Standards of Judicial Review for Conditions of Pretrial Detention

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Note: Standards of Judicial Review for Conditions of Pretrial Detention

I. INTRODUCTION

Pretrial detainees are unconvicted persons who are confined until trial because they have been accused of nonbailable offenses or are unable to post bail. Pretrial detention is an archetypical example of conflict between important governmental interests and private liberty interests. Inevitably, the right of pretrial detainees to be free

1. It has been consistently held that there is no absolute right to have bail set. See, e.g., United States v. Gilbert, 425 F.2d 490, 491-92 (D.C. Cir. 1969) (per curiam); Bloss v. People, 421 F.2d 903, 905 (6th Cir. 1970) (per curiam); Mastrian v. Hedman, 326 F.2d 708, 710 (8th Cir.) (per curiam), cert. denied, 376 U.S. 965 (1964).

The Bail Reform Act of 1966, 18 U.S.C. §§ 3146-3152 (1976), applicable to those charged with federal crimes, provides that the court need not set bail for one charged with an offense punishable by death or for one who has an appeal pending after conviction. See 18 U.S.C. § 3146 (1976).

Article 1, section 7 of the Minnesota Constitution provides that, prior to conviction, all persons are entitled to have bail set except those accused of capital crimes. Minn. Const. art. 1, § 7. Since the death penalty has been abolished in Minnesota, see Act of April 22, 1911, ch. 387, 1911 Minn. Laws 572, all offenses are now bailable. See State v. Pett, 253 Minn. 429, 430, 92 N.W.2d 205, 206 (1958).

2. The eighth amendment to the United States Constitution prohibits only "excessive" bail. U.S. Const. amend. VIII. The Bail Reform Act of 1966, however, requires that a defendant accused of a noncapital federal offense be released on personal recognizance unless the judicial officer determines that the defendant is unlikely to appear at trial. In such a case, he may condition pretrial release in any of the following ways: (a) place the defendant in the custody of a designated person or organization agreeing to supervise him; (b) place restrictions on his travel, association, or place of abode during the period of release; (c) require the execution of an appearance bond in a sum not to exceed ten percent of the amount of the bond; (d) require the execution of a bail bond with sufficient solvent sureties or the deposit of cash in lieu thereof. See 18 U.S.C. § 3146 (1976). In United States v. Leathers, 412 F.2d 169, 171 (D.C. Cir. 1969), the court held that the Bail Reform Act creates a presumption in favor of release on personal recognizance or upon execution of an unsecured appearance bond. Therefore, only when such conditions of release will not reasonably assure appearance can a surety be demanded. In Minnesota, there is no similar statutory presumption in favor of release on personal recognizance. See generally Minn. R. Crim. P. 6.02.

3. Blackstone noted the conflicting values inherent in any analysis of pretrial detention:

[If the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol . . . there to abide till delivered by due course of law. But this imprisonment . . . is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only: though what are so requisite, must too often be left to the discretion of the gaolers; who are

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from "undue or oppressive" confinement is compromised by the state's interest in assuring their presence at trial and maintaining security in the facilities that hold them.  

Traditionally, courts followed a hands-off policy with regard to challenges of prison conditions by inmates, deferring to the discretion of prison administrators. The abuses condoned by the hands-off doctrine, however, have led courts to respond to the complaints of aggrieved prisoners on a routine basis. In the case of detainees, whose presence in jail is not predicated on penal considerations, courts have been generous in fashioning broad remedial relief. The increasing extent to which courts have involved themselves in reviewing conditions of pretrial detention has raised troublesome issues concerning the legal status of detainees, the extent to which courts should substitute their judgments for those of jail administrators, and the degree
of deference federal courts should accord the decisions of administrators of state-run facilities. The major problem underlying these issues is identifying the appropriate standard of judicial review for detainee challenges of jailers' administrative decisions.

This Note reviews the brief history of detainee litigation and concludes that a court's choice between the rational basis and strict scrutiny standards in such cases should be determined by the general rule: a regulation need only bear a rational relationship to a legitimate state interest unless it significantly interferes with a fundamental liberty or burdens a suspect class, in which case it must be justified by compelling necessity. This Note proposes that, when the conditions challenged by detainees warrant only rational basis review, a "rational" jail regulation should be defined as one evidencing no punitive intent.

II. JUDICIAL INTERVENTION

The hands-off doctrine has been repudiated to the extent that convicted prisoners now are extended rights that are not inconsistent with "their status as prisoner[s] [n]or with the legitimate penological objectives of the corrections system."11 Despite this perspective, the Supreme Court's handling of convict cases has exhibited a marked tendency to defer to the expertise of prison administrators.12

The Court has not yet delineated the legal status of pretrial detainees, but it is logical that detainees should retain more rights than convicts since the state's penological objectives do not apply to those presumed innocent.13 Some lower courts have predicated judicial intervention on detainees' eighth amendment right to be free from cruel and unusual punishment,14 or their fourteenth amendment

14. The cruel and unusual punishment clause of the eighth amendment not only prohibits punishments grossly disproportionate to the crime committed, see, e.g., Ingraham v. Wright, 430 U.S. 651, 667 (1977); Weems v. United States, 217 U.S. 349, 368 (1910), but also forbids certain forms of punishment altogether. See, e.g., Estelle v. Gamble, 429 U.S. 97, 104 (1976); Furman v. Georgia, 408 U.S. 238 (1972); Trop v.
guarantee of procedural due process. Neither of these theories, however, is particularly well suited to detainee challenges of the reasonableness or necessity of the routine conditions of pretrial confinement. Substantive due process and equal protection are the consti-


Procedural due process mandates that before the state may deprive a person of a significant liberty or property interest, it must afford him certain procedural safeguards. At minimum, these consist of some reasonable form of notice, see, e.g., Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950); Grannis v. Ordean, 234 U.S. 385, 394 (1914), and a meaningful opportunity to be heard. See, e.g., Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 (1978); Board of Curators v. Horowitz, 435 U.S. 78, 85-86 (1978).


16. The cruel and unusual punishment clause is often said not to apply to detainees because, technically, they are being confined, not punished. See Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1079 (3d Cir. 1976); Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir.), cert. denied, 414 U.S. 1033 (1973); Anderson v. Nosser, 438 F.2d 183, 190 (5th Cir.), modified en banc, 456 F.2d 835, cert. denied, 409 U.S. 848 (1972); cf. Ingraham v. Wright, 430 U.S. 651, 664 (1977) (eighth amendment does not bar corporal punishment in schools). Other courts have withheld judgment on the eighth amendment’s applicability because they have found treatment of detainees in a “manner shocking to the conscience” to be a clear denial of due process. See Feeley v. Sampson, 570 F.2d 364, 370 (1st Cir. 1978); Duran v. Elrod, 542 F.2d 998, 999-1000 (7th Cir. 1976).

A procedural due process challenge to conditions of detainee confinement would be ineffective because of the remedy available. Under a procedural due process theory, detention would be unlawful if not preceded by procedural safeguards sufficient to justify deprivation of liberty. But the remedy would be more formal probable cause
tutional foundations detainees have found most useful in mounting such challenges. Accordingly, this Note confines its analysis of the proper standard of judicial review to these latter theories.

III. SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION

Although substantive due process and equal protection are, of course, distinct constitutional principles, they have almost identical ramifications in the context of detainee suits. Both ostensibly utilize a two-tiered standard of review. Normally, courts merely require that a regulation or legislative classification bear some rational relation to a legitimate state interest. But, whenever a statute or regulation burdens a suspect class or interferes with a fundamental lib-

and bail hearings; the conditions of confinement could remain the same. A successful substantive due process challenge, by contrast, would require jails to change conditions of confinement even if the detention itself were conceded to be lawful. See note 18 infra.


