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Force-Feeding Hunger Striking Prisoners: A Framework for Analysis

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NOTES

FORCE-FEEDING HUNGER-STRIKING PRISONERS: A FRAMEWORK FOR ANALYSIS*

INTRODUCTION

The hunger strike[1] has proven a potent tool to effect change. Mahatma Gandhi fasted fourteen times between 1918 and his death in 1948 while leading India's struggle for independence from Great Britain.[2] In 1981, dissident academician Andrei Sakharov and his wife fasted and won their daughter-in-law's freedom from internment in the Soviet Union.[3] Hunger strikes have also been a means of protest in the United States.[4] Until 1982, however, no reported United States decision purported to define a hunger striker's rights or the countervailing state interests.[5] Last year, three state courts examined these issues.[6] All three cases dealt with prison officials attempting to force-feed a hunger-striking prisoner.[7]

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1. A hunger strike is defined as the action of a person who refuses to eat anything or enough to sustain life in order to obtain compliance with his demands. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1103 (1966). A person who cannot eat for medical reasons is not on a hunger strike. For the purposes of this Note, and unless otherwise stated, a hunger striker is a person of sound mind and adult years. For a summary of law dealing with the threshold issue of competency, see generally Sharpe & Hargest, *Lifesaving Treatment for Unwilling Patients*, 36 FORDHAM L. REV. 695, 696-97 (1968).

2. *Hunger—Again a Tool for Protest*, U.S. NEWS & WORLD REP., May 4, 1981, at 13. *See* State *ex rel.* White v. Narick, 292 S.E.2d 54, 58 (W. Va. 1982) (court recognized the efficacy of Ghandi's hunger strike).

3. *Russians' Way Out—Starve for Freedom*, U.S. NEWS & WORLD REP., July 5, 1982, at 65. In 1982, following Sakharov's example, eight Russians attempted starvation diets with mixed results. Four quit their fasts winning nothing. The Soviets let one go, two others were promised visas and one case was left undecided. *Id.*

4. *See, e.g., In re* Sessions, 672 F.2d 564, 567 (5th Cir. 1982) (prisoners' hunger strike to protest jail conditions); Phillips v. Bureau of Prisons, 591 F.2d 966, 969 (D.C. Cir. 1979) (eleven inmate hunger strikers were removed from segregation and placed in hospital); United States v. Bennet, 539 F.2d 45, 52 n.8 (10th Cir. 1976) (prisoner on hunger strike for 22 days). *See also Sinking a Name*, TIME, May 10, 1982, at 17 (hunger strike successfully used to have name of submarine changed); *Hunger—Again a Tool for Protest, supra* note 2 (report of various uses of hunger strikes).

5. There were, however, unreported decisions which discussed these issues. *See* Boyce v. Petrovsky, No. 81-3322-CV-S-WRC (W.D. Mo. Sept. 1981); *In re* Thomas Clauso, No. L33141-81 (Superior Ct. N.J., Mercer County Feb. 1982); White v. Borden Kircher, No. 81-C-422N (Cir. Ct. W. Va., Marshall County Dec. 1981). *Cited in* Von Holden v. Chapman, 87 A.D.2d 66, ___, 450 N.Y.S.2d 623, 626 (1982).

6. Zant v. Prevatte, 248 Ga. 832, 286 S.E.2d 715 (1982); Von Holden v. Chapman, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982); State *ex rel.* White v. Narick, 292 S.E.2d 54 (W. Va. 1982).

7. The term force-feeding requires definition. Only one inmate hunger strike case mentions the medical procedures used to prevent death. That case authorized the state's use of feeding by intravenous catheterization or by a nasal gastric tube. Von Holden v. Chapman, 87 S.D.2d at ___, 450 N.Y.S.2d at 625. This note uses the term to identify an undesired

These recent cases do not satisfactorily resolve whether force-feeding prisoners is constitutionally permissible. Rather, the divergent decisions and rationale of these cases disclose uncertainties prevalent in this newly litigated area. Only one of these courts classified the hunger striker's behavior as suicidal.[8] Another court held in the prisoner's favor and found that the prisoner's privacy rights overcame any state interest in preserving life.[9] The third court addressed the same factors, but found the inmate status tipped the balance to the state.[10] Constitutional analysis of the bodily intrusions in force-feeding is peculiarly absent from these opinions.

This note will develop an analytical framework for resolving prisoner hunger strike controversies. To facilitate this development, the fact patterns and modes of analysis in the three 1982 cases will be used. The note will then explore each of the state interests pertinent to a prison hunger strike. The individual's constitutional rights in preventing a forced feeding will be examined in juxtaposition to the state interests. Results from the interest/rights dichotomy analysis will form a working framework for aiding future decisions.

The Principal Cases

Zant v. Prevatte[11] was the earliest of the principal cases. A state official petitioned the Georgia courts for permission to examine medically and, if necessary, to force-feed a fasting prisoner.[12] The inmate initiated his hunger strike to attract attention to his transfer request.[13] The prisoner was mentally competent[14] and had no dependents.[15] The state argued that its compelling interests in protecting prisoners' safety and in preserving human life should override the prisoner's privacy rights.[16] The Georgia Supreme Court found these state interests insufficient to displace the prisoner's privacy rights.[17] These

artificial feeding such as those identified by the court above. *See infra* notes 236-47 and accompanying text.

8. Von Holden v. Chapman, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982).

9. Zant v. Prevatte, 248 Ga. 832, 286 S.E.2d 715 (1982).

10. State *ex rel.* White v. Narick, 292 S.E.2d 54 (W. Va. 1982).

11. 248 Ga. 832, 286 S.E.2d 715 (1982).

12. *Id.* at 833, 286 S.E.2d at 716. At the time of the suit doctors predicted that the prisoner would die within three weeks if the fast continued. *Id.* at 832, 286 S.E.2d at 715.

13. *Id.* at 833, 286 S.E.2d at 716. The prisoner felt his life was in danger as long as he remained in the Georgia Prison System. The prisoner believed that there was an organized plan to kill him which he called a "racial contract." He had requested a transfer to North Carolina where he felt he would be safe. *Id.*

14. *Id.* at 834, 286 S.E.2d at 717. Implicit in the Georgia court's recognition of the prisoner's sanity is a basic, yet vitally important, concept: a person who is otherwise mentally competent should not be considered incompetent merely because he has undertaken a hunger strike.

15. *Id.*, 286 S.E.2d at 716. The importance of this factor is discussed *infra* notes 91-94 and accompanying text.

16. 248 Ga. at 834, 286 S.E.2d at 716. The court found the state's interest in the prisoner's life illogical since the prisoner had previously been under a death sentence. *Id.*

17. *Id.*, 286 S.E.2d at 717. In reaching this conclusion the court relied on three cases that dealt with patients who had become seriously ill yet were allowed to refuse life-saving procedures. Lane v. Candura, 6 Mass. App. Ct. 377, 376 N.E.2d 1232 (1978); *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785 (1978); *In re* Yetter, 62 Pa. D. & C.2d 619 (1973). The

rights were held not to be relinquished merely because of inmate status, thus a prisoner may competently choose to fast as a means of expression.[18]

In *State ex rel. White v. Narick*,[19] a hunger-striking prisoner had lost over one hundred pounds[20] in his protest of prison conditions.[21] The state asserted its interests in the preservation of life as the basis for requesting permission to force-feed.[22] West Virginia's highest court initially recognized that the fast implicated the prisoner's protected rights of privacy and free expression.[23] Incarceration, however, severely modified these rights. The court concluded that the state's interest in preserving life was superior to the prisoner's constitutional rights.[24]

The third principal case was *Von Holden v. Chapman*.[25] Mark Chapman, imprisoned for killing John Lennon,[26] declared he would starve himself to death.[27] His purpose was to publicize the plight of starving children.[28] After fasting for seven days Chapman was transferred to a psychiatric center because examining physicians found him mentally ill based upon his desire to kill himself.[29] A New York appellate court thus classified Chapman's behavior as suicidal.[30] The court found neither an inmate's rights of privacy nor free expression sufficient to overcome the state's interest in preventing suicide[31] and

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Zant court found the circumstances in these cases similar to those of a hunger striker. 248 Ga. at 832, 286 S.E.2d at 717.

18. 248 Ga. at 832, 286 S.E.2d at 717.

19. 292 S.E.2d 54 (W. Va. 1982).

20. *Id.* at 55. The court stated that although the prisoner had lost in excess of 100 pounds he had yet to suffer serious physical deterioration. *Id.*

21. *Id.* Shortly after the case was argued, the prisoner ended his fast. After working as the prison's chief cook for four months, he gained back 50 pounds. *Id.* at 55 n.1.

22. *Id.* at 58.

23. *Id.*

24. *Id.* The court examined the same line of cases as did the *Zant* court, yet found them unconvincing. *See* Lane v. Candura, 6 Mass. App. Ct. 377, 376 N.E.2d 1232 (1978); *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785 (1978); *In re* Yetter, 62 Pa. D. & C.2d 619 (1973). In its effort to distinguish refusal of medical treatment from a hunger strike, the court cited J. JONES, FROM HERE TO ETERNITY (1951); D. MORRIS, THE NAKED APE: A ZOOLOGIST'S STUDY OF THE HUMAN ANIMAL (1967), and J. UPDIKE, RABBIT IS RICH (1982). 292 S.E.2d at 58.

25. 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982).

26. John Lennon was the famous musician who was once a member of the Beatles. The murder made international headlines.

27. 87 A.D.2d at ___, 450 N.Y.S.2d at 625. When prison officials sought a court order authorizing force-feeding, Chapman had not eaten for 22 days. Although he was not in any imminent danger of death, the court found judicial intervention necessary to prevent irreversible damage. *Id.*

28. *Id.*

29. *Id.* Chapman had frequently expressed a desire to commit suicide. The physician's finding of mental illness was the basis of the transfer. Chapman, however, was considered competent and was fully aware that his refusal to eat would result in death. *Id.*

30. *Id.* The court summarily reached this conclusion. No attempt was made to define suicide and then apply the facts of the case to the definition.

31. *Id.* at ___, 450 N.Y.S.2d at 626-27. In regard to the privacy right, the court examined treatment refusal cases similar to those examined in *Zant* and *White*. *See supra* notes 17 & 24. The *Chapman* court focused on language in those cases recognizing a suicide prevention interest above and beyond interests in preserving life. By classifying Chapman's behavior as

affirmed an order authorizing Chapman's force-feeding.[32]

THE STATE'S INTERESTS

The principal cases[33] raised several justifications for force-feeding hunger-striking prisoners. They include the state's interest in suicide prevention, the preservation of life, maintaining order and security in prisons, and the state's obligation to protect the health and welfare of persons in its custody. Each of these potential state interests will be examined below.

The State's Interest in Suicide Prevention

In *Chapman*, the court found the state's interest in suicide prevention controlling.[34] The court, however, failed to explain why Chapman's behavior was suicidal.[35] Examining the definitions of suicide assists in justifying the court's characterization. It also reveals why only the *Chapman* court used the suicide-determinative approach when ruling on an inmate hunger strike.

The common law defined suicide as the intentional,[36] voluntary,[37] and positive[38] taking of one's own life.[39] Applying this definition requires two inquiries. First, did the individual intend to cause his own death? Second, did the individual initiate the act leading to death?[40] Both questions should be answered affirmatively to find suicide.[41]

Some courts relying on criminal law have interpreted the intent require-

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suicidal, the court was able to distinguish seriously ill people who refuse treatment from the hunger striker. *Id.* at ___, 450 N.Y.S.2d at 626.

The court quickly disposed of Chapman's first amendment claims, finding that any free speech rights available to a prisoner are limited by legitimate penal concerns. Suicide prevention, the court stated, is one such concern. *Id.* at ___, 450 N.Y.S.2d at 627.

32. *Id.*

33. The term "principal cases" is used here and throughout this note as a shorthand reference to those cases outlined in the previous section: *Zant, White,* and *Chapman.*

34. 87 A.D.2d at ___, 450 N.Y.S.2d at 627. *See supra* note 31.

35. 87 A.D.2d at ___, 450 N.Y.S.2d at 625. *See also supra* note 30.

36. *See* Stiles v. Clifton Springs Sanitarium Co., 74 F. Supp. 907, 909 (W.D.N.Y. 1947); Aetna Life Ins. Co. v. McLaughlin, 370 S.W.2d 229, 235 (Tex. Civ. App. 1963), *rev'd*, 380 S.W.2d 101 (1964).

37. *See* Fleetwood v. Pacific Mut. Life Ins. Co., 246 Ala. 571, 575, 21 So. 2d 696, 700 (1945); Muzenick v. Grand Carniolian Slovenian Catholic Union, 154 Kan. 537, 541, 119 P.2d 504, 508 (1941).

38. *See* Edwards v. Traveler's Life Ins. Co., 20 F. 661 (N.D.N.Y. 1884), *aff'd*, 122 U.S. 457 (1887); Parker v. Aetna Life Ins. Co., 389 Mo. 42, 62, 232 S.W. 708, 713-14 (1921).

