Fordham Law Review

Volume 51 | Issue 4 Article 7

1983

Hunger Striking Prisoners: The Constitutionality of Force-Feeding

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HUNGER STRIKING PRISONERS: THE CONSTITUTIONALITY OF FORCE-FEEDING

INTRODUCTION

When a prisoner goes on a hunger strike,[1] the government must decide whether to force-feed him or allow him to die. Force-feeding, however, may violate a prisoner's constitutional rights. Although a prisoner's rights are limited[2] by governmental interests that pertain to all members of society,[3] and by interests that are peculiar to the penal system,[4] a prisoner does not lose all of his constitutional rights by reason of confinement.[5]

All but one of the few courts addressing this issue have permitted the government to force-feed the prisoner.[6] Moreover, a federal code regulation permitting force-feeding of federal prisoners[7] has been upheld as constitutional.[8] This Note, while recognizing that force-feeding may under certain circumstances be constitutional, criticizes the reasoning of the decisions that have permitted force-feeding.

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1. 28 C.F.R. § 549.61 (1982) provides a statutory basis for classifying a prisoner as a hunger striker:

(a) When he or she communicates that fact to staff and is observed by staff to be refraining from eating for a period of time, ordinarily in excess of 72 hours; or

(b) When staff observe the inmate to be refraining from eating for a period in excess of 72 hours. When staff consider it prudent to do so, a referral for medical evaluation may be made without waiting 72 hours.

2. Bell v. Wolfish, 441 U.S. 520, 545-46 (1979); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 125 (1977); Pell v. Procunier, 417 U.S. 817, 822 (1974); Price v. Johnston, 334 U.S. 266, 285 (1948).

3. P. Clute, The Legal Aspects of Prisons and Jails 5-6 (1980); *see* Roe v. Wade, 410 U.S. 113, 153-55 (1973) (no rights are absolute).

4. Bell v. Wolfish, 441 U.S. 520, 546-47 (1979); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 125, 129-30 (1977); Pell v. Procunier, 417 U.S. 817, 822 (1974).

5. Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."); *accord* Bell v. Wolfish, 441 U.S. 520, 545 (1979); Meachum v. Fano, 427 U.S. 215, 225 (1976); Pell v. Procunier, 417 U.S. 817, 822 (1974); Forts v. Ward, 471 F. Supp. 1095, 1098, 1101 (S.D.N.Y. 1978), *vacated and remanded*, 621 F.2d 1210 (2d Cir. 1980).

6. Zant v. Prevatte, 248 Ga. 832, 286 S.E.2d 715 (1982) (force-feeding not permitted); *In re* Clauso, No. L33141-81 (N.J. Super. Ct. Law Div. Feb. 22, 1982) (order permitting force-feeding); Von Holden v. Chapman, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982) (same); State *ex rel.* White v. Narick, 292 S.E.2d 54 (W. Va. 1982) (same).

7. Hunger Strikes, Inmate, 28 C.F.R. §§ 549.60-.66 (1982). These sections provide guidelines promulgated by the Bureau of Prisons regarding the medical care and administrative procedures relating to inmates who hunger strike. The Bureau of Prisons is responsible for the health and welfare of federal inmates. *Id.* § 549.60.

8. Boyce v. Petrovsky, No. 81-3322 (W.D. Mo. Sept. 16, 1981).

Part I of this Note argues that a hunger striker's right to bodily integrity is fundamental, and can be overcome only by a compelling governmental interest. Part II addresses the relevant countervailing governmental interests. After concluding that no general societal interests are sufficient to overcome a mentally competent hunger striker's right of privacy, the analysis shifts to the particular interests of the penal system. Part II then proposes a standard for establishing a threat to such interests sufficient to override a prisoner's constitutional rights.

I. Constitutional Protection of a Hunger Striker

Hunger striking prisoners threatened with force-feeding have asserted that such governmental interference violates their first amendment right of freedom of expression.[9] The Supreme Court has stated, however, that in determining whether an abridgement of a prisoner's first amendment rights is constitutional, a court should consider whether a prisoner could exercise this right by "alternative means."[10] Because hunger strikers can express their views through alternative means,[11] the first amendment will not protect them from being force-fed.[12] For example, in *Jones v. North Carolina Prisoners' Labor Un-*

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9. Von Holden v. Chapman, 87 A.D.2d 66, 70, 450 N.Y.S.2d 623, 627 (1982) ("[The prisoner] claims that he was attempting to draw public attention to the starving children of the world."); Brief for Appellee at 5-6, Zant v. Prevatte, 248 Ga. 832, 286 S.E.2d 715 (1982) (inmate attempting to communicate that he wanted to be transferred to another prison).

10. Pell v. Procunier, 417 U.S. 817, 823-24 (1974); *accord* Bell v. Wolfish, 441 U.S. 520, 551-52 (1979); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 130 n.6 (1977).

Although restrictions on first amendment rights may not be broader than necessary to further a governmental interest, *see* United States v. O'Brien, 391 U.S. 367, 377 (1968), the Supreme Court has stated that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Bell v. Wolfish, 441 U.S. 520, 547 (1979).

11. A hunger striker could, for example, write a letter to the editor of a newspaper. *See* Pell v. Procunier, 417 U.S. 817, 824 (1974) (Court upheld regulation prohibiting face-to-face interviews between inmates and reporters).

12. *Cf.* Bell v. Wolfish, 441 U.S. 520, 551-52 (1979) (inmate's first amendment right to receive certain hard-cover books outweighed by threat to prison security); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 129-33 (1977) (inmate's first amendment right to associate and form union outweighed by threat to prison security); Pell v. Procunier, 417 U.S. 817, 823-24 (1974) (inmate's first amendment right to face-to-face communications with journalists outweighed by threat to prison security). In Von Holden v. Chapman, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982), the court summarily dismissed the hunger striker's claim. *See id.* at 70-71, 450 N.Y.S.2d at 627. After ruling that the right of privacy does not include the right to commit suicide, *id.* at 68, 450 N.Y.S.2d at 625; see *infra* notes 32-34 and accompanying text, the court stated that "[w]hereas a prisoner's right of expression may not be

ion,[13] inmates were prevented from organizing a union through which they could express their complaints.[14] In upholding the prohibition,[15] the Court stated that the prison's ban "merely affected one of several ways in which inmates may voice their complaints."[16] Although a prisoner may prefer hunger striking to alternative means, the Court has stated that the removal of more " 'desirable' [means] does not convert the prohibitory regulations into unconstitutional acts."[17]

Prisoners have also asserted that force-feeding violates their right of privacy.[18] The alternative means inquiry is not relevant to this assertion because the prisoner is seeking to prevent a governmental intrusion, not to protect a particular means of exercising a right.[19] The right of privacy may thus provide more protection for the hunger striker. Because the right of privacy is a fundamental right,[20] it may not be abrogated unless the government shows a compelling interest.[21]

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circumscribed to an extent greater than that required for the legitimate ends of prison security and administration . . . those legitimate interests clearly include the need to prevent a prisoner's suicide even if cloaked in the guise of First Amendment expression." 87 A.D.2d at 70-71, 450 N.Y.S.2d at 627 (citations omitted).

13. 433 U.S. 119 (1977).

14. *Id.* at 122, 132-33.

15. *Id.* at 132-33.

16. *Id.* at 130 n.6.

17. *Id.* The regulation, however, must operate in a "neutral fashion, without regard to the content of the expression." Pell v. Procunier, 417 U.S. 817, 828 (1974).

18. Boyce v. Petrovksy, No. 81-3322 (W.D. Mo. Sept. 16, 1981); Zant v. Prevatte, 248 Ga. 832, 833, 286 S.E.2d 715, 716 (1982); Von Holden v. Chapman, 87 A.D.2d 66, 67-68, 450 N.Y.S.2d 623, 625 (1982); State *ex rel.* White v. Narick, 292 S.E.2d 54, 56 (W. Va. 1982). The Supreme Court stated that "[i]t is true that inmates lose many rights when they are lawfully confined, but they do not lose all civil rights. . . . Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy." Houchins v. KQED, Inc., 438 U.S. 1, 5 n.2 (1978); *accord* Bell v. Wolfish, 441 U.S. 520, 558-59 (1979).

