, 2008):

> The unnecessary use of sick leave costs the department at least an additional 150 percent over the budgeted amount to cover the vacancies with overtime pay. . . . When other officers were paid overtime to cover the missed work, factor in that overtime cost also. This total can provide a sobering realization of the cost for abusing sick leave.

21 See *Crain*, 920 F2d at 1409.

22 See id, quoting *Kelley v Johnson*, 425 US 238, 247 (1976).

23 Empirical evidence suggests at least 50 percent of sick leave use is for reasons other than illness or unavoidable circumstances. For an overview of the surveys, see Scott D. Camp and Eric G. Lambert, *The Influence of Organizational Incentives on Absenteeism: Sick Leave Use among Correctional Workers* 4 (July 7, 2005), online at http://www.bop.gov/news/research_projects/published_reports/prison_mgmt/sick_cjpr.pdf (visited Aug 29, 2008).

leave is substantial and the chance of being caught is slim. In addition, while many leave policies require medical examination and physician certification for long-term absences from work,[24] the problem of short-term leave abuse is not constrained by this examination requirement.

In fact, the stay-at-home requirement may supplement medical examinations to prevent abuse of long-term leave. While it is difficult to enter fraudulently into long-term paid leave, unnecessarily delaying an exit is much easier. Because significant periods of time may pass between officers' medical evaluations, the potential exists for already-recovered officers to remain on leave and collect compensation before a doctor declares them fit for duty. The stay-at-home requirement, by making time spent on leave less attractive, might encourage officers to return to work sooner rather than claiming continuing illness or injury after their recovery date.

Police departments, concerned with the economic harms and reduction in internal effectiveness caused by sick leave abuse, justify the stay-at-home requirement as a necessary means to curb that abuse. The requirement has a combination of deterrent effects on would-be abusers: the restriction on officers' activities and the potentially invasive enforcement make taking leave less desirable in the first place. And for those officers who do take leave, the requirement helps to expedite their return to duty. These justifications are of no avail to police departments, however, if courts deem the policies unconstitutional.

C. Officers' Challenges

If strictly applied and aggressively enforced, the stay-at-home requirement is harsh to officers on leave:

> [The officers argue that each] was made a virtual prisoner in his home, deprived of his personal, individual liberty[,] ... subjected to frequent harassing and threatening telephone calls, surveillance by police department personnel both inside and outside his home, [and] unannounced visits by representatives of the police department so that he was virtually unable to leave his home without permission of the representatives of the police department.[25]

Officers, some of whom were injured while on duty, have alleged that the sick leave policies are facially unconstitutional.[26] Their basic

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24 See, for example, *Pienta*, 710 F2d at 1261.

25 *Uryevick v Rozzi*, 751 F Supp 1064, 1066–67 (EDNY 1990).

26 See, for example, *Serge*, 610 F Supp at 1087.

argument is that home confinement while on leave greatly restricts their movement and thus denies them the ability to participate in constitutionally protected activities, such as voting, attendance of religious services, freedom of association, and travel.[27] Of course, officers' initial complaints are not always limited to the rights mentioned above and differ from case to case. For example, one officer alleged that the sick leave policy of his department deprived officers on leave of the "right to travel, right to religious worship, right of free access, right of free association, right of privacy, right of liberty, freedom to care for their health and person, freedom from bodily restraint to compulsion and freedom to walk, stroll or loaf."[28]

The officers' claims in the cases at issue are based on substantive due process grounds. The officers argue that the policies as written deprive all officers on leave of constitutionally protected rights. While this Comment focuses on the due process challenges to the sick leave policies, other types of claims are possible. For instance, officers could argue that a policy is unconstitutional on equal protection grounds because it is applied in a discriminatory manner. The distinction between due process and equal protection analysis in this context is further explored in Part III.B.1.

D. Why Police Departments?

Thus far, the discussion has referenced police officers and departments. The reason for this focus is that, with a few exceptions,[29] the constitutional challenges have primarily concerned the leave policies of police departments. The likely reason that police department sick leave policies are almost always the subject of these claims is the attractiveness of police department sick leave benefits and the corresponding potential for abuse.

The policies of police departments are unusually generous in that they offer paid sick leave for a large number of days each year.[30] In

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27 See, for example, *Crain*, 920 F2d at 1405; *Pienta*, 710 F2d at 1260.

28 *Voorhees*, 686 F Supp at 392.

29 See *Hambsch v Department of Treasury*, 796 F2d 430, 435 (Fed Cir 1986) (holding that a policy preventing Secret Service agents from leaving Washington, DC while on leave was facially constitutional under rational basis review); *Korenyi v Department of Sanitation of City of New York*, 699 F Supp 388, 398 (EDNY 1988) (upholding the sick leave policy of the New York Department of Sanitation as constitutional). For further discussion of *Korenyi*, see Part II.A.3.

30 See, for example, Debra J. Saunders, *Oakland Cops' 60-day Paid Sick Leave*, San Fran Chron B7 (Aug 29, 2006) (discussing the pros and cons of the Oakland Police Department contract allowing for sixty days of paid sick leave per year); Frank Main and Fran Spielman; *Sick Leave Investigators to Probe Stay-at-Home Cops*, Chi Sun-Times 12 (Mar 3, 2004) (noting that

fact, some departments, including the NYPD, place no annual limit on the number of sick days an officer may take. While unlimited sick leave is a minority policy even among police departments, it is unheard of at most other municipal agencies.[31]

Several factors may explain why police departments' sick leave policies are unusually generous. One of the obvious reasons is that police work is dangerous,[32] and the risks of physical injury are high relative to other government occupations. Mental health factors are also relevant. Police work is highly stressful, and psychological illness is a problem that police departments must address in the interest of public safety.[33] These mental health issues likely increase the use of sick leave by officers, who might prefer to call in sick rather than address the root issue. Furthermore, officers may fear retaliation or interference by their departments should they seek to obtain counseling.[34] For all of these health reasons, at least some police departments might seek to avoid future tension with officers by allowing for generous leave benefits in anticipation of officers' high rate of leave use.[35]

Chicago police officers "can take as many as 365 sick days every two years" and that such a policy "would be unheard of in private industry").

31 See *Loughran v Codd*, 432 F Supp 259, 263 (EDNY 1976). Although cataloging all of the municipal sick leave policies across the country is beyond the scope of this Comment, it is striking, for example, that urban teachers generally receive ten to twenty days of paid sick leave a year, far less than the police officers in New York City, Chicago, or Oakland, just to name a few of the cities already discussed. See, for example, Chicago Public Schools Policy Manual § 302.9(I)(B) (Dec 19, 2007), online at http://policy.cps.k12.il.us/documents/302.9.pdf (visited Aug 29, 2008). See also Philadelphia School District Employee Sick Leave Policy *1 (Sept 2001), online at http://www.phila.k12.pa.us/teachers/sick_leave.pdf (visited Aug 29, 2008).

32 See Saunders, San Fran Chron at B7 (cited in note 30) (quoting a city spokesman who justified the amount of paid sick leave by noting that while it "may sound to most people out of the ordinary, [ ] most people don't strap on a flak jacket and a handgun before heading out the door").

33 For a comprehensive account of the traumatic, psychological effects of urban police work, see generally Vincent E. Henry, *Death Work: Police, Trauma, and the Psychology of Survival* (Oxford 2004).

34 See Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 Loyola LA L Rev 545, 588–89 (2001) (noting in a series of recommendations to the LAPD that "[i]n the past, the LAPD effectively has prevented its officers from coping with stress by monitoring intrusively officers' attempts to obtain counseling").