39. *See* Bigelow v. Berkshire Life Ins., 93 U.S. 284, 287 (1876); Connecticut Mut. Life Ins. v. Groom, 86 Pa. 92, 97 (1878).

40. *See* Note, *Suicide and the Compulsion of Lifesaving Medical Procedures: An Analysis of the Refusal of Treatment Cases*, 44 BROOKLYN L. REV. 285, 295-96 (1978). The traditional definition of suicide was based on the act's criminality. *See infra* note 55 and accompanying text. These inquiries focus on the two basic elements of any crime. The first question looks for intent, the *mens rea*. The second is searching for a criminal act, the *actus reus*. *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW 175-76 (1972).

41. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 743 n.11, 370 N.E.2d 417, 426 n.11 (1977). *See* Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1, 17-18 (1975).

ment as an objective test.[42] Individuals "intend" the natural and probable consequences of their acts.[43] A voluntary hunger strike would meet this objective test, since the natural and probable consequence of not eating is death.[44]

The intent requirement has also been interpreted as a subjective test that focuses on what the actor has an actual desire to do, rather than on the consequence of his actions.[45] Some courts dealing with blood transfusions to Jehovah's Witnesses have adopted this approach.[46] Jehovah's Witnesses believe blood transfusions are religiously forbidden even when necessary to save one's life.[47] An objective intent test for suicide would be met when the probable consequence of refusing the blood is death. To avoid this result, courts have applied a subjective test that instead focused on the patient's conscious objective.[48] The necessary intent was lacking because the patient's wish was not to die but only to follow his religious precepts.[49] Under a subjective intent standard, the hunger-striking prisoners in the principal cases may not be suicidal. In *Chapman*, the prisoner declared that he would starve himself to death for his cause.[50] Chapman's conscious objective was a starvation-caused death thereby meeting even the subjective intent test. In the other two cases, however, the conscious goal was to obtain favorable treatment from the prison.[51] In each, the prisoner intended to amplify his request through the slow deterioration of his body,[52] but there was no desire to die should prison officials meet his demands.[53] The subjective intent test would not be met in those cases. The sub-

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42. *See, e.g.*, Stiles v. Clifton Springs Sanitarium Co., 74 F. Supp. 907, 909 (W.D.N.Y. 1947); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 279, 281-82, 229 A.2d 670, 672-73 (1971).

43. Reynolds v. United States, 98 U.S. 145, 167 (1878).

44. Using the objective test, religious or ideological motivation has no effect on the finding of the necessary intent. *Id. See* Eicher v. Dillon, 73 A.D.2d 31, 451, 426 N.Y.S.2d 517, 533 (1980) (discussing homicide and involuntary euthanasia), *modified*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981).

45. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 743 n.11, 370 N.E.2d 417, 426 n.11 (1977) (citing Byrn, *supra* note 41, at 17-18); Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228, 255 (1973).

46. *See In re* President of Georgetown College, 331 F.2d 1000, 1009 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *In re* Osborne, 294 A.2d 372, 374 (D.C. 1972).

47. This belief is based on passages from the Bible, *Leviticus* 3:17. *See generally* Ford, *Refusal of Blood Transfusions by Jehovah's Witnesses*, 10 CATH. LAW. 212 (1964).

48. 331 F.2d at 1009, 294 A.2d at 374.

49. In *Georgetown College*, the court stated: "The Gordian knot of this suicide question may be cut by the simple fact that Mrs. Jones did not want to die. . . . Death to Mrs. Jones, was not a religiously-commanded goal, but an unwanted side effect of a religious scruple." *Id.*

50. 87 A.D.2d at ___, 450 N.Y.S.2d at 625.

51. In *Zant* the prisoner wanted a transfer to another state's prison system. 248 Ga. at 833, 286 S.E.2d at 716. The *White* court alluded to a protest about prison conditions. 292 S.E.2d at 55.

52. Although this was not explicitly stated in these cases it is mentioned as one of the essential components of a successful hunger strike. *See The Irish Hunger Strike*, 110 THE NATION 540 (1920).

53. *See* Dooley-Clarke, 11 *Medical Ethics and Political Protest*, HASTINGS CENTER REP. 5 (1981). "Death by starvation is not the stated objective of the hunger strike, but it is a necessary component." *Id.* at 6.

jective intent standard is one explanation why *Chapman* is the only principal case to find the hunger striker suicidal.

A court may validly apply the subjective intent test when evaluating the suicidal aspects of a hunger strike. The objective test is a product of the criminal law,[54] but American jurisdictions have rarely accepted the English policy[55] of providing criminal sanctions against suicides.[56] Nevertheless, American courts have adopted the criminal law intent test in at least one area of civil suicide litigation, life insurance.[57] Courts often find the the presumption of suicide implicit in the objective test necessary to protect insurance carriers, because once an insured has died there may not be any indication of his true intent.[58] This rationale does not obtain in a hunger strike, as the faster is alive and communicates his motivations throughout the strike.[59] The courts need not resort to the criminal law's objective test in civil litigation when the subjective intent is available.[60]

The second part of the traditional suicide test is met by finding a voluntary, positive act of self-murder.[61] Is a hunger strike such a positive act? A hunger striker might assert that his fast is an omission rather than a commission of an

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54. Reynolds v. United States, 98 U.S. 145, 167 (1878).

55. Under English common law, suicide and attempted suicides were clearly crimes. *See* Burnett v. People, 204 Ill. 208, 222, 68 N.E. 505, 510 (1903). "By the English common law suicide was a felony, and the punishment for him who committed it was internment in the highway with a stake driven through the body, and the forfeiture of his lands, goods, and chattels to the king." *See also* 4 W. BLACKSTONE, COMMENTARIES 189-90 (suicide in England once ranked among the highest crimes). Suicide is no longer a crime in Great Britain. *See* Suicide Act of 1961, 9 & 10 Eliz. 2, ch. 60, § 1, *reprinted in* PUBLIC GENERAL ACTS AND MEASURES OF 1961, 766 (neither suicide nor complicity therein shall be considered a crime); Zellick, *The Forcible Feeding of Prisoners: An Examination of the Legality of Enforced Therapy*, 1976 PUB. LAW. 153, 162.

56. Burnett v. People, 204 Ill. 208, 222, 68 N.E. 505, 510 (1903). *See also* Commonwealth v. Dennis, 105 Mass. 162, 162-63 (1870) (although prohibited by law, attempted suicide is unpunishable); State v. Willis, 255 N.C. 473, 476, 121 S.E.2d 854, 856 (1961) (attempted suicide is criminal but unpunishable). *But see* Allen v. State, 102 Tex. Crim. 478, 277 S.W. 1080, 1083 (1925) (one giving poison to person planning suicide, knowing the suicide's intent, is guilty of murder). Also noteworthy is the Model Penal Code's view: "While attempted suicide is still viewed as [criminal] in a few states, we think it clear that this is not an area in which the penal law can be effective and that its intrusion on such tragedies is an abuse." MODEL PENAL CODE § 201.5 comment 1 (Tent. Draft No. 9, 1959), *quoted in* Comment, *The Punishment of Suicide—A Need for Change*, 14 VILL. L. REV. 463, 471 (1969).

57. *See, e.g.*, McReynolds v. New York Life Ins. Co., 122 F.2d 895 (8th Cir. 1941), *cert. denied*, 314 U.S. 700 (1942); Lincoln Petroleum Co. v. New York Life Ins. Co., 115 F.2d 73 (7th Cir. 1940); Union Cent. Life Ins. Co. v. Hollowell, 14 Ind. App. 611, 43 N.E. 277 (1896); Werber v. Guardian Life Ins. Co., 2 Tenn. App. 624 (1926).

58. *See* Note, *supra* note 40, at 307.

59. The hunger strike is an optimal for proving the true intent. Death from fasting is never quick, allowing time for the striker to be questioned and his motives analyzed. As seen in *Chapman*, a psychiatrist can testify as to his perception of the faster's true intent. *See supra* text accompanying note 29. *In re* Osborne, 294 A.2d 372, 374 (D.C. 1972) (judge went to hospital to speak with a dying Jehovah's Witness to discern his motivations for refusing blood).

60. *See* Note, *supra* note 40, at 307-08 (author makes the same argument regarding treatment refusal cases).

61. *See supra* cases cited in notes 36-39 and accompanying text.

act.[62] Judicial dicta and legal commentators, however, have observed that refusing food differs from an omission in the ordinary sense.[63] Eating is so normal and necessary that its cessation becomes an act in the usual sense of that term's usage. The volitional act inquiry, therefore, should be met in any hunger strike situation. Thus, the interpretation and application of the intent test determines whether a particular hunger strike meets the traditional suicide definition.[64]

The State's Interest in Preservation of Life

The state's police power encompasses the means to protect the health and safety of its citizens.[65] When a self-endangering activity also threatens the well-being of others, the state may interrupt that activity.[66] In the hunger strike cases,

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62. A few courts and commentators have found distinctions between omissions and commissions irrelevant when discussing suicide prevention. *See In re* President of Georgetown College, Inc., 331 F.2d 1000, 1009 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); Note, *Unauthorized Rendition of Lifesaving Medical Treatment*, 53 CAL. L. REV. 860 (1965). This position has been highly criticized. *See* Byrn, *supra* note 41, at 18; Riga, *Compulsory Medical Treatment of Adults*, 22 CATH. LAW. 105, 133 (1976).

63. Reynolds v. United States, 98 U.S. 145, 167 (1878) (referring to case of Regina v. Wagstaff, 10 Cox Crim. Cases 530 (1868)); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 581-82, 279 A.2d 670, 672-73 (1971); Byrn, *supra* note 41, at 18. *See also* Zellick, *supra* note 55, at 165 n.55.

64. The *Zant* court never used the term suicide in its opinion. The *White* court only mentioned the prevention of suicide interest in a footnote. "Prevention of suicide is a tenet of our society, but inroads are being made upon it by terminally ill patients who refuse medical treatment." 292 S.E.2d at 58 n.3. The refusal of the courts to discuss suicide is perhaps explained by the fact that hunger strikes are observably different from the usual suicide which involves an impulsive manifestation of mental disorder. *See* Bergler, *Suicide: Psychoanalytic and Medicolegal Aspects*, 8 LA. L. REV. 504 (1948); Dooley-Clarke, *supra* note 53, at 5; Greenberg, *Involuntary Psychiatric Commitments to Prevent Suicide*, 49 N.Y.U. L. REV. 227, 233 (1974).

The state's suicide prevention interest is paternalistic. The competent and rational hunger strikers in *Zant* and *White* had no need for this paternalism. *See* Dooley-Clarke, *supra* note 53. The author reports a psychiatrist's view that nothing is achieved by equating hunger strikes with attempted suicides. The latter is a result of mental disturbance. The hunger striker, however, uses death as a part of a pre-conceived strategy. *Id.* at 5. Some courts and commentators proclaim the traditional definition of suicide obsolete or inapplicable. *See* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 743 n.11, 370 N.E.2d 417, 426 n.11 (1977); *In re* Quinlan, 70 N.J. 10, 52, 355 A.2d 647, 670, *cert. denied*, 429 U.S. 922 (1976); Riga, *supra* note 62, at 134-35; Note, *supra* note 40, at 312. *See infra* notes 78-83 and accompanying text.

65. *See* Hynes v. Mayor of Oradell, 425 U.S. 610, 619 (1976) (police power permits reasonable regulation for public safety); Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976) (state retains "broad power" to protect public health).

66. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

> There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government . . . to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times . . . be subjected to such restraint . . . as the safety of the general public may demand.

as well as in other contexts,[67] the state has asserted an interest in preserving life even with activities which imperil only the actor.[68] This preservation of life interest is rooted in various bases: the fourteenth amendment, general notions of public good, and the *parens patriae* doctrine.[69]

The fourteenth amendment's guarantee to protect life[70] is arguably a mandate for the state to use necessary means to preserve citizens' lives.[71] Because other constitutional protections may be intelligently waived,[72] a competent hunger striker apparently may waive the protection of his own life.[73]

Notions of general public good often underlie the state's preservation of life claims but are rarely discussed by courts.[74] The interest in public good is implicit in some judicial reaction to motorcycle-helmet law challenges. Most courts faced with these suits have found the state's right to prevent purely self-endangering activity irrelevant or insufficient.[75] At least three courts, however,

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Id. at 29. *See also* Bogue v. Faircloth, 316 F. Supp. 486, 489 (S.D. Fla. 1970) (motorcycle helmet laws constitutional because of possible danger to others on the road).

67. *See, e.g.,* Rutherford v. United States, 438 F. Supp. 1287 (W.D. Okla. 1977) (state trying to prevent access to Laetrile), *remanded on other grounds,* 582 F.2d 1234 (10th Cir. 1978), *rev'd and remanded on other grounds,* 616 F.2d 455 (10th Cir. 1980); State v. Eitel, 227 So. 2d 489, 490 (Fla. 1969) (motorcycle helmets must be worn to preserve life of cyclist); State *ex rel.* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975) (religious group forbidden to handle snakes and drink strychnine), *cert. denied,* 424 U.S. 954 (1976).