19. See *supra* note 10 and accompanying text.

20. *See* L. Tribe, American Constitutional Law §§ 15-1 to -3 (1978). Although the right of privacy is not specifically mentioned in the Constitution, it has been afforded constitutional protection. Roe v. Wade, 410 U.S. 113, 152 (1973). The source of this right has been variously defined. Whalen v. Roe, 429 U.S. 589, 598-99 n.23 (1977) (fourteenth amendment's "concept of personal liberty"); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (penumbras of certain guarantees in the Bill of Rights); *id.* at 486-93 (Goldberg, J., concurring) (language and history of the ninth amendment); Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891) (common law). The right of privacy, regardless of its source, "is now an established part of our constitutional jurisprudence." Dike v. School Bd., 650 F.2d 783, 786 (5th Cir. 1981). This right has two aspects: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (footnotes omitted).

21. Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977); Roe v. Wade, 410 U.S. 113, 155 (1973); J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 382-84 (1978) [hereinafter cited as J. Nowak]. This Note refers to the maintenance of prison discipline and security as a compelling interest, in light of the Supreme Court's statement that "[o]ne of the primary functions of government is the

If force-feeding violates a prisoner's right of privacy, it should not be justified by a mere rational relationship to a legitimate interest.[22]

The right of privacy—the right to be let alone[23]—encompasses only those rights "deemed 'fundamental' or 'implicit in the concept of ordered liberty.' "[24] Force-feeding, which is generally accomplished by forcing greased tubes down the throat into the stomach,[25] unquestionably violates bodily integrity.[26] The Supreme Court has declared the right to bodily integrity as basic to our society.[27] For example, in

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preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task." Procunier v. Martinez, 416 U.S. 396, 412 (1974).

22. If the government asserts an interest that is not peculiar to the prison environment, it is held to a high standard of proof. J. Nowak, *supra* note 21, at 382-84; L. Tribe, *supra* note 20, § 15-9, at 915; *see* San Antonio School Indep. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973). If a penal interest is asserted, however, the standard is lower. See *infra* notes 121-42 and accompanying text.

23. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("[The Founding Fathers] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."), *overruled on other grounds,* Katz v. United States, 389 U.S. 347, 352-53 (1967).

24. Roe v. Wade, 410 U.S. 113, 152 (1973) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds,* Benton v. Maryland, 395 U.S. 784, 794-95 (1969)). Not every aspect of an individual's private life, therefore, is protected by this right. *See* Paul v. Davis, 424 U.S. 693, 713 (1976) (state does not violate right of privacy by public disclosure of arrest record); Illinois State Employees Ass'n v. Walker, 57 Ill. 2d 512, 524-27, 315 N.E.2d 9, 15-17 (state employees may be required to file disclosure statements), *cert. denied,* 419 U.S. 1058 (1974); Schulman v. New York City Dep't of Health and Hosps. Corp., 44 A.D.2d 482, 483-84, 355 N.Y.S.2d 781, 782-83 (1974) (right of privacy does not prevent naming mother on death certificate of aborted fetus), *aff'd,* 38 N.Y.2d 234, 342 N.E.2d 501, 379 N.Y.S.2d 702 (1975).

25. Webster's New World Dictionary 545 (2d College ed. 1978). One magazine article reported that two Arab prisoners choked to death when they were force-fed by Israeli officials. The prisoners were sedated and had "tubes thrust down their throats and into their stomachs." Newsweek, Aug. 4, 1980, at 32, col. 1. In Von Holden v. Chapman, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982), the prison official applied to Special Term seeking an order to force-feed Chapman either intravenously or by a nasal gastric tube. *Id.* at 67, 450 N.Y.S.2d at 625.

26. In Rochin v. California, 342 U.S. 165 (1952), the Court, in determining whether the suspect's right to due process was violated, ruled that the pumping of his stomach to obtain physical evidence was "conduct that shocks the conscience. . . . [T]he struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents . . . is bound to offend even hardened sensibilities." *Id.* at 172. Although force-feeding and stomach pumping are performed for different purposes, both impose a significant intrusion on bodily integrity.

27. *See* Ingraham v. Wright, 430 U.S. 651, 673-74 (1977); Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891); Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life,* 26 Rutgers L. Rev. 228, 241 (1973) ("The point remains, however, that no more basic

Schmerber v. California,[28] while permitting the government to subject a suspected drunk driver to a blood test,[29] the Court stated: "The interests in human dignity [are] . . . fundamental human interests. . . . The integrity of an individual's person is a cherished value of our society."[30] Therefore, the right to bodily integrity is encompassed by the right of privacy.[31]

In *Von Holden v. Chapman*,[32] however, a New York appellate court permitted the force-feeding of a prisoner,[33] stating that: "[I]t is self-evident that the right to privacy does not include the right to commit suicide."[34] Yet, the right to prevent force-feeding can exist independently of any right to commit suicide.[35] Instead of determining whether a prisoner has the right to commit suicide, the court

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aspect of personal privacy can be found than bodily integrity, and this interest is entitled to concomitant constitutional protection.").

28. 384 U.S. 757 (1966).

29. *Id.* at 771-72. The Court permitted the blood test because it considered the intrusion insubstantial. *Id.*

30. *Id.* at 769-70, 772.

31. Cantor, *supra* note 27, at 241. The fundamentality of the right of privacy is implicit in the fourth and fifth amendments. *See* Schmerber v. California, 384 U.S. 757, 778-79 (1966) (Douglas, J., dissenting) ("[T]he Fifth Amendment marks a 'zone of privacy' which the Government may not force a person to surrender . . . . Likewise the Fourth Amendment recognizes [the right of privacy] when it guarantees the right of the people to be secure 'in their persons.' " (citation omitted)).

32. 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982).

33. *Id.* at 66-67, 450 N.Y.S.2d at 624.

34. *Id.* at 68, 450 N.Y.S. 2d at 625. The court reasoned that because the Supreme Court has held the right of privacy to include "only personal rights . . . deemed 'fundamental' or 'implicit in the concept of ordered liberty,' " a person's self-destructive acts could not be protected under this right. *Id.* (citations omitted). See *supra* note 24 and accompanying text. The analysis of the *Chapman* court is faulty. In Roe v. Wade, 410 U.S. 113 (1973), the Court held that the right of a woman to have an abortion is included in the right of privacy, *id.* at 154, and only at the point of viability of the fetus is the state's compelling interest in protecting life overriding. *Id.* at 163. Similarly, the *Chapman* court should have determined first whether the right of privacy includes the right to bodily integrity, and second, whether the state's interest in preventing suicide is sufficient to override the right to bodily integrity. The existence of countervailing interests should not bear upon whether the right exists, but rather whether the right may be overcome. Thus, the *Chapman* court should not have summarily dismissed the inmate's asserted right as non-fundamental.

35. In Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), the Court reviewed a state law that restricted the distribution of, and therefore access to, contraceptives. *Id.* at 681-82. The Court referred to its prior decisions establishing "that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." *Id.* at 687. The Court stated that while there is no fundamental right of access to contraceptives per se, such a right is derived from the "constitutionally protected right of decision in matters of childbearing." *Id.* at 688. Similarly, there is no need to establish a fundamental right to commit suicide, but rather, the right may be derived from the constitutionally protected right of privacy, which should protect a hunger striker against the governmental intrusion of force-feeding.

should have determined whether the government had the right to intrude upon the bodily integrity of the prisoner. Although the government may have an interest in preventing suicide,[36] it must not pursue its interest in a manner repugnant to the Constitution.