35 As a practical matter, the police officers' unions may play a role in passing generous sick leave policies, though conceding to strict stay-at-home requirements in the cases at issue. Formally, the cases in Part II pertain to officers suing police departments, with the unions not involved and the collective bargaining process not at issue. See *Uryevick*, 751 F Supp at 1071 n 6. Courts, however, are cognizant of unions and collective bargaining agreements as part of the backdrop to litigation. See *Monahan*, 10 F Supp 2d at 422–23 (noting that the correction officers' union had challenged the sick leave policy and failed three years earlier, that a settlement between the department and the union was reached in the interim, and that the present case was the "third bite at the proverbial apple").

And because their leave policies are generous, police departments may be more likely than other municipal agencies to impose restrictions to curtail abuse because generous sick leave benefits create a greater incentive to procure those benefits through fraud.[36]

II. ANALYSIS OF CURRENT LAW

Given the vivid factual background to these constitutional challenges and the compelling arguments of both sides, it is not surprising that courts reach different outcomes under different lines of reasoning. This Part explores the two main divergences in the current case law. Part II.A addresses the threshold choice of what standard of review courts use to evaluate the constitutionality of sick leave policies. Necessarily, this discussion also raises questions over the extent to which the federal judiciary should involve itself in local government employment policy and the appropriate level of deference accorded to agency judgment. Part II.B examines the subset of courts that use a rational basis standard of review and notes a split in the application of the rational basis standard to the policies at issue.

A. Strict Scrutiny versus Rational Basis

Supreme Court jurisprudence suggests two possible standards of review to evaluate the facial constitutionality of sick leave policies: strict scrutiny or rational basis. Strict scrutiny requires that a regulation "further some vital government end by a means that is least restrictive ... in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights."[37] Three requirements emerge from the definition: (1) there must be a vital government interest; (2) the policy must be less restrictive than alternative means of achieving the government interest; and (3) even if the first two requirements are met, courts must balance the harms and benefits, and the benefits must exceed the harms.

Rational basis is a far more deferential standard, requiring that: (1) the challenged regulation must have "a rational connection to the government's interest"; and (2) the "regulation must be rationally connected in a *non-arbitrary* fashion to the state interest."[38] Unlike

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36 See *Monahan*, 10 F Supp 2d at 422 ("[T]he City believed that the stay-at-home requirement was necessary to prevent its otherwise liberal leave policy from degenerating into an open invitation to fraud."). See also *Crudele*, 2004 WL 1161174 at *2.

37 *Elrod v Burns*, 427 US 347, 363 (1976) (explaining that significant impairment of expressly protected constitutional rights "must survive exacting scrutiny").

38 *Voorhees v Shull*, 686 F Supp 389, 394 (EDNY 1987).

strict scrutiny, rational basis does not call for a balancing of harms and benefits or the examination of less restrictive alternatives. Furthermore, the government's interest need not be "vital."

The two standards of review are not only different in what they demand, but also in where they place the burden of meeting that demand. In rational basis review, the burden of proof is on the plaintiffs to show the absence of a rational basis for the challenged regulation.[39] This puts the plaintiffs in the difficult position of proving a negative. By contrast, strict scrutiny places the burden on the government to "demonstrate a compelling state interest to justify the regulations."[40]

Within the context of this Comment, the argument for rational basis review stems from *Kelley v Johnson*.[41] In *Kelley*, the Court focused on the distinction between the plaintiff's status as a police officer rather than as a member of the citizenry at large.[42] The Court found this distinction "highly significant" because public employees, especially police officers, accept many restrictions as conditions of their employment:

> Respondent's employer has, in accordance with its well-established duty to keep the peace, placed myriad demands upon the members of the police force, duties which have no counterpart with respect to the public at large. Respondent must wear a standard uniform, specific in each detail. When in uniform he must salute the flag. He may not take an active role in local political affairs by way of being a party delegate or contributing or soliciting political contributions. He may not smoke in public.[43]

The Court recognized "the wide latitude accorded the government in the dispatch of its own internal affairs" as the grounds for reviewing public employment regulations more deferentially than regulations of the citizenry at large.[44]

Because of the plaintiff's public employment status, the Court held that rational basis was the correct standard of review and upheld the constitutionality of regulations governing hair length and grooming of

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39 See *Board of Trustees of University of Alabama v Garrett*, 531 US 356, 367 (2001); *Crain v Board of Police Commissioners of the Metropolitan Police Dept of the City of St. Louis*, 920 F2d 1402, 1406 (8th Cir 1990).

40 *Pienta v Village of Schaumburg*, 710 F2d 1258, 1260 (7th Cir 1983). See also *Buckley v Valeo*, 424 US 1, 25 (1976).

41 425 US 238 (1976).

42 Id at 244–45.

43 Id at 245–46.

44 Id at 247.

officers.[45] The Court also recognized the minor invasiveness of grooming regulations on officers' constitutional rights, noting that "the [officer's] claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment."[46] Most lower courts have interpreted *Kelley* to hold that "[a] policy regulating a municipality's agents or employees is generally evaluated under 'rational basis' review."[47]

Interestingly, the argument for strict scrutiny in this context stems from a Supreme Court case of the same year, *Elrod v Burns*.[48] In *Elrod*, the Court examined a newly appointed sheriff's decision to fire officers from the opposing political party and replace them with officers from his own political party.[49] The sheriff's actions were in line with a long-standing Chicago patronage practice. To determine the proper standard of review, the Court focused on the type of constitutional deprivation asserted by the plaintiffs.[50] The Court held that strict scrutiny review was appropriate since the rights of "political belief and association constitute the core of those activities protected by the First Amendment,"[51] and "a significant impairment of First Amendment rights must survive exacting scrutiny."[52] The Court also held that a policy depriving an employee of fundamental constitutional rights must be as narrow as possible:

> [T]he State may not choose means that unnecessarily restrict constitutionally protected liberty. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.[53]

In short, *Elrod* requires courts to consider the nature of the constitutional rights being deprived and adjust their level of scrutiny accordingly.

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45 *Kelley*, 425 US at 239 n 1.

46 Id at 245.

47 *Crudele v City of New York Police Department*, 2004 WL 1161174, *2 (SDNY), citing *Kelley*, 425 US at 245. The remainder of this Part presents several further examples of courts' broad interpretations of *Kelley*.

48 427 US 347 (1976).

49 See id at 350–51.

50 See id at 362–63 (explaining that a deprivation of First Amendment rights must survive the highest level of judicial scrutiny).

51 Id at 356.

52 *Elrod*, 427 US at 362.

53 Id at 363 (quotation marks omitted) (alterations in original).

1. Strict scrutiny: the minority view.

Evaluating one of the earliest constitutional challenges to a police department sick leave policy, the Seventh Circuit, in *Pienta v Village of Schaumburg*,[54] became the lone court to apply strict scrutiny. The court held that the sick leave policy at issue was unconstitutional under that standard.[55] The policy in *Pienta* prohibited officers from leaving their residences except for medical reasons, and even then officers had to contact their supervisors before leaving and when they returned.[56] The court relied on past circuit precedent[57] and on *Elrod* to reach its holding that "the regulation of a public employee depends on the nature of the right affected."[58] More specifically, the court drew the line between rational basis review and strict scrutiny as follows:

> If a plaintiff's claim is grounded solely in the general liberty language of the due process clause as in *Kelley* ... the state need only demonstrate a rational relationship between the regulation and a legitimate state interest. If the public employee challenges limitations on rights specifically protected by other parts of the Constitution, the state must demonstrate that the regulation is necessitated by a compelling state interest and is narrowly tailored to meet that objective.[59]

The officers in *Pienta* alleged—and the court agreed—that "[t]heir rights to vote, to exercise freely their religion by church attendance, to go to court, to attend political or family gatherings, and to travel were infringed."[60] Furthermore, the police department conceded that at least some of these rights were infringed.[61] Because at least some of these uncontested infringements are specifically protected by the Bill of Rights, the court evaluated the sick leave policy under strict scrutiny.[62]

As noted above, the court in *Pienta* found the sick leave policy unconstitutional. A striking aspect of the court's analysis is the visceral

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54 710 F2d 1258 (7th Cir 1983).

