NOTES

TESTING *CRUZAN*: PRISONERS AND THE CONSTITUTIONAL QUESTION OF SELF-STARVATION

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INTRODUCTION

In 1982, a New York court ordered the force-feeding of a prisoner who was attempting starvation to draw attention to the hungry children of the world.[1] Two years later, the Supreme Court of New Hampshire held that, despite inflicting great pain and discomfort, prison officials could continue to feed an inmate with a nasogastric tube.[2] In 1995, the Supreme Court of North Dakota determined that a sixty-four-year-old diabetic prisoner protesting the conditions of his confinement could be forced to undergo treatment after a hunger strike.[3] Soon after, the Second Circuit allowed the unwanted feeding of a civil contemnor in custody for refusing to testify before a grand jury.[4] In all, nearly fifteen state and federal courts have found that prison officials may force-feed a hunger-striking prisoner through highly invasive means.

Hunger strikes have become increasingly common in prisons across the United States and throughout the world. The practice represents one of few ways that inmates can protest the conditions of their incarceration or express political viewpoints. Fasting can also be the only plausible way for a prisoner to intentionally bring about his or her own death. Even so, from Massachusetts to Illinois to North Dakota, nearly every court that has addressed the issue has declined to recognize a prisoner's right to refuse invasive medical treatment—notwithstanding the grave health and safety risks involved. No federal court has ever recognized a prisoner's right to hunger strike, and the Federal Bureau of Prisons has even created detailed guidelines delineating the process for force-feeding inmates.

This state of affairs persists despite the Supreme Court's holdings in *Cruzan v. Director, Missouri Department of Health*[5] and *Washington v. Glucksberg*[6] that individuals necessarily possess a fundamental right to refuse lifesaving medical treatment. This Note argues that force-feeding a competent inmate necessarily violates that inmate's fundamental privacy rights, as established by *Cruzan* and reiterated in *Glucksberg*. Part I illustrates the prevalence of prison hunger strikes in the United States and abroad. While this Note addresses primarily United States law, an international context helps to demonstrate the frequency with which hunger strikes occur. Part II briefly explains the typical process of force-feeding and the related pain and health risks. This explanation is critical to understanding the extent of the physical intrusion involved, and therefore the extent of an inmate's liberty interest in avoiding involuntary treatment. Part III outlines Supreme Court jurisprudence

1. Von Holden v. Chapman, 87 A.D.2d 66 (N.Y. App. Div. 1982).

2. *In re* Caulk, 480 A.2d 93 (N.H. 1984); *see also Force-Feeding Ordered by Judge for Prisoner*, N.Y. TIMES, May 26, 1984, at A10.

3. State *ex rel.* Schuetzle v. Vogel, 537 N.W.2d 358 (N.D. 1995).

4. *In re* Grand Jury Subpoena John Doe v. United States, 150 F.3d 170 (2d Cir. 1998).

5. 497 U.S. 261, 278 (1990).

6. 521 U.S. 702, 725 (1997).

establishing a right to refuse unwanted palliative care. *Cruzan* and *Glucksberg* create a substantive due process framework that emphasizes individual autonomy over involuntary treatment. No court that has sanctioned force-feeding has ever fully explained why hunger striking should fall outside this clear precedent. Nor has any court demonstrated that the practice serves "legitimate penological interests" and passes muster under *Turner v. Safley*.[7] Part IV analyzes governments' countervailing interests in force-feeding prison inmates. Case law requires that adequate interests be averred to justify the intrusions posed by force-feeding. The governmental interests generally asserted—including the preservation of life and effective prison administration—prove to be ill-articulated and unsatisfactory. Part V considers the few cases in which courts have recognized a prisoner's right to refuse treatment and explains why even those holdings may be limited.

I. HUNGER STRIKES IN THE UNITED STATES AND ABROAD: THE INTERNATIONAL PREVALENCE OF PRISONER FASTING

Hunger strikes by prisoners are by no means a purely modern form of protest. The practice has persisted for hundreds of years. For example, hunger strikes were waged by the Fenians in the nineteenth century.[8] Since then, these strikes have occurred in prisons across the world. Varying in length, consequence, and severity, they are hardly rare today.

The United States has seen its share of well-publicized hunger strikes. For example, five such strikes have been waged by detainees held by the United States in Guantanamo Bay, Cuba.[9] In 2005, for instance, more than a quarter of approximately 500 detainees fasted to protest the conditions and length of their confinement. Twenty were tube-fed.[10] The details were disturbing and included accounts that military medics were forcing "finger-thick" tubes into prisoners' noses without painkillers.[11] According to lawyers for the detainees, the medics were also recycling "dirty feeding tubes used on other prisoners."[12] In 2002, nearly 200 detainees refused meals in a rolling hunger strike that was triggered after a guard removed a turban from a praying inmate.[13] That same year, two

7. 482 U.S. 78, 89 (1987).

8. Richard Ford, *Starving to Death for a Cause*, TIMES (London), Nov. 6, 2001, at 2.

9. *Detainees' Hunger Strike in Month Two*, WASH. POST, Sept. 10, 2005, at A6.

10. *Guantanamo Hunger Strike Keeps Growing*, CHI. TRIB., Sept. 16, 2005, at 5.

11. Charlie Savage, *Guantanamo Medics Accused of Abusive Force-Feeding*, BOSTON GLOBE, Oct. 15, 2005, at A4.

12. *Id*. Judge Gladys Kessler of the U.S. District Court for the District of Columbia found allegations concerning the force-feeding of detainees at Guantanamo Bay "deeply troubling" and ordered the government to inform a detainee's lawyer within twenty-four hours of a client's force-feeding. Neil A. Lewis, *Guantanamo Detainees Gain in Ruling*, N.Y. TIMES, Oct. 27, 2005, at A22 (quoting Judge Kessler).

13. Richard A. Serrano, *Detainees in Cuba Refuse To Eat After Cell Incident*, L.A. TIMES, Mar. 1, 2002, at A1.

others who refused food for a month—stating that "they wanted to go home"—were force-fed through stomach tubes.[14]

Smaller-scale strikes have occurred throughout the country. In 2004, a Sikh priest from India starved himself to death in a California state prison without officials recognizing that he was on strike at all.[15] A Maryland prisoner convicted of burglary refused to eat solid food in protest of his lengthy sentence. The prisoner, Warren R. Stevenson, was rendered unconscious after his body weight dropped to 107 pounds. He was force-fed through a nasogastric tube.[16] Stevenson's forced treatment occurred just after a prisoner convicted of murder in Arizona died from a hunger strike while demanding access to a religious diet. Teshone Abate was also force-fed, but died after repeatedly pulling out his own feeding tubes. He weighed only seventy-five pounds at the time of his death.[17] Even Jack Kevorkian continuously threatened to starve himself to death in prison, though he later recanted his threats.[18]

Accounts from abroad provide further illustration. During the summer of 2004, nearly 3000 Palestinian inmates from several prisons initiated a hunger strike, demanding better conditions in Israeli jails. They drafted an exhaustive list of 149 demands, ranging from an end to strip searches to more family visits. Israel's Public Security Minister, Tzachi Hanegbi, announced that the prisoners could starve themselves to death—the government simply would not yield to demands.[19] This was not the first time Israel had witnessed such an event. Eight years earlier, prisoner Uzi Meshulam and his followers waged a similar hunger strike. A High Court justice finally issued an order to force-feed one member of the group, though the inmate ultimately decided to end the protest.[20]

Turkey has witnessed several waves of severe hunger strikes. In 2001, controversial, nationwide prison reforms sparked strikes that lasted for months.

14. *U.S. Force-Feeds 2 Prisoners Who Did Not Eat for 30 Days*, WASH. POST, Apr. 1, 2002, at A2.

15. Mark Arax, *Corcoran Inmate Starves to Death*, L.A. TIMES, Feb. 20, 2004, at B9.

16. Katherine Shaver, *Md. Inmate's Hunger Strike Underscores Growing Debate; Courts Being Asked To Decide if Prisoners Have a Legal Right To Starve Themselves*, WASH. POST, Jan. 7, 1998, at B1.

17. *Thurmond Leaves Hospital*, SUN-SENTINEL (Ft. Lauderdale), Jan. 5, 1998, at 3A.

18. Allan Hall, *Final Solution*, SCOTSMAN, Apr. 17, 1999, at 15; Jon Hall, *Friends Say Kevorkian Ceases Role in Suicides, Including His Own*, BOSTON GLOBE, Sept. 19, 1999, at A3; Richard Roeper, *Kevorkian Supporters Don't Know (Real) Jack*, CHI. SUN-TIMES, Nov. 24, 1998, at 11; *Suicide Doctor Is Jailed in Detroit Amid a Threat To Starve Himself*, N.Y. TIMES, Nov. 6, 1993, at A1.

19. Harvey Morris, *Palestinian Prisoners' Hunger Strike Gathers Momentum*, FIN. TIMES (London), Aug. 24, 2004, at 8. One prison official did note that if it became necessary, authorities would force-feed prisoners to keep them from starving to death.

20. Raine Marcus, *Meshulam Moved to Jail in North*, JERUSALEM POST, May 13, 1996, at 12 (noting that "[a]uthorities . . . are determined to ensure that no prisoners starve themselves to death, and all followers are constantly being examined by doctors"); Raine Marcus, *Prisons Service Continues Crackdown on Meshulam Followers*, JERUSALEM POST, May 8, 1996, at 12.

In Istanbul alone, more than twenty individuals died protesting the transfer of hundreds of prisoners to single-cell prisons.[21] By 2002, the death toll of those protesting prison conditions had risen to more than forty-five.[22] Several years earlier, more than 1900 Turkish inmates in thirty-three prisons participated in a similar hunger strike. Several prisoners died of starvation while demanding access to legal defense, medical treatment, and an end to in-prison torture.[23]

Perhaps the most publicized prison hunger strikes were those that occurred more than twenty years ago in a Northern Ireland prison. On March 1, 1981, Irish Republican Army (IRA) prisoner Bobby Sands initiated a now-famous, seven-month hunger strike. Sands and his followers demanded that the British government officially recognize them as "prisoners of war" rather than "criminals."[24] The prisoners succeeded with some of the demands that they made—they were allowed to wear their own clothes and were no longer required to work in the prison. However, the strikers were never able to regain their desired political status.[25] Ten prisoners, including Sands, eventually starved to death in protest.[26]

Unlike the United States, Great Britain has officially recognized a prisoner's legal right to starve. In 1994, the High Court of Justice's Family Division announced a landmark ruling that, so long as a prisoner can demonstrate sanity, he is free to refuse food and sustenance.[27] The right

21. Pelin Turgut, *City Life: Istanbul—Price of Prisoners' Rights May Be Death for Strikers*, INDEPENDENT (London), Apr. 30, 2001, at 13; *see also Court Orders Liquidation of Media Group Holdings*, SUN-SENTINEL (Ft. Lauderdale, Fla.), May 30, 2001, at 1A.