18. The due process clause "affords not only a procedural guarantee against the deprivation of 'liberty', but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State." Kelly v. Johnson, 425 U.S. 238, 244 (1976). See also L. Tribe, American Constitutional Law 502 & n.4 (1978) (substantive due process deals with the content of a law or practice, while procedural due process deals with the adequacy of a law or practice's enforcement procedures).


20. The equal protection test has long been understood as being two-tiered. Compare Dandridge v. Williams, 397 U.S. 471, 486 (1970) (statutory classification will not be set aside if any state of facts may be conceived to justify it), with Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (statutory classification that penalizes the exercise of a fundamental right is unconstitutional unless necessary to promote a compelling governmental interest). The substantive due process test is also moving towards a two-tiered standard. See Roe v. Wade, 410 U.S. 113, 154-55 (1973) (fundamental right to personal privacy includes abortion decision, and regulation of that right must be justified by compelling state interest). See also Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (plurality) (Court will closely scrutinize the importance of the government's interests when a regulation intrudes on the freedom of choice concerning family living arrangements). The Supreme Court has warned, however, that strict scrutiny substantive due process must be applied with caution lest judges lapse back into the Lochner era practice of substituting their own opinions for the informed judgments of legislators and professional administrators. Id. at 502 & n.9 (citing Lochner v. New York, 198 U.S. 45 (1905)).


22. Recognized "suspect" classifications are usually based on congenital or unalterable traits likely to be perceived as a badge of inferiority. See generally Develop-
courts employ a strict scrutiny standard of review. Under this standard, the state carries the burden of demonstrating a compelling necessity for the challenged classification or regulation. Moreover, in some circumstances, the state must show that the classification or regulation is the "least restrictive means" of achieving its goal.

Commentators have suggested that courts engaging in equal protection review have developed an intermediate standard that is more rigorous than rational basis but less demanding than strict scrutiny. The hallmark of this standard is that the court's choice of the rational basis rubric is not outcome-determinative in favor of the challenged law or regulation. Although the Supreme Court has not explicitly acknowledged the existence of such an intermediate standard, it has implicitly done so in cases in which it has explained the rationality


23. Fundamental liberties are defined by the "teachings of history" and the "solid recognition of the basic values that underlie our society." Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring). Generally, these rights are either explicit in the Bill of Rights, see, e.g., Bullock v. Carter, 405 U.S. 134, 143 (1972) (right to vote); implicit in it, see, e.g., Williams v. Rhodes, 393 U.S. 23, 30 (1968) (freedom of association); or "penumbral" to it. See, e.g., Roe v. Wade, 410 U.S. 113, 152-54 (1973) (right to personal privacy); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate). A fundamental liberty may also arise, by necessity, from the nation's federal structure. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 630-31 (1969) (right to travel interstate).


25. "'Strict review'. . . seems to entail . . . a requirement that the challenged classification be strictly relevant to whatever purpose is claimed by the state to justify its use, and also that it be the fairest and least restrictive alternative evidently available for the pursuit of that purpose . . . ." Michelman, The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7, 20 n.34 (1969). The Supreme Court has often used the least restrictive means test when fundamental liberties have been significantly abridged. See, e.g., Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973); Police Dep't of Chicago v. Mosely, 408 U.S. 92, 102 (1972); Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Keyishian v. Board of Regents, 385 U.S. 589, 602 (1967); Shelton v. Tucker, 364 U.S. 473, 488 (1960).

In detainee cases, "least restrictive means" and "compelling necessity" inter-changeably signify that the court is applying a strict scrutiny standard. See Feeley v. Sampson, 570 F.2d 364, 379 (1st Cir. 1978) (Coffin, C.J., dissenting).

test as requiring a substantial relation between a challenged law and some legitimate governmental purpose.27

IV. APPLICATION OF THE SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION THEORIES IN DETAINEE SUITS

The federal courts' involvement in detainee challenges of jail administration has followed three distinct trends. The earliest decisions called for the rational basis standard of review in all cases except those challenging conditions of confinement that affected fundamental liberties. In 1971, the courts began to shift toward a rule requiring strict scrutiny of every condition of pretrial confinement. Recent Supreme Court cases, however, have implicitly undermined the strict scrutiny approach, and within the last year, several courts have reinstated the rational basis test as the proper standard of review in detainee cases.

Before 1971, courts generally adhered to the rule that conditions of pretrial detention need be only rationally related to the state's legitimate interest in assuring the accused's presence at trial.28 An exception was recognized, however, where a challenged condition significantly interfered with a detainee's exercise of a fundamental liberty. In such a case, the interference had to be the least restrictive means capable of satisfying the state's limited interest in pretrial detention.29

The cases of Seale v. Manson30 and Palmigiano v. Travisono31 illustrate the general rule and the exception. In Seale, the court held that a jail regulation forbidding beards would be reviewed only for reasonableness, since a beard was not "communicative" enough to warrant strict scrutiny protection under the first amendment.32 In


32. 326 F. Supp. at 1380. This aspect of Seale has been overruled by implication.
Palmigiano, the court held that jail officials must show both that a "compelling justification" exists for interfering with a detainee's fundamental first amendment right to correspond through the mail and that such interference was the least restrictive alternative available. As a result, the court would not sanction total censorship of a detainee's mail, but it did permit jail officials to limit a detainee's uncensored mail to an "approved addressee list" of seven persons. The court held that the jail's selection of names for this list would be reviewable only to ensure its rational relationship to the legitimate purposes of pretrial confinement.

A 1964 district court decision, Butler v. Crumlish, seems anomalous because of its broad assertion that conditions of pretrial detention that do not "inhere in confinement" are unlawful. This standard requires that jail regulations be more than merely rational. The Butler court held that requiring detainees to appear in police line-ups for crimes other than the one for which they were detained is "unrelated" to assuring their presence at trial.

Since the Butler court decided that the regulation in question was irrational, its apparent support for the least restrictive means test was simply dictum. Moreover, the Butler court adopted a very expansive view of the conditions that inhere in confinement and thus need be subject only to a rational basis standard of review:

The prison authorities . . . may subject a criminal defendant who is imprisoned for want of bail to all those restraints which are an essential part of the management of a prison. Thus, pending trial, such a defendant may be imprisoned in a cell and must submit to the routine of the prison relating to his meals, his exercise and the many activities of his daily life. All these matters are . . . incidental elements in the organized caretaking of the general company of prisoners.

Butler, then, despite its confusing definition of detainee rights, is not inconsistent with the other detainee cases of this period; it would apply the rational relation test to challenged prison regulations in all

33. 317 F. Supp. at 786.
34. Id. at 786 n.38.
35. Id. at 791.
36. Id.
38. Id. at 567.
40. 229 F. Supp. at 567.
41. Id. at 566.
but exceptional circumstances.

The second trend in detainee cases developed following the publication of an influential *Yale Law Journal* note in 1970. The note-writer argued that, when considered in light of the freedom accorded to arrested persons released on bail, all restrictions placed on detainees must be rationally related to the state's purpose in holding them for trial, or their detainment would constitute a denial of equal protection.43 Citing jury sequestration,44 medical quarantine,45 and civil commitment46 cases as analogous, the notewriter went on to conclude 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."47 The innovative aspect of this rule was that a significant interference with a fundamental liberty was not made a prerequisite for application of strict scrutiny. It was, therefore, a marked departure from the rule observed in the early detainee cases,48 and from Supreme Court appli-
lications of the least restrictive means test to such significant interference. 49

The proposed rule was, nevertheless, immediately adopted by several federal district courts. 50 Its attraction was no doubt due in part to its implied assumption that pretrial detention is, by itself, a significant interference with constitutionally protected liberties. 51 In addition, the rule afforded persons detained in state-run facilities an avenue for escaping the abstention doctrine set forth in Johnson v. Avery: 52 "There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene." 53

During this period, the blanket application of strict scrutiny to every condition of pretrial detention became the clear majority rule. 54

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53. Id. at 486.