55 See id at 1260 (explaining that the police department's policy was subject to strict scrutiny because several of its provisions infringed on rights protected by the Bill of Rights).

56 Id at 1262.

57 See id at 1260, citing *Division 241 Amalgamated Transit Union v Suscy*, 538 F2d 1264, 1266 (7th Cir 1976) ("Where the [public] employee argues he is being deprived of a right specifically protected by the Constitution, the standard generally applicable to deprivations of that right applies.").

58 *Pienta*, 710 F2d at 1260.

59 Id.

60 Id.

61 Id at 1260 n 2.

62 *Pienta*, 710 F2d at 1260–61.

dislike for the stay-at-home requirement, evinced by the strong language the court used to describe the regulations at issue, calling them "morale-chilling" and equating them with "house arrest."[63] More substantively, the court found that the state interests justifying the stay-at-home requirement could be achieved by narrower, unchallenged regulations already in place.[64] For example, the requirements that officers notify the Department "sufficiently in advance to fill its manpower needs" and obtain a physician's certificate to remain on sick leave longer than three days addressed the concerns regarding leave abuse without any deprivation of officers' constitutional rights.[65] Finally, the court noted in dicta that the policy might not even pass rational basis review because it applied too broadly to have any relation to a given employee's medical needs.[66] This line of criticism stems from the fact that sick and injured leave are lumped under the same policy. The example the court used is that an officer with a broken arm may not be fit for duty or even a desk job, but there is no reason to prevent him from attending church or going to court to deal with a parking ticket.[67] The stay-at-home requirement thus took little account of individual employee circumstances.

2. Rational basis.

The majority of courts have held that rational basis is the appropriate standard of review. Courts evaluating the constitutionality of sick leave policies after *Pienta* have roundly rejected the Seventh Circuit's analysis.[68] Instead, courts both before and after *Pienta* have relied upon *Kelley*'s bright-line distinction between public employees and private citizens[69] in adopting the more deferential rational basis review.

Most of the rational basis cases have been at the district court level. Several of the cases involve sick leave policies within New York. In one of the earliest, *Loughran v Codd*,[70] the Eastern District of New

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63 Id at 1259–60.

64 Id at 1260–61. See also Part I.B.

65 *Pienta*, 710 F2d at 1261.

66 Id.

67 Id.

68 See, for example, *Crain*, 920 F2d at 1408 ("[W]e decline to follow the approach taken in *Pienta*."); *Monahan v City of New York Department of Correction*, 10 F Supp 2d 420, 424 n 3 (SDNY 1998) ("[T]his Court, like the other courts to consider [*Pienta*], finds it completely unpersuasive."); *Voorhees*, 686 F Supp at 393–94 ("Plaintiff urges that this court follow the reasoning of *Pienta* . . . but we decline to do so.").

69 See note 42 and accompanying text.

70 432 F Supp 259 (EDNY 1976).

York relied on the then-newly decided case of *Kelley*.[71] The officer in *Loughran* was on long-term sick leave and was confined to his home twenty-two hours a day.[72] The officer challenged the sick leave policy on the ground that it denied him a constitutional right to travel, without making any of the other challenges discussed in Part I.C.[73] First, recognizing that the right to travel is a "basic constitutional freedom," the court appeared to suggest that the police department had to offer a compelling interest to justify the restriction of that right.[74] The analysis then turned to the status of the plaintiff as a public employee, which became the determinative factor in the court's choice of rational basis review.[75]

After *Pienta* was decided in 1983, officers tried again. They alleged the full assortment of constitutional deprivations—voting, attendance of religious services, freedom of association, and travel—discussed in Part I.C, but further cases in New York have rested upon *Loughran* and *Kelley* to adopt unanimously rational basis review.[76] Because the Second Circuit has still not heard a case on the standard of review question, rational basis review is firmly entrenched in the New York district courts.

Courts outside New York have also chosen rational basis review. In *Serge v City of Scranton*,[77] the officer plaintiffs attempted to advocate a strict scrutiny standard following *Pienta* by distinguishing between a claim implicating the general contours of the Fourteenth Amendment and a claim asserting "violations of more fundamental rights."[78] But as in the New York cases, the court followed *Kelley*:

> The Court in *Kelley* did note that matters of personal appearance were different from more fundamental rights but the choice of the standard of review in *Kelley* did not turn on that distinction. Rather, the Court used a rational relationship test because the plaintiff was asserting his Fourteenth Amendment rights "not as

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71 See id at 263.

72 See id at 262.

73 Id.

74 *Loughran*, 432 F Supp at 263. The court then indicated that the sick leave policy infringed the plaintiff's constitutional right to travel. See id.

75 See id.

76 See *Crudele*, 2004 WL 1161174 at *2; *Capasso v Metropolitan Transportation Authority*, 198 F Supp 2d 452, 460 (SDNY 2002); *Monahan*, 10 F Supp 2d at 424 n 3; *Uryevick v Rozzi*, 751 F Supp 1064, 1068 (EDNY 1990); *Voorhees*, 686 F Supp at 393–94.

77 610 F Supp 1086 (D Pa 1985).

78 Id at 1088.

> a member of the citizenry at large, but on the contrary as an employee of [a] police force."[79]

As noted above, the majority of the rational basis cases have been district court cases. But the Eighth Circuit, in *Crain v Board of Police Commissioners of the Metropolitan Police Department of the City of St. Louis*,[80] also chose rational basis review, and the court presented a fuller analysis than many of the New York district cases. In *Crain*, two officers challenged the constitutionality of the St. Louis Police Department's sick leave policy.[81] The court began by noting the nonbinding prior cases: *Voorhees v Shull*,[82] *Serge*, and *Loughran* (among others) in support of rational basis review and *Pienta* in support of strict scrutiny.[83] After observing that the Supreme Court "has never considered a sick leave policy such as the one at issue here,"[84] the court cited *Kelley* for the proposition that the distinction between public employees and private citizens is determinative of the proper standard of review.[85] Curiously, the court never mentioned *Elrod*.