22. Douglas Frantz, *World Briefing Europe: Turkey: 46th Death in Hunger Strike*, N.Y. TIMES, Jan. 9, 2002, at A8.

23. Cynthia Hanson & Suman Bandrapalli, *The News in Brief*, CHRISTIAN SCI. MONITOR, July 25, 1996, at 2; *see also World News Briefing*, ROCKY MOUNTAIN NEWS, July 24, 1996, at 29A (reporting that prison officials were unable to force-feed inmates because other striking inmates would not allow the workers to enter the prison wards).

24. *See* James T. Kelly, *The Empire Strikes Back: The Taking of Joe Doherty*, 61 FORDHAM L. REV. 317, 332 (1992); Daniel F. Mulvihill, *The Legality of the Pardoning of Paramilitaries Under the Early Release Provisions of Northern Ireland's Good Friday Agreement*, 34 CORNELL INT'L L.J. 227, 233 (2001).

25. Mulvihill, *supra* note 24, at 233. Mulvihill notes that the strikers hoped to achieve several goals, besides a change in political status, through the protests: (1) "the right to wear their own clothes"; (2) the ability "to avoid prison work"; (3) the right "to freely associate within the prisons"; (4) the creation of "organized recreational facilities"; and (4) the "restoration of remission time lost." *Id.* at 233 n.45. For more information on the IRA hunger strikes generally, see DAVID BERESFORD, TEN MEN DEAD: THE STORY OF THE 1981 IRISH HUNGER STRIKE (1987); JOHN M. FEEHAN, BOBBY SANDS AND THE TRAGEDY OF NORTHERN IRELAND (1983).

26. *See* Leonard Downie, Jr., *Ulster: A Political Solution?*, WASH. POST, Sept. 7, 1981, at A1.

27. Sec'y of State v. Robb, [1995] Fam. 127; *see also* Richard Ford & Valerie Elliot, *Fanatic Who Revelled in His Notoriety*, TIMES (London), Nov. 6, 2001; *Prisoners Win Right To Starve*, DAILY MAIL (London), Oct. 5, 1994, at 2. Justice Thorpe stated that the right of an individual to decide his own future outweighed the state interest in preventing starvation. *Robb*, [1995] Fam. at 132. It was emphasized that this right was not diminished by prisoner

recognized has been tested with human life. For example, in 2001, Barry Horne, a "dedicated animal rights terrorist," starved himself to death in the name of animal rights after he firebombed facilities associated with animal products. Because he was declared sane, the prison that held him had no choice but to abide by his refusal to eat.[28] Not every case has been so dramatic: In 1996, Gary Bland died following a ninety-eight-day hunger strike.[29] He was the longest survivor of a prison hunger strike and the first to starve himself in a British prison for nonpolitical reasons.[30]

The prevalence and severity of hunger strikes during the past few decades demonstrate the importance of formulating a clear jurisprudence on the matter—the result literally would signify the difference between life and death.[31]

II. METHODS OF FORCE-FEEDING: PROCEDURE AND PRACTICE

Identifying the physical intrusiveness involved in force-feeding is a critical step in recognizing a prisoner's right to refuse treatment. Naturally, the more invasive a procedure or practice, the more critical an individual's liberty interest becomes. Even recently, in *Wilkinson v. Austin*, the Supreme Court noted that a liberty interest in the correctional context becomes greater as

status. *Id*. The case effectively overruled a 1909 case involving a British suffragette. That case had been interpreted by the courts as placing a duty on prison officials to force-feed.

28. Kevin Toolis, *Inside Story: To the Death*, GUARDIAN (London), Nov. 7, 2001, Features, at 6.

29. *Killer Starves Himself to Death in Jail*, HERALD (Glasgow), Jan. 20, 1996, at 6; Sally Weale, *Contrite Murderer Starved Himself to Death*, GUARDIAN (London), Jan. 20, 1996, at 2. For a history of prison hunger strikes in Britain, see Richard Ford, *supra* note 8.

30. Some countries have taken a more blunt approach: In Australia, seventeen prisoners began a hunger strike in 1998, protesting a ban on contact visits and demanding exercise equipment and other "hobby materials." While the strike eventually ended on its own accord, the Queensland Prisoners Minister asserted that the prisoners were welcome to starve. He brusquely claimed: "I don't care if they starve. I don't care about them, they're the bottom of the barrel." Scott Emerson & Christopher Niesche, *Vicious, Callous Prisoners Welcome To Starve*, AUSTRALIAN (Sydney), Apr. 8, 1998, at 3. The prisoners received daily medical checks and regular counseling from psychologists.

31. Many of the hunger strikes discussed here occurred abroad. However, even the way other legal systems manage hunger-striking inmates could have an impact on American jurisprudence. This is especially true given the Supreme Court's increasing attention to international sources and doctrine in creating its own precedent—as demonstrated recently in cases like *Roper v. Simmons*, 125 S. Ct. 1183, 1198-1200 (2005), and *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003). *See* Carl Bruch & John Pendergrass, *Type II Partnerships, International Law, and the Commons*, 15 GEO. INT'L ENVTL. L. REV. 855, 886 n.54 (2003) ("More broadly, sitting members of the U.S. Supreme Court increasingly have considered international law, policy, and practice in interpreting domestic law."); *see also* Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (considering the views of the "world community" in holding that the execution of a mentally retarded individual is prohibited by the Eighth Amendment).

conditions or hardships become more significant.[32] Here, it is "difficult to imagine a greater intrusion upon one's right to bodily integrity and self-determination than force-feeding."[33] For that reason, doctors around the world have condemned the procedure.[34]

Two methods of force-feeding are generally discussed in the context of prisoner fasting. The preferred method occurs via medical tube. For example, nasogastric feeding, most commonly sanctioned by the courts, is accomplished by inserting a soft tube into the nose, through the esophagus, and directly into the stomach.[35] This process can be both painful and dangerous. An account from a 1984 New Hampshire case is revealing:

> [N]asogastric tube-feeding began . . . in accordance with the . . . order of the superior court. No novocaine was used during the insertion of the tube. [The prisoner] suffered a great deal of pain and discomfort as a result of the constant irritation of the tube on his throat and nasal passages. His efforts to resist the painful swallowing reflex caused him to suffer severe headaches. The tube was removed due to the danger of imminent ulceration of his throat and nasal passages.[36]

Tube feeding is also problematic given the frequency with which it must occur. Illustrative is an Alabama case in which a prisoner received the procedure every three days:

> [M]edical personnel initially inserted a large tube into his nose, which did not fit. The medical personnel then attempted to insert smaller and smaller tubes until [the prisoner's] nose began bleeding internally. The doctor ordered that [the prisoner] be injected with an anesthetic, and a gastric tube inserted through his mouth. Since then, [he] has received an injection of anesthetic and a gastric tube through the mouth every three days.[37]

Intravenous treatment has also been sanctioned by the courts. That procedure involves penetration through a major blood vessel. There are several drawbacks to this method. First, unless a prisoner is sedated, he or she will in all likelihood attempt to obstruct treatment by pulling out the needles used to deliver nutrients. That interference could lead to a severe loss of blood that

32. 125 S. Ct. 2384, 2394-95 (2005) (finding that the combination of (1) a change in parole eligibility and (2) the lengthy duration associated with the Supermax facility of the Ohio State Penitentiary gave rise to a liberty interest).

33. *In re* Caulk, 480 A.2d 93, 99 (N.H. 1984) (Douglas, J., dissenting).

34. *See infra* notes 137-38 and accompanying text.

35. *See In re* Hier, 464 N.E.2d 959, 961-62 (Mass. App. Ct. 1984) (providing a detailed account of various methods of force-feeding). Though the courts refer most commonly to nasogastric feeding, gastronomy tubes seem to be used more often for longer-term care as they cause less discomfort and fewer complications. *See* David Orentlicher, *Feeding Tubes, Slippery Slopes, and Physician-Assisted Suicide*, 25 J. LEGAL MED. 389, 390 (2004).

36. *Caulk*, 480 A.2d at 99 (Douglas, J., dissenting).

37. *In re* Soliman, 134 F. Supp. 2d 1238, 1245 (N.D. Ala. 2001), *vacated as moot*, 296 F.3d 1237 (11th Cir. 2002) (defendant no longer in U.S. custody).

could be fatal in just three to four minutes.[38] Also, this intrusive procedure carries a risk of infection, especially given the tendency for inmates to interfere.[39]

Still, only a few state courts have refused to condone the procedure. Every federal court to address the issue has sanctioned the force-feeding of a prisoner, regardless of whether the individual was a convicted inmate, a pretrial detainee, or a person being held pursuant to a civil contempt order. In fact, the Federal Bureau of Prisons has fashioned guidelines detailing how prison officials should handle inmates engaging in a hunger strike. Prison officials must monitor the health and welfare of inmates, ensuring that all procedures are taken to "preserve life."[40] According to the federal regulations, seventy-two hours without eating constitutes a presumptive hunger strike.[41] Once it is determined that an inmate is on a strike, he or she is medically examined for any physical or psychological problems.[42] If medically necessary, the inmate will be transferred to a Medical Referral Center or another appropriate institution.[43] Prison officials are ordered to prepare and deliver three meals per day to inmates, unless otherwise instructed by a physician—any commissary food or private food items are confiscated.[44] Once a physician determines that, absent treatment, an inmate's life or health will be at risk, he or she may order treatment against the inmate's will.[45] Prior to any involuntary medical procedures, staff members are instructed to make reasonable efforts to convince the prisoner to undergo treatment voluntarily.[46]

Current methods of force-feeding may very well keep a prisoner alive, but the associated levels of intrusion need no further illustration.[47] These procedures—and the accompanying pain and health risks—produce exactly the kind of bodily intrusion warned against in cases like *Cruzan*.