68. Zant v. Prevatte, 248 Ga. 832, 833, 286 S.E.2d 715, 716 (1982); Von Holden v. Chapman, 87 A.D.2d 66, ___, 450 N.Y.S.2d 623, 624 (1982); State *ex rel.* White v. Narick, 292 S.E.2d 54, 58 (W. Va. 1982).

69. The principal cases do little to identify these bases. The most explicit statement by any of the three courts was: "A state must preserve human life, a concern at the very core of civilization." 292 S.E.2d at 58 (citation omitted).

70. U.S. CONST. amend. XIV, § 1 provides: "[N]or shall any State deprive any person of life . . . without due process of law. . . ."

71. *See* Delgado, *Euthanasia Reconsidered — The Choice of Death As an Aspect of the Right of Privacy,* 17 ARIZ. L. REV. 474, 482 (1975). Delgado theorizes that if the Supreme Court in Roe v. Wade, 410 U.S. 113 (1973), had found "personhood" in the fetus then abortion could be prohibited. An individual attempting to die could likewise be prohibited from extinguishment. Delgado, *supra,* at 482-83.

72. The fourteenth amendment protects against deprivation of property. It cannot be questioned, however, that a person may waive this protection and give his property away. *See* Delgado, *supra* note 78, at 483.

73. A court, however, may substitute its judgment for that of an incompetent person in determining the disposition of his property. *See* United States Fidelity & Guar. Co. v. Chambers, 204 Ark. 81, 160 S.W.2d 888 (1942). If a hunger striker is found incompetent, the court may then exercise its best judgment and protect his life.

74. This basis in essence applies a paternalistic social model to our current form of government. Under this model, it is the government's duty to play a positive role ensuring the security and welfare of the people as a whole. This interest in the whole of society legitimizes the use state's use of police power to prohibit people from engaging in activities hazardous only to themselves. *See generally* T. HOBBES, THE ELEMENTS OF LAW, NATURAL AND POLITIC (2d ed. 1969).

75. Some courts have held the laws unconstitutional as being beyond the scope of the the police power. *See, e.g.,* People v. Fries, 42 Ill. 2d 446, 250 N.E.2d 149 (1969); American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968), *overruled,* City of Adrian v. Poucher, 67 Mich. App. 133, 240 N.W.2d 298 (1976); State v. Betts, 21 Ohio Misc. 175, 252 N.E.2d 866 (1969). Most courts, however, have upheld such statutes as protecting other drivers from an injured motorcyclist. *See, e.g.,* Everhardt v. City of New Orleans, 253 La. 285,

have recognized the government's public interest allowing it to protect an individual from himself.[76] Implicitly, these courts reasoned that the government has a duty to ensure a productive and vital society. All persons form the societal whole, therefore, the viability of each individual is a matter of governmental concern.[77].

Whether this public interest sufficiently supports state action to save a hunger-striking prisoner's life is questionable.[78] General notions of societal benefit are a rather incorporeal foundation for the preservation of life interest.[79] This interest, like the suicide prevention interest is supported only by varying and subjective social and religious norms.[80] Indeed, the increasing number of cases where death has been competently chosen may manifest change in these underlying norms.[81] Furthermore, the courts' reasoning seems exceedingly narrow. It is a mistake to assume that the communal whole is always best

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217 So. 2d 400, *appeal dismissed,* 395 U.S. 212 (1969); Commonwealth v. Howie, 354 Mass. 769, 238 N.E.2d 373, *cert. denied,* 393 U.S. 999 (1968); State v. Krammes, 105 N.J. Super. 345, 252 A.2d 223 (per curiam), *cert. denied,* 54 N.J. 257, 254 A.2d 800 (1969).

76. State v. Eitel, 227 So. 2d 489, 490-91 (Fla. 1969) (state may preserve life of individual "for his own sake," for some "divinely ordained and humanely explicable purpose"); State v. Lee, 51 Hawaii 516, 518, 465 P.2d 573, 576 (1970) (state has valid interest in preventing threat to "the very fabric of society"); Bisenius v. Karns, 42 Wis. 2d 42, 51, 165 N.W.2d 377, 382 (dictum) (upheld statute on other grounds, but might have upheld it even if its only aim were to "protect persons against the consequences of their own actions"), *appeal dismissed,* 395 U.S. 709 (1969).

77. *See* Holden v. Hardy, 169 U.S. 366, 397 (1898); Delgado, *supra* note 71, at 491; Comment, State *ex rel.* Swann v. Pack: *Self Endangerment and the First Amendment,* 65 Ky. L.J. 195, 203 (1976).

78. Although the preservation of life interest is mentioned in *White* and *Chapman,* these courts did not rely on that factor. The *Chapman* court based its holding on the suicide prevention interest. 87 A.D.2d at ___, 450 N.Y.S.2d at 626. *See supra* note 31 and accompanying text. The *White* court's conclusion was that the preservation of life interest outweighs an inmate's rights. 292 S.E.2d at 58. The court then went on to state: "We cannot condemn fasting — Ghandi taught us about its force — as a way to secure change." *Id.* This observation, coupled with a statement concerning prisoners' use of hunger strikes to manipulate the system, *id.,* leads to the conclusion that the court has relied on prison concerns to allow force-feeding, not on the general notion of life preservation.

79. This is evidenced by the court's failure to discuss this basis, despite numerous citations to the preservation of life interest. *See, e.g., In re* President of Georgetown College, 331 F.2d 1010 (D.C. Cir. 1964); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971).

80. The religious norms are based in the concept of sanctity of life. The Biblical source is the commandment, "thou shalt not kill." *Exodus* 20:13. *See* Byrn, *supra* note 41, at 21. One author has commented that free-willed death goes against the sanctity of life because any unnecessary death cheapens it. Note, *supra* note 62, at 867. *But see* Cantor, *supra* note 45, at 244 (assertion that the sanctity of life is dependent on the ability to exercise free will).

Social norms can be traced to the English idea that a death deprived the King of loyal subjects. *See* Hales v. Petit, 75 Eng. Rep. 387, 400 (C.B. 1562). An American adaptation of this notion was stated by Thomas Jefferson: "[T]he care of human life and happiness, and not their destruction, is the first and only legitimate object of good government." 16 WRITINGS OF THOMAS JEFFERSON 310 (Lipscomb & Bergh 1903), *quoted in* Byrn, *supra* note 41, at 21. *But see supra* note 64.

81. *See, e.g.,* Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980); *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785 (1978); Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (1962). *In re* Yetter, 62 Pa. D. & C.2d 619 (1973).

served through the forced preservation of every individual's life. For example, the hunger strikes in *Zant* and *White* might appear self-serving. If these strikes were instead viewed as bringing to light prison practices of such insidiousness that they provoked a life-endangering protest,[82] it is then conceivable that the gains from effective hunger-striking could contribute more to society than would a single individual's continued existence.[83]

One other basis upon which the state may rely to support its preservation of life interest is its *parens patriae* role.[84] Under the *parens patriae* doctrine the state must intervene when necessary to protect individuals who cannot protect themselves.[85] The state has used this doctrine to prevent self-initiated death by mental incompetents[86] and children.[87] A few courts have equated prisoners with children and the insane so that medical treatment can be dispensed despite the prisoner's withholding consent.[88] At least one federal court has found, however, that the lack of prisoner consent to a medical procedure could be sufficient basis for an action against the prison.[89] This decision properly

82. This presupposes that the hunger strike attracts the attention of prison officials or governmental bodies who have the ability and desire to change any inhumane treatment of prisoners. For a description of the elements necessary for a politically successful hunger strike, see *The Irish Hunger Strike, supra* note 52. *See also Hunger — Again a Tool for Protest, supra* note 2 (recounting how inmates in Attica, N.Y., received better prison conditions as a result of the hunger strike).

83. The end of racial discrimination would certainly benefit society to a great extent. In 1963, 15 white anti-segregationists in a North Carolina jail fasted for prison reforms. Their demands were met. *Hunger — Again a Tool for Protest, supra* note 2. No one in that strike died. *Id.* If, however, the willing death of one of the strikers were necessary for their demands to be met, would it not still be possible to say that society realized a net gain?

84. *Parens patriae* literally means parent of the country. The doctrine refers to the state's right, as sovereign, to act as guardian of legally disabled persons. State of W. Va. v. Chas. Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir. 1971).

85. *See* Addington v. Texas, 441 U.S. 418, 426 (1979); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975); Note, *The Tragic Choice: Termination of Care for Patients in a Permanent Vegetative State,* 51 N.Y.U. L. REV. 285, 309 (1976).

86. *In re* President of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964); *In re* Schiller, 148 N.J. Super. 168, 372 A.2d 360 (1977); State Dep't of Human Serv. v. Northern, 563 S.W.2d 197 (Tenn. Ct. App. 1978). Most courts, however, that have found a patient competent to refuse life-saving treatment, reject state *parens patriae* assertions when incompetency sets in during the waning moments of life. *See* Holmes v. Silver Cross Hosp., 340 F. Supp. 125, 130 (N.D. Ill. 1972); *In re* Estate of Brooks, 32 Ill. 2d 361, 365-66, 205 N.E.2d 435, 442 (1965).

87. *See* People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, *cert. denied,* 344 U.S. 824 (1952); State v. Perricone, 37 N.J. 463, 181 A.2d 751, *cert. denied,* 371 U.S. 890 (1962). *See also* Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied,* 377 U.S. 985 (1964) (pregnant woman may not refuse necessary blood transfusion).

88. *See* Ramsey v. Ciccone, 310 F. Supp. 600 (W.D. Mo. 1970) (dictum). "Even though the treatment is unusually painful, or causes unusual mental suffering, it may be administered to a prisoner without his consent if it is recognized as appropriate by recognized medical authority or authorities." *Id.* at 605. "[I]t is well established that medical care which is administered over the objections of a prisoner does not constitute the denial of any federal right." Smith v. Baker, 326 F. Supp. 787, 788 (W.D. Mo. 1970) (dictum), *aff'd,* 442 F.2d 928 (8th Cir. 1971) (per curiam) (affirmed dismissal for lack of federal jurisdiction).

89. Runnels v. Rosendale, 499 F.2d 733 (9th Cir. 1974). The court found that although the other state interests of prison security and life preservation could possibly overrule the patient's choice, the state's judgment of what was best for the prisoner could not be sub-

recognizes that incarceration does not remove a person's ability to fully understand the consequences of his actions and to make rational choices accordingly.[90]

Some courts have cited *parens patriae* as a basis for preventing a parent's death when it would mean abandoning a dependent child.[91] The state's interests are to protect a child from psychological harm due to the loss of a parent and to prevent the child from becoming a public charge.[92] Most courts have not allowed this *parens patriae* claim if the one seeking death could show these harms will not occur in that particular instance.[93] An inmate hunger striker should be afforded the same opportunity.[94]

The State's Obligation to Protect the Health of Persons in Its Custody

Prison officials are under a common law duty to provide medical treatment to inmates.[95] This duty was found determinative in *Leigh v. Gladstone*,[96] a 1909 English decision allowing force-feeding of a fasting prisoner. Mrs. Leigh was serving a short sentence for illegal suffragette activities.[97] After

stituted for the prisoner's own decision. *Id.* at 735. *See also* Irwin v. Arrendale, 117 Ga. App. 1, 159 S.E.2d 719 (1967) (valid cause of action against prison medical director for capriciously X-raying inmates without their consent).

90. *See* J. GOBERT & N. COHEN, RIGHTS OF PRISONERS 338 (1981); Zellick, *supra* note 55, at 173.

91. *See In re* President of Georgetown College, 331 F.2d 1000, 1008 (D.C. Cir. 1964); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964); Hamilton v. McAuliffe, 277 Md. 336, 353 A.2d 634 (1976) (*parens patriae* not mentioned by name but the legal concerns supporting doctrine are alluded to throughout).

92. *See* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 742, 370 N.E.2d 417, 426 (1977). *But see* Cantor, *supra* note 45, at 251-52. The emotional abandonment argument, though appealing, is not necessarily implicated by the parent's death. The state's argument presupposes a loving, supportive relationship. This assumption should be tested in each circumstance, especially in light of the effect incarceration has on such relationships. *Id.* One student work has suggested that a parent's willingness to die for his beliefs can be a source of pride and respect for the child. Note, *Compulsory Medical Treatment: The State's Interest Re-evaluated*, 51 MINN. L. REV. 293, 301 (1966).