Although the Eighth Circuit's reliance upon the distinction between public employees and private citizens paralleled the district court cases discussed above, the court went further, finding "ample support for *Kelley*'s status-oriented approach."[86] The court analogized to prior cases that had reviewed regulations pertaining to public employees more deferentially than those pertaining to the citizenry at large.[87] For example, the court cited *Reeder v Kansas City Board of Police Commissioners*,[88] which held that the Kansas City Police Department could prohibit officers from making political contributions in the interest of maintaining a nonpartisan police force, because "public employees receive certain benefits and undertake certain duties ... [and] [o]ne of those duties may require the surrender of rights that would otherwise be beyond the reach of governmental power."[89] The court then cited other Eighth Circuit precedent (also relying on *Kelley*) supporting the

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79 Id, quoting *Kelley*, 425 US at 244–45.
80 920 F2d 1402 (8th Cir 1990).
81 See id at 1404.
82 686 F Supp 389 (EDNY 1987).
83 See *Crain*, 920 F2d at 1406–07.
84 Id at 1407.
85 See id.
86 Id at 1408.
87 See *Crain*, 920 F2d at 1408.
88 733 F2d 543 (8th Cir 1984).
89 Id at 547.

use of rational basis review for cases involving police regulations.[90] After this lengthy overview of precedent, the court unsurprisingly held that rational basis was the appropriate standard of review.[91]

In short, the rational basis courts, relying on *Kelley*, focus on the status of officers as public employees. Because the government is acting as an employer, the rational basis courts are deferential to the internal employment policies of municipal agencies. These courts also reject a distinction between general liberty claims and rights explicitly protected by the Constitution as meaningless in this context.

3. A right-by-right approach.

One final case on this issue, *Korenyi v Department of Sanitation of City of New York*,[92] is an outlier in several respects. First, as the title suggests, the policy at issue was not from a police department, but from the New York City Sanitation Department.[93] But more importantly, the court took a different approach to the standard of review question. Noting the contrast between *Pienta* and the various rational basis cases, including *Voorhees* and *Kelley*, the court declined to assert a "general standard" of review,[94] instead adopting a right-by-right approach. This approach gives the review of each allegedly deprived constitutional right its own standard based on past precedent and whether the right is explicitly protected by the Bill of Rights.[95] Though the latter point seems to follow *Pienta* and *Elrod*, *Korenyi* has been cited as a rational basis case by later courts.[96]

Yet rational basis only applied to a subset of the rights at issue. For example, the right to travel was examined under rational basis review because it is not specifically mentioned in the Constitution, but

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90 See *Crain*, 920 F2d at 1408–09, citing *Vorbeck v Schnicker*, 660 F2d 1260, 1266 (8th Cir 1981).

91 See *Crain*, 920 F2d at 1409.

92 699 F Supp 388 (EDNY 1988).

93 Id at 391. The court did not discuss this factual difference. The text of the policy's stay-at-home requirement did have an unusual aspect: an explicit list of activities for which employees would be denied permission to leave their homes. The list included "[a]ppointments with lawyers," "[g]oing to church or other religious services," and "[p]icking up children from school or other locations." Id.

94 See id at 393, citing *Pickering v Board of Education*, 391 US 563, 568 (1968) (noting in support of its case-by-case approach that "the problem in any case is to arrive at a balance between the interests of the [employee], as a citizen ... and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

95 *Korenyi*, 699 F Supp at 393–96 (discussing the five separate deprivations asserted in the case: the right to travel, the right to consult with counsel, freedom of association, the right to vote, and free exercise of religion).

96 See, for example, *Crudele*, 2004 WL 1161174 at *2; *Monahan*, 10 F Supp 2d at 424.

instead is derived from "our constitutional concepts of personal liberty."[97] In contrast, the court indicated that freedom of association would be evaluated under strict scrutiny, except that the plaintiff only alleged the inability to meet with friends and family, rather than the inability to associate "for purposes of expression."[98] The court found the restriction on social activity outside the home was "minimal" and that no constitutional deprivation occurred at all.[99]

While the court put forth a novel approach to the standard of review problem, the analysis for the other rights was limited, since the court concluded that several of the alleged deprivations simply did not occur as a result of the sick leave policy, obviating the need to choose between competing standards of review.[100] The end result is that none of the rights was actually evaluated under strict scrutiny, which perhaps explains why later courts have described the case as an example of rational basis review.

B. Arbitrariness Split among Rational Basis Courts

The actual outcomes in the cases are more mixed than the split on the standard of review question suggests. Recall that the two-part test under rational basis review is as follows: (1) the challenged regulation must have "a rational connection to the government's interest"; and (2) the "regulation must be rationally connected in a *non-arbitrary* fashion to the state interest."[101] Courts' application of the second prong (the "arbitrariness prong") has often been dispositive in determining the constitutionality of police department sick leave policies. The division boils down to whether, in a challenge to the facial constitutionality of a sick leave policy lacking written guidelines to constrain supervisors' discretion, the arbitrariness prong encompasses the potential for arbitrary *application* of the policy. The following cases illustrate this division.

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97 *Korenyi*, 699 F Supp at 393.

98 Id at 394. But see *Roberts v United States Jaycees*, 468 US 609, 617 (1984) ("[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.").

99 See *Korenyi*, 699 F Supp at 395.

100 For example, Election Day was a legal holiday on which the sick leave policy and its stay-at-home requirement did not apply, so the right to vote was clearly not infringed. See id at 395. Also, the court found that the right to consult with counsel was not infringed since the employee on leave could consult with an attorney over the telephone, in writing, or in person at the employee's home. See id at 394.

101 *Voorhees*, 686 F Supp at 394. See note 38 and accompanying text.

The court in *Loughran*, finding the sick leave policy at issue constitutional, only mentioned the arbitrariness prong abstractly in its articulation of the rational basis standard of review.[102] The court never addressed a need for written guidelines explicitly; however, it considered "shortsighted" the plaintiff's argument that application of the policy was "permeated by whimsical decision making."[103]

In contrast, most of the New York cases after *Loughran* held the sick leave policies unconstitutional under the arbitrariness prong. Because there were no written guidelines on how to apply the policies—in particular, how supervisors were to grant permission for officers to leave their homes—the policies created an unreasonable "potential for wholly arbitrary denial of an officer's constitutionally protected rights."[104] For example, in *Uryevick v Rozzi*,[105] the leave policy required officers to stay at home unless a supervising officer granted permission after "determin[ing] whether the request is for a reasonable purpose and time."[106] Because there were no guidelines for what constituted a "reasonable" request, or enumerated examples of such requests, the court found the policy unconstitutional.[107] In the later New York case of *Capasso v Metropolitan Transportation Authority*,[108] the policy lacked even the general "reasonableness" language of the previous example, and the court unsurprisingly followed *Voorhees* and *Uryevick*.[109]

With respect to the ultimate determination of a policy's constitutionality, the one exception among the New York cases is *Monahan v City of New York Department of Correction*.[110] The court upheld the sick leave policy, noting that "[a] regulation is not rendered unconstitutional

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102 See *Loughran*, 432 F Supp at 263.

103 See id at 265. The court noted that the plaintiff's medical status and the accompanying rehabilitative needs were evaluated weekly by a police physician, and procedures were in place for the plaintiff to challenge the police physician's findings with evaluations by a private physician. The plaintiff in fact did challenge those findings, to no avail. See id.

104 *Voorhees*, 686 F Supp at 394–95. Later New York cases essentially followed *Voorhees* to reach the same result, namely that the sick leave policies were facially unconstitutional under the arbitrariness prong. See *Crudele*, 2004 WL 1161174 at *3; *Capasso*, 198 F Supp 2d at 461; *Uryevick*, 751 F Supp at 1069.

105 751 F Supp 1064 (EDNY 1990).

106 Id at 1066.

107 See id at 1069. Furthermore, the sick leave policy in *Uryevick* had longer hours of home confinement—twenty-four hours a day, seven days a week—for those officers designated "sick leave abusers" by the Police Commissioner. The court found that the absence of written guidelines for the designation of "sick leave abusers" was an additional violation of the arbitrariness prong. See id at 1070.