38. *Hier*, 464 N.E.2d at 962; Comm'r of Corr. v. Myers, 399 N.E.2d 452, 454 (Mass. 1979).

39. *Hier*, 464 N.E.2d at 962.

40. 28 C.F.R. § 549.60 (2005).

41. *Id.* § 549.61.

42. *Id.* § 549.63(a). This initial examination includes the execution of the following procedures: "(1) Measure and record height and weight; (2) Take and record vital signs; (3) Urinalysis; (4) Psychological and/or psychiatric evaluation; (5) General medical evaluation; (6) Radiographs as clinically indicated; (7) Laboratory studies as clinically indicated." *Id.*

43. *Id.* § 549.63(d).

44. *Id.* § 549.64.

45. *Id.* § 549.65(a)-(e).

46. *Id.* Only a doctor can order that a prisoner be released from hunger strike evaluation or treatment. *Id.* § 549.66.

47. Without force-feeding, humans can generally live thirty to fifty days after the body has lost more than twenty-five percent of its normal weight. Carla Hall, *Power and Politics of Fasting*, L.A. TIMES, June 10, 1993, at A1.

III. FOUNDATIONS OF PRIVACY: THE SUPREME COURT AND THE CONSTITUTIONALITY OF THE RIGHT TO STARVE

A. *The Right To Be Free from Force-Feeding:* Cruzan *and* Glucksberg

A prisoner's right to refuse unwanted medical treatment is firmly rooted in the Supreme Court's "right-to-die" jurisprudence, established more than fifteen years ago. The Court has long recognized a constitutional right to privacy generally, though the exact source of that right is difficult to pinpoint. It has been grounded in several foundations, including common law rights, the Constitution's general provision of "liberty," and specific constitutional provisions. The specific "right to die" most relevant here has been couched in terms of the Fourteenth Amendment's substantive due process guarantees.[48]

Early prisoner starvation cases—decided more than twenty years ago—examined prisoners' rights through a general autonomy lens. Because there was little in the way of specific right-to-die jurisprudence, these early opinions appealed mostly to common-sense arguments about self-determination and invasiveness.[49] It was only after the Supreme Court decided *Cruzan v. Director, Missouri Department of Health* and *Washington v. Glucksberg* that a prisoner's right to starve began to take clearer form.

In *Cruzan*, the Supreme Court suggested that the Constitution gave a competent individual the right to refuse lifesaving medical treatment. While a state could condition that right on the establishment of clear and convincing evidence of a patient's wishes, the right itself was assumed.[50] Nancy Cruzan was in a car accident that left her in a persistent vegetative state.[51] Her parents, recognizing the permanence of her condition, sought a court order mandating withdrawal of all artificial feeding and hydration.[52] The Missouri Supreme Court held that state law dictated that a surrogate, such as Cruzan's parents, could not end Cruzan's life without at least clear and convincing evidence of her desire to have treatment withdrawn. The United States Supreme Court, in a 1989 opinion, held that Missouri's procedural requirement comported with the Constitution.[53]

48. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S 261, 279 n.7 (1990).

49. There has been a lack of scholarly attention to the issue of prison hunger strikes since *Cruzan*, *Glucksberg*, and *Turner*—the pivotal cases—were decided. While there was some attention to this privacy question in the early 1980s, it was directed only at a few early cases discussing general privacy rights outside of the *Cruzan* and *Turner* frameworks. *See, e.g.*, Steven C. Bennett, *The Privacy and Procedural Due Process Rights of Hunger Striking Prisoners*, 58 N.Y.U. L. REV. 1157 (1983); Joel K. Greenberg, *Hunger Striking Prisoners: The Constitutionality of Force-Feeding*, 51 FORDHAM L. REV. 747 (1983); Stephanie Clavan Powell, *Forced Feeding of a Prisoner on a Hunger Strike: A Violation of an Inmate's Right to Privacy*, 61 N.C. L. REV. 714 (1983).

50. *Cruzan*, 497 U.S. at 278, 284.

51. *Id.* at 266.

52. *Id.* at 268.

53. *Id.* at 280.

The *Cruzan* opinion confirmed the notion that, given certain procedural safeguards, an individual may refuse medical treatment. It succinctly stated: "The principle that a competent person has a constitutionally protected liberty interest *in refusing unwanted medical treatment* may be inferred from our prior decisions."[54] Moreover, the opinion was steeped in pro-autonomy language. It began by quoting an 1891 Supreme Court case to establish this country's long-time recognition of the sanctity of self-determination. It emphasized that "[n]o 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 restraint or interference of others, unless by clear and unquestionable authority of law."[55]

In *Washington v. Glucksberg*, the Court clarified and reinforced its holding in *Cruzan*.[56] In distinguishing assisted suicide from the refusal of medical treatment, the Court upheld Washington's ban on assisted suicide. However, it took the opportunity to articulate its "right-to-die" jurisprudence further and bolstered the principle assumed in *Cruzan*:

> The right assumed in *Cruzan* . . . was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions.[57]

Cruzan, reinforced by *Glucksberg*, firmly established a broad substantive due process right to refuse palliative care. The Supreme Court did not condition that right on the status of the individual, the seriousness of his or her medical condition, the reason for the refusal, or the asserted interests of other parties. Rather, the doctrine concentrates on the liberty interest itself, as opposed to the surrounding circumstances. There is no relevant mention of such factors in either opinion. As will be demonstrated, given the categorical nature of the right recognized, there can be little dispute that a nonincarcerated individual could wage a hunger strike and assert a constitutional right to refuse artificial nutrition and hydration. Considering the holdings of *Cruzan* and *Glucksberg*, there is no reason why that right should not also extend to a prison inmate, so long as certain procedural safeguards are met.[58]

54. *Id.* at 278 (emphasis added).

55. *Id.* at 269 (quoting Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

56. 521 U.S. at 725.

57. *Id.*

58. The process may even be simplified in the case of a hunger-striking prisoner. Because a prisoner would not be asserting his right through a surrogate, issues regarding substituted judgment would not come into play.

B. *The Implications of Prisoner Status on the "Right To Starve":* Turner v. Safley

In *Turner v. Safley*, the Supreme Court maintained that a prisoner "retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[59] However, the *Turner* Court created a new, and often lenient, standard for evaluating the validity of prison regulations, even when they impose upon a prisoner's fundamental constitutional rights: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is *reasonably related to legitimate penological interests*."[60] The Court articulated a four-part test to determine the reasonableness of such prison directives. First, any regulation must have a "valid, rational connection" to a legitimate governmental interest.[61] Second, alternative means must be open to inmates wishing to exercise the right.[62] Third, the impact of the right on guards, inmates, and prison resources must be considered.[63] Last, the question whether "ready alternatives" to the regulation exist must be answered.[64]

Using this framework, the *Turner* Court upheld a Missouri regulation restricting inmate-to-inmate correspondence.[65] On the other hand, the Court rejected a regulation prohibiting inmates from marrying unless the marriage was approved by a prison superintendent.[66] The Court found that the marriage regulation was "an exaggerated response to [the prison's] security objectives."[67]

As will be demonstrated, the force-feeding of a prison inmate cannot pass muster even under *Turner*'s relaxed standard. Here, assuming that *Turner* does apply to this most fundamental right, we are confronted with a similarly "exaggerated response" to what may be hypothetical security concerns. Prison officials in the case of hunger-striking inmates have failed utterly to explain how allowing a fully competent inmate to refuse invasive medical procedures is "inconsistent with proper incarceration."[68] They have not shown sufficient evidence that hunger strikes hinder prison operations or that they injure the

59. 482 U.S. 78, 95 (1987) (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).

60. *Id.* at 89 (emphasis added).

61. *Id.* (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

62. *Id.* at 90.

63. *Id.*

64. *Id.*

65. *Id.* at 91-93.

66. *Id.* at 94-97.

67. *Id.* at 97-98. For a summary of the Court's analysis on the marriage regulation and related prisoners' rights issues, see Rachel Roth, *"No New Babies?": Gender Inequality and Reproductive Control in the Criminal Justice and Prison Systems*, 12 AM. U. J. GENDER SOC. POL'Y & L. 391, 395-97 (2004).

68. *See infra* Part IV.B (discussing this evidentiary failure).

inmate community as a whole.[69]

Moreover, the Supreme Court has emphasized that it applies "*Turner*'s reasonable-relationship test *only* to rights that are 'inconsistent with proper incarceration.'"[70] Recently, in *Johnson v. California*, the Court held that an unwritten prison regulation segregating inmates in double cells warranted strict scrutiny review, rather than the more lax *Turner* standard.[71] It emphasized that while "certain privileges and rights must necessarily be limited in the prison context," rights that need not necessarily be compromised for proper prison administration are "not susceptible to the logic of *Turner*."[72] As the subsequent discussion will demonstrate, the rights of hunger-striking prisoners clearly need not be compromised for proper prison management.[73]

Last, it is important to note that the procedures utilized for force-feeding an inmate greatly surpass in bodily invasiveness any of the above regulations. Forcibly inserting a tube into an individual's body is simply not a proportional reaction that can be considered "reasonably related to penological interests."[74]

IV. STATE INTERESTS IN FORCE-FEEDING PRISON INMATES

In all, more than twelve courts have sanctioned the use of force-feeding to handle a hunger-striking prisoner. To be sure, every court must recognize that force-feeding implicates an inmate's privacy rights. The critical question becomes whether the state can posit interests sufficiently substantial as to prevail over prisoners' rights. Prison officials opposing hunger strikes have claimed that several state interests are determinative. First, and most often cited, is the state's general interest in the preservation of life. Associated, is the

69. *See* discussion *infra* Part IV.B-C.

70. Johnson v. California, 125 S. Ct. 1141, 1149 (2005) (quoting Overton v. Bazzetta, 539 U.S. 126, 131 (2003)) (emphasis in original).

71. *Id.* at 1148 ("Because the CDC's policy is an express racial classification, it is 'immediately suspect.'") (citation omitted).

72. *Id.* at 1149.