93. *See In re* Osborne, 294 A.2d 372 (D.C. 1972). The court refused to order a transfusion for a 34-year-old man whose wife agreed with his decision and "who had, through material provision and family and spiritual bonds, provided for the future well-being of his two children." *Id.* at 375. In Holmes v. Silver Cross Hosp., 340 F. Supp. 125 (N.D. Ill. 1972), the court denied a motion to dismiss a complaint that alleged constitutional violations from the administration of a blood transfusion under color of law. The patient had a wife and a young child, but the court was lacking information on whether the family's sole support came from the patient. *Id.* at 130.

94. The *Zant* court apparently recognized this *parens patriae* interest when it made special note of the fact that the fasting prisoner had no dependents. 248 Ga. at 834, 286 S.E.2d at 717.

95. *See, e.g.*, Spicer v. Williamson, 191 N.C. 487, 132 S.E. 291 (1926) (public required to care for prisoners, who, because of the deprivation of their liberty, cannot care for themselves). There is usually also a statutory duty to care for prisoners. *See* Estelle v. Gamble, 429 U.S. 97, 103 & n.8 (1976). Lack of medical attention can also violate the eighth amendment's proscription against cruel and unusual punishment. *Id.*

96. 26 T.L.R. 139 (1909).

97. *Id.* at 140. She had previously been convicted of resisting arrest at least five times.

refusing food for three days she was forcibly fed, occasioning extreme pain and discomfort.[98] She claimed the force-feeding was a means of prison discipline to deal with a stubborn prisoner.[99] In a conclusory opinion, the court ruled that as a matter of law the prison official's duty to maintain the prisoner's health mandated life-preserving action.[100] The prisoner's requests to be let alone were irrelevant because allowing the prisoner to die would be a breach of duty.[101] Similar reasoning was cited by the court in *Chapman*.[102]

The *Leigh* court's rationale is superficially appealing, but it confuses two distinct tort concepts. The first deals with the scope of a person's duty of care,[103] and the second focuses on the substantive nature of that duty. Generally, a person has no legal duty to assist another whose life is in danger.[104] A duty arises, however, when one is charged with the responsibility of caring for that person,[105] as are prison officials.[106] The state has a duty to protect a prisoner from harm.[107] If prison authorities know or have reason to believe a prisoner might commit suicide, those authorities must use reasonable care to prevent it.[108]

She was placed in jail for climbing up on a roof and throwing stones and bottles through the windows of a meeting hall. When the police came for her she threw slates and gravel at them. When placed in jail she broke the cell's windows with her fists. *Id.* at 141.

98. *Id.* at 140. She was fed through a flexible tube inserted through her nose or mouth. *Id.*

99. *Id.* at 140. Except for the force-feeding, however, she was treated well. *Id.* at 141.

100. *Id.* at 142. There was no appearance of any legal authority for the court's conclusion. The opinion contained no discussion of relevant principles of law, nor was there citation to any cases or statutes. *Id. See* Zellick, *supra* note 55, at 160.

101. 26 T.L.R. at 142. There was no debate about whether force-feeding was legal per se, the only question before the jury was whether the feeding was properly done.

102. 87 A.D.2d at ___, 450 N.Y.S.2d at 625. The court stated that Chapman's conduct was not constitutionally protected. Rather, the state has a duty to protect the health and welfare of persons in its custody. *Id. See also* Sconiers v. Jarvis, 458 F. Supp. 37, 40 (D. Kan. 1978) (court used exactly the same arguments as did the *Leigh* court).

103. The scope of the duty is essentially a proximate cause test. If one is not under a duty to protect against a harm, he cannot proximately cause that harm and cannot be held liable. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 244 (4th ed. 1971).

104. *See* Handiboe v. McCarthy, 114 Ga. App. 541, 131 S.E.2d 905 (1966) (no duty to save drowning child); Sidwell v. McVay, 282 P.2d 756 (Okla. 1955) (no duty to prevent neighbor's child from hammering on a dangerous explosive). *See generally* W. PROSSER, *supra* note 103, at 340-41.

105. *See* Cashen v. Riney, 239 Ky. 779, 40 S.W.2d 339 (1931) (school owes duty of care to pupils); Sylvester v. Northwestern Hosp. of Minneapolis, 236 Minn. 384, 53 N.W.2d 17 (1952) (hospital owes duty of care to patients). *See generally* Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 898 (1934).

106. Cohen v. United States, 252 F. Supp. 679 (N.D. Ga. 1966); Taylor v. Slaughter, 171 Okla. 152, 42 P.2d 235 (1935); Kusah v. McCorkle, 100 Wash. 318, 170 P. 1023 (1918).

107. Upchurch v. State, 51 Hawaii 150, 454 P.2d 112 (1969); Lamb v. Clark, 282 Ky. 167, 138 S.W.2d 350 (1940); Wilson v. State, 36 A.D.2d 559, 317 N.Y.S.2d 546 (1971). Of course, a duty to keep prisoners safe from harm does not mean that the state will be liable for every injury to its prisoners. Usually, the state is liable only for foreseeable risks of injury. *Id.* at 559-60, 317 N.Y.S.2d 548. *See also* 18 U.S.C. § 4042 (1976) (establishes the duty of care to prisoners in federal penitentiaries).

108. *See* Maricopa County v. Cowart, 106 Ariz. 69, 471 P.2d 265 (1970); Thomas v. Williams, 105 Ga. App. 321, 124 S.E.2d 409 (1962); Dezort v. Hinsdale, 35 Ill. App. 3d 703, 342 N.E.2d 468 (1976).

The second concept involves substantive tort elements. Any force applied to a person without privilege or consent is tortious.[109] Such force is tortious even if it results in trivial harm[110] or a benefit.[111] For medical treatment to be nontortious there must be either consent, whether express or implied,[112] or a privilege.[113] There is no basis for the *Leigh* court's reasoning that the state's extended duty of care changes the substantive nature of that duty.[114]

Legal commentators have stated that the *Leigh* decision reflects the then applicable suicide felony laws.[115] The *Chapman* court invoked the *Leigh* rationale because it found Chapman's strike suicidal.[116] If the *Leigh* court's rationale had been that the state's custodial role mandated state action to prevent suicide, then there would have been no misperceptions of tort law. The common law power to prevent suicide[117] would be transformed into a duty which would make the touching nontortious. This duty is the law presently recognized by most United States jurisdictions.[118] Under this analysis, courts deciding prison hunger-strike cases should deem suicide prevention an adjunct of the state's

109. *See* W. PROSSER, *supra* note 103, at 36. The essence of a battery action is not the defendant's intent, but the unprivileged or unconsented touching of the plaintiff.

110. *See* Mason v. Wrightson, 205 Md. 481, 109 A.2d 128 (1954); Bumgart v. Bailey, 247 Miss. 604, 156 So. 2d 823 (1963); Rullis v. Jacobi, 79 N.J. Super. 525, 192 A.2d 186 (1963).

111. *See* Chambers v. Nottebaum, 96 So. 2d 716 (Fla. 3d D.C.A. 1957); Schoendorff v. Society of New York Hosp., 211 N.Y. 125, 105 N.E. 92 (1914), *overruled on other grounds,* Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 8, 163 N.Y.S.2d 3, 10 (1957).

112. *See* Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941).

113. A privilege can arise through a court order. *In re* President of Georgetown College, 331 F.2d 1000, 1010 (D.C. Cir.), *cert. denied,* 377 U.S. 978 (1964). A privilege is also found in an emergency situation where there is not time to gain consent. Luka v. Lowrie, 171 Mich. 122, 136 N.W. 1106 (1912); Jackovach v. Yocom, 212 Iowa 914, 925, 237 N.W. 444, 449 (1931).

114. *See* Kennedy, *The Legal Effect of Requests by the Terminally Ill and Aged Not to Receive Further Treatment from Doctors,* 1976 CRIM. L. REV. 217, 227; Editorial, *Feeding Prisoners by Force,* 1974 CRIM. L. REV. 206, 206-07. (Both articles criticize the *Leigh* court's rationale.) An example will illustrate how the *Leigh* court incorrectly applied these two tort law concepts. A stranger noticing a burning house owes no duty of care to the house's owner and need not act. *See supra* sources cited in note 104. If a fire department sees the fire, however, a duty arises since it is charged with the prevention of fire damage to property within its jurisdiction. *See* City of Phoenix v. Yates, 69 Ariz. 68, 76, 208 P.2d 1147, 1151 (1949). A fire department would therefore have to use reasonable means to save the house. *See supra* sources cited in notes 105-06. Nevertheless, as long as no other property or life is endangered, neither the stranger nor the fire department has the right to save the property if the owner wishes it to burn. *See* W. PROSSER, *supra* note 103, at 124-25.

115. *See* Zellick, *supra* note 55, at 163, 169. "Apart, then, from the fact that suicide was a crime, there is little in the common law generally to support [the *Leigh*] ruling." *Id.* at 169. *See also* Kennedy, *supra* note 114 (the *Leigh* opinion was merely a response to the times).

116. 87 A.D.2d at ___, 450 N.Y.S.2d at 625.

117. This common law power was originally based on the legal concept that one can use reasonable force to prevent the commission of a crime. *See generally* W. LAFAVE & A. SCOTT, *supra* note 40, at 406. *See also* Byrn, *supra* note 41, at 18. Byrn discusses the effect of privilege to prevent suicide. Often, this privilege has been made statutory. *See, e.g.,* N.Y. PENAL CODE § 35.10(4) (McKinney 1975).

118. *See, e.g.,* Porter v. County of Cook, 42 Ill. App. 3d 287, 355 N.E.2d 561 (1976) (prisoner hearing "voices" set fire to mattress, injuring himself); Thorton v. City of Flint, 39 Mich. App. 260, 197 N.W.2d 485 (1972) (prisoner hearing "voices" jumped from upper bunk); Gioa v. State, 22 A.D.2d 181, 254 N.Y.S.2d 384 (1964) (jail liable for foreseeable suicide of prisoner).

custodial care interest. This emphasizes the importance of finding suicide under the analysis previously discussed.

The State's Interest in Maintaining Security and Order in Prison

A prison administration's primary task is to maintain security and order.[119] The *White* court partially relied on this state interest and allowed force-feeding.[120] Implicit in *White* is that the hunger striker can be force-fed because of his inmate status.[121] Although the court did not directly base its holding on security and order considerations,[122] it cited *Commissioner of Correction v. Myers,*[123] which did.[124] In *Myers,* a prisoner refused life-saving hemodialysis treatments to protest his placement in a medium, as opposed to minimum, security prison.[125] The state argued that failure to prevent Myers' death would seriously threaten prison order and security.[126] Myers' death might generate an explosive reaction among other inmates.[127] The state asserted that such a reaction would be much less likely if Myers were involuntarily treated in order to keep him alive.[128]

While unrest among other inmates can be avoided if the prisoner's demands are acceded to, this alternative triggers other security and order claims the state asserted in *Myers.* The inability to compel treatment might encourage other inmates to attempt similar coercion.[129] Submitting to a prisoner's demands purely because of the protest method might violate the prison official's legal

119. Procunier v. Martinez, 416 U.S. 396, 412-13 (1974). The court also mentioned rehabilitation as being a major state interest.

120. 292 S.E.2d at 56. The court never mentioned the terms security and order in its holding. In finding authority for its conclusion that a prisoner's rights are limited, however, the court cited Supreme Court cases which have been decided on security and order bases. *Id. citing* Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977).

121. 292 S.E.2d at 58. "West Virginia's interest in preserving life is superior to White's personal privacy (*severely modified by his incarceration*) and freedom of expression right." *Id.* (emphasis added).

122. *See id.* at 56. *See also supra* note 120.

123. 379 Mass. 255, 399 N.E.2d 452 (1979).

124. 292 S.E.2d at 57.

125. 379 Mass. at ___, 399 N.E.2d at 454. These are the facts upon which the court based its decision. By the time the case was heard, however, Myers had received a kidney transplant and had been transferred to a minimum security prison. Although the case was factually moot, the court found the issues presented in the original situation were of public importance and capable of repetition. *Id.* at ___, 399 N.E.2d at 452.

126. *Id.* at ___, 399 N.E.2d at 457.

127. *Id.*

128. *Id.* at ___, 399 N.E.2d at 459 app. A prison official's speculation of explosive reactions should include the possibility that the hunger striker might die during force-feeding. *See* Zellick, *supra* note 55, at 157 (food introduced into lung is easily fatal); *Inquest on Hunger-Striker,* BRIT. MED. J., July 6, 1941, at 53 (force-feeding possibly leads to death-causing pneumonia).

In 1980 Israeli prison officials accidently killed two hunger-striking inmates during a force-feeding procedure. *Force-Feeding Stirs a Clamor,* NEWSWEEK, Aug. 4, 1980, at 32. These deaths prompted days of violent Arab protests. *Id.*

129. 379 Mass. at ___, 399 N.E.2d at 452.

duties.[130] For example, moving a prisoner to a minimum security block solely to avoid having him starve could place both the public and other prisoners in jeopardy. Finally, such concessions to a hunger striker would reduce the prison supervisor's effective authority.[131] In *Myers*, the prison official argued that the power to compel treatment would increase his ability to avoid these evils associated with submitting to unreasonable demands.[132] The same argument could be used by a prison official seeking the power to force-feed an inmate.