108 198 F Supp 2d 452 (SDNY 2002).

109 See id at 461.

110 10 F Supp 2d 420 (SDNY 1998).

simply because its implementation requires the exercise of substantial discretion, unless such exercise presents an unreasonable potential for denial of a constitutional right."[111] This framework is not any different from the other post-*Loughran* New York cases, but there was an important factual difference in *Monahan*: the sick leave policy allowed officers up to four hours each workday away from their homes without needing to obtain permission.[112] Because the policy was less restrictive than in most other cases and officers had sufficient time away from their homes to engage in constitutionally protected activities, the plaintiffs' allegations were quite weak and arbitrariness was a nonissue.[113]

Despite its invocation in the New York district cases, the arbitrariness prong has had little sway in other courts. In *Serge*, the court announced it would use rational basis review but never applied the arbitrariness prong, instead dismissing the plaintiffs' claims for a lack of specificity regarding the police department's alleged conduct.[114] More importantly, the court in *Crain* never explicitly addressed the arbitrariness prong in holding the sick leave policy constitutionally permissible. Instead, the court focused on the rational relation between the "stringent" stay-at-home requirement and the police department's "legitimate interests" in preventing abuse and expediting the return of officers to work.[115] Besides the absence of the arbitrariness prong in the analysis, language in the opinion suggested it should play little role in facial challenges to the constitutionality of sick leave policies. The court first observed that there were no guidelines in the police manual for how supervisors were to grant permission for officers to leave their residences and then noted that "while allegations that [ ] leave was granted in an arbitrary or discriminatory manner might state an Equal Protection claim or a violation of 42 U.S.C. § 1981, appellant has not raised this issue and we express no opinion on it."[116] In short, the court was content to wait until officers brought actual discrimination claims against the Department rather than searching the policies' text for the

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111 Id at 425.

112 See id ("[O]fficers suffering longer-term illnesses that prevent them from returning to work, while required to remain in their residences for most of the day, can leave for up to four hours each day for any reason and can also leave at any time for medical appointments.").

113 See id (observing that the policy "is not significantly different from the 'confinement' [the plaintiffs] would suffer while working their ordinary eight-hour workdays as corrections officers—except, of course, that here they are being paid without having to work").

114 See 610 F Supp at 1088–89 ("[The police department] contend[s] that these allegations are too vague and conclusory in a civil rights complaint. We agree.").

115 *Crain*, 920 F2d at 1409.

116 Id at 1406 n 5.

"potential for wholly arbitrary denial of an officer's constitutionally protected rights."[117]

In sum, the courts reviewing municipal agencies' sick leave policies take a variety of approaches. The Seventh Circuit in *Pienta* stands alone in using strict scrutiny based on the distinction in *Elrod* between rights enumerated in the Constitution and the more general liberty interest claims of *Kelley*. Most other courts, including the Eighth Circuit in *Crain*, use rational basis review, following *Kelley*, based on the plaintiffs' status as public employees. Furthermore, among the rational basis courts, there is a split in how to apply the arbitrariness prong of rational basis review. Many of the New York district court cases hold sick leave policies unconstitutional when they grant unbridled discretion to supervisors in determining whether to grant employees permission to leave their residences. In contrast, the approach taken by the Eighth Circuit in *Crain* is unconcerned with the mere fact that supervisors are given broad discretion. This approach waits until officers bring separate claims regarding arbitrary or discriminatory application of the policy before examining whether there is a constitutional violation. Finally, the court in *Korenyi* declined to articulate a general standard of review at all, instead adopting a right-by-right approach.

III. SOLUTION

As the discussion above indicates, courts confronting the constitutionality of a sick leave policy like the ones at issue have many approaches available in choosing a standard of review. Part III.A discusses the need for a single standard of review that incorporates deference to agency judgment while also protecting employees. Part III.B then advocates the use of a modified form of rational basis review in order to meet these competing goals, switching the burden to the municipal agency to demonstrate that the sick leave policy furthers a legitimate state interest.

A. The Need for Deference

This Part begins by critiquing *Korenyi*'s right-by-right approach and then demonstrates why the vast majority of courts are correct in deciding that the constitutionality of a sick leave policy stay-at-home requirement should be evaluated holistically under a single standard of review. Next, this Part examines the Supreme Court jurisprudence

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117 *Voorhees*, 686 F Supp at 394–95.

and analogizes to the related area of military law. Finally, this Part argues that, given the uncertainty of the constitutional harms, strict scrutiny goes too far and traditional rational basis review does not go far enough, introducing the need for an intermediate standard.

1. A single standard of review.

The right-by-right approach of *Korenyi*,[118] though it appears to be a novel middle ground between rational basis review and strict scrutiny, provides little assistance for two reasons. First, the approach lacks a valid legal basis. Second, the approach would be difficult to apply.

The *Korenyi* court misread the precedent from which it draws its right-by-right approach. The court relied on the Supreme Court's decision in *Pickering v Board of Education*,[119] in particular the following passage: "[T]he problem in any case is to arrive at a balance between the interests of the [employee], as a citizen ... and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[120] But this passage suggests a case-by-case review, not a right-by-right one. Furthermore, *Pickering* did not involve review of a public employment policy. In *Pickering*, the plaintiff was a public school teacher who alleged he was wrongfully discharged in retaliation for writing an editorial in the local paper criticizing the school board's handling of revenue proposals.[121] At issue was whether the writing of the letter was constitutionally protected speech and therefore an improper basis for discharge. Thus, the court in *Korenyi* improperly extrapolated from *Pickering* a confusing right-by-right approach for reviewing municipal agencies' sick leave policies.

Even if *Pickering* provided a valid legal basis, the approach, if adopted, would confuse courts by shifting the question to whether any given *right*, rather than any given *policy*, should be reviewed under strict scrutiny or rational basis. While it is true that courts should look to the constitutional rights affected by the stay-at-home requirement, they should do so in the context of choosing a single standard of review. For example, if a restriction on employees' ability to leave their residences is unconstitutional under strict scrutiny because it unnecessarily deprives them of the freedom to attend religious services, the restriction remains unconstitutional even if the right to travel, say,

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118 See Part II.A.3.

119 391 US 563 (1968).

120 Id at 568.

121 Id at 565–68.

would only require rational basis review on its own. The court in *Korenyi* never addressed the difficulty of evaluating a single stay-at-home requirement under multiple standards of review, because it was unnecessary in the particular case.[122] And, unsurprisingly, no court in this context has attempted to evaluate a sick leave restriction under both strict scrutiny and rational basis review.

2. Analysis of the Supreme Court jurisprudence.

Because the right-by-right approach of *Korenyi* is flawed, courts must choose a single standard of review to evaluate a municipal agency's sick leave policy. As the circuit split demonstrates, both *Kelley* (rational basis review) and *Elrod* (strict scrutiny) arguably apply in the context of sick leave policies. The text of the cases fails to resolve definitively this tension.

The context of the two cases indicates that they are not simply inconsistent. Both cases were decided in 1976. (*Kelley* was decided two months before *Elrod.*) Then-Justice William Rehnquist wrote the majority opinion in *Kelley* and joined the dissent in *Elrod*; Justice William Brennan wrote the plurality opinion in *Elrod* and joined the dissent in *Kelley*. But strangely enough, both dissents took issue with the application of the law to the facts rather than the standard of review used, though the conclusion of the dissent in *Kelley* possibly foreshadowed *Elrod.*[123] This illustrates that the Court found *Elrod* and *Kelley* quite different, and the cases should be reconcilable.