54. Prior to the Supreme Court's decision in Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977), see text accompanying notes 69-87 infra, the majority rule had been adopted in the following circuits:


Fifth Circuit. See Miller v. Carson, 563 F.2d 741, 747 (5th Cir. 1977); Pugh v.
Although some courts announced a rule that applied strict scrutiny only to those conditions that did not inhere in confinement, those courts applied their rule as if it called for blanket strict scrutiny. Only three circuits retained the earlier rule that reserved strict scrutiny for conditions significantly interfering with fundamental liberties.  

Rainwater, 557 F.2d 1189, 1196-97 (5th Cir. 1977) (strict scrutiny premised on findings that detainees are suspect class and that fundamental right to be presumed innocent is abridged by detention), vacated as moot, 572 F.2d 1053 (5th Cir. 1978); Taylor v. Sterrett, 532 F.2d 462, 470 n.11, 471 (5th Cir. 1976) (strict scrutiny premised on abridgement of fundamental right of access to courts); Mitchell v. Untreiner, 421 F. Supp. 886, 893-94 (N.D. Fla. 1976).  


Chief Judge Coffin of the First Circuit, dissenting in Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978), summarized the majority rule as follows: "Deprivations may be imposed on detainees for legitimate purposes such as institutional security only if such deprivations are justified by 'compelling necessity' . . . or if the deprivation is the least restrictive alternative available to maintain order and security . . . ." Id. at 379 (Coffin, C.J., dissenting) (citations omitted). Coffin's dissent recognizes that, regardless of the particular formula used to express the rule, courts following the strict scrutiny standard have applied it to every aspect of pretrial confinement without trying to determine whether any particular condition may actually inhere in confinement.  

56. The rule in the Seventh Circuit is that the conditions of pretrial detention must be reasonably related to the state's interest in assuring the accused's presence at trial. See Bijeol v. Nelson, 579 F.2d 423, 425 (7th Cir. 1978); Duran v. Elrod, 542 F.2d 998, 1000 (7th Cir. 1976); Classon v. Krautkramer, 451 F. Supp. 12, 14 (E.D. Wis. 1977); Vienneau v. Shanks, 425 F. Supp. 676, 680 (W.D. Wis. 1977); Jordan v. Wolke, 75 F.R.D. 696, 700 (E.D. Wis. 1977). The Seventh Circuit does, however, apply strict scrutiny to conditions of pretrial detention that affect fundamental first amendment liberties. See Smith v. Shimp, 562 F.2d 423, 426 (7th Cir. 1977). But see Vienneau v. Shanks, 425 F. Supp. 676, 680 (W.D. Wis. 1977) (rational relation test deemed appropriate for reviewing jail officials' practice of spot-checking detainee mail). Vienneau may indicate that the Seventh Circuit courts reserve strict scrutiny for conditions that significantly affect fundamental liberties. See text accompanying notes 66-68 infra.  

Although the Third Circuit has not stated its rule as plainly as has the Seventh, its practice of deferring to the decisions of jail administrators and placing the burden of proof on detainees is consistent with the rational relation test. See Main Road v. Aytch, 565 F.2d 54, 57 (3d Cir. 1977) (deferral to prison authorities' discretion appropriate unless pretrial detainees produce substantial evidence that jail officials have
The third, and present, trend in detainee cases arose as a result of two Supreme Court decisions involving the rights of convicted prisoners, Pell v. Procunier and Jones v. North Carolina Prisoners' Labor Union, Inc. In Pell, the plaintiffs challenged a California Department of Corrections regulation barring convicted inmates from face-to-face interviews with media representatives. Because other avenues of communication with the news media remained open to the inmates, the regulation did not absolutely deny their ability to air grievances in public. The Supreme Court upheld the regulation, concluding that inmates retain no first amendment right to engage in face-to-face interviews. 

exaggerated their responses to security concerns); Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1081-82 (3d Cir. 1976) (placing burden on detainees to produce evidence of intentional conduct or deliberate indifference on part of defendant in order to sustain charge of due process infringement); United States ex rel. Tyrrell v. Speaker, 535 F.2d 823, 827 (3d Cir. 1976) (state violates due process clause by arbitrarily imposing materially greater restrictions on detainees than on convicts in same facility). But see Owens-El v. Robinson, 442 F. Supp. 1388, 1378 (W.D. Pa. 1978). The Third Circuit has also held that the restrictions placed on detainees are rational and do not deny them equal protection as compared to persons free on bail. See Priest v. Nardini, 390 F.2d 150 (3d Cir. 1968) (per curiam); Rigney v. Hendrick, 355 F.2d 710, 715 (3d Cir. 1965), cert. denied, 384 U.S. 975 (1966).

In addition, the Fourth Circuit appears to follow the minority rule. The only case on point, Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972), supplemented, 363 F. Supp. 1152 (D. Md. 1973), states that "a pretrial detainee may not be disciplined in any way except to the extent reasonably required in order to insure his presence at trial and to maintain the order and security of the institution." 344 F. Supp. at 269. But, when fundamental liberties were at stake, the Collins court, like the Seventh Circuit, placed the burden of showing "necessity" on the jail officials. Id. at 271, 283. In a case involving convicted prisoners, Crowe v. Leek, 550 F.2d 184 (4th Cir. 1977), the court held that "the State has a compelling interest in assuring the security of its prisons and . . . whenever that need conflicts with the rights of prisoners the latter must yield." Id. at 188.

59. In Pell, two cases were consolidated for oral argument. Plaintiffs were four California prison inmates in one case (No. 73-754), and three professional journalists in the other (No. 73-918).
60. Section 415.071 of the California Department of Corrections Manual, quoted in 417 U.S. at 819, provided that "[p]ress and other media interviews with specific individual inmates will not be permitted." The regulation was enacted in response to a violent prison episode that prison officials believed was due in part to certain inmates gaining disproportionate notoriety among their fellows by virtue of media interviews. Id.

61. 417 U.S. at 828. The Court assumed that the right of free speech "includes a right to communicate a person's views to any willing listener, including a willing representative of the press for the purpose of publication by a willing publisher." Id. at 822. But it stated that the prohibition of a specific means of communication, so long as viable alternatives were left open, does not necessarily raise a constitutional issue. Id. at 823. The regulation in Pell prohibited only face-to-face interviews; the Court
Pell is significant because the Supreme Court declined to apply strict scrutiny even though a first amendment question had been raised. Although admitting a constitutional duty to "delineate and protect fundamental liberties," Justice Stewart's majority opinion notes that "'[I]lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights.'" The Court thus held that given the unique nature of the prison environment, the refusal to permit face-to-face interviews was a reasonable "time, place, and manner" regulation that did not "abridge any First Amendment freedoms retained by prison inmates."

The Court has often indicated that to warrant strict scrutiny, the deprivation of a fundamental liberty must be significant. Pell demonstrates that this level of significance varies according to the environment being regulated. Since the Court conceded that this regulation would raise a first amendment question if applied to the general public, the import of Pell's holding is that the security concerns related to the special environment of prisons render the regulation too insubstantial to warrant strict scrutiny. The penal considerations that justify the higher threshold of significance for convicted prisoners include deterrence, rehabilitation, and institutional security.