73. The *Turner* factors concern only the relationship between the penological interest asserted and the prison regulation or practice in question. *See* Shaw v. Murphy, 532 U.S. 223, 230 (2001).

74. Even in the context of a prison, the Court has found that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." Washington v. Harper, 494 U.S. 210, 229 (1990). In a post-*Turner* case, the Supreme Court upheld a Washington regulation that allowed prison authorities to drug dangerous inmates against their will so long as three conditions are met: (1) the inmate has a "serious mental illness"; (2) the inmate is "dangerous to himself or others"; and (3) treatment is "in the inmate's medical interest." *Id.* at 227. The Court's decision hinged in large part on the statute's procedural safeguards and the likelihood that an inmate considered gravely in need of nonconsensual medical treatment by a psychiatrist could pose "serious harm" to himself and the prison population. *Id.*; *see also* Sell v. United States, 539 U.S. 166 (2003) (emphasizing the liberty interest in avoiding unwanted drugs and quashing orders authorizing forced administration of antipsychotic drugs).

more specific interest in preventing suicide. Second, and unrelated to sanctity of life issues, are concerns about the prisons themselves. These asserted interests include not only prison safety and efficiency concerns, but also concerns about sanctioning the manipulation of prison officials. Third, officials cite the interests of external parties. These interests most often take the form of a concern for the ethical integrity of the medical profession and, less often, a concern for third parties involved—generally, dependent children of hunger-striking prisoners.

Prison officials have taken a very pragmatic legal approach in their efforts to oppose hunger strikes. Curiously absent from any state arguments or judicial opinions are the more philosophical notions that a prisoner should be forced to live out his sentence as a form of retribution for his crimes. While it should not be found ultimately determinative when compared with the privacy right at stake, this less utilitarian theory may make more intuitive sense than many of the rationales advanced by the state.

The idea is that by permitting an inmate to effectively avoid his mandated time in jail, the state is enabling him to circumvent the punishment society has deemed appropriate. As one commentator has noted, "retributive-based punishment requires no action by the offender demonstrating personal accountability other than serving out the required sentence."[75] Therefore, "doing the time" is critical. If that is the case, allowing a prisoner to fast to death allows him to absolve himself of personal accountability for his crime. This argument becomes especially controversial in the context of death row prisoners. No court has properly addressed this claim, but it appears to be a more persuasive argument. Still, in the end, even this argument cannot justify disregarding the autonomy interest guaranteed by *Cruzan*. The philosophical point simply is not sufficient when compared to an individual's right to control the course of his own life or death. At all events, its absence from the debate is difficult to understand.

Also absent from the relevant discussions is any mention of prisons' "PR," so to speak. It is highly possible, if not probable, that a prison could be subject to great public condemnation in response to the news that a prisoner has been allowed to die in its custody. This condemnation could be triggered by the death itself, by the outrage of family members, or because the death raised grave concerns about the conditions of the prison. The practice of forcing hunger strikers to execute a release of civil or criminal liability would lessen concerns of legal sanctions. But the effects of public disapproval could be felt widely by prisons and the government generally. One cannot help but wonder if these types of rationales are lurking in the background of prison officials' and judges' minds.

75. Erik Luna, *The Practice of Restorative Justice: Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 246.

A. *The Preservation of Life and the Prevention of Suicide*

1. *The preservation of life*

Every court to address the dilemma posed by prison hunger strikes has found the state's interest in the preservation of life to be a central, if not *the* central, government interest at stake.[76] Some courts have found that this interest alone justifies the force-feeding of an inmate.

In *White v. Narick*, for instance, a prisoner convicted of murder and serving a life sentence began a hunger strike that caused him to lose more than 100 pounds.[77] With limited explanation, the West Virginia Supreme Court held that the state's interest in preserving life was clearly superior to White's autonomy and privacy rights. The court strongly disagreed with the Georgia Supreme Court's earlier decision in *Zant v. Prevatte*, in which the prisoner prevailed.[78] The *White* court made clear that *Zant* failed to recognize the importance and sanctity of life.[79]

Interestingly, the *White* court insinuated that the state's interest in life would depend on the condition of the individual. For example, the court would recognize the right to refuse treatment of those "approaching certain, painful, uninvited death."[80] Therefore, a terminally ill and pained individual would have the ability to "get it over with."[81] But the court distinguished the case of a hunger-striking prisoner, mostly because of doubts about a prisoner's commitment to death. As the court noted: "[P]rotestations for causes . . . are emotional commitments as various and unpredictable as the winds."[82]

Commissioner of Correction v. Myers employed a similar distinction.[83] The Supreme Judicial Court of Massachusetts discussed whether prison officials could be permitted to force dialysis and other life-saving techniques on a prisoner with a severe kidney condition.[84] It determined that the state's interest in preserving life was "quite strong."[85] While an earlier Massachusetts case had determined that "a person has a strong interest in being free from nonconsensual invasion of his bodily integrity,"[86] Myers did not have a "life-

76. *See, e.g.*, Singletary v. Costello, 665 So. 2d 1099, 1109 (Fla. Dist. Ct. App. 1996) ("Turning to the instant case, quite obviously, the state interest in the preservation of life, the most significant interest, is implicated.").

77. 292 S.E.2d 54, 55 (W. Va. 1982).

78. 286 S.E.2d 715 (Ga. 1982).

79. *White*, 292 S.E.2d at 57.

80. *Id.* at 58.

81. *Id.* (internal quotation marks omitted).

82. *Id.*

83. 399 N.E.2d 452 (Mass. 1979).

84. *Id.* at 453-54.

85. *Id.* at 456.

86. *Id.* at 455 (quoting Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977)).

threatening" condition, and he could "live an otherwise normal and healthy life."[87]

Other courts have made this distinction between a terminally ill individual and a hunger striker. Illustrative is *In re Caulk*.[88] Joe Caulk, a thirty-six-year-old prisoner, was serving the equivalent of a life sentence for sexual assault and other crimes when he began refusing solid foods. He claimed he was unhappy, disappointed with life, and that if he could not "live freely, he [did] not want to live at all."[89] He believed that by starving himself, he would be "paying another debt for his past misdeeds."[90] The New Hampshire Supreme Court found that—because the inmate was completely healthy—the preservation of human life was paramount. Like the West Virginia Supreme Court in *White*, it asserted that Caulk did not present a case in which an individual suffering from a debilitating condition chose to forgo extraordinary methods to save his life. Rather, "the defendant . . . set the death-producing agent in motion with the specific intent of causing his own death."[91] The court allowed prison officials to continue force-feeding Caulk.

This distinction, based on the condition of a prisoner, is not convincing or viable. A jurisprudence focused on "how bad" a prisoner's condition really is would be impossible to administer over time. Judges are simply not qualified to make the decisions that would necessarily be involved. Such determinations are the province of doctors, not those adjudicating the law. More important, given the depth of the privacy right involved, the distinctions stressed in cases like *White* and *Caulk* cannot justify the preservation of life as an adequate rationale for force-feeding. The right described in *Cruzan* is based on the supremacy of personal autonomy and continues to apply in the prison context. In cases where a nonprisoner wishes to refuse treatment, the preservation of life is subrogated to the individual's right to self-determination. There is simply no reason why the same outcome should not prevail in the case of prison inmates, unless the state has a stronger interest in preserving the life of a prisoner than a nonprisoner. That cannot be the case—especially given that there are more similarities between a terminally ill patient and a prisoner than the courts might like to admit, particularly in the case of a death row inmate. [92] Neither *Cruzan*

87. *Id.* at 456.

88. 480 A.2d 93 (N.H. 1984).

89. *Id.* at 94-95.

90. *Id.* at 95.

91. *Id.* at 97.

92. For an interesting argument on a prisoner's right to die in another context, see Julie Levinsohn Milner, *Dignity or Death Row: Are Death Row Rights To Die Diminished? A Comparison of the Right To Die for the Terminally Ill and the Terminally Sentenced*, 24 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 279 (1998). Milner argues that obligatory appeals and automatic sentence reviews can violate a prisoner's right to die by keeping him alive against his will. She claims that "the right to die . . . should exist for competent terminally sentenced individuals as it does for competent terminally ill individuals." *Id.* at 283. The basis for Milner's argument is that the circumstances of an ill patient and those of

nor *Glucksberg* conditions the right to refuse treatment on the severity of an individual's condition or physical status. Nor does either case condition the right on a particular level of commitment to death, so long as the decision is made personally.

It is possible that courts' cynicism regarding a prisoner's commitment to a hunger strike is not misplaced. For example, one could cite the fact that the prisoner in *White* voluntarily ended his fast after the case was argued. He later became the prison's chief cook and gained fifty pounds in four months.[93] However, it is difficult to determine a prisoner's level of commitment to death when death is not an option. It is surely possible that White, confronted with his inability to fast in peace, decided to eat on his own rather than suffer the humiliation and discomfort of painful medical procedures. But even these considerations take us down an unnecessary road. Questions of commitment are wholly irrelevant. If a prisoner "defies expectations" and ends his own life through starvation, he has simply taken advantage of his own self-determination. On the other hand, if a prisoner, armed with the right to end his own life by starvation, chooses to forgo that right, the state can simply claim victory in preserving life. It is unclear why the fact that some prisoners may retreat from a hunger strike bears at all on the right to be able to undertake one in the first place.

2. *The prevention of suicide*

Both state and federal courts have steadily maintained a judicial policy that frowns upon—and seeks to prevent—the commission of any act falling under the general umbrella of "suicide" or "assisted suicide." True, attempts at suicide no longer carry criminal punishment.[94] Yet, as the Supreme Court recently noted, our common law system has punished or otherwise censured suicide for more than 700 years.[95] State legislatures also have reinforced this policy. For example, the majority of states impose criminal penalties for assisting another in ending his or her life.[96]

In scrutinizing, and ultimately precluding, the actions of hunger-striking prisoners, the courts have drawn upon this general condemnation of suicide. In *Von Holden v. Chapman*, the prisoner convicted of killing John Lennon appealed an order allowing the director of the New York Psychiatric Center to impose force-feeding.[97] Chapman stated that he meant to kill himself and was

an inmate under a death sentence are "in many salient and powerful respects" comparable. *Id.* at 291.