A problem emerges, though, in that the cases are reconcilable in multiple ways. The first approach, as seen in the rational basis courts, reads *Kelley* broadly and *Elrod* narrowly.[124] Certain language in *Elrod* supports this reading. For instance, the Court noted that "the prohibi-

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122 See Part II.A.3. None of the rights was actually evaluated under strict scrutiny because of deficiencies in the complaint or a lack of actual deprivation.

123 See *Kelley*, 425 US at 256 n 8 (Marshall dissenting) ("Because, to my mind, the challenged regulation fails to pass even a minimal degree of scrutiny, there is no need to determine whether, given the nature of the interests involved and the degree to which they are affected, the application of a more heightened scrutiny would be appropriate."); *Elrod*, 427 US at 382 (Powell dissenting) (arguing that "the plurality seriously underestimates the strength of the government interest especially at the local level . . . and it exaggerates the perceived burden on First Amendment rights").

124 One seemingly obvious point in favor of this approach might be that *Kelley* involved a municipal regulation whereas *Elrod* did not. But this distinction falls apart quickly since *Elrod* would have almost certainly come out the same had the patronage practice been written down and promulgated as an official policy, rather than as a longstanding and widely acknowledged employment practice. In fact, the *Elrod* Court cites cases in support of its conclusion that invalidated state *statutes* barring public employment on the basis of "membership in 'subversive' organizations." 427 US at 358.

tion on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons."[125] More significantly, the concurrence by Justice Potter Stewart promoted a narrow reading. It began by calling the plurality's opinion "wide-ranging" and would limit the holding of the case: "The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs."[126] Read from Justice Stewart's point of view, *Elrod* is confined to its particular facts, and the case does not apply in the context of municipal agencies' sick leave policies.

The general principle animating the broad reading of *Kelley* is that municipal agencies' leave policies fall under the government's power as an employer rather than its general state power to regulate the public at large. The analysis in *Voorhees* is a useful example, and it also illustrates how courts have read *Elrod* narrowly:

> When rights specifically protected by the Bill of Rights are curtailed by municipal regulations, strict scrutiny applies, and the municipality must demonstrate a compelling interest to justify their existence.... [The plaintiff] has alleged the violation of such rights. It is crucial to note, however, that the plaintiff brings this suit not as an ordinary citizen, but as [a state] employee .... The Supreme Court has indicated that the State as employer has an interest which differs significantly from its interest in regulating the citizenry in general, and that when a State acts as an employer the courts should evaluate those actions under a more deferential standard than strict scrutiny.[127]

As noted above, the court in *Voorhees* ultimately adopted rational basis review.[128] However, *Elrod* was unequivocally a case of the "State act[ing] as employer."[129] Therefore, the court in *Voorhees*, to distinguish *Elrod*, muddled its seemingly bright-line approach of evaluating all municipal agency regulations under a rational basis test: "The compelling interest standard might be triggered *even where the plaintiff is a government employee* if the restrictions in question punish the employee for the substance of his beliefs or expression."[130] Since the stay-

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125 Id at 360.

126 Id at 374–75 (Stewart concurring).

127 686 F Supp at 393.

128 See note 76 and accompanying text.

129 *Elrod*, 427 US at 350.

130 *Voorhees*, 686 F Supp at 394 (emphasis added), citing *Elrod*, 427 US at 368.

at-home requirement did not reach this threshold, rational basis review prevailed. This is a narrow reading of *Elrod*, limiting the applicability of strict scrutiny in the public employment context to the most egregious cases.

In summary, the first way of reconciling *Elrod* and *Kelley* establishes that courts should be more deferential to governmental employment regulations than to regulations of the citizenry at large, both because the government has a significant interest in regulating the conduct of its employees and because courts are wary of disrupting the government's conduct in its internal affairs.[131]

But it is hardly obvious that restrictive stay-at-home requirements, capable of disturbing officers' political life and religious observance,[132] are more like *Kelley*'s regulations governing hair length than *Elrod*'s patronage employment practices. A second way to reconcile the cases follows the Seventh Circuit's approach in *Pienta*, reading *Elrod* broadly and focusing on the distinction between interests protected explicitly in the Bill of Rights versus interests found in the general contours of the Fourteenth Amendment's "liberty" interest.

Certain language in *Kelley* supports this distinction between the cases. The Court noted prior cases in which state regulations survived "challenges based on the explicit language of the First Amendment" and then stated that "there is surely even more room for restrictive regulations of state employees where the claim *implicates only the more general contours of the substantive liberty interest* protected by the Fourteenth Amendment."[133] Furthermore, the opinion concluded by stating that "[t]he regulation challenged here did not violate any right guaranteed respondent by the Fourteenth Amendment."[134]

The above indicates that the constitutionality of municipal agencies' sick leave policies falls somewhere between the two poles of *Kelley* and *Elrod*. Because both cases can plausibly be read as narrow or broad, their text alone does not determine which standard of review should apply here.

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131 See, for example, *Kelley*, 425 US at 245–47 (stating that the government's desire for uniformity of appearance of its police officers was sufficiently rational to survive a Fourteenth Amendment challenge); *Loughran*, 432 F Supp at 263 ("Traditionally, government agencies have been granted the widest latitude in the dispatch of its own affairs.").

132 See *Pienta*, 710 F2d at 1260.

133 425 US at 245 (emphasis added).

134 Id at 249.

3. Comparison to military law.

Another approach to selecting the standard of review that should apply is to analogize a police department to another public institution: the military. This analysis is not determinative,[135] but it provides useful context before discussing the relevant policy considerations.

There are many similarities between police departments and the military. Police departments are often characterized as "paramilitary organizations" because they require discipline and a strict hierarchy of authority to ensure public safety.[136] This suggests that constitutional issues in the two contexts should be treated similarly. As one commentator has noted: "Police forces ... like the military, are institutions of national importance that require discipline and conformity. Constitutional claims arising in these institutions, therefore, involve the same central question raised by constitutional challenges to military actions: do the specialized requirements of the institution justify intrusions on constitutional rights?"[137]

The military is accorded significant deference by the courts.[138] This deference is most notable in *Goldman v Weinberger*,[139] a case in which the Supreme Court upheld an Air Force regulation prohibiting a rabbi servicemember from wearing a yarmulke indoors, despite the fact that he had been wearing it for years prior to any complaint.[140] The majority was not willing to squarely address the First Amendment concerns, instead relying on the "military's perceived need for uniformity."[141] The deference to any claim of military necessity is so great that one com-

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135 In *Kelley*, for example, the appellate court below had concluded that the "unique judicial deference" given to the military was inapplicable to police departments. See *Dwen v Barry*, 483 F2d 1126, 1128 (2d Cir 1973). The Court in *Kelley* did not dispute that conclusion, instead stating that "the conclusion that such cases are inapposite, however correct, in no way detracts from the deference due [the municipality's] choice of an organizational structure for its police force." *Kelley*, 425 US at 246.

136 See, for example, *Crain*, 920 F2d at 1409.

137 Stephen L. Rabinowitz, Note, Goldman v. Secretary of Defense: *Restricting the Religious Rights of Military Servicemembers*, 34 Am U L Rev 881, 888 (1985) (discussing the military's infringement of servicemembers' religious rights and advocating different levels of scrutiny based on the relationship of the regulation to the military's defense function).