The state's interests in maintaining order and security, suicide prevention, preservation of life and custodial care are judicially recognized as appropriate bases to force-feed protesting inmates. The prisoner, however, may have equally compelling interests that protect his right not to be force-fed. If the individual's interests are constitutionally protected, the courts must more carefully examine the weight of the state's interests.

THE CONSTITUTIONAL RIGHTS OF A HUNGER-STRIKING PRISONER

Until ten to fifteen years ago it was difficult to tell whether prisoners had any constitutional rights.[133] Before the 1950s, they probably did not. The prevalent theory was that prisoners were merely slaves of the state.[134] After the slave theory declined, courts still did not recognize prisoner's rights.[135] Inmate petitions claiming constitutional infringements were routinely dismissed under the "hands off" doctrine,[136] a euphemism for judicial reluctance to become involved in the prison's internal operations.[137] Many lower courts began

130. *Id.* at ___, 399 N.E.2d at 459 app.

131. *Id.* This could result from any unfair preferential treatment of fasters as perceived by the prisoners who abide by the system. *See also* Zellick, *supra* note 55, at 173-75. The author discusses three additional, but less tangible, state interests in force-feeding a prisoner. The first such interest is freedom from moral blackmail. A prison official should be free from the threat to his conscience posed by a prisoner in his custody starving to death. Second, the state's interest in rehabilitating prisoners is hindered by the prisoner's death. Third, the state has a duty to carry out the sentence imposed by the courts. If a person has been sentenced to ten years in prison, this interest is adversely affected by allowing the prisoner to "escape" through death. *Id.*

132. *Id.*

133. J. GOBERT & N. COHEN, *supra* note 90.

134. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871). *See* Robbins, *The Cry of* Wolfish *in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211, 211 (1980).

135. J. GOBERT & N. COHEN, *supra* note 90, at 1.

136. *See* Procunier v. Martinez, 416 U.S. 396, 404 (1974) ("Traditionally, federal courts have adopted a broad hands-off attitude towards problems of prison administration."); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 507-08 (1963).

137. J. GOBERT & N. COHEN, *supra* note 90, at 1. *See, e.g., In re* Taylor, 187 F.2d 852, 853 (9th Cir.) (review of prison matters "not within the province of the courts"), *cert. denied*, 341 U.S. 955 (1951); Stroud v. Swope, 187 F.2d 850, 851 (9th Cir.) ("not the function of the courts"), *cert. denied*, 342 U.S. 829 (1951); Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951) ("courts have no supervisory jurisdiction over the conduct of the various institutions"). For a discussion of several rationale justifying the hands-off doctrine, see Robbins, *supra* note 134, at 212-13.

to ignore the doctrine in the 1960s,[138] and in 1974, the Supreme Court explicitly repudiated it. The Court held that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims . . . when a prison regulation or practice offends a fundamental constitutional guarantee. . . ."[139] It is now well established that inmates are not stripped of constitutional protections.[140] Prisoners, however, retain only those constitutional rights not inconsistent with their status or the penal system's legitimate needs.[141]

The prisoners in the principal cases set forth two constitutional arguments for prohibiting force-feedings. First, because the hunger strike was undertaken to make a statement,[142] it should be protected under the United States Constitution's first amendment free speech safeguards.[143] Second, the right of privacy allows a person to refuse medical treatment even when the effect of such refusal is death.[144]

Prisoners' Hunger Strikes as Constitutionally Protected Expression

The first amendment's guarantee of free speech is afforded great constitutional protection.[145] The first amendment protections can encompass nonverbal communicative conduct.[146] Nevertheless, it is clear that outside the prison

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138. *See, e.g.*, Inmates of Suffolk County Jail v. Eisenstadt, 494 F.2d 1196 (1st Cir.) (cruel and unusual punishment), *cert. denied sub nom.*, Hall v. Inmates of Suffolk County Jail, 419 U.S. 977 (1974); Pierce v. La Valee, 293 F.2d 233 (2d Cir. 1961) (prisoners' freedom of religion); Sewell v. Pegelou, 291 F.2d 196 (4th Cir. 1961) (prisoners' freedom of religion), *rev'd on other grounds*, 409 U.S. 421 (1973); Pearson v. Townsend, 362 F. Supp. 207 (D.S.C. 1973) (denial of due process rights by disciplinary board). For a discussion of the social and political influences affecting the decline of the hands-off doctrine, see J. GOBERT & N. COHEN, *supra* note 90, at 2-3.

139. Procunier v. Martinez, 416 U.S. 396, 405-06 (1974).

140. Bell v. Wolfish, 441 U.S. 520, 545 (1979).

141. *See id.* at 545-46; Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 125 (1977); Wolff v. McDonnell, 418 U.S. 539, 555 (1974); Pell v. Procunier, 417 U.S. 817, 822 (1974); Price v. Johnston, 334 U.S. 266, 285 (1948).

142. *See* Zant v. Prevatte, 248 Ga. 832, 833, 286 S.E.2d 715, 716 (1982) (to get attention of prison officials); Von Holden v. Chapman, 87 A.D.2d 66, ___, 450 N.Y.S.2d 623, 625 (1982) (to draw attention to the starving children of the world); State *ex rel.* White v. Narick, 292 S.E.2d 54, 55 (W. Va. 1982) (to protest prison conditions).

143. 248 Ga. at 833, 286 S.E.2d at 716; 87 A.D.2d at ___, 450 N.Y.S.2d at 624; 292 S.E.2d at 58.

144. 248 Ga. at 833, 286 S.E.2d at 716; 87 A.D.2d at ___, 450 N.Y.S.2d at 624; 292 S.E.2d at 58.

145. *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (free speech is a right that cannot be circumscribed so that it exists in principle but not in fact); Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967) (free speech is the indispensable condition of nearly every other form of freedom); American Fed'n of Labor v. Swing, 312 U.S. 321 (1941) (free discussion must be jealously guarded). *See generally* Meiklejohn, *Free Speech and Its Relation to Self Government, reprinted in* A. MEIKLEJOHN, POLITICAL FREEDOM (1960).

146. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (wearing armbands as a symbolic act); Brown v. Louisiana, 383 U.S. 131, 142 (1966) (first amendment protects silent sit-in in a public library).

context all conduct conveying a message is not constitutionally protected.[147] Within the prison context first amendment rights are replete with uncertainty.[148] Few Supreme Court decisions have addressed prisoners' free speech rights.[149] Further, the Court has yet to examine first amendment rights of symbolic conduct in a prison situation.[150] A general reading of first amendment cases suggests, however, that a hunger-striking prisoner could not successfully rely on the right to free speech to avoid force-feeding.[151]

The Supreme Court has attempted to delineate when communicative conduct can be governmentally prohibited or regulated. For the nonprison context, the Court has established that the government's regulation must: first, further an important or substantial governmental interest; second, be unrelated to the suppression of free expression; and third, be the least restrictive of alleged first amendment freedoms compared to other available means that meet the state's interests.[152] If the government regulation fails the second element,

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147. For example, one may hang a congressman in effigy to express dissatisfaction with his performance as a legislator. A law preventing such action would be held unconstitutional. *See generally* Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844 (1970). The congressman, however, may not actually be hanged even though there is at least as much communicative impact in the death-producing act.

148. *See* J. GOBERT & N. COHEN, *supra* note 90, at 100; Note, *A Review of Prisoners' Rights Under the First, Fifth and Eighth Amendments,* 18 DUQ. L. REV. 683, 685 (1980).

149. *See* Bell v. Wolfish, 441 U.S. 520 (1979) (upholding a publishers-only rule for prisoners' receipt of hard cover books); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (upholding regulation against bulk mailing); Wolff v. McDonnell, 418 U.S. 539 (1974) (upholding prison practice of inspecting mail); Pell v. Procunier, 417 U.S. 817 (1974) (upholding ban against face-to-face interviews). Other cases, although apparently dealing with prisoner first amendment rights, were actually based on the rights of outsiders. *See, e.g.,* Procunier v. Martinez, 416 U.S. 396, 408 (1974). *See generally* Note, *supra* note 148, at 684-88.

150. None of the principal cases cited any such precedent. *See generally* Zant v. Prevatte, 248 Ga. 832, 286 S.E.2d 715 (1982); Von Holden v. Chapman, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982); State *ex rel.* White v. Narick, 292 S.E.2d 54 (W. Va. 1982). *See also* Commissioner of Correction v. Myers, 379 Mass. 255, 399 N.E.2d 452 (1979).

151. Of the three principal cases, only the *Chapman* court applied a first amendment analysis. The *Chapman* court dismissed the first amendment claim summarily: "[W]e need only remark that Chapman's status as a prisoner renders his First Amendment rights subject to the reasonable limitations necessary for the maintenance of order and discipline in a penal institution." 87 A.D.2d at ___, 450 N.Y.S.2d at 627. *See also* J. GOBERT & N. COHEN, *supra* note 90, at 108. The authors reach four conclusions derived from Supreme Court decisions in the free speech area: (1) prisoners do not forfeit all first amendment rights; (2) first amendment rights can be restricted when necessary to serve the legitimate penal goals; (3) legitimate penal goals include, but are not necessarily limited to, maintaining internal security and order and promoting rehabilitation; (4) significant deference is to be given the judgment of prison officials who formulate the rules which effectuate the above goals. *Id.*

Another method of analysis focuses on whether the speech infringement occurs in a public forum. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 688-93 (1978); Stone, *Fora Americana: Speech in Public Places,* 1974 SUP. CT. REV. 233.

152. United States v. O'Brien, 391 U.S. 367, 377 (1968). The Court also listed another requirement, that the regulation be within the constitutional power of the government. *Id.* It is omitted here because it is implicitly a part of the first requirement. *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1482, 1483 & n.10 (1975).

it is deemed a regulation aimed at the communicative impact of conduct.[153] As such, it is further analyzed to determine if the affected expression is constitutionally protected.[154] The government must show either a clear and present danger posed by the expression[155] or a compelling justification for the regulation that burdens protected speech.[156] The Court used this three-pronged test to determine whether censorship of prisoners' mail was constitutional.[157] It would seem appropriate, therefore, to use the same test in evaluating a prisoner's hunger strike as protected communicative conduct.[158]

Using this analysis a successful first amendment claim of a hunger-striking prisoner is unlikely. The speech/conduct test's first and third requirements are

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153. *See* L. TRIBE, *supra* note 151, at 584-85; Ely, *supra* note 152, at 1484. *See also* Spence v. Washington, 418 U.S. 405, 414 n.8 (1974).

154. *See* Ely, *supra* note 152, at 1484 (discussing switching to a different track of analysis should the criterion of the speech/conduct test not be met). Examples of speech not constitutionally protected include: obscenity, Hamling v. United States, 418 U.S. 87 (1974); Miller v. California, 413 U.S. 15 (1973); T. EMERSON, THE SYSTEM OF FREE EXPRESSION 495-503 (1970); and knowingly false statements, Time, Inc. v. Hill, 385 U.S. 374 (1967).

155. *See, e.g.*, Hess v. Indiana, 414 U.S. 105, 108 (1973) (demonstrator's disorderly conduct conviction invalidated because his expression failed to pose a clear and present danger); Brandenburg v. Ohio, 395 U.S. 444, 447 (Ku Klux Klan leader's conviction under criminal syndicalism statute reversed because advocacy was not directed to incite imminent lawless action nor likely to cause such action). *See generally* Strong, *Fifty Years of "Clear and Present Danger": From* Schenck *to* Brandenburg — *and Beyond*, 1969 SUP. CT. REV. 41.

156. *See* Widmar v. Vincent, 454 U.S. 263, 270 (1981); L. TRIBE, *supra* note 151, at 602; Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 747 (1980).

157. Procunier v. Martinez, 416 U.S. 396, 413-14 (1974). Several prisoners challenged the validity of California prison rules authorizing mail censorship between prisoners and outsiders. Although the three requirements were combined into two, the wording was very similar:

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

Id. at 413.