Because bodily integrity is a fundamental right,[37] the government should not be permitted to force-feed unless it shows that hunger striking threatens a compelling governmental interest.[38]

II. Governmental Interests

The government has general legitimate interests in promoting the health, safety and welfare of society.[39] Although the definition of "compelling" is not derived from precise "mathematical formulas,"[40] certain of these interests have been recognized as compelling,[41] and have been or could be asserted to justify force-feeding.[42] For the purposes of this Note, compelling interests are categorized as either general societal—those that apply to all members of society—or penal—those that are peculiar to the prison environment.[43] When a

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36. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 741-42, 370 N.E.2d 417, 425-26 (1977); Von Holden v. Chapman, 87 A.D.2d 66, 68, 450 N.Y.S.2d 623, 625-26 (1982); State *ex rel.* White v. Narick, 292 S.E.2d 54, 57 (W. Va. 1982). See *infra* pt. II(A)(1).

37. See *supra* notes 23-31 and accompanying text.

38. See *supra* notes 20-22 and accompanying text.

39. The states may act to promote this interest under their police powers. Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905). On the federal level, the commerce clause, although intended primarily to regulate economic interests, has also been used for the "protection of safety, order and morals." E. Freund, The Police Power—Public Policy and Constitutional Rights § 66, at 64 (1904). The commerce clause has been interpreted as creating a national police power. *See* United States v. Darby, 312 U.S. 100 (1941); Champion v. Ames (Lottery Case), 188 U.S. 321 (1903); B. Schwartz, Constitutional Law § 4.10, at 118 (2d ed. 1979).

40. Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972); *see* J. Nowak, *supra* note 21, at 383 ("Under the strict scrutiny standard the Court requires that the law be necessary to promote a compelling . . . interest . . . . [T]he justices [must be] satisfied that the law is necessary to promote an end of government which is clearly more important than the limitation of the fundamental liberty . . . .").

41. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 690 (1977).

42. Boyce v. Petrovsky, No. 81-3322, slip op. at 2 (W.D. Mo. Sept. 16, 1981) (governmental duty to protect and care for those within its custody); Von Holden v. Chapman, 87 A.D.2d 66, 68, 70-71, 450 N.Y.S.2d 623, 625, 627 (1982) (governmental interest in preventing suicide and in maintaining prison discipline); State *ex rel.* White v. Narick, 292 S.E.2d 54, 57 (W. Va. 1982) (governmental interest in preventing suicide and in enhancing the sanctity of life).

43. In Von Holden v. Chapman, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982), in determining whether force-feeding should be permitted, the court discussed a general societal interest, the prevention of suicide, *id.* at 68-69, 450 N.Y.S.2d at 625-26, and a penal interest, the maintenance of order and discipline. *Id.* at 70-71, 450 N.Y.S.2d at 627. See *supra* note 21.

general societal interest is asserted, as opposed to a penal interest, the government bears a heavier burden of proof in justifying the infringement of a fundamental right.[44] The standard of proof is not determined by the inmate's status, but by the interest asserted. For example, in *Skinner v. Oklahoma*,[45] a state statute authorizing sterilization of certain recidivist prisoners[46] was held unconstitutional.[47] Because the state interest asserted—reduction of the criminal gene pool[48]—is a general societal interest, the government was subject to the higher standard of proof.[49] Conversely, when a penal interest is asserted, substantial deference has been afforded the opinions of prison officials regarding the need to encroach upon a fundamental right.[50] Thus, it is important to characterize a governmental interest asserted to justify force-feeding as either general societal or penal.

A. *General Societal Interests*

1. The Prevention of Suicide

In *Von Holden v. Chapman*,[51] a New York appellate court permitted force-feeding, relying on the government's interest in preventing suicide.[52] The court, however, did not determine whether the government was protecting solely the individual from his own actions,[53] or

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44. *Compare* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 127 n.5, 128 (1977) (penal interest) (prison officials did not have to offer "one scintilla of evidence" to support their belief that the union would disrupt operation of the prison) *with* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 262-63, 268 (1974) (general societal interest) (state must satisfy "heavy burden of justification" as to manner in which a burden on fundamental right of travel furthers the state's interest in preventing fraud).

45. 316 U.S. 535 (1942).

46. *Id.* at 536-37.

47. *Id.* at 541.

48. *Id.* at 541-42.

49. *See id.* at 541. Because this classification affected the fundamental right of procreation, the Court examined the state statute under the strict scrutiny standard. *Id.* This standard requires the state to establish a compelling interest. J. Nowak, *supra* note 21, at 383.

50. Bell v. Wolfish, 441 U.S. 520, 551, 555 (1979); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 128-29, 133 (1977); Pell v. Procunier, 417 U.S. 817, 827 (1974). See *infra* notes 121-26 and accompanying text.

51. 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982).

52. *Id.* at 68, 450 N.Y.S.2d at 625-26. Similarly, in State *ex rel.* White v. Narick, 292 S.E.2d 54 (W. Va. 1982), the court relied on the governmental interest in preserving life, which it considered to be the converse of the prevention of suicide. *Id.* at 57.

53. *See* 87 A.D.2d at 68-71, 450 N.Y.S.2d at 625-27. For discussions on the permissibility of protecting an individual from his own actions, see Ravin v. State,

whether it was also seeking to protect the public as a whole.[54] A governmental interest based only on the protection of an individual from his own acts should not be considered legitimate. As John Stuart Mill wrote in 1863:[55]

> [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.[56]

Adherence to Mill's philosophy is essential to the protection of individual rights. Otherwise, the power of the majority would be unlimited,[57] and could be exerted over all aspects of a person's life.[58] A basic tenet of our democratic government is that the majority may not indiscriminately impose its views on the minority.[59]

This reasoning is reflected in *Stanley v. Georgia*,[60] in which the Supreme Court struck down as unconstitutional a state law that criminalized the mere possession of obscene material.[61] The Court stated that while the government may regulate the public dissemina-

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537 P.2d 494, 508-09 (Alaska 1975); State v. Cotton, 55 Hawaii 138, 139, 516 P.2d 709, 710 (1973); E. Freund, *supra* note 39, § 155, at 141-42.

54. *See* 87 A.D.2d at 68-71, 450 N.Y.S.2d at 625-27.

55. J.S. Mill, On Liberty (1863).

56. *Id.* at 23.

57. *See* Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969). In *Norton*, Judge Bazelon held that homosexual conduct by a tenured civil servant is an insufficient ground for dismissal. *Id.* at 1168. Judge Bazelon reasoned that "the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity." *Id.* at 1165; *see* Lister, *The Right to Control the Use of One's Body*, in The Rights of Americans 348-64 (N. Dorsen ed. 1970).

58. State v. Cotton, 55 Hawaii 138, 147, 516 P.2d 709, 714 (1973) (Abe, J., dissenting) ("[T]he protection of an individual from himself is [not] within the legitimate exercise of the police power; otherwise . . . the State could regulate an individual's life, his way of living, and even his way of thinking.").

59. C. Antieau, Rights of Our Fathers 193-201 (1968). In his chapter on limitations of natural rights, Antieau noted:

> Well understood and accepted by the American Founding Fathers was the rule of the natural law that permits limitation upon the exercise of natural rights when clearly necessary for the common good . . . . "Rightful liberty," Thomas Jefferson once noted, "is unobstructed action according to our will within limits drawn around by the equal rights of others."

Id. at 197 (footnote omitted).

60. 394 U.S. 557 (1969).

61. *Id.* at 568. The obscene materials was found in the home of the defendant. *Id.* at 558. The Court noted that, in addition to first amendment considerations, *id.* at 564, the defendant's fundamental "right to be free, except in very limited circum-

tion of ideas considered harmful to the public,[62] it may not regulate an individual's personal thoughts, even though controlling one's moral thoughts may be to some a "noble purpose."[63] Georgia asserted that its law protected the public from harm, but the Court rejected the assertion as unfounded.[64]

Although the Court has not addressed the issue of whether restrictions may be imposed solely to protect an individual from self-destructive acts,[65] it follows from *Stanley* that the government should be required to show a public harm. This proposition has been discussed in the many cases reviewing state laws that require motorcyclists to wear helmets.[66] A majority of these courts have determined that such

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stances, from unwanted governmental intrusions into one's privacy" was also affected. *Id.*

62. *Id.* at 566.