93. White v. Narick, 292 S.E.2d 54, 55 n.1 (W. Va. 1982).

94. *See* Mark Strasser, *Assisted Suicide and the Competent Terminally Ill: On Ordinary Treatments and Extraordinary Policies*, 74 OR. L. REV. 539, 557 (1995).

95. *See* Washington v. Glucksberg, 521 U.S. 702, 711 (1997).

96. *See* Laurie v. Senecal, 666 A.2d 806, 808-09 (R.I. 1995) (citing cases).

97. 87 A.D.2d 66, 66 (N.Y. App. Div. 1982).

attempting to "draw attention to the starving children in the world."[98] He claimed that prison officials had no right to stop him, relying upon his constitutional right of privacy and freedom of expression. The New York Supreme Court, Appellate Division rejected both claims outright. In what has become a leading case on the state's duty to prevent suicide, the court flatly held that "the right to privacy does not include the right to commit suicide."[99] In its pre-*Cruzan* opinion, the court found it "ludicrous" to suggest that self-destructive acts could be constitutionally protected.[100] Instead, it looked to the high social value of life, and the "grave public wrong[ness]" of suicide.[101]

In emphasizing this interest, history is often evoked. For example, in *Laurie v. Senecal*, the Rhode Island Supreme Court pointed out that at common law, suicide was a serious felony that the state could prevent through reasonable means.[102] In *Commonwealth v. Kallinger*, a Pennsylvania commonwealth court similarly noted that Pennsylvania's public policy strongly opposed the commission of suicide.[103] For example, it is a crime under Pennsylvania law to aid another in the commission of suicide. Similarly, a police officer may use any force necessary to prevent a suicide.[104]

To the extent that courts rely on an interest in preventing suicide, they are backsliding from the clearly established holdings of *Cruzan* and *Glucksberg*. *Glucksberg* clearly distinguished "suicide" and "assisted suicide" from *refusing medical treatment*.[105] If a historical denouncement of suicide were enough to keep a prisoner from refusing a nasogastric tube, it could presumably be enough to prevent Nancy Cruzan from doing the same—even if she asserted that right herself. It cannot be the case that *Cruzan*, *Glucksberg*, and their progeny safeguard empty rights, to be denied at an indirect reference to common law history. To be sure, one cannot ignore the distinction between terminal illness and incarceration. One situation may present a more instinctively sympathetic circumstance than the other. And it is not altogether farfetched to extrapolate from the notion that a police officer may "use any force necessary" to prevent a suicide the notion that there exists a similar right to perform invasive lifesaving procedures. But our constitutional doctrine concentrates on the right to refuse treatment itself, rather than the reason for asserting that right. Again, judges and legislatures should not become involved in the complicated medical, spiritual, and philosophical questions of who

98. *Id.* at 67.

99. *Id.* at 68.

100. *Id*.

101. *Id*. (citation omitted). The court easily rejected Chapman's First Amendment claim by noting that prisoners' First Amendment rights are always subject to reasonable limitations. *Id.* at 70.

102. 666 A.2d at 808.

103. 580 A.2d 887, 892 (Pa. Commw. Ct. 1990).

104. *Id.* (citing 18 PA. CONS. STAT. §§ 508(d)(1), 2505 (1990)).

105. Washington v. Glucksberg, 521 U.S. 702, 722-23 (1997).

deserves to die the most. The procedures involved in force-feeding prisoners are equally invasive and, in almost all respects, identical to those used by the doctors in more traditional "right-to-die" cases like *Cruzan*. Most important, they are meant to bring about exactly the same effect.

It is also necessary to mention that fasting prisoners, just like patients in the traditional "right-to-die" context, should be required to show full competency and voluntariness before their right may be exercised. This is not a cumbersome hurdle, given that competency can be determined by doctors and psychologists. Hunger-striking prisoners should be required to discuss the ultimate physical and psychological effects of their proposed actions—including an explanation of the processes their bodies will undergo.

B. *Effective Prison Administration*

Prison officials generally enjoy wide legal latitude in enforcing prison rules for security, order, and discipline. As the Supreme Court has stated in broad terms, "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees."[106] For that reason, federal and state courts have given significant weight to government assertions that allowing an inmate to refuse life-sustaining treatment will hurt prisons.[107]

Commonly, asserted interests in prison administration fall into two categories. The first is a fear that a hunger-striking prisoner will encourage "copycats." If hunger strikes *do* negatively impact prisoners, the only thing worse than one hunger strike would be many hunger strikes. Second, is the fear that a fasting inmate's death would incite riots within the prison. If that reaction were likely, or often demonstrated, prison officials certainly would have a strong interest in quelling disorder by prohibiting hunger strikes.

In *Commonwealth v. Kallinger*, an inmate initiated a hunger strike after he claimed that a vision of Christ in a toilet bowl asked the prisoner to join him.[108] According to the court, the case hinged on Pennsylvania's interest in orderly administration of its prison system.[109] In finding that interests in prison security and discipline outweighed Kallinger's privacy right, the court emphasized that "allowing a prisoner to starve to death while in state custody would have an *unpredictable negative effect* on the security and order within the prison system."[110] The court claimed that other inmates would likely try to replicate Kallinger's actions or could simply "become angry and lose faith in the

106. Bell v. Wolfish, 441 U.S. 520, 546 (1979).
107. *See* discussion *supra* Part IV.B.
108. 580 A.2d 887, 888 (Pa. Commw. Ct. 1990).
109. *Id.* at 890.
110. *Id.* at 891 (emphasis added).

system."[111] Consequently, the court ordered that officials continue force-feeding Kallinger through a nasogastric tube.[112] Similar language regarding the delicate nature of prison administration can be found in other cases. In *In re Caulk*, the New Hampshire Supreme Court sanctioned the force-feeding of a prisoner, stating: "We agree with the State that prison officials will lose much of their ability to enforce institutional order if any inmate can shield himself from the administration's control and authority by announcing that he is on a starvation diet."[113]

It goes without saying that a substantiated interest in effective prison administration is laudable. But the oddity of cases like *Kallinger* is the sheer lack of evidence employed—and found sufficient—to justify the state's concern for the inner-workings of prisons. In other areas of the law implicating fundamental liberty interests, courts require the state to meet the heaviest of burdens before fundamental rights may be restricted. First Amendment jurisprudence provides a ready example.[114] A requirement of greater evidence is no less important here. The *Kallinger* court itself admits that the effect of a faster's death would be, at best, "unpredictabl[y] negative."[115] Not a single judge or prison official has adequately explained how the death of a fasting inmate jeopardizes the safety of the prison where he is incarcerated. Not a single riot, protest, or altercation has been cited. Even in *Turner v. Safley*, prison officials offered concrete evidence in an attempt to validate the regulation restricting inmate correspondence. Officials testified that mail between different institutions was being used to generate escape plans and to plot assaults. Actual witnesses testified that the Missouri Division of Corrections had a problem with gang activity and that restricting prison-to-prison correspondence was an "important element" in combating that problem.[116] Though reasonable minds could differ on the sufficiency of the justifications offered, at least there was something to debate.[117] Here, there is simply no evidence of a threat to "security" in the sense of a possibility of bodily harm or significant injury to inmates, guards, or the public.

Because no evidence has been produced to show concrete prison-wide

111. *Id.*

112. *Id.* at 893.

113. 480 A.2d 93, 96 (N.H. 1984).

114. *See, e.g.*, Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 76 (1976) (Powell, J., concurring) ("Because a substantial burden rests upon the State when it would limit in any way First Amendment rights, it is necessary to identify with specificity the nature of the infringement in each case.").

115. Commonwealth v. Kallinger, 580 A.2d 887, 891 (Pa. Commw. Ct. 1990).

116. 482 U.S. 78, 91 (1987).

117. Moreover, the interests found sufficient in cases like *Turner* actually implicated the deference we grant to prison officials for questions involving "security" in the traditional sense. Because the operations of jails and prisons are often shrouded in mystery, prison officials' claims regarding "security interests" are generally deferred to in large part because of fear.

consequences of allowing a hunger strike, the decisions in cases like *Kallinger*—based solely on speculative fear—cannot justify the intrusive force-feeding of an inmate. It may be true, as *Kallinger* declares, that prison officials have "an overwhelming interest in maintaining prison security, order and discipline."[118] However, it does not follow that prison officials may therefore freely hypothesize dire consequences of allowing a hunger-striking prisoner to carry out his or her will. To the contrary, a few courts addressing the matter have pointed out the *absence* of verifiable security concerns. For example, the Florida District Court of Appeal in *Singletary v. Costello*[119] rejected the arguments found conclusive in *Kallinger* and *Caulk*. The court held that the state's interest in prison administration could not prevail, given that there was no evidence of actions undermining security, safety, or welfare within the prison. Rather, "arguments concerning the effect of Costello's conduct [were] nothing more than speculation and conjecture."[120] In a forceful dissent in *State ex rel. Department of Corrections v. Millard*, Judge Knecht also emphasized the necessity of proving an actual threat:

> What is missing in this record is any evidence that Millard's conduct has had, or will have, any effect on order, security, or discipline. . . . Millard has carefully expressed his will. We need not like him or the reasons for his hunger strike, but if the government wants to ram a tub [sic] down his throat or cut a hole in his abdomen, it should be required to demonstrate a compelling reason for doing so.[121]

Even if there were a legitimate threat to prison security, existing methods of controlling and penalizing inmates would offer far less intrusive means of discouraging hunger strikes. Loss of privileges, prisoner segregation, and other punishments may provide a better means of preventing hunger strikes.[122] These tactics would discourage copycats by making hunger strikes—and any resulting protests—less desirable. They would also dissuade less determined prisoners striking solely for short-term gain.

On a more basic level, if the state wishes to discourage copycat prisoners from striking, it does not follow that force-feeding would produce this result. To the contrary, inmates may be more encouraged to follow a hunger striker's lead if they know they will not have to pay the ultimate price of death—indeed,

118. *Kallinger*, 580 A.2d at 890.

119. 665 So. 2d 1099 (Fla. Dist. Ct. App. 1996).

120. *Id.* at 1110; *see also id.* ("In the instant case, however, the Appellants adduced no evidence that Costello's actions undermined the security, safety or welfare within the prison.").

121. 782 N.E.2d 966, 972-73 (Ill. App. Ct. 2003) (Knecht, J., dissenting).