138 For a recent overview of this deference, see Emily Reuter, Note, *Second Class Citizen Soldiers: A Proposal for Greater First Amendment Protections for America's Military Personnel*, 16 Wm & Mary Bill Rts J 315, 329–33 (2007).

139 475 US 503 (1986).

140 See id at 505.

141 Id at 509–10. Justice O'Connor's dissent advocated a strict scrutiny standard. See id at 530–31 (O'Connor dissenting) (arguing that a strict scrutiny standard "is sufficiently flexible to take into account the special importance of defending our Nation without abandoning completely the freedoms that make it worth defending").

mentator after *Goldman* argued, "[T]here no longer exists any substantive review of constitutional challenges to the military in federal courts."[142]

Cases drawn from the military context suggest that courts should review police department regulations, including sick leave policies, deferentially. However, there are differences between the military and police departments that caution against taking the analogy too far. First, the military is a federal institution, and oversight by the federal judiciary implicates separation of powers issues involving both the legislative and executive branches.[143] In contrast, oversight by the federal judiciary over police departments, which are state institutions, avoids this concern.[144] Furthermore, the military has a comprehensive statutory scheme in the Uniform Code of Military Justice,[145] as well as a separate military court system, which limits but does not preclude appellate review by civilian courts.[146] Finally, not every sick leave case at issue involved police departments. For instance, *Korenyi* involved a sanitation department,[147] which is not as analogous to the military because there is less need for order and discipline to ensure public safety.

4. Uncertain harms at stake.

Neither Supreme Court jurisprudence nor a comparison to military law marks a clear path for courts to follow. The current case law shows that strict scrutiny is an outlier in this context, and for sensible reasons. The distinction in *Elrod* between enumerated rights and general liberty claims is flawed in these cases. Applying the distinction merely encourages artful pleading by plaintiffs, which is perhaps why the alleged deprivations are similar among the cases.[148] Unlike in *Elrod*, where the policy blatantly conditioned employment on political

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142 Linda Sugin, Note, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 NYU L Rev 855, 861 (1987).

143 See, for example, Kalyani Robbins, *Framers' Intent and Military Power: Has Supreme Court Deference to the Military Gone Too Far?*, 78 Or L Rev 767, 775 (1999) (providing a list of circumstances in which the Supreme Court has deferred to military and congressional decision-making, and concluding that "[i]t is highly unlikely that any of these regulations would have survived scrutiny in a civilian context").

144 See *Elrod*, 427 US at 352 ("[T]he separation-of-powers principle ... has no applicability to the federal judiciary's relationship to the States.").

145 Uniform Code of Military Justice, Pub L No 506, 64 Stat 107 (1950), codified as amended at 10 USCA §§ 801–940 (2007).

146 For a discussion and critique of the constitutional basis for a military judiciary, see Robbins, 78 Or L Rev at 774–75 (cited in note 143).

147 699 F Supp at 391.

148 See note 27 and accompanying text.

belief, the actual constitutional harm in these cases is largely uncertain.[149] A case like *Monahan*, in which officers had up to four hours a day to leave their residences,[150] presents minimal opportunity for constitutional deprivation, while in *Crudele v New York City Police Department*,[151] the officer was not even allowed to sit outside in his own yard without permission.[152] And regardless of how the policies are drafted, it is impossible to know in advance which of a given employee's interests will be infringed.

Given this uncertainty, strict scrutiny goes too far in replacing the judgment of the municipal agency with that of the court since even a comparatively lenient policy like *Monahan*'s may be struck down if a court determines that the government's interest does not rise to the level of "vital" or "compelling," or if a less restrictive alternative exists. And on the other side of the review spectrum, deferential rational basis review too strongly protects municipal agencies when there is potential for a significant deprivation of employees' constitutional rights.

B. Modified Rational Basis

A modification to rational basis review is useful to balance deference to municipal agencies with protection of public employees' constitutional rights. This Part critiques an existing modification—expansion of the arbitrariness prong—and proposes an alternate modification that shifts the burden of demonstrating a rational basis for the stay-at-home requirement to the municipal agency.

1. Arbitrariness goes too far.

Rational basis review is highly deferential to municipal agencies. How, then, have several district courts found sick leave policies unconstitutional under the arbitrariness prong of rational basis review?

The first step in understanding this puzzle is to recognize that there are two distinct notions of "arbitrariness." The first applies to substantive due process cases, as seen in *Kelley*, and guards against means that are irrationally chosen to meet the government's desired ends: "The constitutional issue to be decided by these courts is whether [the government's] determination that such regulations should be

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149 Some courts found the actual deprivations minimal, see *Crain*, 920 F2d at 1409–10, while others found the deprivations severe, see *Pienta*, 710 F2d at 1260.

150 See 10 F Supp 2d at 425. See also notes 112–13 and accompanying text.

151 2004 WL 1161174 (SDNY).

152 Id at *3 n 2.

enacted is so irrational that it may be branded 'arbitrary,' and therefore a deprivation of respondent's 'liberty' interest."[153] This is a narrow view of arbitrariness and is essentially a restatement of the requirement that the means the government uses must be rationally related to furthering a legitimate state interest. Indeed, the Court in *Kelley* did not mention arbitrariness again, focusing instead on the legitimate reasons police departments have to regulate hair length.[154]

A second notion of arbitrariness is more expansive, and is associated with equal protection claims. It has two components. The first is a protection against legislative discrimination, preventing classifications based on "arbitrary or capricious" factors.[155] The second and related component prevents selective enforcement of laws for arbitrary or discriminatory reasons.[156]

Returning to the cases at issue, the application of arbitrariness by the New York district courts, relating to the arbitrary exercise of authority by supervising officers, resembles the second component of the expansive equal protection notion of the term. While officers may in fact challenge the policies on equal protection grounds, the cases discussed here apply the broad notion of arbitrariness to due process challenges. Curiously enough, *Voorhees*, the first case to hold the sick leave policy unconstitutional on arbitrariness grounds, cited approvingly the passage in *Kelley* above as support for its approach.[157]

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153 *Kelley*, 425 US at 248, citing *Williamson v Lee Optical Co*, 348 US 483, 487–88 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

154 *Kelley*, 425 US at 248:

> This choice [to regulate hair length] may be based on a desire to make police officers readily recognizable to the members of the public, or a desire for the esprit de corps which such similarity is felt to inculcate within the police force itself. Either one is a sufficiently rational justification for regulations so as to defeat respondent's claim based on the liberty guarantee of the Fourteenth Amendment.

155 See *Baker v Carr*, 369 US 186, 226 (1962) ("Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.").

156 See, for example, *Whren v United States*, 517 US 806, 813 (1996) (noting that the Constitution prevents selective enforcement of the law and that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause").

157 See *Voorhees*, 686 F Supp at 394 ("*Kelley* did admit that the liberty interest in matters of personal appearance was distinguishable from more fundamental rights ... [but] assume[d] for decision purposes that it was a right falling within the protections of the due process clause and announced the 'irrational-arbitrary' test accordingly."). Cases following *Voorhees* either cite *Kelley* itself or one of the previous cases finding the sick leave policy unconstitutional. See, for

The rational basis courts relying on the arbitrariness prong appear to be misreading *Kelley* and conflating the two separate notions of arbitrariness, one relating to substantive due process claims and the other to equal protection claims, discussed above. These courts recognize that because serious deprivations of officers' constitutional rights are at stake, something more than rational basis review might be necessary to protect those rights adequately. Consequently, this use of arbitrariness may reflect an attempt by those courts to find an intermediate standard of review by modifying the rational basis test to allow for increased judicial oversight, forcing municipal agencies to constrain their own discretion by specifying in the policy how its terms are to be applied.