The ambiguity of Jones v. North Carolina Prisoners' Labor Union, Inc., decided by the Supreme Court three years after Pell, makes it difficult to determine whether Jones was intended only as a restatement of Pell, or as an announcement of a totally new theory. The plaintiff in Jones, a labor union formed to improve prison working conditions through collective bargaining, had organized more than 2,000 inmates in forty separate North Carolina prison units. In an effort to curtail the union's growing influence, the North

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62. Id. at 827.
63. Id. at 822 (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)).
64. Id. at 826.
65. Id. at 828 (emphasis added).
66. See note 49 supra.
67. 417 U.S. at 825.
68. Id. at 822-23. See also Price v. Johnston, 334 U.S. 266, 285 (1948).
70. The new theory would be that the fundamental liberties doctrine, no longer applies to convicted prisoners, thus amounting to a de facto reinstatement of the discredited "hands off" doctrine. See id. at 139-47 (Marshall, J., dissenting). See generally Calhoun, supra note 12.
71. 433 U.S. at 122.
Carolina Department of Corrections prohibited inmates from soliciting their fellows to join the union, from holding union meetings, and from receiving and distributing the union's bulk mailings. The plaintiff complained that such regulations infringed the union's, and its members', constitutionally protected liberties of association, free speech, and assembly. The Supreme Court, reversing a three-judge district court that had invalidated the regulations, held that the ban on inmate solicitation and group meetings was rationally related to the reasonable objectives of prison administration, and that the ban on bulk mailings was reasonable given the other avenues of "informational flow" open to the union and its members.

Justice Rehnquist, speaking for the Court, emphasized two points. First, he criticized the district court for failing to give appropriate deference to the decisions of prison administrators and for failing to recognize the peculiar and restrictive circumstances of penal confinement. Second, he concluded that on the facts of the case, the proper standard of judicial review was the rational relation test, not strict scrutiny.

Jones probably represents a harsher version of the Pell theory, rather than a total abrogation of the fundamental liberties doctrine insofar as it applies to convicts. For instance, Justice Rehnquist

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72. Id.
73. Id. at 122-23.
74. The lower court held, inter alia, that since the jail had permitted membership in the union, it could not forbid inmate solicitation of other inmates for membership. North Carolina Prisoners' Labor Union v. Jones, 409 F. Supp. 937, 944 (E.D.N.C. 1976), rev'd, 433 U.S. 119 (1977). It also held that since organizations other than the union were permitted to mail literature into the jail at bulk rates, it would be a denial of equal protection to forbid the union this privilege. Id. Finally, it held that the union must be given the same right to assemble as other inmate organizations. Id. at 945.
75. Justice Rehnquist, writing for a majority of the Court, stated that "[t]he ban on inmate solicitation and group meetings . . . was rationally related to the reasonable, indeed to the central, objectives of prison administration," 433 U.S. at 129 (emphasis added) (citing Pell v. Procunier, 417 U.S. 817 (1974)). In Pell, the Court listed four legitimate objectives of penal confinement—deterrence, protection of the public from further criminal acts, rehabilitation, and internal security—and deemed the internal security interest to be "central to all other considerations." 417 U.S. at 822-23. Justice Rehnquist's approval of the challenged regulations thus seems to turn primarily on their rational relationship to security concerns. It is noteworthy that the state's interest in security is the only one of the four penal objectives outlined in Pell that also applies to detainees. See note 87 infra.
76. Justice Rehnquist concluded that the ban on bulk mailing privileges was only the loss of a "cost advantage" that did not "fundamentally implicate free speech values." 433 U.S. at 130-31 (emphasis in original). This was simply another way of stating the conclusion that the regulation did not meet the requisite level of significance for the application of strict scrutiny.
77. Id. at 125.
78. Id. at 127-28.
observed that "First Amendment speech rights are barely implicated in this case." And the Chief Justice, in a concurring opinion, stated that the Court's reluctance to second-guess jail administrators "does not imply that a prisoner is stripped of all constitutional protection as he passes through the prison's gates. Indeed, this Court has made clear on numerous occasions that the Constitution and other federal laws protect certain basic rights of inmates." Jones' importance, then, lies in its assertion that courts are ill-equipped to deal with the problems of prison administration and reform, and should not second-guess the informed decisions of state legislatures or administrators in this sensitive field, except under extraordinary circumstances.

Although Pell and Jones unquestionably signal a retreat from intensive judicial supervision of prison administration, their rationales have only limited application to pretrial detention. Since detainees are presumed innocent, their confinement must not be for "penal" purposes such as retribution, deterrence, or rehabilitation. Yet, the Court in Pell identified "penal" considerations as the major factor justifying curtailment of prisoner liberties.

There are, however, other aspects of the Pell and Jones rationales that may be applied to judicial review of prison administration without regard to the convict-detainee distinction. For instance, because the need for security provisions, including a daily regimen regarding meals, exercise, and the like, is not based on penal considerations, such measures should apply to unconvicted inmates with the same force as to convicted ones. Furthermore, regardless of the legal status of the incarcerated persons, Jones' requirement that federal courts should ordinarily abstain from intervening in state-run institutions would still apply.

79. Id. at 130 (emphasis added).
80. Id. at 137 (Burger, C.J., concurring).
81. Id. at 126, 136.
82. Id. at 137 (Burger, C.J., concurring).
83. See note 87 infra.
84. 417 U.S. at 822-23.
85. Under certain circumstances, the need for adequate security provisions may apply with even greater force to detainees than convicts. For example, in Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978), as those provided for one serving a term of years. A detainee with a notorious record as a bank robber may not be entitled to as lenient security considerations as someone serving a misdemeanor sentence.
88. Id. at 371. See also note 6 supra and accompanying text.
These considerations suggest that the majority rule in detainee cases—that every deprivation of liberty associated with pretrial detention be strictly scrutinized—is no longer tenable. In addition, it would seem that courts adjudicating detainee rights can no longer ignore the Pell-Jones "significance" theory, for it is evident that the security requirements that accompany pretrial confinement necessarily result in curtailment of certain detainee liberties. The Pell-Jones reliance on penal considerations to justify many conditions of confinement, however, seems to suggest that the threshold for significant deprivations of detainee liberties should not be as high as it is for convicts. Since Jones, several detainee cases have been decided by the circuit courts. Two of them, Feeley v. Sampson and Wolfish v. Levi, consider at length the appropriate scope of judicial review. Significantly, both Feeley and Wolfish avoid application of the blanket strict scrutiny rule. Apparently, both courts concluded that, after Pell and Jones, certain conditions of pretrial detention need only have a rational basis. The noteworthy difference between Feeley and

86. See text accompanying notes 42-55 supra.

87. In Pell v. Procunier, 417 U.S. 817 (1974), Justice Stewart explained the penal considerations underlying the "necessary withdrawal or limitation" of liberties occasioned by lawful incarceration:

An important function of the corrections system is the deterrence of crime. The premise is that by confining criminal offenders in a facility where they are isolated from the rest of society, ... they ... will be deterred from committing additional criminal offenses. This isolation, of course, also serves a protective function by quarantining criminal offenders for a given period of time while, it is hoped, the rehabilitative processes of the corrections system work to correct the offender's demonstrated criminal proclivity ... .

Finally, central to all other correction goals is the institutional consideration of internal security within the corrections facilities themselves. Id. at 822-23. Although the state's interest in maintaining secure jails certainly applies to detainees, see note 85 supra and accompanying text, it is beyond question that the penal interests of deterrence, isolation, and rehabilitation do not apply to pretrial detainees. See, e.g., Ingraham v. Wright, 430 U.S. 651, 674 (1976); Moore v. Janing, 427 F. Supp. 567, 571 (D. Neb. 1976); Dillard v. Pitchess, 399 F. Supp. 1225, 1232 (C.D. Cal. 1975); Hamilton v. Love, 328 F. Supp. 1182, 1193 (E.D. Ark. 1971); Seale v. Manson, 325 F. Supp. 1375, 1379 (D. Conn. 1971). The penal objectives that justify withdrawing convicts' rights do not, for the most part, apply to detainees; detainees thus should retain certain rights that are withdrawn from convicts.