63. *Id.* at 565-66.

64. *See id.* at 566-68. For example, Georgia asserted that "exposure to obscene materials may lead to . . . crimes of sexual violence." *Id.* at 566.

65. Certain language in Roe v. Wade, 410 U.S. 113 (1973), arguably supports the view that the government may protect an individual from his own acts:

> The state has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. . . . Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

Id. at 150. This language, however, should not be interpreted as validating a law that protects one solely from self-destructive acts when the potential recipient of care does not want such care. Moreover, when the government seeks to force-feed a hunger striker, it seeks to regulate not only a procedure, but the actual decision of the hunger striker as well. *Roe* should not be interpreted to allow regulation of such a decision. *Cf.* Rutherford v. United States, 616 F.2d 455, 457 (10th Cir.) (government may not force a patient to undergo medical treatment, but if patient decides to receive treatment, government may monitor it), *cert. denied*, 449 U.S. 937 (1980).

The Supreme Court upheld proscriptions on polygamous marriages even though such restrictions impinged on the fundamental right to exercise religion. *See* Mormon Church v. United States, 136 U.S. 1, 49-50 (1890); Reynolds v. United States, 98 U.S. 145, 166 (1878). Such a proscription arguably protects an individual from his own acts. In upholding such restriction, the *Reynolds* court queried: "[I]f a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?" *Id.* However, the court in *In re* Brooks, 32 Ill. 2d 361, 367-68, 205 N.E.2d 435, 439 (1965), stated that such proscriptions were upheld because polygamy harms the public.

66. *See* L. Tribe, *supra* note 20, § 15-12, at 939. For a discussion of cases addressing motorcycle helmet laws, see *id.* at 938-39; Note, *Motorcycle Helmets and the Constitutionality of Self-Protective Legislation*, 30 Ohio St. L.J. 355 (1969). Motorcycle cases requiring the assertion of a public harm include Kingery v. Chapple, 504 P.2d 831, 835-36 (Alaska 1972); People v. Fries, 42 Ill. 2d 446, 450, 250 N.E.2d 149, 151 (1969); People v. Smallwood, 52 Misc. 2d 1027, 1029-30, 277 N.Y.S. 2d 429, 432 (1967); State v. Betts, 252 N.E.2d 866, 872 (Franklin, Ohio Mun. Ct. 1969). *But see* State v. Quinnam, 367 A.2d 1032, 1033 (Me. 1977).

laws protect the public;[67] the laws did not rest entirely on the protection of the motorcyclist.[68] In *State v. Cotton*,[69] the Supreme Court of Hawaii ruled that to be valid, Hawaii's motorcycle law must further public protection: "We accept . . . the fundamental tenet that the relationship between the individual and the state leaves no room for regulations which have as their purpose and effect *solely* the protection of the individual from his own folly."[70]

Consistent with the premise that protection of an individual from his own acts is not a valid purpose, the government may not force-feed a hunger striker solely to prevent a suicide.[71] The beliefs that "suicide

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67. Ravin v. State, 537 P.2d 494, 508-09 (Alaska 1975); *see, e.g.*, Simon v. Sargent, 346 F. Supp. 277, 279 (D. Mass.) (per curiam) (public protection is prevention of societal costs resulting when motorcyclist is injured), *aff'd mem.*, 409 U.S. 1020 (1972); Bogue v. Faircloth, 316 F. Supp. 486, 489 (S.D. Fla. 1970) (protection of other motorists sufficient to uphold law), *appeal dismissed per curiam*, 441 F.2d 623 (5th Cir. 1971); People v. Poucher, 398 Mich. 316, 320, 247 N.W.2d 798, 800 (1976) (same); State v. Mele, 103 N.J. Super. 353, 355, 247 A.2d 176, 177-78 (Hudson County Ct. 1969) (same); Bisenius v. Karns, 42 Wis. 2d 42, 50-51, 165 N.W.2d 377, 381-82 (same), *appeal dismissed*, 395 U.S. 709 (1969). *But see* People v. Smallwood, 52 Misc. 2d 1027, 1029-30, 277 N.Y.S.2d 429, 432 (1967) (no public protection, law unconstitutional); State v. Betts, 252 N.E.2d 866, 872 (Franklin, Ohio Mun. Ct. 1969) (same).

68. *But see* State v. Quinnam, 367 A.2d 1032, 1033 (Me. 1977).

69. 55 Hawaii 138, 516 P.2d 709 (1973).

70. *Id.* at 139, 516 P.2d at 710. The court upheld the Hawaiian motorcycle law because it protected the state from costs incident to motorcycle accidents and maintained social order. *Id.* at 141, 516 P.2d at 711.

The protection of an individual from his own acts has been held insufficient in other situations. In *In re* Osborne, 294 A.2d 372 (D.C. 1972), the court refused to order a patient to submit to a blood transfusion. *Id.* at 375. The court reasoned that "[t]he notion that the individual exists for the good of the state is, of course, quite antithetical to our fundamental thesis that the role of the state is to ensure a maximum of individual freedom of choice and conduct." *Id.* at 375 n.5. In Ravin v. State, 537 P.2d 494, 507 (Alaska 1975), the court ruled that the prohibition against the possession of marijuana at home violated Alaska's constitution. The court, accepting the proposition that the state could exercise its power only over activities affecting others, found no harm to the public. *Id.* at 504. *Contra* Marcoux v. Attorney General, 375 Mass. 63, 70, 375 N.E.2d 688, 692 (1978) (law criminalizing possession of marijuana upheld because state may protect individuals from "their own folly").

In Application of President & Directors of Georgetown College, Inc., 331 F.2d 1010, 1015-18 (D.C. Cir.) (Burger, J., dissenting), *cert. denied*, 377 U.S. 978 (1964), Judge Burger voted to dismiss the petition concerning forced administration of a blood transfusion to an unwilling recipient for lack of justiciable controversy, stating that some matters are "beyond reach of all governmental power." *Id.* at 1016.

71. A minority of states currently classify attempted suicide as a crime. Model Penal Code § 210.5 comment 2 (1980); W. LaFave & A. Scott, Handbook on Criminal Law § 74, at 569 (1972).

The issue whether attempted suicide is a crime does not determine the compelling nature of a governmental interest. The government under its police powers, may prevent certain acts, whether or not the act is a crime. *Cf.* Cantor, *supra* note 27, at 255 (issue whether "attempted suicide is a criminal offense [is] not determinative of whether a state can validly compel a reluctant patient to undergo treatment"). *But*

[is] against the law of God" and that suicide is morally wrong[72] are not based on legal principles. There are, however, purposes beyond the protection of the hunger striker related to the prevention of suicide that may justify force-feeding.[73]

2. The Protection of Incompetents

Although the government generally may not protect an individual from his own acts, it may protect certain classes of individuals.[74] The government has a compelling interest in protecting incompetents because they cannot protect themselves.[75] Because the government may

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cf. Cawley, *Criminal Liability in Faith Healing*, 39 Minn. L. Rev. 48, 68 (1954) ("[I]n those states where attempted suicide has been made lawful by statute (or the lack of one), the refusal of necessary medical aid, whether equal to or less than attempted suicide, must be conceded to be lawful.").

72. Van Holden v. Chapman, 87 A.D.2d 66, 69, 450 N.Y.S.2d 623, 626 (1982) (citing Wallace v. State, 232 Ind. 700, 116 N.E.2d 100 (1953)).