This modified rational basis test suffers from two significant problems. First, if courts use a modified rational basis standard, they should reduce future uncertainty by being explicit about how they are modifying the established test and the source of the modification, rather than erroneously reading the language of *Kelley*. Second, even if courts are explicit, this particular context may be ill-suited for cabining discretion. Whether officers should be granted permission to leave their residences is necessarily a fact-specific inquiry. Are police departments required to enumerate all the possible reasons officers might give in requesting permission to leave their residences? And what level of specificity do courts require?

A concrete example illustrates problems that arise by requiring greater specificity. In *Uryevick*, the agency amended its sick leave policy (post-litigation) to avoid arbitrariness. The new policy specified:

> Such can be defined as any verifiable purpose or personal emergency request for which a reasonable person would expect to receive an affirmative reply [granting permission to leave]. Examples include, but are not limited to, attending religious services, exercising elective franchise, emergencies involving immediate family members, purchase or replacement of prescribed medication, doctors visits, special family occasions such as weddings and graduations, and deaths not covered by these Rules and Regulations. When questionable circumstances arise, Desk Officers may contact the Medical Administration Office for further clarification and guidance.[158]

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example, *Crudele*, 2004 WL 1161174 at *2 (citing *Uryevick* and *Capasso*); *Capasso*, 198 F Supp 2d at 460 (citing *Uryevick*); *Uryevick*, 751 F Supp at 1068 (citing both *Kelley* and *Voorhees*).

158 *Uryevick*, 751 F Supp at 1069 n 3.

This language is a significant improvement over a complete lack of formal guidelines. It avoids two of the constitutional deprivations, religious observance and voting, and is clear to emphasize that the list is not exhaustive. But formal guidelines may still invite abuse. After all, once the approved examples are written down, officers will know exactly what to tell their supervisors to get permission to leave their residences. In particular, one can imagine "religious observance" and "family emergencies" increasing among officers on leave.

In short, to the extent that courts force agencies to cabin their own discretion and avoid open-ended application of the sick leave policies, those courts should announce openly that they are applying a modified form of rational basis review rather than misread *Kelley* and conflate two separate concepts of "arbitrariness." Relying on the arbitrariness prong to require greater specificity has merit in protecting against unnecessary and open-ended deprivations of employees' constitutional rights but may be inappropriate for leave of residence determinations and may create a roadmap for further abuse.

2. A proposal to switch the burden.

Because the arbitrariness modification is flawed, this Comment recommends a different modification to rational basis review, placing the burden on the government to demonstrate a rational basis for the sick leave policy. Under standard rational basis review, properly applied,[159] courts will almost always validate the sick leave policies at issue for all of the legitimate interests discussed in Part III.B. Given that rational basis review may be insufficient to protect public employees, the municipal agencies, not the plaintiffs, should bear the burden of demonstrating a legitimate interest underlying the policy.[160] This recommendation is grounded largely in maintaining judicial deference to agency decisionmaking coupled with the assertion that the balancing of competing interests is often best resolved at the municipal level.[161]

The greatest benefit of burden-shifting is that it brings the competing interests of employee and employer to the surface by forcing the municipal agency to articulate the rationales underlying the sick leave

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159 See the critique of "arbitrariness" in Part III.B.1.

160 This point is well articulated by Justice Blackmun's dissent in *Goldman*. See 475 US at 527 (Blackmun dissenting) ("The problem ... it seems to me, is not doctrinal but empirical.... Reasoned military judgments, of course, are entitled to respect, but the military has failed to show that this particular judgment ... is a reasoned one."). An important difference though is that the empirical standard required here is minimal.

161 See, for example, *Vance v Bradley*, 440 US 93, 97 (1979).

policy and encouraging potential plaintiffs to direct their energies towards local political resolution. The burden-shifting approach requires agency justification for depriving employees of their constitutional rights, and if an agency is unable to do so convincingly, then the resulting dissatisfaction might lead to a change in policy at the local level.

This modified standard is still highly deferential to agency discretion, more so than expanded arbitrariness review. But there are backstops for employees who are unfairly affected by the restrictiveness of the sick leave policies. If the policies are being applied maliciously or in a discriminatory manner, then employees can bring equal protection claims. Furthermore, the employees can take steps to turn the restrictive policy into a political issue, doing everything from pushing their union to revise the collective bargaining agreement[162] to writing editorials in their local newspaper.[163]

Shifting the burden to the municipal agency does have real consequences, however. Unlike the expansion of arbitrariness, the difference in judicial outcomes would be limited to the extremes, where the municipal agency fails to present a legitimate reason for having a stay-at-home requirement or when the policy is highly or unnecessarily restrictive to the point of irrationality. It is not hard to imagine extreme cases of a stay-at-home requirement, either in the terms of the sick leave policy or the invasiveness of its enforcement, where the burden-shifting would create a difference in outcome. The municipal agency would probably have a difficult time articulating a rational basis for a stay-at-home requirement that restricted the activities of officers inside their own homes, perhaps by disconnecting officers' cable television or internet access. Or, on the enforcement side, a policy that forced officers to wear a GPS signal at all times so that they could never go anywhere without a supervisor finding out would be difficult to justify.

Finally, courts have applied a burden-shifting approach in other contexts, and in some cases the shift has led to a court finding an agency's policy unconstitutional. A recent example is the Fourth Circuit case of *Morrison v Garraghty*,[164] in which a non–Native American inmate claimed that prison officials violated his equal protection rights because the prison's policy conditioned obtaining Native American

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162 Police unions play a significant role in the formation of sick leave policies, even though the cases largely ignore the collective bargaining process. See note 35.

163 See *Pickering*, 391 US at 566 (describing how the plaintiff, a teacher, wrote an editorial in his local paper criticizing the school board's tax increase proposal).

164 239 F3d 648 (4th Cir 2001).

religious items on proof of Native American descent.[165] Despite the fact that many of these religious items were "per se dangerous in the prison environment" and that prison safety and security "are precisely the type of day-to-day considerations that require prison authorities to take actions which call for [a] lesser standard of scrutiny," the court held that the prison "failed [ ] to demonstrate that the race-based [ ] policy is reasonably related to [a] legitimate penological interest."[166] The burden-shifting approach of *Morrison* is a useful middleground between rational basis and strict scrutiny: "By adopting [a] reasonableness standard while shifting the burden of proving reasonableness to the government, the Fourth Circuit achieved a much more appropriate balance between the need to give prison officials discretion to maintain prison security and the need to protect inmates against invidious discrimination."[167]

CONCLUSION

In light of the intelligible principle that public employment regulations should be viewed more deferentially than regulations affecting the public at large, this Comment joins the majority of courts in recommending a deferential standard of review for municipal agencies' sick leave policies. However, there is uncertainty in any given case regarding exactly what constitutional rights are being deprived and the seriousness of those deprivations. Therefore, a modification to rational basis review—forcing the agency to articulate the rational basis for the policy—allows courts to strike down extremely restrictive policies while directing the rest towards political resolution by bringing out the competing interests at stake.

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165 Id at 657.

166 Id at 659–60.

167 Recent Cases, *Ninth Circuit Holds That Cell Assignments Based on Race Are Permissible*, 117 Harv L Rev 2448, 2455 (2004) (critiquing the Ninth Circuit's application of standard rational basis review in an equal protection prison case by comparison to the Fourth Circuit's earlier decision in *Morrison*).