88. See Marcera v. Chinlund, No. 78-2081 (2d Cir. Feb. 27, 1979); Bell v. Manson, 590 F.2d 1224 (2d Cir. 1978); Bijelo v. Nelson, 573 F.2d 423 (7th Cir. 1978); DiMarzo v. Cahill, 575 F.2d 15 (1st Cir.), cert. denied, 99 S. Ct. 312 (1978); Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), cert. granted sub nom. Bell v. Wolfish, 99 S. Ct. 76 (1978) (No. 77-1829); Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978); Ahrens v. Thomas, 570 F.2d 286 (8th Cir. 1978); Main Road v. Aytch, 565 F.2d 54 (3d Cir. 1978).

89. 570 F.2d 364 (1st Cir. 1978).

Wolfish is that they advocate significantly different formulae for determining whether the rational basis standard is appropriate for a given condition.

In Feeley, plaintiff detainees challenged jail regulations banning contact visits and social telephone calls, providing for mail censorship, and forbidding the possession of any personal property in cells. The district court, applying strict scrutiny, invalidated the regulations. The First Circuit Court of Appeals reversed in part, holding that the proper standard of review was whether such regulations were arbitrary and capricious, or lacking in reasonable relation to the limited purpose for which unconvicted persons may be confined.

Applying this standard, the court of appeals concluded that the ban on contact visits was rational for security reasons. It held, however, that the jail's failure to promulgate any meaningful rules governing visitation was unreasonable, since it permitted jail officials to exercise arbitrary control over the visitation process. The circuit court reversed a lower court order requiring that detainees be permitted to make ten social telephone calls per day, remanding the issue for determination of whether the jail's complete ban on social calls was reasonable. Also reversed was an order that the jail refrain from opening detainee mail without a search warrant. Finally, the court held that the jail's ban on possession of personal property in cells was unreasonable.

91. Detainees were not permitted to touch their visitors, being separated from them by a mesh screen. 570 F.2d at 372.
92. Id. at 373-74.
93. The jail censored detainees' incoming and outgoing mail. If detainees did not sign a statement consenting to mail censorship, their mail was withheld entirely. Id. at 367.
94. Id. at 375.
95. Id. at 368.
96. Id. at 371.
97. The district court had determined that the jail's denial of contact visits was unlawful because such visits were permitted at the New Hampshire State Prison. The circuit court concluded, however, that the physical differences between the jail and state prison rendered the denial of contact visits at the jail non-arbitrary. Id. at 373.
98. Prior to the litigation, visits were permitted twice a week between one and three o'clock in the afternoon. During the trial, the jail amended its regulation so that visits were permitted "at all reasonable times." The circuit court found this amended regulation faulty because it gave jail administrators arbitrary control, on an ad hoc basis, over visitation. Id. at 372.
99. The circuit court held that it was incorrect to compare the freedom of those on bail and of detainees, and to place the burden of justification entirely on the state. Id. at 373.
100. Id. at 374.
101. Id. The court recognized mail censorship as a reasonable security measure for both detainees and convicts.
102. The district court had ordered the jail to prepare a list of items of personal
The Feeley decision is significant for several reasons. First, the court explicitly disavowed the blanket strict scrutiny rule that had been applied by district courts of the First Circuit on several prior occasions. In Wolfish v. Levi, decided only six days after Feeley, plaintiff detainees challenged twenty specific jail conditions and regulations related to overcrowding, unreasonable searches, censorship, and access to courts. As in Feeley, the district court in Wolfish applied the majority rule of blanket strict scrutiny. The Second Circuit Court of Appeals affirmed in part, modifying the rule's operation to no longer require strict scrutiny of every condition of confinement:

[Pretrial detainees may be subjected to only those "restrictions and privations" which "inhere in their confinement itself or which are justified by compelling necessities of jail administration."]

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

property that could be kept in cells, using as a standard the list in effect at the New Hampshire State Prison. The circuit court remanded the order because in issuing it, the district court ignored the differences in the two facilities and their inmate populations. Id. at 375.


104. 570 F.2d at 372, 374.

105. The Feeley court's holding is limited since it proceeded under the assumption that the challenged regulations did not significantly interfere with any fundamental liberties retained by the plaintiffs. Id. at 370, 372. There is nothing in the Feeley decision to indicate that the court would eschew the strict scrutiny standard if a fundamental liberty retained by the plaintiffs had been significantly abridged. Thus, Feeley should be read as announcing the minority rule—that the rational relation standard is appropriate so long as no fundamental liberty is significantly abridged—as it is already followed in the Third, Fourth and Seventh Circuits. See note 56 supra.


108. 573 F.2d at 124 (quoting Rhem v. Malcolm, 507 F.2d 333, 336 (2d Cir. 1974)).
The *Wolfish* opinion manifests ample awareness of two dangers associated with the overly broad use of strict scrutiny: encouraging excessive or trivial litigation, and permitting courts to make difficult substantive judgments in areas in which they lack sufficient expertise. The court in *Wolfish* implied that, of the issues it decided on appeal, some may have been so trivial as not to warrant judicial attention. Moreover, it expressed the realistic fear that courts were becoming a forum of first resort for the resolution of institutional grievances despite the ready availability of sufficient internal administrative procedures. Finally, the circuit court identified two district court orders as arbitrary, explicable only as judicial second-guessing of rational administrative decisions.

*Feeley* and *Wolfish* represent two alternative postures that

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109. In his [trial court] decree, Judge Frankel intervened broadly into almost every facet of the [Metropolitan Correctional Center] . . . . [In some] cases we believe a balance more restrained should have been struck between the court's power to redress inmate grievances and deference to prison administrators. Many of the cited deficiencies, if indeed they existed, were not of a kind to require a chancellor's decree to bring about compliance.

. . . After wading through the many aspects of this decree, we can only implore the litigants in this case to avoid this increasingly acute problem of "litigation neurosis" in future disputes by resolving petty problems in the administrative arenas, without burdening our courts.

*Id.* at 121 (footnote omitted). In conclusion, the *Wolfish* court said:

In actuality, we have here decided not one, but twenty cases relating to specific conditions at the [Metropolitan Correctional Center]. That fact, in all candor, is ominous, for it represents the growing involvement of the courts in all aspects of prison administration. . . .

. . . It is important for courts to involve themselves with those conditions that violate the Constitution. But it is equally important that courts be spared from adjudicating petty matters that do not rise to litigable magnitude . . . .

*Id.* at 133-34 (footnote omitted).

110. "[C]ourts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism." *Id.* at 124 (citing Procunier v. Martinez, 416 U.S. 396, 405 (1974)). "Concern with minutiae of prison administration can only distract the court from detached consideration of the one overriding question presented to it: does the practice or condition violate the Constitution?" *Id.* at 125.

111. *Id.* at 121, 125, 132-34.

112. *Id.* at 121.

113. *Id.* at 132-33. Judge Frankel had decreed at the trial court level that inmates should be permitted to possess typewriters for their personal use, but the circuit court could perceive of no constitutional right justifying such an order. Frankel had also ordered that detainees be permitted to wear their own clothes because he found the prison-issued jumpsuits to be "garish, illfitting, degrading and humiliating to wear." *Id.* at 132. The circuit court granted that some detainees may find the jumpsuits "aesthetically obnoxious," but decided that such questions of personal taste do not rise to litigable magnitude, especially when a uniform is necessary for the security purpose of identifying inmates. *Id.* at 133.
courts have assumed in reaction to Jones. Although Feeley jettisoned the majority rule altogether, Wolfish attempted to salvage it by slightly narrowing its application. Both decisions are symptomatic of the uncertainty created by Pell and Jones.