73. The government has a compelling interest in preventing its citizens from becoming public charges. *See* Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 Fordham L. Rev. 1, 33-36 (1975). If force-feeding would in fact protect the government from having to support dependents of the hunger striker, force-feeding may be justified. *Cf.* Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1008 (D.C. Cir.) (blood transfusion ordered over refusal of patient to consent, one consideration being that "[t]he patient had a responsibility to the community to care for her infant"), *cert. denied*, 377 U.S. 978 (1964); *In re* Osborne, 294 A.2d 372, 375 (D.C. 1972) (blood transfusion not ordered because patient had already provided for family). This justification, however, has not been raised in the cases addressing the permissibility of force-feeding.

Medical ethics considerations have been asserted as a compelling governmental interest when a terminally ill patient refused treatment. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 745, 370 N.E.2d 417, 427 (1977). This interest, however, appears not to be compelling. The protection of a doctor's conscience to save a dying patient is not a compelling interest: "The law of informed consent would be rendered meaningless if patient choice were subservient to conscientious medical judgment. . . . The rule of the supremacy of the 'doctor's conscience' finds no real support in law." Byrn, *supra*, at 29 (footnotes omitted); *accord* Matter of Storar, 52 N.Y.2d 363, 377, 420 N.E.2d 64, 71, 438 N.Y.S.2d 266, 273, *cert. denied*, 454 U.S. 858 (1981); Cantor, *supra* note 27, at 250-51. *But see* United States v. George, 239 F. Supp. 752, 754 (D. Conn. 1965) (doctor's conscience must be considered when patient who voluntarily submitted to medical care demands medical mistreatment). A doctor's fear of civil or criminal liability is not a compelling interest. A doctor may protect himself by obtaining a patients' informed consent. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 744 n.12, 370 N.E.2d 417, 427 n.12 (1977); Matter of Storar, 52 N.Y.2d 363, 377, 420 N.E.2d 64, 71, 438 N.Y.S.2d 266, 273, *cert. denied*, 454 U.S. 858 (1981).

74. E. Freund, *supra* note 39, at 142 ("[I]nterest of a class may constitute a public interest, that is to say, an interest of sufficient magnitude to make itself felt throughout the community.").

75. *See* Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1008 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 Mich. L. Rev. 945, 956-57

protect incompetents from the harmful effects of their irrational decisions,[76] it has a compelling interest in determining the competency of a hunger striker,[77] and should have the right to request a hearing for that purpose.[78] If a prisoner is adjudicated incompetent, he may be force-fed, but if he is adjudicated competent, the government should yield to his rational decision.[79]

(1959). The states, under the doctrine of *parens patriae* have the power to care for those who, because of mental illness (or minority), cannot care for themselves. *See* E. Freund, *supra* note 39, at 242-43. This doctrine stems from the police powers. See *supra* note 39.

76. *See* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 743 n.11, 370 N.E.2d 417, 426 n.11 (1977); Cantor, *supra* note 27, at 256; G. Grisez & J. Boyle, Life and Death with Liberty and Justice 127 (1979).

77. The government may assert that it has the right to force-feed an inmate who decides to hunger strike because the prison environment has depressed him. The government, however, should only be allowed to force-feed if the hunger striker is incompetent: "[I]f the patient understands the nature, purpose, and consequences of the proposed treatment . . . he or she is competent. The test is similar to a person's ability to contract." D. Meyers, Medico-Legal Implications of Death and Dying § 15.1, at 470 (1981); *see* Byrn, *supra* note 73, at 24.

78. Although the specific type of hearing that should be required is beyond the scope of this Note, Vitek v. Jones, 445 U.S. 480 (1980) offers some guidance. In *Vitek*, an inmate was transferred from a state prison to a mental hospital without a hearing. *Id.* at 484. A Nebraska statute allowed such a transfer if a psychiatrist informed the prison director that the inmate suffered from a "mental illness or defect." *Id.* The Court held that due process entitled the inmate to a hearing as to his mental condition before such a transfer could be effected. *Id.* at 493-94. Because the inmate's conviction did not also entitle the state "to determine that [the inmate] has a mental illness," *id.* at 493, these procedural safeguards were necessary to prevent "unwelcome treatment," *id.* at 495, and the resultant deprivation of the inmate's liberty interest. *Id.* at 489-90. The Court held that the interest stemmed from the specific Nebraska statute. *Id.* at 487-88.

Similarly, a hunger striker has a liberty interest in bodily integrity; this interest stems from the Constitution. See *supra* notes 23-31 and accompanying text. Because a unilateral determination of incompetency resulting in force-feeding involves "unwelcome treatment" and the deprivation of a liberty interest, a hunger striker should be afforded a hearing as to his competency. As in *Vitek*, however, the hearing need not be in a traditional adversarial setting to avoid unnecessary disruption of prison administration. *Id.* at 496. The Court, in adopting the district court's procedures, required the government to provide written notice, a hearing, an opportunity for the inmate to present evidence in his favor "except upon a finding . . . of good cause for not permitting such presentation." *Id.* at 494-96. Additionally, an independent decision-maker (who may come from inside the prison) must be provided, and a decision must be written by the factfinder. *Id.* at 495-96. Also, the inmate is entitled to "independent assistance" at the hearing, *id.* at 497, but the state is not required to provide counsel. *See id.*; *id.* at 497-500 (Powell, J., concurring in part).

79. The argument that a decision to hunger strike and eventually die cannot be rational is incorrect. *See* Lenhard v. Wolff, 443 U.S. 1306, 1312-13 (1979) (Rehnquist, Circuit Justice); Brandt, *The Morality and Rationality of Suicide*, in Handbook for the Study of Suicide 61, 72 (S. Perlin ed. 1975). As Justice Rehnquist stated:

> The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot

3. Preservation of Society

The preservation of society is another purpose that the government may assert to justify force-feeding.[80] If hunger striking creates a sufficient role-model effect on others, this interest would be threatened. Sociological studies on the modeling or imitative effect of suicide have produced conflicting results.[81] One noted sociologist, Emile Durkheim, posited that imitation is rarely the reason one commits suicide.[82] He found that only persons having a strong predisposition to suicide are likely to imitate, and that such persons would probably have committed suicide anyway.[83] Because the government bears a heavy burden in justifying an infringement of a fundamental right based upon a general societal interest,[84] neither the mere possibility of modeling nor the existence of conflicting evidence that modeling will occur justifies force-feeding.[85]

> be a rational decision, regardless of its motive, suggests that the preservation of one's own life at whatever cost is the *summum bonum*, a proposition with respect to which the greatest philosophers and theologians have not agreed and with respect to which the United States Constitution by its terms does not speak.

443 U.S. at 1312-13 (Rehnquist, Circuit Justice).

80. Cantor, *supra* note 27, at 242; *see* Procunier v. Martinez, 416 U.S. 396, 412 (1974); G. Grisez & J. Boyle, *supra* note 76, at 125-26; *cf.* Dennis v. United States, 341 U.S. 494, 501 (1951) (government has power to prevent revolution that would lead to anarchy).

81. *Compare* D. Lester, Why People Kill Themselves 187-89 (1972) (cannot draw reliable conclusion from evidence on imitative effect of suicide) *with* D. deCatanzaro, Suicide and Self-Damaging Behavior—A Sociobiological Perspective 77-81 (1981) (increasing evidence that suicide has imitative effect).

82. E. Durkheim, Suicide—A Study in Sociology 123-42 (1963). Although there has been evidence of modeling of hunger striking in prisons, Von Holden v. Chapman, 87 A.D.2d 66, 67, 450 N.Y.S.2d 623, 625 (1982), the hunger striking was apparently not for the purpose of committing suicide, *see* State *ex rel.* White v. Narick, 292 S.E.2d 54, 58 (W. Va. 1982), and therefore did not threaten preservation of society. Rather, "[t]heir main aim [was] to gain attention from prison officials and occasionally from the public, to manipulate the system." *Id.* at 58; *see* Commissioner of Correction v. Myers, 379 Mass. 255, 267, 399 N.E.2d 452, 459 (1979) (prison official's assertion that an inmate's right to refuse life-saving treatment will be misused by inmates to have demands met). Hunger striking for the purpose of forcing prison officials to accede to demands will not be encouraged if the officials do not yield to their demands. See *infra* notes 112-14 and accompanying text.