122. *See* Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 570 (1997) (citing AM. CORR. ASS'N, MANUAL OF CORRECTIONAL STANDARDS 253 (1959)) (stating that, depending on the infraction, often "a few days in punitive segregation followed by thirty to ninety days in administrative segregation, or in some other status that involves continued control or loss of privileges is sufficient").

death would be impossible. As the trial court judge noted in *Costello*, "It is hard to imagine that if [Costello] dies as a result of his actions, that inmates will be rushing to imitate him."[123] It is also possible that inmates would view the autonomy threat posed by a force-feeding more threatening than the death of another prisoner; retaliation could be increased. Nor can officials cite a concern for legal liability—which may be lurking in the background of this debate—as a determinative issue. A prisoner on a hunger strike can—and should—be forced to execute a release to relieve prisons and prison officials of liability, including claims under 42 U.S.C. § 1983.

Finally, in considering prison resources, it is well worth noting the expenditure of resources required to keep a prisoner *alive*. The cost per year for the average federal prisoner in 1998 was $19,800.[124] By 2004, that cost had risen to $23,265.[125] Expenditures for state prison sentences are just as high. Florida taxpayers pay more than $1 million for a single sixty-year sentence.[126] In California, the same sentence would cost more than $1.4 million.[127] While it would be difficult to assess the costs of letting someone starve, including the possible rehabilitation costs if the prisoner changes his mind, these resource issues may factor in.

C. *The Ethical Integrity of the Medical Profession*[128]

Courts addressing the issue have adopted near-polar views in analyzing asserted interests in the ethical integrity of the medical profession. For

123. *State Inmate Entitled To Starve Himself, Judge Rules*, SUN-SENTINEL (Ft. Lauderdale), Mar. 5, 1995, at A24 [hereinafter *State Inmate Entitled To Starve*].

124. Thomas Bak, *Pretrial Release Behavior of Defendants Whom the U.S. Attorney Wished To Detain*, 30 AM. J. CRIM. L. 45, 65 (2002).

125. Donald P. Lay, *Rehab Justice*, N.Y. TIMES, Nov. 18, 2004, at A31.

126. *See* FLA. DEP'T OF CORR., 2003-2004 ANNUAL REPORT 7 (budget summary), *available at* http://www.dc.state.fl.us/pub/annual/0304/budget.html#imcost (last visited Oct. 18, 2005).

127. Michele Benedetto, *An Ounce of Prevention: A Foster Youth's Substantive Due Process Right to Proper Preparation for Emancipation*, 9 U.C. DAVIS J. JUV. L. & POL'Y 381, 394 n.52 (2005). These numbers are higher for special needs and older prisoners, who may be more likely to initiate a hunger strike. For example, on average, the costs of housing an older prisoner is "two to three times that of a younger prisoner." Michael Vitiello & Clark Kelso, *A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy*, 38 LOY. L.A. L. REV. 903, 945 (2004).

128. In discussing the interests of external parties, it is necessary to add that there is a potential state interest in the protection of innocent third parties. Such an interest "arises when the refusal of medical treatment endangers public health or implicates the emotional or financial welfare of the patient's minor child." Singletary v. Costello, 665 So. 2d 1099, 1105 (Fla. Dist. Ct. App. 1996) (citation omitted). Theoretically, this interest would be implicated if a hunger-striking prisoner had dependent children who relied on him or her financially. This interest has been so little recognized by the courts—either because it is rare for a prisoner with children to initiate a hunger strike or because the interest is slight—that it bears little need for attention.

example, the Supreme Judicial Court of Massachusetts, in *Commissioner of Correction v. Myers*, found that an interest in the integrity of the medical profession lent strong support to the authorization of forced treatment.[129] A nephrologist treating Myers testified that "medical ethics demanded that everything possible be done to [treat] the defendant 'up to the point we cannot technically manage it.'"[130] While prolonging life only briefly could not justify hugely painful procedures, the *Myers* court found no indication that medical ethics could condone the failure to save life where "the traumatic cost to the patient is not inordinate and the prognosis is good."[131] The court in *Commonwealth v. Kallinger* similarly cited a prison psychiatric director who testified that "it would be devastating to the staff and the staff morale if they had to allow someone to cease living, virtually by their own hand, while under [prison] care."[132]

At the other end of the spectrum from the reasoning employed in *Myers* and *Kallinger* is the concept that medical ethics are intended to effectuate and complement a patient's right to self-determination. Therefore, medical integrity requires that the patient make the ultimate decisions. The *Singletary* and *Thor* courts emphasized, for example, that "patient autonomy and medical ethics are not reciprocals; one does not come at the expense of the other."[133] The California Supreme Court, in *Thor*, noted that at common law, any physician who initiates a medical procedure without the patient's consent commits a battery.[134] In that case, the California Medical Association, representing 35,000 doctors as amicae, advocated for the broadest possible interpretation of a prisoner's right to self-determination.[135] The Association clearly agreed with the court that medical ethics do not require that all efforts toward prolonging life be undertaken.[136]

This focus on self-determination is reflected throughout the medical community. The World Medical Association—with approximately eighty medical association members, including the American Medical Association—prohibits the force-feeding of prisoners on a hunger strike. Its official policy emphasizes the duty of a doctor to respect a patient's autonomy rights and directs that "[a]ny treatment administered to [a] patient must be with his

129. 399 N.E.2d 452, 458 (Mass. 1979).

130. *Id.* at 454 (quoting the testimony of Dr. Tai Jin Chung).

131. *Id.* at 458.

132. 580 A.2d 887, 892 (Pa. Commw. Ct. 1990) (quoting the testimony of Dr. Jack Wolford).

133. *Singletary*, 665 So.2d at 1109 (citing Thor v. Superior Court, 855 P.2d 375, 386 (Cal. 1993)).

134. 855 P.2d at 381.

135. The California Medical Association claimed that it was hoping for a broad rights-based ruling. According to the legal counsel for the Association, it is unclear what would have happened had Andrews not been suffering from an unrelated medical condition. Maura Dolan, *Ill May Refuse Efforts To Save Life, Court Says*, L.A. TIMES, July 27, 1993, at A1.

136. *Thor*, 855 P.2d at 386.

approval."[137] Responding to the 2005 hunger strikes in Guantanamo Bay, a group of British doctors urged their government to intervene in acts of force-feeding. The physicians stated that "[f]undamental to doctors' responsibilities in attending a hunger striker is the recognition that prisoners have the same right as any other patient to refuse medical treatment."[138]

Much of the rhetoric discussing the ethics of the medical profession as it relates to hunger-striking prisoners focuses on the "dilemma" faced by prison and health officials confronted with an individual wishing to die.[139] This focus is questionable for three reasons. First, the tension faced by these officials is no different than the circumstances posed in cases like *Cruzan*. In the nonprison setting, doctors would have no choice but to abide by a patient's asserted wishes. There is no reason then why medical ethics should demand different results in the case of a prison inmate. Second, prison officials would not face a "difficult choice," as *In re Caulk* and *Von Holden v. Chapman* opine, if a prisoner's right to refuse treatment were clearly determined and enforced by the courts. Officials would simply have to let a sane and fasting prisoner meet his own death. Third, it is unclear why the emotional tension felt by a prison official—even if very real—should justify denying a fundamental right to the entire prison population.[140] There can be no question that prison employment requires exposure to all sorts of pain and evils; making a prison official's job more emotionally palatable should not come at the expense of a prisoner's right to self-determination.

Last, it is important to acknowledge the potential harms to the medical community posed by allowing prison officials to administer involuntary medical intervention. Instructing doctors to treat patients against their will pits doctor against patient, creating a very unhealthy dynamic for the medical profession in general. As one commentator noted, the relationship between doctor and patient could be undermined given that "[t]he physician-patient

137. WORLD MED. ASS'N, DECLARATION ON HUNGER STRIKERS (1992), *available at* http://www.wma.net/e/policy/h31.htm (last visited Oct. 30, 2005).

138. David Nicholl et al., *Force-Feeding at Guantanamo Bay*, GUARDIAN (London), Oct. 25, 2005, at 35.

139. *See, e.g.*, *In re* Caulk, 480 A.2d 93, 96 (N.H. 1984). The *Caulk* court stated:

> The defendant's simple wishes in this case also do not reflect the predicament which will be placed at the doorstep of prison personnel and the medical profession when and if he reaches the point of being alive yet comatose. During any period of the defendant's incompetence, prison personnel will be faced with the choice of honoring their constitutional and statutory duty to protect the life that lies precariously in their custody or of honoring a past request that in effect contravenes their legal obligations. Society should not force its servants to make such choices.

Id. (citation omitted).

140. *See* Robert L. Risley, *Ethical and Legal Issues in the Individual's Right To Die*, 20 OHIO N.U. L. REV. 597, 603 (1994) ("For self-determination to have any meaning it cannot be subject to the scrutiny of anyone else's conscience or sensibilities. It is the individual who must live or die with the course of treatment chosen or rejected, not the state and the physician.") (quoting Thor v. Superior Court, 855 P.2d 375, 385 (Cal. 1993)).

relationship is based on trust."[141] It must be conceded that a doctor-patient relationship of "trust" in the context of prisons is often illusory to begin with. However, further eroding a potential relationship serves no real object. Even more problematic is the fact that, as described above, this nonconsensual treatment can produce painful and harmful medical results.[142]

D. *Fear of Manipulation of the Prison System*

The courts have shown particular wariness of prisoners' attempts to manipulate the prison system through hunger strikes. Jurists appear to be far more skeptical when a strike is waged to protest a prison transfer, for example, rather than to end life or make a political statement.[143]

In *People ex rel. Department of Corrections v. Fort*,[144] the defendant inmate appealed a judgment allowing the Illinois Department of Corrections to force-feed him. After the defendant was involuntarily transferred within the prison system, he "went berserk."[145] Refusing to eat, he claimed that he was initiating a hunger strike because "he fear[ed] for his life."[146] The Illinois Appellate Court found that the clear purpose of the defendant's hunger strike was to manipulate the Department of Corrections—he would end the strike if he were transferred to a less restrictive facility.[147] Therefore, the attempt to

141. Strasser, *supra* note 94, at 561; *see also id.* ("[I]f physicians refuse to help patients die, patients will distrust their physicians, fearing that they will be forced to stay hooked up to machines against their will. This fear might not only undermine the physician-patient relationship, but, as a practical matter, might also cause patients to delay seeking treatment, thereby adversely affecting their long-term prognosis.") (footnotes omitted).