158. This conclusion might be questioned because the prison case applying this test, Procunier v. Martinez, 416 U.S. 396 (1974), focused on the rights of the nonprisoners whose mail was also being censored. *Id.* at 408. The speech/conduct test, however, is not dependent on the strength or weaknesses of a person's free speech rights. Rather, it is merely a tool to see if those rights are even implicated. For example, this test was used in Tinker v. Des Moines Indep. School Dist., 393 U.S. 503 (1969), even though the first amendment guarantees could be restricted in light of the special school environment. *Id.* at 507. This restriction on free speech liberties of students is, although lesser in degree, phrased similarly to the restriction on prisoner first amendment rights. "[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the correctional system." Pell v. Procunier, 417 U.S. 817, 822 (1974). It has been stated that the Supreme Court in Bell v. Wolfish, 441 U.S. 520 (1979), removed even the pretense of the least restrictive alternative analysis for evaluating prisoners' first amendment rights. J. GOBERT & N. COHEN, *supra* note 90, at 108. Nevertheless, the reasons for adopting the speech/content test prevail. *See generally* Berger, *Withdrawal of Rights and Due Deference: The New Hands Off Policy in Correctional Litigation*, 47 UMKC L. REV. 1, 10-11 (1978).

customarily satisfied by the state showing a rational interest, which is easily done.[159] The second requirement is an intent test. Absent explicit intent to suppress the communicative content,[160] courts have sometimes inferred such intent from the circumstances.[161] The government action fails the second test if the harm the state seeks to avert grows out of the actor's communication.[162]

Applying this test to an inmate hunger strike is facilitated by postulating two analyses. First, if the state were to base the attempt to force-feed on its suicide prevention and preservation of life interest, the first and third requirements of the speech/conduct test would be met. The state has valid reasons for preventing suicides and preserving life[163] and there is no less drastic means to protect these interests than by force-feeding.[164] The critical issue is thus the state's intent, and whether its action is aimed at the message conveyed by the strike. Regardless of the inmate's message or lack of message in not eating, the state's interest in suicide prevention and preservation of life are not content-based.[165] The prisoner would have no viable first amendment claim.

A second analysis is demonstrated by hypothesizing there are two different fasters in prison. Assume that one prisoner merely stops eating with no communicative intent. The second hunger striker uses his fast to receive concessions. If the state let the first prisoner die but attempted to stop the second, the state's evident motivation would be content-based, and the action would not pass the test's second criterion.[166]

Once state action has failed the speech/conduct test,[167] the state would have

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159. *See* Ely, *supra* note 152, at 1486 (first requirement has turned out to be no protection at all to those engaging in symbolic speech). *Id.* at 1485, 1506 (third requirement is easily met especially when confronting unorthodox modes of expression). *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968).

160. This automatically triggers analysis of the expression's constitutional worth. *See supra* note 154. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (statute singling out information about drug prices); Cohen v. California, 403 U.S. 15 (1971) (statute singling out offensive conduct, applied to offensive language).

161. *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). *See generally* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1338 (1970).

162. *See* Ely, *supra* note 152, at 1497. In Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969), a school attempted to prohibit students from wearing armbands to protest the United States' Viet Nam War involvement. *Id.* at 504. The state asserted a negative reaction to the armbands would cause a major disruption in school. *Id.* at 505. Because the harm in this case, disruption of school, flowed directly from reaction to the armbands' communicative content, the school regulation failed the intent requirement. *Id.* at 509-11. *See generally* Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. REV. 29 (1973).

163. *See generally supra* notes 33-92 and accompanying text. Despite any of the arguments propounded by this Note which tend to discredit these interests, they are sufficiently based, even if only in constant repetition, to pass a minimal scrutiny test. *See supra* note 159.

164. *But see* Radzinowicz & Hood, *The Status of Political Prisoner in England: The Struggle for Recognition*, 65 VA. L. REV. 1421 (1979) (describing the "Cat and Mouse Act").

165. *See* Nimmer, *supra* note 162, at 38-39.

166. The state would probably deny that it was force-feeding to inhibit speech. Under the speech/conduct test, however, such an intent could be imputed to the state's actions.

167. *See supra* notes 152-56 and accompanying text.

to demonstrate that allowing the action to continue would present a clear and imminent danger to substantial societal interests.[168] This burden has traditionally been difficult to meet.[169] The prison environment, however, triggers a different test. The Supreme Court has held that prison officials may examine the purpose for a prisoner's exercise of a constitutional right[170] for detrimental effect on prison order and security.[171]

For example, assume a person outside prison writes a book explaining methods for escaping from prison. To suppress publication of the book the state would have to prove that the book's distribution would present a clear and present danger to its interest in prison security.[172] The state need not prove that the book will imminently lead to inmate escapes to ban it inside a prison.[173] The state need only claim that the book's purpose is to help prisoners escape.[174] Similarly, the state can assert that the hunger striker's purpose is to manipulate the prison system which causes a disruption of prison order.[175] The importance of the state's interest in prison order would allow hunger strikes with an expressive purpose to be prohibited. Moreover, the courts will not disturb the state's characterization of the prisoner's purpose absent substantial proof that the state has exaggerated the threat to security.[176] Practically, this is an insurmountable burden.[177] The hunger-striking prisoner, therefore, has no viable first amendment claim.[178]

The Prisoner's Personhood Rights

The second constitutional right asserted by the hunger strikers in the principal cases was their right of privacy or personhood.[179] Personhood en-

168. *See, e.g.*, Cox v. Louisiana, 379 U.S. 559, 565-66 (1965); Edwards v. South Carolina, 372 U.S. 229, 237 (1963).

169. *See* L. TRIBE, *supra* note 151, at 602.

170. Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 126 n.4 (1977).

171. *Id. See also* Commissioner of Correction v. Myers, 379 Mass. 255, ___, 399 N.E.2d 452, 458 n.4 (1979) (the purpose of life-saving treatment refusal was to manipulate the prison system).

172. *See, e.g.*, Cox v. Louisiana, 379 U.S. 559, 565-66 (1965); Edwards v. South Carolina, 372 U.S. 229, 237 (1963). *See also* United States v. Progressive, Inc., 467 F. Supp. 990 (1979) (needed to show irreparable harm to suppress publication and distribution of article describing how to make a hydrogen bomb).

173. Procunier v. Martinez, 416 U.S. 396, 413-14 (1974) (prison official need not show with certainty that correspondence will adversely affect security and order interests and obviously can prevent escape plans from circulating).

174. *See* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 126 n.4 (1977).

175. *See supra* notes 127-32 and accompanying text.

176. Pell v. Procunier, 417 U.S. 817, 827 (1974).

177. *See* Robbins, *supra* note 134, at 219 (The substantial deference given prison administrators by the Court has created a new hands off doctrine.). *See generally* Berger, *supra* note 158, at 20.

178. From a practical view, a hunger striker may not have a valid first amendment claim because his speech has not been impaired. Although he is being kept alive, his abstinence from food has gained the attention of prison officials and possibly the public. By keeping him alive, however, the impact of the speech has been lessened. There is no pressure on the prison to choose between a prisoner demand and a life.

179. *See supra* note 144. The term "personhood" has been defined as "those attributes

compasses the right to be let alone,[180] the right of bodily integrity, and the right of self-determination.[181] These rights protect a hunger striker's behavior in two ways. First, a competent person has the right to determine the course of his life, including how and when life shall end.[182] Second, any unauthorized treatment is an invasion of his right of bodily integrity.[183]

The Supreme Court has granted constitutional protection for personhood rights;[184] however, these rights are not absolute.[185] As early as 1891 the Court recognized: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraints or interference by others unless by clear and unquestionable authority of law."[186] The Court thus defined personhood rights with a balancing test. These rights have substance only

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of an individual which are irreducible in his selfhood." L. TRIBE, *supra* note 151, at 889 (quoting Freund, 52d A.L.I. Annual Meeting 42-43 (1975)). This right has been based on elements of Natural Law. *Id.* at 894-95. One often-quoted explanation of the source of personhood rights is the dissent of Justice Brandeis in Olmstead v. United States, 277 U.S. 438 (1928) (overruled, Katz v. United States, 389 U.S. 347, 352-53 (1967)):

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id. at 478 (Brandeis, J., dissenting). *See generally* Craven, *Personhood: The Right to Be Let Alone*, 1976 DUKE L.J. 699.

180. *See* Craven, *supra* note 179, at 699.

181. *See* Youngberg v. Romeo, 102 S. Ct. 2452, 2458 (1982) (right to personal security is a substantively protected liberty); Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, 1104 (1960) ("Anglo-American law starts with the premise of thorough-going self determination"); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 742, 370 N.E.2d 417, 426 (1977) (privacy "is an expression of the sanctity of individual free choice and self-determination"); Suenram v. Society of Valley Hosp., 155 N.J. Super. 593, 603, 383 A.2d 143, 148 (1977) ("individuals must be given the maximum latitude in determining their own destiny"); Byrn, *supra* note 41, at 9 (right of bodily self-determination); Note, *supra* note 92, at 293-94 (there is a common law principle of "the inviolability of the body"). *See generally* Cantor, *supra* note 45, at 236-38.

182. *See generally* Note, *The Refusal of Life-Saving Medical Treatment vs. The State's Interest in the Preservation of Life: A Clarification of the Interests at Stake*, 58 WASH. U.L.Q. 85, 96-100 (1980).

183. *See generally id.* at 100-01.

184. *See, e.g.*, Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (contraception for minors); Roe v. Wade, 410 U.S. 113, 153 (1973) (woman's freedom to choose whether to terminate pregnancy); Griswold v. Connecticut, 381 U.S. 479 (1965) (rights of married couples). *See generally* Clark, *Constitutional Sources of the Penumbral Right to Privacy*, 9 VILL. L. REV. 833 (1974); Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965).

185. *See* Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905). The right to be let alone is subject to the state's interest in safety, health, peace, good order and community morals. *Id.*

186. Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

insofar as the personal freedom does not conflict with an overriding state interest.[187] Examining the balance between personhood claims and the state interests will isolate unaddressed salient factors and define a hunger-striking prisoner's personhood rights.

Personhood Rights vs. Suicide Prevention

In *Chapman*, the New York court found that personhood rights do not embrace suicidal activities.[188] New York, however, does not have a statute prohibiting attempted suicide.[189] At least one federal appellate court has declared refusing necessary medical aid is lawful in states without statutory prohibitions of attempted suicide.[190] The court noted, however, that states may compel life-saving medical assistance if they have made attempted suicide illegal.[191] Therefore, only statutory prohibitions would be sufficient authority to overcome a personal choice of life or death.[192] Most other courts and commentators, however, disagree.[193]

The criminality of attempted suicide may be irrelevant in the personhood balance.[194] The lack of a criminal statute does not generally evidence lessened state concern,[195] but rather reflects legislative recognition that persons attempting suicide need professional help rather than punishment.[196] Further, criminalizing attempted suicide has little, if any, deterrent effect.[197]

The *Chapman* court relied on several statutes to find a compelling interest in suicide prevention.[198] These statutes allow involuntary commitment of a person likely to harm himself,[199] authorize a person to use the physical force necessary to stop a suicide[200] and make aiding or promoting suicide a felony.[201] Similar statutes or common law doctrines can be found in most other jurisdic-

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187. *See* Riga, *supra* note 62, at 132. Individual rights do not exist *in se et per se*, but only exist when society recognizes them in the face of coercive government force. *Id.*

188. 87 A.D.2d 66, ___, 450 N.Y.S.2d 623, 625 (1982). The court stated: "To characterize a person's self-destructive acts as entitled to that Constitutional protection would be ludicrous." *Id.*

189. The *Chapman* court does not cite to such a statute although it cites other relevant statutes. *Id.* at ___, 450 N.Y.S.2d at 625-26. *See infra* notes 198-201 and accompanying text.

190. *See, e.g., In re* President of Georgetown College, 331 F.2d 1000, 1009 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

191. *Id.*

192. *Id.*

193. *See* Wallace v. State, 232 Ind. 700, 116 N.E.2d 100 (1953) (suicide unlawful although not criminal). *See also* Byrn, *supra* note 41, at 18 ("the failure to outlaw attempted suicide does not make it lawful").

194. *See generally* Comment, *supra* note 56, at 468.

195. *See* State v. Campbell, 217 Iowa 848, 853, 251 N.W. 717, 719 (1933); Commonwealth v. Wright, 26 Pa. 666, 669 (1902); Grace v. State, 44 Tex. Crim. 193, 69 S.W. 529 (1902).

196. *See* Commonwealth v. Wright, 26 Pa. 666, 669 (1902); Schulman, *Suicide and Suicide Prevention: A Legal Analysis*, 54 A.B.A. J. 855, 860 (1968).

197. *See* Comment, *supra* note 56, at 470-71.

198. 87 A.D.2d at ___, 450 N.Y.S.2d at 625-26.

199. N.Y. MENTAL HYG. LAW §§ 9.37, .39, .41 (Consol. 1978).

200. N.Y. PENAL LAW, § 35.10 (Consol. 1978).

201. *Id.* §§ 125.15, 120.30.

tions[202] and should be sufficient authority of law to justify state intrusion upon a person's decision to commit suicide.[203]

Personhood Rights vs. Preservation of Life

Personhood rights have been frequently balanced against the state's preservation of life interest in two nonprison circumstances: terminally ill patients refusing life-sustaining medical treatment[204] and Jehovah's Witnesses refusing medically necessary blood transfusions.[205] *In re Quinlan*[206] involved an incurably comatose patient[207] who was kept physically alive[208] through the constant assistance of a respirator, catheter, feeding tube and full-time medical supervision.[209] The Supreme Court of New Jersey suggested that the constitutional privacy right encompasses a patient's decision to decline medical treatment in certain circumstances.[210] The court posited a formula for identifying these circumstances. The state's interest in preserving life weakens and the individual's personhood right grows as the degree of bodily invasion increases and the prognosis dims.[211] At some point the individual's rights overcome the state's interests.[212]

In interpreting the prognosis factor, the *Quinlan* court examined both the extended length[213] and the quality of life.[214] Karen Quinlan could have lived indefinitely in her comatose state, but the court found the prognosis for a meaningful existence dim.[215] The dimness of prognosis factor requires a court to evaluate the quality of life resulting from undesired treatment, which often necessitates examining the nonphysical qualities of life. For example, one court has stated that depriving a competent human being of the right to choose his destiny lessens the value of life.[216] A study of the Jehovah's Witness cases[217] lends insight into the weight of nonphysical qualities in assessing prognosis.