Arguably, there now exist four possible formulations of the proper standard for judicial review in detainee cases. At one extreme is the extant majority rule that subjects every deprivation of liberty associated with pretrial detention to strict scrutiny. This formulation no longer seems viable because it fails to take account of the rationales of Pell and Jones. At the opposite extreme is a rule that could be inferred from Justice Marshall's construction of the majority opinion in Jones: the conditions of pretrial detention need only be rationally related to the state's interest in confinement even if they work a substantial interference with a fundamental liberty. This rule would be premised on the questionable hypothesis that Jones rejects the fundamental liberties doctrine insofar as prison inmates are concerned. But, even in the unlikely event that Jones destroyed that doctrine's applicability for convicted inmates, it is difficult to justify applying such a harsh rule to detainees. Since both these extreme standards are implausible, the proper rule is undoubtedly one of the two intermediate standards proposed by Feeley and Wolfish.

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114. For a list of courts following the majority rule prior to Jones, see note 54 supra. Since Jones, the First Circuit has explicitly rejected the majority rule. See Feeley v. Sampson, 570 F.2d 364, 371 (1st Cir. 1978). The Third Circuit has reaffirmed its adherence to the minority rule, see Main Road v. Aytch, 565 F.2d 54, 57 (3d Cir. 1977), as has the Seventh Circuit. See Bijelo v. Nelson, 579 F.2d 423, 425 (7th Cir. 1978). In the Ninth Circuit, where no detainee cases have been heard at the appellate level, the latest district court opinion applies the rational basis test, see Stewart v. Gates, 450 F. Supp. 583, 585 (C.D. Cal. 1978), without reference to an earlier case, decided in the same district, that had applied strict scrutiny. See Dillard v. Pitchess, 399 F. Supp. 1225, 1235 (C.D. Cal. 1975).


115. See text accompanying notes 57-87 infra.


118. Because such a rule would rely heavily on the penal objectives of confinement, see Pell v. Procunier, 417 U.S. 817, 822-23 (1974), it would contravene the principle that detainees may not be punished. See note 87 supra.

119. The Feeley rule is a rational basis test that reserves strict scrutiny for conditions of confinement significantly interfering with fundamental liberties. See notes 91-105 supra and accompanying text.

120. The Wolfish rule is a strict scrutiny test that reserves the rational basis test for conditions inhering in confinement. See text accompanying notes 107-08 supra.
V. ANALYSIS OF FEELEY AND WOLFISH

A. DOCTRINAL INCONSISTENCY OF THE WOLFISH RULE

Strict scrutiny is appropriate only where a law or regulation burdens a suspect class or significantly interferes with a fundamental liberty.\(^\text{121}\) Detainees have never been recognized as a suspect class.\(^\text{122}\) Thus, for the Wolfish rule to comport with constitutional doctrine, it must implicitly equate the "not inherent in the mere fact of confinement" formula to some significant interference with a fundamental liberty.

One early detainee case suggested that the "extraordinary deprivation of liberty" occasioned by pretrial detention is sufficient to justify strict scrutiny.\(^\text{123}\) While this explanation arguably supports the majority rule of blanket strict scrutiny, it cannot logically underlie the Wolfish rule. The extraordinary deprivation of liberty rationale would command that every aspect of pretrial detention be viewed as a significant interference with a fundamental liberty, whether it inheres in confinement or not. The Wolfish court, however, held that conditions inhering in confinement need only have a rational basis.\(^\text{124}\)

The most probable statement of the fundamental liberty underlying Wolfish would be the liberty to be free from state imposed punishment prior to conviction.\(^\text{125}\) The fifth and sixth amendments do

\(^{121}\) See notes 22-25 supra and accompanying text.

\(^{122}\) Under existing doctrine, detainees do not qualify as a suspect class because they are not classified on the basis of an immutable or congenital characteristic. See generally Developments, supra note 22, at 1126-27. In McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969), the Court rejected the argument that detainees should be treated as a suspect class. But see Pugh v. Rainwater, 557 F.2d 1189, 1197 (5th Cir. 1977) (detainees are suspect class because quality of their access to courts is conditioned on their poverty), vacated as moot, 572 F.2d 1053 (5th Cir. 1978).


There is another fundamental liberty that could justify strict scrutiny of pretrial detention conditions: the guarantee against "excessive" bail derived from the eighth amendment. See generally United States v. Thompson, 452 F.2d 1333, 1340 (D.C. Cir. 1971), cert. denied, 405 U.S. 998 (1972); Ackies v. Purdy, 322 F. Supp. 38, 41 (S.D. Fla. 1970). It could be argued that pretrial detention is merely a surrogate for bail because both serve the same purpose—assuring the accused's presence at trial. If
not allow the government to impose punishment without first according the accused procedural due process consisting of a full criminal trial before a duly constituted court. But, while this procedural right undoubtedly warrants some basic constitutional protection, it is unclear whether it rises to the status of a fundamental substantive right and, if so, whether it should apply to the routine aspects of the detention scheme.

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127. A major problem with recognizing a fundamental right to be free from state imposed punishment is the uncertain breadth of its application due to the vagueness of the term "punishment." For instance, the paddling of school children by a public school teacher would certainly be state imposed punishment, but to accord this treatment strict scrutiny would contradict the Supreme Court's recent decision in Ingraham v. Wright, 430 U.S. 651, 682 (1977) (due process clause does not require notice and hearing prior to imposition of corporal punishment in public schools). Similarly, such a fundamental liberty might have an undesirable impact on the judicial review process of administrative decisions which, by statute, need only meet a rationality standard. See, e.g., Brawner Bldg., Inc. v. Shehyn, 442 F.2d 847, 853 (D.C. Cir. 1971) (construing role of judiciary for Administrative Procedure Act § 10(3), 5 U.S.C. § 706 (1976)); Haynes v. United States, 418 F.2d 1380, 1384 (Ct. Cl. 1969) (same).

128. It is conceivable that a fundamental liberty to be free from physical punishment was established by Ingraham v. Wright, 430 U.S. 651, 674 (1977) ("It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law"). However, the Court's holdings in Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (procedural safeguard of probable cause hearing sufficient due process to justify deprivations associated with pretrial detention), and Fell
McDonald v. Board of Election Commissioners\textsuperscript{129} undermines the contention that such a right has fundamental status. McDonald dealt with an Illinois statute administratively interpreted to prohibit pretrial detainees from obtaining absentee ballots.\textsuperscript{130} Plaintiff detainees had argued for an equal protection test similar to that applied in Wolfish,\textsuperscript{131} but the Supreme Court declined to use such a test. Instead, it decided the case on fundamental right-to-vote principles, holding that the challenged denial of absentee ballots was too insignificant to trigger strict scrutiny;\textsuperscript{132} thus, the statute was tested only for rationality.\textsuperscript{133}

The salient aspect of McDonald was the Court's refusal to apply strict scrutiny to a denial of voting rights, even though such a denial certainly does not inhere in the mere fact of pretrial confinement.\textsuperscript{134} Under the Wolfish rule this deprivation would require strict scrutiny regardless of its impact on the right to vote. The Supreme Court has, therefore, already forsaken the opportunity to recognize the hypothetical fundamental liberty that is necessary to give the Wolfish rule doctrinal consistency.

\textsuperscript{129} v. Procunier, 417 U.S. 817, 827-28 (1974) (upon lawful incarceration, prisoners do not retain fundamental liberties inconsistent with legitimate penal objectives such as institutional security), imply that even if such a fundamental right existed, lawfully incarcerated persons do not retain the full measure of its protection.

\textsuperscript{130} 394 U.S. 802 (1969).

\textsuperscript{131} The challenged statute extended absentee voting rights to four classes of persons: (1) those absent from the county of their residence for any reason whatsoever; (2) those physically incapacitated; (3) those whose observance of religious holidays precludes attendance at the polls; and (4) those serving as poll watchers in precincts not their own. Id. at 803-04. The Board of Election Commissioners denied a request for absentee ballots by Cook County Jail detainees, because they had not demonstrated "physical incapacity" within the meaning of the statute. Id. at 804-05.