142. *See* Lawrence K. Altman, M.D., *The Doctor's World; Hunger Strike: What Is Role* [sic] *of Physicians?*, N.Y. TIMES, Jan. 20, 1981, at C3 ("Inserting a feeding tube can be tricky even under ordinary circumstances, and a physician presumably could be held liable for malpractice, if not manslaughter, if something went wrong during a forced feeding.").

143. Prisoners' First Amendment rights—in the form of symbolic speech—certainly come into play when an inmate fasts to make a political statement or encourage public attention. First Amendment claims tend to be coupled and briefed with privacy claims in this context, but none has been successful in a court of law. While there are many interesting First Amendment issues involved in prisoner fasting, such discussion exceeds the scope of this Note. For an early pre-*Cruzan*, pre-*Turner* discussion of prisoner fasting and First Amendment rights, see D. Sneed & Harry W. Stonecipher, *Prisoner Fasting as Symbolic Speech: The Ultimate Speech-Action Test*, 32 HOW. L.J. 549 (1989). Of course, the required application of the *Turner* framework would change the First Amendment analysis. *See supra* Part III.B.

144. 815 N.E.2d 1246 (Ill. App. Ct. 2004).

145. *Id.* at 1248.

146. *Id.* at 1249. The defendant claimed that his hunger strike was justified because "they would end up killing [me] anyway." He stated that if he were to die, it would be "by nobody else's hands but [his]." *Id.* After being examined by the court, the defendant asserted that his strike was "letting the administration know that by me prolonging this hunger strike, that they need to start taking me seriously." He further claimed that he would not end the strike unless he was transferred back to his original place of imprisonment. *Id.*

147. *Id.* at 1250-51.

force-feed him was "reasonably related to a legitimate penological purpose" under the *Turner* framework.[148] A similar justification—defeating prison manipulation—had been found adequate in a previous case in Illinois. In *People ex rel. Illinois Department of Corrections v. Millard*, widely quoted in *Fort*, an inmate protested prison conditions and his transfer to a new correctional center.[149] Within weeks of the transfer, Millard became "obstinate" and refused medical care.[150] Approximately five months later he waged a hunger strike. He refused to eat until he was sent back to his former place of incarceration, released from prison, or died.[151] The appellate court granted the Department of Corrections authority to "administer life-essential nutrition," hinging its decision on the fact that Millard's primary purpose was to "manipulate the system."[152] The court invoked the *Turner* standard to find that any privacy right asserted by Millard was outweighed by the Department of Correction's interest in the administration of the penal system.[153]

Two cases involving civil contemnors also illustrate judges' fear of manipulation and reinforce the idea that a hunger-striking prisoner's purpose may matter. In *In re Sanchez*, Sanchez was found in contempt for refusing to testify in front of a grand jury.[154] His attempted hunger strike was thwarted after the court found that "Mr. Sanchez [was] not on a hunger strike as a means of demonstrating on behalf of some political cause or religious belief."[155] Rather, he was simply "attempting to bring maximum pressure to bear upon the Judge."[156] In another case involving a civil contemnor, the Second Circuit upheld the lower court's force-feeding order.[157]

It becomes clear that a prisoner's reason for hunger strikes may be relevant to a court's determination of his privacy rights. One court has outright stated that "the 'purpose' for refusing unwanted medical treatment 'is a factor which prison officials may legitimately consider in determining whether [the refusal] is likely to be a disruptive influence, or otherwise detrimental to the effective administration of the . . . prison system.'"[158] This emphasis on purpose—that privacy rights should be reserved for individual autonomy interests and not for securing preferable material interests—seems hard to avoid. One cannot help but feel somehow different about cases like *Cruzan* and

148. *Id.* at 1250.
149. 782 N.E.2d 966, 967 (Ill. App. Ct. 2003).
150. *Id*. at 968.
151. *Id.*
152. *Id.* at 968, 972.
153. *Id*. at 972.
154. 577 F. Supp. 7, 8 (S.D.N.Y. 1983).
155. *Id*. at 9.
156. *Id*.
157. *See, e.g.*, *In re* Grand Jury Subpoena John Doe, 150 F.3d 170, 172 (2d Cir. 1998).
158. State *ex rel*. Schuetzle v. Vogel, 537 N.W.2d 358, 361 (N.D. 1995) (quoting Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119, 126 n.4 (1977)).

Thor where an individual simply cannot bear to live anymore, versus a case like *Millard* where the inmate appears primarily concerned with securing material gains. But while it may be easier to sympathize with an individual simply wishing to end his or her life, the motive involved should have no bearing on the right recognized—especially when an inmate is willing to die in support of his cause.

The courts justify their emphasis on purpose by pointing to the "inherent" detrimental effects of manipulative hunger strikes on prisons. However, the necessary link between purpose and effect remains unexplained. For example, the *Millard* court held that "the Department may force-feed a hunger-striking inmate, whose only purpose is to attempt to manipulate the system *so as to avoid disruptive or otherwise detrimental effects to the orderly administration of our prison system*."[159] If this does not make sense, there is a reason. The *Millard* court, and courts employing similar reasoning, never explained how the purpose of the strike would have any bearing on the severity of the consequences feared. There is no reason to believe that Millard's strike would be any less disruptive to the prison community had the strike been for another purpose—say to end Millard's pain and suffering or to protest anti-environment legislation.[160] Put more bluntly, the reason why a person wishes to die—or the import of the cause for which he is willing to end his life—is not a question for the courts.

A more straightforward solution would be to instruct prison officials to refuse to give in to prisoner demands. By stating—and confirming—that they will never give in to hunger strikers' irrational demands, prison officials can minimize incentives to manipulate the system. There simply would be nothing to gain. Any prisoner so full of conviction that he still refuses to end his hunger strike, even though he has nothing to gain, should be fully entitled to the protections of the right to refuse unwanted medical treatment.

V. THREE STAND ALONE, SORT OF: COURTS RECOGNIZING A PRISONER'S RIGHT TO REFUSE UNWANTED MEDICAL TREATMENT

A. Zant, Thor, *and* Singletary

In only three states have courts recognized a prisoner's right to refuse

159. People *ex rel.* Ill. Dep't of Corr. v. Millard, 782 N.E.2d 966, 972 (Ill. App. Ct. 2003) (emphasis added).

160. Though not stated in such a way by the court, it is possible to argue that purpose may matter because of a fear that other prisoners will attempt to mimic the behavior of a hunger-striking inmate. However, this argument holds little weight. Prison officials are in no way bound to accede to the demands of a hunger striker. If authorities refuse to give in to prison manipulation, inmates will soon learn that all they can gain from a strike is extreme discomfort and, ultimately, death. It makes little sense to assert that the privacy rights of inmates should suffer so that prison officials need not execute the tough demands that their jobs require.

unwanted medical treatment. In *Zant v. Prevatte*, the Supreme Court of Georgia found that there was no compelling interest sufficient to override Prevatte's right to refuse unwanted medical treatment.[161] Prevatte's hunger strike was allegedly waged to get the attention of prison officials—which he no doubt acquired. Prevatte, held at the Georgia Diagnostic and Classification Center, claimed that a scheme to kill him had been planned and that his life was in danger as long as he remained in the state. He pled for a transfer to North Carolina where he felt he would be safe.[162] At the time the case was decided, Prevatte had not eaten for more than three months. Doctors surmised that he would die within three weeks if his body was not nourished immediately.[163]

The state argued that it had the unconditional right to prevent Prevatte from carrying out his plan; it cited a duty to protect the health of its prisoners and a compelling interest in preserving human life.[164] The court was not persuaded. But because *Cruzan* had not yet been decided, it based its opinion on general right-to-privacy language. The court first noted the "perils" of the state involving itself in life-or-death issues.[165] It declared: "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."[166]

The court noted the absurdity of the State's argument, taken to its necessary conclusion. Prevatte was at one time sentenced to death. The court appropriately scoffed at the perversity of the state wishing to keep Prevatte "alive against his will so it could later kill him."[167]

The California Supreme Court is one of only two courts in the last twenty years to recognize the privacy right of prisoners in refusing unwanted treatment. In a relatively lengthy opinion in *Thor v. Superior Court*, it announced what appeared to be a very broad holding:

> [U]nder California law a competent, informed adult has a fundamental right of self-determination to refuse or demand the withdrawal of medical treatment of any form irrespective of the personal consequences. Under the facts of this case, we further conclude that in the absence of evidence demonstrating a threat to institutional security or public safety, prison officials, including medical personnel, have no affirmative duty to administer such treatment and may not deny a person incarcerated in state prison this freedom of choice.[168]

The prisoner in that case, Howard Andrews, was sentenced to fifteen years

161. 286 S.E.2d 715, 717 (Ga. 1982).
162. *Id.* at 716.
163. *Id.*
164. *Id*.
165. *Id.*
166. *Id.* at 716-17.
167. *Id.* at 716.
168. 855 P.2d 375, 378-79 (Cal. 1993).

to life for the 1989 fatal stabbing of his supervisor.[169] During his incarceration, he threw himself from a third-story prison deck and was paralyzed from the neck down.[170] Andrews required assistance with all bodily functions; indeed, his condition was irreversible.[171] In 1991, he began refusing to eat or accept medical treatment. A prison doctor monitoring Andrews sought a court order to force-feed and medicate the inmate.[172]

The California Supreme Court undertook a two-part analysis to determine first, whether a nonincarcerated individual could assert the privacy right, and second, whether that right could be maintained in the prison context. Addressing the first question, the court used strong language to iterate that the state's interests—even the paramount interest in preserving life—necessarily came at the expense of self-determination and bodily integrity.[173] It concluded: "It is antithetical to our scheme of ordered liberty and to our respect for the autonomy of the individual for the State to make decisions regarding the individual's quality of life. It is for the patient to decide such issues."[174]

Having found that a competent and informed adult could withhold life-sustaining medical treatment and nourishment, the court turned to the harder question of whether a *state prisoner* could exercise that right. The court refused to wholly distinguish prisoners from nonprisoners and cited the California Penal Code for support.[175] The court found it persuasive that the prison was not

169. Dolan, *supra* note 135, at A1.

170. Philip Hager, *Right-To-Die Case Goes to High Court*, L.A. TIMES, May 29, 1992, at A3.

171. *Thor*, 855 P.2d at 379.