83. E. Durkheim, *supra* note 82, at 141-42. Durkheim concluded:

> With very rare exceptions, then, it may be said that imitation is not an original factor of suicide. It only exposes a state which is the true generating cause of the act and which probably would have produced its natural effect even had imitation not intervened; for the predisposition must be very strong to enable so slight a matter to translate it into action.

Id. at 141.

84. See *supra* notes 20-22, 39-50 and accompanying text.

85. *Cf.* Healey v. James, 408 U.S. 169, 188-91 (1972)("ambivalent responses" to queries regarding student violence not sufficient to overcome right to freedom of

4. The Enhancement of the Sanctity of Life

Another purpose that may be asserted is the government's interest in promoting the sanctity of life.[86] Because unnecessary death arguably cheapens the value of life,[87] perhaps the government should be permitted to force-feed a hunger striker. Although this argument has initial appeal, it does not consider whether the sanctity of life could be *enhanced* by allowing a hunger striker to die. As one commentator noted, "[h]uman dignity is enhanced by permitting the individual to determine for himself what beliefs are worth dying for."[88]

Many courts have recognized the right of a terminally ill patient to refuse life-prolonging medical treatment.[89] Although some considerations in those cases differ from those involving hunger strikers,[90] both situations involve the concept of choice and the impact of unnecessary death on the value of life. For example, in *Superintendent of Belchertown State School v. Saikewicz*,[91] the Supreme Judicial Court of

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expression). In Student Coalition for Gay Rights v. Austin Peay State Univ., 477 F. Supp. 1267 (M.D. Tenn. 1979), the court ruled that the defendant university's refusal to recognize a gay rights group was unconstitutional. *Id.* at 1274. In defense of its position, the university asserted that recognizing the group would increase homosexual activity. *Id.* at 1273. The court in reply stated that "[i]n the face of such contrasting opinions, defendants have not carried the 'heavy burden' [of establishing an infringement to a compelling state interest]." *Id.* at 1274.

86. Cantor, *supra* note 27, at 244 ("Sanctity of life is not just a vague theological precept. It is the foundation of a free society."). Society becomes brutalized as the value of life declines.

Arguably, the state may also have an interest in "promoting a thriving and productive population." *Id.* at 242. Such an interest, however, would not outweigh the right to privacy because the resulting "marginal social utility" palls in light of the "immediate invasion" of personal privacy "both because of the small numbers involved and the attenuated impact on the economy." *Id.* at 243.

87. *See* State *ex rel.* White v. Narick, 292 S.E.2d 54, 57 (W. Va. 1982) (There are "compelling reasons for preserving life, not the least being civility."); *cf.* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 742, 370 N.E.2d 417, 426 (1977) ("[T]he State has an additional interest in seeing to it that individual decisions on the prolongation of life [by medical treatment] do not in any way tend to 'cheapen' the value which is placed in the concept of living.").

88. Cantor, *supra* note 27, at 244; *accord* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 742, 370 N.E.2d 417, 426 (1977).

89. *E.g.*, *In re* Osborne, 294 A.2d 372, 374-75 (D.C. 1972); *In re* Estate of Brooks, 32 Ill. 2d 361, 372-73, 205 N.E.2d 435, 442 (1965); Lane v. Candura, 6 Mass. App. Ct. 377, 378, 376 N.E.2d 1232, 1233 (1978); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 740, 745, 370 N.E.2d 417, 424-25, 427 (1977); *In re* Quackenbush, 156 N.J. Super. 282, 289-90, 383 A.2d 785, 789-90 (P. Ct. 1978); *In re* Storar, 52 N.Y.2d 363, 376, 420 N.E.2d 64, 70, 438 N.Y.S.2d 266, 272, *cert. denied*, 454 U.S. 858 (1981).

90. According to commentators, the terminally ill patient does not have the specific intent to die and has not set in motion the life-ending mechanism. Byrn, *supra* note 73, at 17-19; Bratton, *The Right to Die: A Constitutional One?*, 41 Jurist 155, 165 n. 56 (1981).

91. 373 Mass. 728, 370 N.E.2d 417 (1977).

Massachusetts, while recognizing the right of a guardian to refuse chemotherapy for a 67-year-old incompetent,[92] acknowledged the interest of the state in assuring that the decision did not cheapen the value of life.[93] The court concluded, however:

> The constitutional right to privacy . . . is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life. The value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice.[94]

The Supreme Court recognized that the possibility of an unnecessary death does not automatically undermine the governmental interest in promoting the sanctity of life when it held that a prisoner on death row could waive a next-friend appeal.[95] The concept of choice prevailed even though an appeal could have resulted in a reversal of the death sentence.[96] The prisoner should not have been granted this right if unnecessary death automatically degrades the sanctity of life.[97] Similarly, force-feeding should not be justified on the ground that it promotes the sanctity of life. Human dignity is enhanced by respecting a prisoner's decision.

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92. *Id.* at 752-53, 370 N.E.2d at 431.

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

94. *Id.* This principle is exemplified in Brian Clark's play, *Whose Life Is It Anyway?*, which has received widespread attention and was produced as a major motion picture:

> Judge: But wouldn't you agree that many people with appalling physical handicaps have overcome them and lived essentially creative, dignified lives?
>
> Ken: Yes, I would, but the dignity starts with their choice. If I choose to live, it would be appalling if society killed me. If I choose to die, it is equally appalling if society keeps me alive.
>
> Judge: I cannot accept that it is undignified for society to devote resources to keeping someone alive. Surely it enhances that society.
>
> Ken: It is not undignified if the man wants to stay alive, but I must restate that the dignity starts with his choice. Without it, it is degrading because technology has taken over from human will.

B. Clark, *Whose Life Is It Anyway?*, in Best Plays of the Seventies 309 (1980).

95. Hammett v. Texas, 448 U.S. 725, 725 (1980) (per curiam); *see* Note, *The Death Row Right to Die: Suicide or Intimate Decision?* 54 S. Cal. L. Rev. 575, 576 (1981) (capital defendant cannot waive automatic appeal, but may waive discretionary appeal). To waive a next-friend appeal, the prisoner must be competent. *See* Hammett v. Texas, 448 U.S. 725, 725 (1980) (per curiam). See Taylor, *When Weighing a Stay of Execution*, N.Y. Times, Sept. 1, 1982, at A20, col. 4, for a discussion of a death-row prisoner who waived such appeal.

96. *See* Hammet v. Texas, 448 U.S. 725, 726 (1980) (Marshall, J., dissenting).

97. In Lenhard v. Wolff, 443 U.S. 1306 (1979) (Rehnquist, Circuit Justice), in deciding whether to issue a stay of execution based on a next-friend appeal when the defendant did not wish to prevent his execution, Justice Rehnquist stated: "From my view of the controlling legal precepts, the record evidence of competency is more

5. Protection and Care of Those Within the Custody of the Government

The government has a duty to protect and care for those within its custody.[98] This duty includes providing for the medical and dietary needs of prisoners.[99] Failure to meet minimum standards violates the eighth amendment.[100] In *Boyce v. Petrovsky*,[101] a federal district court permitted force-feeding, reasoning that the government could not be relieved of this duty.[102]

On the other hand, in *Zant v. Prevatte*,[103] the Supreme Court of Georgia ruled that this duty does not give the government "the right to feed [a prisoner] to prevent his death from starvation if that is his wish."[104] The government's duty is to provide care for prisoners, not to impose it on unwilling recipients.[105] Moreover, even the *Boyce* court recognized that this duty emanates from the government's interest in "dignity, civilized standards, humanity and decency."[106] These concepts are implicit in the governmental interests of preserving society and promoting the sanctity of life.[107] As previously discussed,

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important to the determination of whether a stay is appropriate than is the merit of the underlying application." *Id.* at 1310 (Rehnquist, Circuit Justice). Nevertheless, Justice Rehnquist issued the stay of Jesse Bishop's execution because the full Court was going to consider the application a short time thereafter. *Id.* at 1313 (Rehnquist, Circuit Justice). At that later date, the stay was denied and the inmate executed. Lenhard v. Wolff, 444 U.S. 807 (1979).