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202. *See* Schulman, *supra* note 196, at 858-61; Comment, *supra* note 56, at 468.

203. This conclusion is based on the standard discussed *supra* text accompanying note 187, which indicates that personhood rights may be restricted by clear authority of law.

204. *See, e.g.*, Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980); *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785 (1978); Eichner v. Dillon, 73 A.D.2d 431, 426 N.Y.S.2d 517 (1980).

205. *See, e.g., In re* Osborne, 294 A.2d 372 (D.C. 1972); *In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965); *In re* Melido, 88 Misc. 2d 974, 390 N.Y.S.2d 523 (1976).

206. 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

207. *See id.* at 26, 355 A.2d at 654.

208. *Id.* at 25, 355 A.2d at 655. Although her brain was capable of some primitive reflex-level functioning, she had no cognitive function or awareness of her surroundings. She did not, however, exhibit the signs of "brain death." *Id.*, 355 A.2d at 654.

209. *Id.*, 355 A.2d at 655.

210. *Id.* at 38-39, 355 A.2d at 663.

211. *Id.* at 41, 355 A.2d at 664.

212. *Id.*

213. *Id.* at 40-41, 355 A.2d at 663.

214. *Id.* "[N]o external compelling interest of the State could compel Karen to endure the unendurable, only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive or sapient life." *Id.* at 39, 355 A.2d at 663.

215. *See id.* at 26, 41, 355 A.2d at 664, 669.

216. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977). That court stated:

Superficially, the Jehovah's Witness cases are contradictory on the weight afforded personhood rights.[218] Further examination, however, reveals that those cases finding a governmental power to compel transfusions have done so in circumstances in which the state could invoke the *parens patriae* doctrine.[219] When the state used another basis for its preservation of life interest, the courts have upheld the patient's ability to refuse transfusions.[220] The Jehovah's Witness cases demonstrate the importance of considering life's nonphysical qualities when evaluating prognosis. In most instances the patient can be restored to full health if compelled to take the transfusion.[221] The courts, however, evaluate the spiritual quality of life and have refused to force a Jehovah's Witness to live a life in sin when he has competently chosen death.[222]

> The constitutional right to privacy, as we conceive it, is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life. The value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice.

Id. at 742, 370 N.E.2d at 426.

217. In these cases a member of the Jehovah's Witness faith has contracted an illness or had an accident whereby the usual medical procedure would require a blood transfusion. The litigation arises when the patient refuses the blood transfusion on the basis of his religious beliefs.

In these cases most courts focused on the patient's personhood rights despite the presence of the religious freedom issue. *See, e.g., In re* Osborne, 294 A.2d 372, 376 (D.C. 1972) (Yeagley, J., concurring); *In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965); Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (1962). *But see* Holmes v. Silver Cross Hosp., 340 F. Supp. 125 (N.D. Ill. 1972).

218. *See, e.g., In re* President of Georgetown College, 331 F.2d 1000 (D.C. Cir.) (ordering a transfusion), *cert. denied,* 377 U.S. 978 (1964); Holmes v. Silver Cross Hosp., 340 F. Supp. 125 (N.D. Ill. 1972) (forced transfusion violation of civil rights); United States v. George, 239 F. Supp. 752 (D. Conn. 1965) (transfusion ordered); *In re* Osborne, 294 A.2d 372 (D.C. 1972) (refusal of transfusion allowed).

219. Satz v. Perlmutter, 362 So. 2d 160, 163 (Fla. 4th D.C.A.) (competent adult may refuse treatment), *aff'd,* 379 So. 2d 359 (1978) (holding limited to facts of this case). *See, e.g., In re* President of Georgetown College, 331 F.2d 1000 (D.C. Cir.) (dependant minor child and that patient in extremis precluding rational thought, caused the court to refuse permission to let the patient die), *cert. denied,* 377 U.S. 978 (1964); United States v. George, 239 F. Supp. (D. Conn. 1965) (father with four minor children given transfusion despite his protests); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971) (patient in shock and disoriented given transfusion over her protests); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (court ordered transfusion for pregnant Jehovah's Witness despite her protests), *cert. denied,* 377 U.S. 985 (1964); Powell v. Columbia Presbyterian Medical Center, 49 Misc. 2d 215, 267 N.Y.S.2d 450 (1965) (court ordered transfusions for mother of six children).

220. *See, e.g., In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965) (court found patient's actions were within his right to be let alone since he had no children, was capable of rational decisions, and was not a danger to society). *Brooks* is considered the trend in the law. *See* Byrn, *supra* note 41, at 18-19.

221. *See, e.g., In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965). The woman's peptic ulcer was not fatal after blood was transfused. *See also* Byrn, *supra* note 41, at 10.

222. There must not be any minor or unknown children affected. *See supra* cases cited notes 219-20. *See also* United States v. George, 239 F. Supp. 752, 753 (D. Conn. 1965) (court placed weight on the patient's statement that his conscience could "be clear" as long as the court ordered the transfusion).

The hunger striker's prognosis should he be force-fed is much like that of the Jehovah's Witness. Physical health can be fully restored,[223] however, his ideological life has been diminished.[224] The *Zant* court recognized this diminution. "The State can incarcerate one who has violated the law and, in certain circumstances, even take his life. But it has no right to destroy a person's will by frustrating his attempt to die if necessary to make a point."[225] Just as Jehovah's Witnesses have been allowed to follow their religious precepts, hunger strikers might be allowed to choose a cause worthy of their possible death. Denying the right to choose encroaches upon an integral part of personhood.[226]

Analogizing a hunger strike to *Quinlan* offers a further insight into the application of the prognosis factor. In *Quinlan,* the undesired medical treatment only sustained the patient's life in its damaged state.[227] There was no cure associated with the treatment.[228] Similarly, the motivations prompting the hunger striker's life-endangering protests are not erased through a force-feeding.[229] The prognosis for the intellectual well-being of the hunger striker is as dim after treatment as before.[230]

At this stage in the personhood analysis, the *Zant* and *White* courts diverged.[231] The *Zant* court implicitly recognized that certain causes are worth dying for, even one as self-serving as a prison transfer.[232] In contrast, the *White* court mused that "protestations for causes . . . are emotional commitments as various and unpredictable as the winds."[233] The *White* court thus would not impute any future idealogical suffering into the prognosis factor. The re-

223. Force-feeding, however, is not a risk-free operation. *See supra* note 128.

224. *See generally* Thomas v. Collins, 323 U.S. 516, 531 (1945) (first amendment equates freedom of mind with freedom of conscience).

225. 248 Ga. at 834, 286 S.E.2d at 716-17 (quoting the lower court).

226. *See supra* note 216 and accompanying text.

227. 70 N.J. 10, 26, 355 A.2d at 655.

228. *Id.,* 355 A.2d at 651.

229. For example, had the prisoner in *Zant* been force-fed, the fears which prompted his transfer request would not have been dissipated.

230. This point has much more appeal when evaluating a more politically oriented protest, such as the hunger strikes by the Irish Republican Army in British prisons. *See* Dooley-Clarke, *supra* note 53, at 5. Nevertheless, part of the essence of personhood is the ability to choose one's own cause no matter how irrational it might seem to others. *See In re* President of Georgetown College, 331 F.2d 1000, 1017 (D.C. Cir.) (Burger, J., dissenting), *cert. denied,* 377 U.S. 978 (1964).

231. *Compare* Zant v. Prevatte, 248 Ga. 832, 834, 286 S.E.2d 715, 717 (1982) (quoting lower court) ("no [state] right to destroy a person's will by frustrating his attempt to die if necessary to make a point") *with* State *ex rel.* White v. Narick, 292 S.E.2d 54, 57 (W. Va. 1982) (*"Nothing could destroy a person's will more than death."*) (emphasis added).

232. *See* 248 Ga. at 834, 286 S.E.2d at 717.

233. 292 S.E.2d at 58 & n.5 *citing* J. JONES, FROM HERE TO ETERNITY (1951). The court, therefore, was giving little credence to the prisoner's professed ideological commitments. This view of prisoners' commitments might be attributed to the state interest in preventing any risk of error in the hunger striker's judgment. This risk of error interest has been stated as: "Life is too precious . . . to permit its termination when there is the slightest possibility that the decision to die will prove erroneous or based on false premises." Delgado, *supra* note 71, at 483. It has been argued, however, that this state interest should not apply to a person who is competent to make life choices. *Id.* at 483-87.

fusal to consider ideological effects, however, could have been a reaction to the facts presented. The prisoner in *White* had lost in excess of one hundred pounds without suffering serious physical deterioration.[234] After the case was argued but before the decision was announced, the inmate had voluntarily quit his fast and had begun working as the prison's chief cook.[235] The court's refusal to seriously address the protests for a cause is not surprising. Future courts, with more compelling facts, might reasonably reach a different decision.

To apply the *Quinlan* balancing test's second factor, the degree of bodily invasion, it is necessary to understand the medical procedures for force-feeding. There are essentially two methods of introducing sufficient nutrients into a fasting person's body to keep him alive. The first method is through an intravenous tube.[236] Although a seemingly unobtrusive medical procedure, it cannot be safely performed on a struggling patient.[237] Intravenous feedings, therefore, can only be used on a patient who is too weak to resist or who has been sedated.[238] Neither of these alternatives is satisfactory. If the doctor waits until the patient is overcome with weakness, the treatment can be continued only until the patient regains his strength.[239] Once he is strong enough to resist he must be allowed to once again succumb to his fast before resuming treatment.[240] Even if the prisoner is sedated, the intravenous feeding must be done so slowly that almost constant restraint and sedation are necessary.[241] With either method the hunger striker is being artificially kept in an unconscious state. Doctors have found this neither medically nor morally sound.[242]

Another method is to insert a feeding tube through the prisoner's nose or

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234. 292 S.E.2d at 55. This would imply that the prisoner's build was such that the loss of 100 pounds was not seriously harmful.

235. *Id.* at 55 n.1.

236. *See* Joyeux & Solassol, *Basic Problems of Artificial Nutrition,* 26 BIOMEDICINE 149 (1977). Intravenous feeding should take place under strict aseptic conditions. *Id.* at 152.

237. *See Standing Firm,* 124 NEW L.J. 513, 514 (1974).

238. *See id.*; Zellick, *supra* note 55, at 157. The intravenous process is slow. The prisoner would not be able to be taken from his cell, sedated, and then returned. Rather, he would be continually confined to the hospital. *See Standing Firm, supra* note 237, at 514.

239. Zellick, *supra* note 55, at 157.

240. *Id.*

241. *Id. Standing Firm, supra* note 237, at 514, suggests that a prison hunger striker be told that after fasting one week he will be sedated and intravenously fed for a fixed period.

242. *See* Zellick, *supra* note 55, at 157. In 1975 the 29th World Medical Assembly issued the Declaration of Tokyo. Declaration 5 reads:

> Where a prisoner refused nourishment and is considered by the doctor as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, *he or she shall not be fed artificially.* The decision as to the capacity of the prisoner to form such a judgment should be confirmed by at least one other independent doctor. The consequences of the refusal of nourishment shall be explained by the doctor to the prisoner.

Lewey, *Force-Feeding — A Clinical or Administrative Decision?,* 116 CAN. MED. A.J. 416 (1977). The present policy of the Canadian Medical Association is that a prisoner who refuses nourishment shall be artificially fed. *Id.* The British policy is to leave discretion to the prison's medical official. *Id.*

mouth.[243] This method is preferred by prison administration and is more commonly used.[244] The prisoner can go about his daily routine except during meal time.[245] This method requires some cooperation from the patient-prisoner. When the patient resists, this method may cause pain and risk of injury or even death.[246] Both methods of force-feeding involve significant physical intrusion.

Most courts have considered more than the purely physical aspects of the bodily invasion.[247] For example, a blood transfusion entails a relatively minimal physical intrusion.[248] To a Jehovah's Witness, however, that simple medical process involves great insult and degradation as his religious beliefs are openly thwarted.[249] Similarly, the *Myers* court found the trial judge had viewed the obtrusiveness of hemodialysis too narrowly.[250] Although the procedure was physically unobtrusive, it required considerable commitment from the patient who had to undergo the treatment three times a week.[251] Force-feeding a hunger striker parallels both these examples. Tube feeding involves great indignation[252] as the prisoner remains conscious and physically restrained throughout the procedure.[253] Like the patient in *Myers*, the hunger striker must submit to the procedure repeatedly until his resolve is broken.