172. *Id*. The physician sought to use a gastrojejunostomy tube or a percutaneous gastrostomy tube. The court defined those procedures:

> A "gastrojejunostomy" is "[a] surgical operation for the creation of an anastomosis (artificial communication) between the stomach and the jejunum [forming a bypass for food]. The jejunum is the second part of the small intestine, separated from the stomach by the intervening duodenum." A "gastrostomy" is "[t]he surgical cutting of an opening into the stomach wall through the wall of the abdomen, usually in order to create a channel for artificial feeding. . . ."

Id. at 379 n.1 (quoting 2 J.E. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE G-25, G-27 (1991)).

173. *Id*. at 383.

174. *Id.* (citing Brophy v. New Eng. Sinai Hosp., Inc., 497 N.E.2d 626, 635 (Mass. 1986) (authorizing the wife of a medical patient to remove her husband to a medical facility that could honor his wishes of having food and water entirely withheld)).

175. *Id*. at 387; *see also id*. (noting that a prisoner "may . . . be deprived of such rights, *and only such rights*, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public.") (quoting CAL. PENAL CODE § 2600 (1993)) (emphasis added).

The language of the statute was amended in 1994 and now reads: "A person sentenced to imprisonment in a state prison may during that period of confinement be deprived of such rights, and only such rights, as *is reasonably related to legitimate penological interests*." CAL. PENAL CODE § 2600 (2005) (emphasis added). However, the statute specifically states that "[n]othing in this section shall be construed to overturn the decision in *Thor v. Superior Court*, 5 Cal. 4th 725." *Id*. The statute also specifies that involuntary administration of

able to offer *any* evidence that granting Andrews the right to refuse treatment would undermine prison integrity.[176] However, the court did reserve the possibility that a change in circumstances could establish the need to override an inmate's choice.[177]

Andrews died less than two months after the California Supreme Court handed down its decision. While it appeared that he did in fact choose to live, he died of septic shock—an infection caused by internal bleeding. His mother and others blamed prison officials for not providing adequate care.[178]

In *Singletary v. Costello*, Costello was sentenced to life imprisonment for first-degree murder.[179] He initiated a hunger strike to protest both a punitive transfer and disciplinary actions and accusations filed against a chaplain, which Costello felt were false.[180] A doctor had testified that Costello lost nearly thirty pounds in about three months.[181] The Florida Department of Corrections sought a temporary injunction to impose forced treatment, alleging each of the above interests. However, the Court of Appeal of Florida stated that both the U.S. and Florida constitutions protected Costello's right to refuse treatment.[182] It cited *Cruzan* for the proposition that the U.S. Constitution grants any competent person the right to refuse hydration and nutrition.[183] The court, like the California Supreme Court in *Thor*, found that Costello's status as a prisoner did not forfeit his privacy claim.[184]

B. *Limitations on the Right Recognized*

These three holdings appear to be obvious victories for the incarcerated community. However, the rights recognized—especially those in *Thor* and *Singletary*—must be viewed in light of their limitations. For example, while *Thor*'s holding may appear to be far-reaching and categorical, it carries a built-

psychotropic medication is prohibited unless certain court-specified procedures are followed. *Id*. (citing Keyhea v. Rushen, 223 Cal. Rptr. 746 (Ct. App. 1986)).

176. *Thor*, 855 P.2d at 388. The court also found that the protection of innocent third parties was not implicated. *Id.* at 387.

177. *Id*. at 388 ("A custodial environment is uniquely susceptible to the catalytic effect of disruptive conduct; and courts will not interfere with reasonable measures required to forestall such untoward consequences.").

178. Marlowe Churchill, *Quadriplegic Inmate's Agony Is Finally Over, Mother Says*, PRESS ENTERPRISE (Riverside, Cal.), Sept. 22, 1993, at B1; Maura Dolan, *Paralyzed Inmate in Right-To-Die Case Succumbs*, L.A. TIMES, Sept. 21, 1993, at A3.

179. 665 So. 2d 1099, 1101 (Fla. Dist. Ct. App. 1996).

180. *Id*. at 1102.

181. *Id*. at 1101.

182. *Id*. at 1102. Costello was not new to the courts. In 1972 he filed a suit that eventually became a 45,000-inmate class action. *See State Inmate Entitled To Starve*, *supra* note 123. The case resulted in improvements to health care and food for prison inmates. *Id.*

183. *Singletary*, 665 So. 2d at 1102.

184. *Id.* at 1105 ("[A] prisoner retains the fundamental right to privacy espoused by . . . the Florida Constitution.").

in caveat. The court found it relevant, and possibly determinative, that Andrews suffered from a "profoundly disabling" and "irreversible" condition.[185] The court indicated that "as the quality of life diminishes because of physical deterioration, the State's interest in preserving life may correspondingly decrease."[186] Therefore, it is possible that a California prisoner may only hunger strike if he or she has a preexisting debilitating condition.

Interestingly, the prisoner's paraplegic condition in *Thor* was a result of his own doing—in throwing himself from a prison deck, he attempted to end his own life, or at least to severely injure himself. That act could easily be viewed as the first stage of a procedure to intentionally produce death, rather than the onset of a "disabling" condition. Theoretically, then, a prisoner could just severely injure himself and then claim the right to refuse treatment. The California Supreme Court did not address that issue.

Next, the court noted that prison officials may consider purpose or motive in determining whether a prisoner's self-deterioration will be overly disruptive. Thus, it concludes, a prisoner may not reject necessary medical treatment—and presumably food—in an effort to gain better "placement within the prison system."[187] As stated above, it is not clear how a prisoner's motive bears on the consequences of his actions. But nevertheless, the court's assertions leave open the question of how the California Supreme Court would have decided a case like *Zant* where the inmate, with no apparent medical problems, sought a prison transfer. It is possible that the Supreme Court of Georgia is willing to recognize a right that the California Supreme Court would not.

The *Singletary* opinion also warns of its own limitations. The Florida court specifies that the decision "should not be interpreted as universally holding that a prison inmate has the right to starve to death."[188] Instead, the court was careful to point out that its holding meant only that under the facts of *that* case, the state interests could not prevail over Costello's privacy right. We are not told *which* facts are relevant.

Not surprisingly, courts have taken advantage of the limitations built into these cases. For example, several courts have distinguished their own cases and used *Thor* as a shield because of its "limited holding."[189]

Several circumstances remain for which the courts, even those that have recognized the "right to starve," have provided no consensus: Should a prisoner with no preexisting health problems always retain this right? Should a consenting prisoner with four dependent children retain this right? Should a

185. Thor v. Superior Court, 855 P.2d 375, 384 (Cal. 1993).

186. *Id.* at 384-85 (quoting McKay v. Bergstedt, 801 P.2d 617, 622 (Nev. 1990)).

187. *Id.* at 389 (citing Comm'r of Corr. v. Myers, 399 N.E.2d 452 (Mass. 1979)).

188. *Singletary*, 655 So. 2d at 1110.

189. *See, e.g.*, Laurie v. Senecal, 666 A.2d 806, 808-09 (R.I. 1995) (distinguishing that case from cases like *Thor* where treatment "merely condemns [the prisoners] to existences that are physically intolerable, without even the possibility of amelioration of terminal illnesses or vegetative conditions").

prisoner serving a one-year, minimum-security sentence retain this right? Should a prisoner deemed mentally unstable retain this right? What if a prisoner categorically admits that he is on strike for the sole purpose of manipulating prison officials? Even the Florida, Georgia, and California courts are likely to come out differently on these questions. That means that the "right to starve," if it is a right at all, is a very unpredictable one.

CONCLUSION

The holdings of *Zant*, *Thor*, and *Singletary* plant a strong seed for recognizing a prisoner's "right to starve." But to secure the autonomy principles that *Cruzan* and *Glucksberg* promise, a much more categorical recognition of prisoners' rights is needed. The right ultimately recognized should not be affected by a prisoner's incarcerated status. It should not be contingent on a prisoner's physical state. And it should not be conditioned on the purpose of a hunger strike. Rather, our Constitution guarantees a competent incarcerated adult the fundamental right to fast to his natural death without physical intrusion by the government.

The prevalence of hunger strikes in the United States—and abroad—ensures that these constitutional questions will only become more pressing. The highly invasive procedure of force-feeding a nonconsenting individual can no longer be justified. *Cruzan* dictates that a competent individual is guaranteed the right to refuse unwanted medical treatment and that right applies no less to a fasting prisoner than it did to Nancy Cruzan. Government interests in the preservation of life, the prevention of suicide, effective prison administration, medical ethics, and combating manipulation cannot prevail over this most basic right to autonomy.[190]

This is not to say that the "right to starve" should be absolute. Adequate procedural safeguards must be put in place to ensure (1) that a prisoner's decision to fast is informed and voluntary, and (2) that government officials are not forced to pay the price of an inmate's voluntary death. New Hampshire Supreme Court Justice Douglas's dissent in *In re Caulk* helps inform the following proposed safeguards: First, it should be determined that the prisoner is fully competent and is able to voluntarily, knowingly, and intelligently enter into a fast. Second, it should be established that the prisoner has met with a doctor and has a complete understanding of the medical and psychological consequences of his strike. Third, the prisoner must execute an official release to relieve the prison and the government of all civil or criminal liability—

190. As one constitutional commentator has noted:

> Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when, and how one's body is to become the vehicle for another human being's creation; second, when and how—this time there is no question of "whether"—one's body is to terminate its organic life.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 921 (1978).

including any claim under 42 U.S.C. § 1983. This includes acknowledging that prison and health officials will provide no medical aid during the final phases of the prisoner's strike—unless the strike is forfeited. Fourth, the prisoner must waive the ability of any individual to serve as a lifesaving surrogate that may reinstate medical treatment once the prisoner is no longer competent.

So long as these procedures are satisfied, a prisoner, even one seeking to secure death, should be fully entitled to access the constitutional guarantees dictated by the United States Supreme Court more than fifteen years ago.