\textsuperscript{132} The detainees in McDonald argued for the following rule: "Not every consequence of pre-trial detention is constitutionally permissible. Those restraints which are not an essential part of the management of a prison, and which are not reasonably related to the only legitimate purpose of detention—security, can not be justified . . . ." Brief for Appellants at 11, McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969). This statement posits a two-part standard of review: (1) restraints that do not inhere in prison management cannot be justified, and (2) restraints that do inhere in prison management must be rationally related to security considerations. The rule followed in Wolfish v. Levi, 573 F.2d 118, 124 (2d Cir.), cert. granted sub nom. Bell v. Wolfish, 99 S. Ct. 76 (1978)(No. 77-1829), adopts a similar formula. See text accompanying note 108 supra.

\textsuperscript{133} 394 U.S. at 807. See generally note 49 supra.

\textsuperscript{134} 394 U.S. at 808-09.

"[C]ertainly there is nothing in the record of this case . . . to suggest that denial of absentee ballots to incarcerated qualified voters awaiting trial is essential to the proper management of the Cook County Jail or of any other penal institution." Brief for Appellants at 11, McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969).
B. IMPrACTICABILITY OF THE Wolfish RULE

Aside from its doctrinal problem, the Wolfish rule suffers from a practical flaw. It requires courts to make difficult distinctions between conditions that inhere in confinement and those that do not.

Not all cases are difficult. Clearly, conditions equated with punishment do not inhere in pretrial confinement. Certain traditional benchmarks exist that aid in determining, for unconvicted detainees, the point at which mere confinement ends and punishment begins. Such punishment clearly includes being subjected to shocking or inhumane conditions, and, in most cases, being treated materially worse than convicted inmates housed in the same facility. But when such traditional indicia are not present, it is extremely difficult for courts to determine whether a certain condition inhere in confinement. Rather than make this difficult subjective distinction, courts adopting this rule have simply applied strict scrutiny to every challenged aspect of pretrial detention.

135. See note 87 supra.
137. A number of courts have stated that detainees must be treated better than convicts. See, e.g., O’Bryan v. County of Saginaw, 437 F. Supp. 582, 595 (E.D. Mich. 1977); Moore v. Janing, 427 F. Supp. 567, 574 (D. Neb. 1976) (dictum); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 686 (D. Mass. 1973), aff’d, 494 F.2d 1196 (1st Cir.), cert. denied, 419 U.S. 977 (1974); Smith v. Sampson, 349 F. Supp. 268, 272 (D.N.H. 1972). This rule was questioned, however, in Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978). The court held that the rule was not “conclusive,” reasoning that in many situations a fair comparison between detainees and convicts cannot be made either because they pose significantly different security risks, id. at 371, or because they are housed in different facilities. Id. at 573, 575.

A recent example of a court’s inability to draw this distinction is Bell v. Manson, 590 F.2d 1224 (2d Cir. 1978). Two judges, on a three-judge panel, voted to reverse the lower court because the trial judge had applied the rational basis test in assessing a jail’s practice of strip searching pretrial detainees returning from outside visits. See id. at 1225. They held that Wolfish v. Levi, 573 F.2d 118, 131 (2d Cir.), cert. granted sub nom. Bell v. Wolfish, 99 S. Ct. 76 (1978) (No. 77-1829), required that such searches be justified by compelling necessity, see Bell v. Manson, 590 F.2d at 1226, the implication being that the procedure did not inhere in confinement. Judge Lumbard, dissenting, took the opposite view:

In Wolfish . . . we did not rule out all routine strip searches . . .

. . . [I]t is obvious that the safety of all persons incarcerated in [the Bridgeport Community Correctional Center], as well as the safety of prison personnel, requires some search of prisoners returning to prison after they have been in contact with others in connection with court appearances or
Although the *Wolfish* court called attention to this problem, it proposed no criteria to be used by trial courts in determining which conditions inhere in confinement. In fact, the court resolved many of the issues before it on appeal without referring to the standard of review it was applying. Judging from the only two issues obviously resolved by the rationality test—the propriety of the trial judge’s orders that detainees not be held for more than sixty days\(^3\) and that they be permitted to wear their own clothes\(^4\)—it seems possible that the "inhere in confinement" formula is merely a labelling device designed to free Second Circuit courts from resolving issues they consider too trivial for judicial consideration. If so, the *Wolfish* version of the strict scrutiny rule is functionally identical to the now questionable majority rule of blanket strict scrutiny; it simply incorporates the requirement that an issue be significant before it warrants strict scrutiny.

C. **The *Wolfish* Rule As an Unnecessary Application of Strict Scrutiny**

A strict scrutiny standard of review is not necessary to achieve a desirable level of protection for detainees. Since the traditional rational relation test is perceived as offering minimal protection from oppressive regulation,\(^1\) it is understandable that a majority of courts have preferred a standard of review that explicitly calls for a high level of protection. The fear that the *Feeley* rule neglects the substantive rights of detainees, however, is unfounded.

The *Feeley* court recognized that the state has a single legitimate...
interest in restraining detainees: assuring their presence at trial.\textsuperscript{142} Although this interest encompasses reasonable security measures,\textsuperscript{143} the First Circuit Court of Appeals has held, in a post-\textit{Feeley} decision, that it does not include administrative convenience.\textsuperscript{144} Rehabilitation and deterrence are also clearly not within the state's legitimate interest in assuring presence at trial.\textsuperscript{145} Finally, it is beyond question that punishment of detainees is considered a denial of due process. Thus, under \textit{Feeley}, conditions that are inhumane or "shock the conscience" are obviously unlawful,\textsuperscript{146} as are conditions that are materially worse for detainees than similarly situated convicts.\textsuperscript{147} This extraordinary narrowing of legitimate interests the state may proffer in support of regulations affecting detainees elevates the \textit{Feeley} test to an intermediate level of judicial scrutiny. The court's selection of the rationality standard is, therefore, not outcome-determinative in favor of the state. This observation is borne out by existing law. The history of the minority rule, which \textit{Feeley} epitomizes, is replete with instances of jail regulations being found irrational.\textsuperscript{148}

\section*{VI. THE PUNITIVE INTENT TEST}

A problem with the \textit{Feeley} rule is that courts may apply it as though it were a minimum rationality standard. Since the \textit{Feeley} rule's superiority is conditioned on the fact that it grants detainees some measure of heightened protection, it is desirable that courts more explicitly state the contours of this unique standard of rationality.

\textsuperscript{142} 570 F.2d at 368-69.
\textsuperscript{143} \textit{Id.} at 369; see note 85 supra and accompanying text.
\textsuperscript{144} DiMarzo v. Cahill, 575 F.2d 15, 20 (1st Cir.) (jail ordered, by court applying \textit{Feeley} standard, to hire sufficient personnel to provide adequate conditions), \textit{cert. denied}, 99 S. Ct. 312 (1978).
\textsuperscript{145} \textit{See note 87 supra.}
\textsuperscript{146} \textit{It is impossible to conceive of situations where treatment so cruel or barbaric as to violate the eighth amendment if visited upon a sentenced prisoner would satisfy a detainee's due process rights.} 570 F.2d at 370.
\textsuperscript{147} \textit{See discussion of \textit{Feeley} in note 137 supra.}
\textsuperscript{148} See DiMarzo v. Cahill, 575 F.2d 15, 20 (1st Cir.) (district court's order that additional prison staff be hired may be affirmed even under a standard less rigorous than strict scrutiny), \textit{cert. denied}, 99 S. Ct. 312 (1978); Feeley v. Sampson, 570 F.2d 364, 372 (1st Cir. 1978) (regulation allowing detainee visitation "at all reasonable times" unlawful since it gives jail administrators arbitrary control, on an ad hoc basis, over visitation); Duran v. Elrod, 542 F.2d 998, 1000 (3d Cir. 1976) (district court erred in dismissing complaint alleging lack of visiting privileges, lack of sufficient telephones, and an inadequate opportunity for exercise and recreation, since these deprivations were not necessarily reasonable in relation to the state's sole purpose of assuring detainees' presence at trial); United States \textit{ex rel. Tyrrell v. Speaker,} 535 F.2d 823, 827 (3d Cir. 1976) (state violated due process clause by arbitrarily imposing materially greater restrictions on detainees than on convicted prisoners in same facility).
This can be accomplished by conducting the rationality analysis in terms of "punitive intent." Since the basic issue in most cases brought by detainees is whether they are being punished rather than merely confined, it can be said that the conditions of pretrial detention are reasonable regulatory measures so long as they do not amount to punishment. The punitive intent doctrine is eminently suited to such a substantive due process analysis of detainee complaints.