There is a distinction, however, between the intrusiveness of force-feeding and the procedures described in *Quinlan*, the Jehovah's Witness cases, and *Myers*. The latter circumstances requiring the intrusive procedures were un-

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243. *See Standing Firm, supra* note 237, at 514.

244. In addition, the prisoner need not be constantly sedated. All accounts of past force-feedings of hunger strikers have reported that tube feeding was utilized. *See generally* Zellick, *supra* note 55, at 157.

245. *See* Pankhurst, *Forcibly Fed,* McCLURE's August 1913, at 87 (suffragette's personal account of being force-fed in jail). Although this source is quite dated, the same general medical procedures were being used in 1974. *See generally* Zellick, *supra* note 55, at 157-58.

246. *See* Zellick, *supra* note 55, at 156-58; Altman, *The Doctor's World Hunger Strike: What Is Role of Physicians?,* N.Y. TIMES, Jan. 20, 1981, at C3, col. 1; *supra* note 128 and accompanying text.

247. *See* Note, *supra* note 182, at 111. *See also* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 754, 370 N.E.2d 417, 432 (1977) (examining the disorienting effect of treatment).

248. An intravenous blood transfusion should be considered a physically minimal intrusion when compared to other cases evaluating intrusiveness. *See, e.g.,* Satz v. Perlmutter, 362 So. 2d 160 (Fla. 4th D.C.A.) (patient on respirator), *aff'd with opinion,* 379 So. 2d 359 (1978); Lane v. Candura, 6 Mass. App. Ct. 377, 376 N.E.2d 1232 (1978) (amputation of leg); *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785 (1978) (amputation of leg).

249. *See, e.g., In re* Osborne, 294 A.2d 372 (D.C. 1972). The patient was questioned about his feelings concerning receipt of a blood transfusion. The patient responded: "I wish to live, but with no blood transfusion. Now, get that straight." *Id.* at 374. Ignoring such an adamant request would certainly cause indignation.

250. 379 Mass. ___, 399 N.E.2d at 457.

251. *Id.* This invasion was significantly so great that had Myers not been a prisoner he would have been allowed to refuse treatment. *Id.* at ___, 399 N.E.2d at 458.

252. *See* Pankhurst, *supra* note 245, at 90. After being force-fed Ms. Pankhurst wrote: "But infinitely worse than any pain was the sense of degradation, the sense that the very fight that one made against the repeated outrage was shattering one's nerves and breaking down one's self control." *Id.*

253. *See* Zellick, *supra* note 55, at 156-57.

controllable;[254] conversely, any forced-feeding and accompanying pain or degradation results solely from the hunger striker's conscious choice.[255] Courts have cited this voluntariness factor when discussing the appropriateness of bodily intrusion.[256] There has been no precedent, however, determining the weight afforded this argument.

The *Myers* decision provides an overall view of the personhood and state's life preservation balance.[257] Unlike the principal cases, the *Myers* court described the *Quinlan* balancing test and systematically applied it to the facts presented.[258] Myers' prognosis was considered bright because continued treatment would provide a normal and healthy life.[259] The magnitude of the bodily intrusion dialysis caused was sufficiently great, however, to allow the personhood rights to prevail over the state's life preservation interests.[260] The *Myers* court's analysis differs from that proposed above for hunger-striking prisoners in only two respects. First, the *Myers* court did not consider the nonphysical quality of life in evaluating the prognosis. Second, under the *Myers* facts, the court had no reason to address how self-inducement of the condition necessitating treatment should affect the evaluation of bodily invasion. The *Myers* decision and these two additional factors provide an adequate basis for future personhood and life preservation balancing in hunger strikes.

Personhood Rights vs. Prison Security and Order

The *Myers* court also balanced personhood rights against the state's interest in an orderly and secure prison.[261] The court found that the balance favoring personhood against life preservation shifted when the state also asserted prison order and security interests.[262] The *White* and *Chapman* courts similarly relied on this state interest to allow force-feeding.[263] The state interest in prison order thus heavily weighs the balance against personhood rights.[264] More significantly, the state need only to recite, as if mere liturgy, its interest in "order

254. This relates to the omission-commission distinction in applying the second inquiry of the traditional suicide test. *See supra* notes 61-64 and accompanying text.

255. *See Standing Firm, supra* note 237, at 514.

256. *See* Blackford v. United States, 247 F.2d 745, 752 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958). *See also* Breithaupt v. Abram, 352 U.S. 432, 435 n.2 (1957) (consent to blood test to determine alcoholic content of suspected intoxicated driver's blood is deemed given by statute. The statute declared that one who operates a motor vehicle on a state road consents to the blood test if there is reasonable cause for his arrest.).

257. 379 Mass. 255, 399 N.E.2d 452.

258. *Id.* at 255, 399 N.E.2d at 455-56. The court does not directly cite *Quinlan*. Its decision is, however, based on Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977), which adopted the *Quinlan* test.

259. 379 Mass. at ___, 399 N.E.2d at 456.

260. *Id.* at ___, 399 N.E.2d at 458.

261. *Id.* at ___, 399 N.E.2d at 457. The state interest in protecting the health of persons in state custody need not be separately balanced against personhood rights. That interest is considered an adaptation of the suicide prevention interest and is implicitly included in the suicide/personhood balance. *See supra* text following note 126.

262. 379 Mass. at ___, 399 N.E.2d at 457. *See supra* notes 119-33 and accompanying text.

263. *See Chapman*, 87 A.D.2d at ___, 450 N.Y.S.2d at 627; *White*, 292 S.E.2d at 56.

264. Of the three principal cases and *Myers*, *Zant* is the only court allowing the prisoner to refuse treatment, and it did not discuss prison security and order interests.

and security."[265] Indeed, this state interest carries such a strong presumption of validity that it is likely to overcome prisoners' rights claims.[266] As a result, many commentators have declared the Supreme Court's repudiation of the "hands off" doctrine illusory.[267] This was substantiated in *Bell v. Wolfish*.[268]

In *Wolfish*, the Court decided whether correction officials could conduct body-cavity searches absent probable cause to believe that the inmate was concealing contraband.[269] The Second Circuit Court of Appeals examined the circumstances surrounding the searches and found insufficient security reasons for the practice.[270] Accordingly, the appellate court held that the gross personhood violation inherent in body-cavity searches outweighed any claimed security interest.[271] The Supreme Court, however, found the facts concerning the search's efficacy irrelevant.[272] Instead, the court allowed body-cavity searches because "a detention facility is . . . fraught with serious security dangers."[273] A prisoner could successfully pierce the security and order interest presumption only by producing substantial evidence that the restriction was irrational.[274] In practical terms, this presumption is insurmountable.[275]

The one-sided balancing test of *Wolfish* might be avoided by distinguishing force-feeding from a body-cavity search. In *Wolfish*, the court noted the search was merely visual.[276] The relationship between the need for body searches and prison security is evident. A similar relationship between fasting and prison order, however, requires proof of likely mass emulation or rioting.[277] Finally, the most dramatic difference is that force-feeding may determine whether prisoners live or die.

Focusing on these differences, a court might determine that the extreme judicial deference to prison officials' judgments is inappropriate in hunger-strike situations. The Supreme Court in *Wolfish* relied on the separation of powers doctrine to support its judicial deference mandate.[278] The executive, not

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265. *See* Berger, *supra* note 158, at 20; Robbins, *supra* note 134, at 219. *See also* Bell v. Wolfish, 441 U.S. 520, 563 (1979) (Marshall, J., dissenting) (The court has accorded "virtually unlimited deference to detention officials' justifications for particular impositions.").

266. *See* J. GOBERT & N. COHEN, *supra* note 90, at 16; *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 1, 108 (1979).

267. *See* Berger, *supra* note 158, at 20; Robbins, *supra* note 134, at 219.

268. 441 U.S. 520 (1979).

269. *Id.* at 558.

270. Wolfish v. Levi, 573 F.2d 118, 131 (2d Cir. 1978), *rev'd sub nom.*, Bell v. Wolfish, 441 U.S. 520 (1979).

271. *Id.*

272. *Id. See* 441 U.S. at 577 (Marshall, J., dissenting) (the Court has overlooked the facts). The lower courts and the dissent found that contraband had only been discovered once in a strip search and therefore concluded such searches lack utility. The majority found this evidence demonstrated the searches' significant deterrent effect. *Id.* at 558.

273. *Id.* at 559. *See* Robbins, *supra* note 134, at 219.

274. 441 U.S. at 540-44 & n.23.

275. *See* Berger, *supra* note 158, at 20; Robbins, *supra* note 134, at 219; *The Supreme Court, 1978 Term, supra* note 266, at 108.

276. 441 U.S. at 558 n.39. Security personnel did not touch the prisoners in making the searches. *Id.*

277. *See supra* notes 127-28 and accompanying text.

278. 411 U.S. at 548.

the judicial branch, has been charged with prison operations.[279] Prison administration, however, does not usually include the responsibility of making life and death decisions. If the courts always defer to prison administrators' judgment, the balance will invariably favor the state. Adherence to a strict policy of judicial deference in a hunger-strike situation allows administrative judgment to decide life or death questions which are peculiarly within the judicial realm.[280] Instead, it is incumbent on the courts to impartially consider all the factors of force-feeding decisions rather than blithely following the state's assertion of prison interests.[281]

CONCLUSION: A FRAMEWORK FOR FUTURE ANALYSIS

The three principal decisions and their different analytical routes reveal the law's uncertainty in force-feeding hunger-striking prisoners. The analysis of the balance between individual's rights and the state's interests offers no definitive answer. That discussion, however, does establish a methodological framework for analyzing hunger-striking prisoner cases. This conclusion summarizes the separate points of the framework.

The initial task is to determine the mental competence of the hunger-striker. A lack of mental capacity allows the state to substitute its judgment for that of the hunger-striker. A prisoner, however, is not incompetent by virtue of his inmate status. He has the right to make fundamental life choices even though they may be overriden by countervailing state interests.

The state has the power and custodial duty to prevent suicides. Suicidal behavior is determined by examining all facts surrounding a hunger strike. A hunger strike may be distinguished from suicide by adopting the subjective test of the intent requirement for suicide. The better approach recognizes suicide laws inapplicable to those hunger strikers not manifesting mental disorder. Although if the facts indicate the faster's death would abandon a dependent child, under the *parens patriae* doctrine the state may act to prevent death.

If neither suicide prevention nor *parens patriae* is applicable, the state's ability to force-feed depends on the balance of four interests: preservation of life, prison order and security, and the rights of free speech and personhood. In balancing these interests, a court must consider that the state's interest in prison order is given great weight in this balance.

The Supreme Court has recently delineated the following factors which

279. *Id.*

280. *See* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 759, 370 N.E.2d 417, 435 (1977). The court stated: "[S]uch questions of life and death seem to us to require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created." *Id.*

281. *See generally* Berger, *supra* note 158, at 21-23 (discussing the general propriety of judicial deference). Another argument for distinguishing *Wolfish* is to assert that the constitutional right to die is a fundamental right that the state may burden only if a compelling state interest is served. Assuming *arguendo* that the right to die is a fundamental right, the prison official may look to the purpose of that right's exercise. Thus, the fundamental right to die could be infringed just as first amendment rights can be. *See supra* text accompanying note 170.

make the state's interest almost always determinative of whether to allow force-feeding. Although convicted prisoners do not forfeit all constitutional protections, their rights may be limited or withdrawn to accommodate prison order and security.[282] Prison administrators, not the courts, are to judge whether there is an important security and order interest present.[283] In making this determination prison officials may look to the purpose for which the asserted constitutional right is being exercised.[284] These administrative decisions must be upheld absent substantial proof that the government's actions are an exaggerated response to the perceived problem.[285]

The right to free speech will be pertinent only in extremely limited circumstances. Even if this right is implicated, its effect in the prison setting is tenuous.

The hunger striker's personhood rights are evaluated by considering the degree of physical and ideological intrusion associated with a force-feeding. The fact that any intrusion results from the striker's voluntary actions might also be influential. The state interest in preserving life is enhanced by recognizthe that force-feeding can sustain the prisoner's physical health, but it is weakened by recognizing the diminished quality of life after the forced-feeding.

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282. Bell v. Wolfish, 441 U.S. 520, 543, 545-56 (1979).

283. *Id.* at 547-48.

284. *See* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 126 n.4 (1977).

285. 441 U.S. at 540 n.23. If an exaggerated administrative response can be proven, *see, e.g.,* Bono v. Saxbe, 620 F.2d 607 (7th Cir. 1980) (strip searches before and after) or the court determines the prison interests are not implicated, then the other three interests must be balanced. *See, e.g., Zant,* 248 Ga. at 833, 286 S.E.2d at 716 (it appears the state failed to assert its interest in maintaining prison order).