98. Estelle v. Gamble, 429 U.S. 97, 103-04 (1976); Ruiz v. Estelle, 679 F.2d 1115, 1149, *modified in part, vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982) (per curiam); Hendrix v. Faulkner, 525 F. Supp. 435, 519 (N.D. Ind. 1981).

99. Estelle v. Gamble, 429 U.S. 97, 103-04 (1976); *see* Hutto v. Finney, 437 U.S. 678, 683 (1978); Bounds v. Smith, 430 U.S. 817, 834 (1977) (Burger, C.J., dissenting); J. Palmer, Constitutional Rights of Prisoners § 10.3 (2d ed. 1977).

100. Estelle v. Gamble, 429 U.S. 97, 102-04 (1976). Failure to meet a "contemporary standard of decency" in providing "basic human needs" violates the eighth amendment's prohibition against cruel and unusual punishment. Rhodes v. Chapman, 452 U.S. 337, 347 (1981); *see* Hutto v. Finney, 437 U.S. 678, 685-87 (1977); Bishop v. Stoneman, 508 F.2d 1224, 1225-26 (2d Cir. 1974); Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974).

101. No. 81-3322 (W.D. Mo. Sept. 16, 1981).

102. *Id.* slip op. at 2 ("[T]he government cannot be relieved of that constitutional obligation by the *unreliable* whims of individual prisoners." (emphasis added)). If the prisoner is deemed competent, however, his decision to refuse care is not unreliable. See *supra* notes 74-79 and accompanying text.

103. 248 Ga. 832, 286 S.E.2d 715 (1982).

104. *Id.* at 834, 286 S.E.2d at 716.

105. Similarly, although the states have the duty to appoint counsel in certain instances, it does not have the right to impose representation on competent defendants wishing to represent themselves if such defendants clearly and willingly waive their right to counsel. *See* Faretta v. California, 422 U.S. 806, 833 (1975).

106. Boyce v. Petrovsky, No. 81-3322, slip op. at 2 (W.D. Mo. Sept. 16, 1981) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

107. See *supra* pt. II(A)(3-4) and accompanying text.

however, these interests, although compelling, are not threatened by hunger strikes.[108] If the interests underlying a duty are not threatened, the duty should not be a basis for force-feeding.[109] The duty should not be used as a sword to intrude upon a prisoner's privacy, but rather as a shield, to be used by an inmate seeking the protection of a minimum level of care.

It is submitted that the decisions that have permitted force-feeding based on the assertion of general societal interests[110] are erroneous. Assuming a prisoner is competent, no general societal interest can justify the bodily intrusion of force-feeding. This result may be different, however, when a penal interest is asserted by the government.

B. *Penal Interests*

The Supreme Court has stated that the maintenance of prison discipline and security is the most important penal interest.[111] Hunger

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108. *Id.*

109. Fear of liability based on the government's duty should not justify force-feeding. In Von Holden v. Chapman, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982), the court noted that the state "may be cast in civil damages for its failure to observe such duty." *Id.* at 68, 450 N.Y.S.2d at 625. Although the government has the duty to supervise suicidal persons within its custody, Wilson v. Sponable, 81 A.D.2d 1, 7-8, 439 N.Y.S.2d 549, 553 (1981); *see* Suicide Prevention Program, 28 C.F.R. § 549.70-.71 (1982), this duty is designed to prevent an irrational act. See *supra* note 76. If an inmate was competent at the time of the decision to hunger strike, the failure to prevent such an act is not blameworthy. *See* W. Prosser, Handbook on Torts § 18, at 101 (4th ed. 1971) (no wrong done to willing person).

110. Boyce v. Petrovsky, No. 81-3322, slip op. at 2-3 (W.D. Mo. Sept. 16, 1981) (government's duty to care for prisoners outweighs prisoner's privacy right); Von Holden v. Chapman, 87 A.D.2d 66, 68-70, 450 N.Y.S.2d 623, 625-26 (1982) (government's interest in preventing suicide outweighs prisoner's privacy right); State *ex rel.* White v. Narick, 292 S.E.2d 54, 58 (W. Va. 1982) (government's interest in preserving life outweighs prisoner's privacy right).

111. Bell v. Wolfish, 441 U.S. 520, 546-47 (1979); Pell v. Procunier, 417 U.S. 817, 823 (1974). In *Pell*, the Court stated that "the legitmate penological objectives of the corrections system" also include general deterrence, specific deterrence and rehabilitation. *Id.* at 822-23. The Court stated that "[i]t is in the light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners." *Id.* at 823. With the possible exception of threatening prison discipline and security, see *infra* notes 112-19 and accompanying text, hunger striking should not threaten these interests.

The death of a hunger striker should not threaten the objective of general deterrence, that is, the deterrence of others from committing crimes. *Id.* at 822. Because death "can scarcely be said to be an easier or preferable alternative," Zellick, *The Forcible Feeding of Prisoners: An Examination of the Legality of Enforced Therapy*, 1976 Pub. L. 153, 175, the knowledge that one may hunger strike in prison without interruption should not hinder the deterrent effect the fear of incarceration has on potential offenders. Specific deterrence is not impinged because the hunger striker who dies is removed permanently from society. Rehabilitation has been considered an important penal objective "since most offenders will eventually return to society."

strikers may threaten this interest in different ways. For instance, if the hunger striker makes demands to which prison authorities accede, other prisoners may be encouraged to hunger strike, thus creating havoc in the administration of the prison.[112] If prison officials demonstrate tenacity in not acceding to the demands, however, the hunger striker, as well as the other inmates, are likely to realize that hunger strikes are not an effective manipulative tool.[113] Prisoners may instead voice their complaints through administrative and judicial avenues.[114]

Hunger strikers may carry out their threats to die, however, if prison officials do not accede to demands. Prison officials might be subjected to pressure from other prisoners, prison staff, family members and the general public to prevent the deaths.[115] But pressure alone should not justify constitutional violations. For example, public officials have been required to implement desegregation programs despite the pressure of communities vehemently opposed to desegregation.[116] The avoidance of public pressure is not a compelling inter-

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417 U.S. at 823. If the hunger striker dies, however, rehabilitation would not be applicable. *See* Zellick, *supra*, at 175.

112. Commissioner of Correction v. Myers, 379 Mass. 255, 264, 399 N.E.2d 452, 457 (1979); *see* State *ex rel.* White v. Narick, 292 S.E.2d 54, 58 (W. Va. 1982).

113. Zellick, *supra* note 111, at 175.

114. See *supra* note 16 and accompanying text. Prisoners are entitled to seek redress of wrongs through judicial or administrative procedures. J. Palmer, *supra* note 99, ch. 11 (2d ed. 1977 & Supp. 1981); Breed & Dillingham, *Dispute Resolution in Corrections*, in Prisoners' Rights Sourcebook 139, 139 (I. Robbins ed. 1980); Project, *Twelfth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1981-82*, 71 Geo. L.J. 339, 779-800 (1982). For example, a federal prisoner may apply for an administrative remedy to "review . . . any aspect of his imprisonment if less formal procedures have not resolved the matter." 28 C.F.R. §§ 542.10-.15 (1982). An inmate may also have his claim reviewed in state or federal court if the jurisdictional prerequisites are met. J. Palmer, *supra* note 99, § 11.2-.3.

A state prisoner may bring a suit against prison officials for violating his rights under § 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976). Cooper v. Pate, 378 U.S. 546, 546 (1964) (per curiam) (state inmates have right to sue their keepers under § 1983); *see* J. Palmer, *supra* note 99, § 11.6. A federal prisoner may sue prison officials for damages resulting from constitutional violations. Carlson v. Green, 446 U.S. 14, 16-25 (1980); *see* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971).