In determining whether a regulation constitutes punishment, the Supreme Court has looked for "unmistakable evidence of punitive intent." This evidence may be subjective: "[w]hether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation . . . ." In Kennedy v. Mendoza-Martinez, the Court identified objective criteria that indicate whether punitive intent exists:

- Whether the sanction involves an affirmative disability or restraint,
- whether it has historically been regarded as a punishment,
- whether its operation will promote the traditional aims of punishment—retribution and deterrence,
- whether an alternative purpose to which it may rationally be connected is assignable for it, and
- whether it appears excessive in relation to the alternative purpose assigned . . . .

Under the Kennedy test, a regulation is not punishment simply because it imposes an affirmative disability or restraint. Whether a condition of confinement has historically been considered punishment may, however, be determinative. The Kennedy test does not bind courts to uphold regulations simply because they bear some minimally rational relation to a legitimate state purpose. A court is free to decide that a regulation is excessive even though minimally rational.

The punitive intent doctrine provides an explanation of the Supreme Court's decision in McDonald v. Board of Election.

152. Id. at 168-69 (footnotes omitted).
153. "If the statute imposes a disability for the purpose of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose." Trop v. Dulles, 356 U.S. 86, 96 (1958) (plurality) (footnote omitted), cited in Kennedy v. Mendoza-Martinez, 372 U.S. at 170.
154. See Wong Wing v. United States, 163 U.S. 228, 237-38 (1896) (detained aliens awaiting deportation may not be put to hard labor since it has historically been treated as an "infamous punishment" for which conviction of a crime is the due process prerequisite).
Commissioners,\textsuperscript{155} in which a statute was held to be rational although it denied detainees the opportunity to obtain absentee ballots.\textsuperscript{156} In Illinois, prior to the enactment of the statute, certain classes of people were unable to obtain absentee ballots. The statute extended absentee voting privileges to many of them, but not to detainees. Clearly, the statute was intended to be ameliorative, not punitive; it was in the nature of a voting reform.\textsuperscript{157} The McDonald Court held that the reform's failure to cover every possible beneficiary was not grounds for reversal\textsuperscript{158} absent a showing of punitive intent.

The punitive intent doctrine is well suited to deciding issues that do not easily lend themselves to resolution by a more generalized statement of the rationality rule. For example, lower federal courts have reached conflicting results on such issues as whether detainees may have contact visits,\textsuperscript{159} or whether jails may subject detainees to strip searches\textsuperscript{160} after they return from court appearances or other outside visits. These decisions may be reconciled utilizing the Kennedy "excessiveness" criteria.

Undoubtedly, denying detainees contact visits bears some minimally rational relationship to the state's interest in jail security. In many jails, however, such a denial would be an excessive reaction to a minor problem.\textsuperscript{161} On the other hand, such a denial might not be

\begin{thebibliography}{99}
\bibitem{155} 394 U.S. 802 (1969).
\bibitem{156} See notes 129-34 supra and accompanying text.
\bibitem{157} See 394 U.S. at 809-11. The primary purpose of the challenged statute was to extend absentee voting privileges to additional classes of persons. See id. at 803-04; note 130 supra.
\bibitem{158} [A] legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' . . . and a legislature need not run the risk of losing an entire remedial scheme simply because it failed . . . to cover every evil that might conceivably have been attacked. 394 U.S. at 809 (citation omitted).
\bibitem{159} Compare Miller v. Carson, 563 F.2d 741, 748-49 (5th Cir. 1977) (contact visits permitted), with Feeley v. Sampson, 570 F.2d 364, 373 (1st Cir. 1978) (contact visits not permitted).
\bibitem{160} Compare Wolfish v. Levi, 573 F.2d 118, 131 (2d Cir.), cert. granted sub nom. Bell v. Wolfish, 99 S. Ct. 76 (1978) (No. 77-1228) (strip search may not include genital or anal inspection unless there is probable cause to believe the inmate is concealing contraband), and Black v. Amico, 387 F. Supp. 88, 91 (W.D.N.Y. 1974) (strip search of pretrial detainee's visitor is unlawful where no real suspicion of introducing contraband exists), with Bell v. Manson, 427 F. Supp. 445 (D. Conn. 1976) (practice of strip and rectal search is reasonably designed to support security and internal order at the jail), rev'd, 590 F.2d 1224 (2d Cir. 1978), and Giampetruzzi v. Malcolm, 406 F. Supp. 836, 844 (S.D.N.Y. 1975) (not unreasonable to strip search pretrial detainees who have been classified as security risks).
\bibitem{161} See Miller v. Carson, 563 F.2d 741, 748-49 & n.9 (5th Cir. 1977) (contact visits permitted when defendant failed to present direct evidence of alleged threats to jail security).
\end{thebibliography}
excessive in an older jail with minimal security arrangements and a serious contraband problem. The same analysis applies to strip searches. This practice has been disallowed when the record discloses it is of little demonstrable utility and has the effect of humiliating those who must submit to it. But it has been argued that the practice is reasonable where the element of overt punitive intent is missing and the security interest is valid.

Using the punitive intent test to determine the rationality of jail regulations under the Feeley standard should lead to more consistent judicial review of detainee complaints. Moreover, its use should allay the fear that the Feeley rational basis standard would not offer detainees adequate protection from administrative excesses.

VII. CONCLUSION

Recent Supreme Court decisions have created considerable confusion regarding the standard of judicial review appropriate when pretrial detainees challenge the administrative decisions of their jailers. Of the possible standards considered in this Note, the best is that the decisions of jail administrators need be only rationally related to the state’s interest in assuring detainees’ presence at trial, unless such decisions significantly interfere with a fundamental liberty. If such significant interference is present, the decisions must pass the strict scrutiny test. The danger that lower courts may mistakenly construe this rule as requiring only minimum rationality can be mitigated by incorporating the punitive intent test as the standard’s measure of rationality. A rationality standard, so understood, would offer detainees heightened protection while guarding against the dangers of overreaching strict scrutiny.

162. See Feeley v. Sampson, 570 F.2d 364, 367, 373 (1st Cir. 1978).
Addendum

As this issue went to print, the Supreme Court announced its decision in *Bell v. Wolfish*, 47 U.S.L.W. 4507 (May 14, 1979). In *Bell*, both the majority and Mr. Justice Stevens in dissent concluded that it was inappropriate for courts to subject routine conditions of pre-trial confinement to strict scrutiny. Instead, the Court stated, the proper inquiry is whether such conditions amount to punishment. It adopted the *Kennedy v. Mendoza-Martinez* test as the standard for determining whether such conditions amount to punishment or are merely valid regulatory restraints.

*See notes 149-60 supra and accompanying text.*