115. As one official faced with pressure to prevent such a death said: "[I]t would be very difficult to make the prisoners, their families and the correction department staff understand that I had done everything legally possible to prevent a death of a prisoner . . . ." Commissioner of Correction v. Myers, 379 Mass. 255, 267, 399 N.E.2d 452, 459 (1979).

116. For example, in 1962, James Meredith, a black student, was granted permission under a Fifth Circuit order to enroll at the University of Mississippi. *See* Meredith v. Fair, 328 F.2d 586, 589 (5th Cir. 1962). Governor Ross Barnett strongly opposed the desegregation and refused to enforce the court's order. S. Wasby, A. D'Amato & R. Metrailer, Desegregation from Brown to Alexander 211 (1977). Federal marshalls, facing violent opposition, escorted Meredith onto the campus. *Id; see*

est,[117] and should not justify force-feeding.[118] The death of a hunger striker, however, may spark a prison riot.[119] If the government establishes that such a threat to prison discipline and security exists, it would be justified in force-feeding the prisoner.[120]

The government's burden in proving the infringement of a penal interest is significantly lighter than its heavy burden in proving the infringement of a general societal interest.[121] Substantial deference is afforded the opinion of prison officials.[122] For example, in *Jones v. North Carolina Prisoners' Labor Union,*[123] the Court deferred to the prison official's opinion that the exercise of a prisoner's first amendment rights would disrupt prison discipline.[124] The Court reasoned that requiring a higher showing would unnecessarily burden the oper-

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also H. Rodgers & C. Bullock, Law and Social Change: Civil Rights Laws and Their Consequences 71-74 (1972) (elected officials publicly announced their refusal to implement desegregation plans); *cf.* A. Goldberg, Equal Justice: The Warren Era of the Supreme Court 60 (1971) ("[T]here is no justification for the Court to avoid deciding a citizen's substantial claim of constitutional right on the basis that it may injure itself it if decides that case and vindicates those rights.").

117. *See* Procunier v. Martinez, 416 U.S. 396, 413 (1974) ("[T]he regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions . . . .").

118. One commentator, in discussing whether the British government should yield to public pressure to force-feed Irish hunger strikers, stated that the "desire to avoid political embarrassment" is not a compelling ground. Zellick, *supra* note 111, at 173-74.

119. A prison riot has devastating effects both for the government and the prison population. *See* R. Oswald, Attica—My Story 254-98 (1972); T. Wicker, A Time to Die 269-310 (1975); New York State Special Commission on Attica, *Attica*—The Official Report 366-470 (1972).

120. Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry."); *accord* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 128 (1977); *see* Pell v. Procunier, 417 U.S. 817, 822 (1974); Procunier v. Martinez, 416 U.S. 369, 412-14 (1974).

121. See *supra* notes 44-50 and accompanying text.

122. See *supra* note 50 and accompanying text.

123. 433 U.S. 119 (1977).

124. *Id.* at 128-29, 132. The prisoners were prohibited from participating in union activities. See *supra* notes 13-14 and accompanying text. The deference permitted under *Jones* has been criticized as entirely removing prisoners' first amendment rights. *See* Calhoun, *The Supreme Court and The Constitutional Rights of Prisoners: A Reappraisal,* 4 Hastings Const. L.Q. 219, 220, 234 (1977); Comment, *The Future of Prisoners' Unions:* Jones v. North Carolina Prisoners' Labor Union, 13 Harv. C.R.-C.L. L. Rev. 799, 803-04 (1978).

In his dissenting opinion, Justice Marshall noted that a rule permitting such deference deviates from previous Supreme Court cases concerning prisoners' rights. *See* 433 U.S. at 143 (Marshall, J., dissenting). For example, even though segregation in certain prisons may be rationally related to the prevention of prison disorder, the Court ruled in Lee v. Washington, 390 U.S. 333 (1968), that segregated prisons are unconstitutional. 433 U.S. at 143 (Marshall, J., dissenting).

ation of prisons,[125] such operation being within the particular knowledge and expertise of the prison authorities.[126]

The substantial deference afforded the opinion of the prison official in *Jones*, however, should not always be granted. The degree of deference should vary according to the magnitude of the intrusion upon the inmate's constitutional rights. Although certain intrusions may be permitted based solely on the opinion of a prison official, more substantial intrusions should be allowed only upon a showing of a factual basis to support the assertion. This distinction is based on the consequences that would ensue if the prison official's opinion is wrong. For example, if one avenue of speech is removed as a result of an erroneous assertion,[127] the right to freedom of speech may still be exercised by other means.[128] Substantial deference is properly afforded here. A force-feeding, however, involves an "all or nothing" intrusion. If the official is wrong in asserting the need to force-feed, the right to bodily integrity would be substantially and unnecessarily violated. A prison official should therefore be required to support his opinion that force-feeding is necessary.[129]

While a requirement of proof of an actual disruption would compromise the important governmental interest of maintaining prison discipline and security,[130] affording absolute deference to the opinion of a prison official would not adequately protect the inmate's right of privacy.[131] Thus, the proper standard should give appropriate deference to the prison official's opinion while ensuring that a threat to prison discipline and security actually exists.

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125. *See* 433 U.S. at 128.

126. *Id.*

127. See *supra* note 10 and accompanying text.

128. See *supra* notes 11-17 and accompanying text.

129. The magnitude of such an intrusion is not justified by an unsupported assertion by a prison official. In Commissioner of Correction v. Myers, 379 Mass. 255, 399 N.E.2d 452 (1979), however, the court permitted a forced hemodialysis, *id.* at 265-66, 399 N.E.2d at 458, without requiring the warden to support his opinion that "one could expect an explosive reaction by other inmates to the death." *Id.* at 267, 399 N.E.2d at 459 app. If the warden was wrong, the inmate unnecessarily suffered a grave intrusion upon his right of privacy.

130. Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 126 (1977) ("Because the realities of running a penal institution are complex and difficult, we have also recognized the wide-ranging deference to be accorded the decisions of prison administrators.").

131. *See id.* at 142 (Marshall, J., dissenting) ("[P]rison officials inevitably will err on the side of too little freedom."); *cf.* Freedman v. Maryland, 380 U.S. 51, 57-58 (1965) (a censor will not be as protective of the first amendment as would a court). Prison officials have incentive to stop a hunger strike because a prisoner's death may subject the official to adverse public pressure, whereas an invasion of the prisoner's privacy generally would not. See *supra* note 115 and accompanying text. Thus, a court is best situated to protect the interests of both the prisoner and prison officials. 433 U.S. at 141-43.

Because the fourth amendment balances the invasion of personal rights against governmental security interests,[132] the standards developed by the Supreme Court regarding the reasonableness of searches and seizures are useful in deriving a standard under which force-feeding would be justified. A major factor in determining the reasonableness of a search and seizure is the intrusiveness of the invasion.[133] As the invasion of privacy increases, the level of requisite suspicion increases.[134] A full search, for example, imposes a great intrusion and therefore requires the highest showing—probable cause.[135] A standard as stringent as probable cause, however, should not be used when a penal interest is asserted, considering the peculiarities of the prison environment.[136] Although force-feeding is at least as intrusive as a full

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132. Under the fourth amendment, the reasonableness of a search depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference." United States v. Hinckley, 672 F.2d 115, 129 (D.C. Cir. 1982) (per curiam) (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)); *see* United States v. Cortez, 449 U.S. 411, 421 & n.4 (1981); United States v. Martinez-Fuerte, 428 U.S. 543, 555-58 & n.12 (1976); Brinegar v. United States, 338 U.S. 160, 176 (1949); W. Ringel, Searches & Seizures, Arrests and Confessions §§ 1.1–.3, 4.1 (1980).

133. Bell v. Wolfish, 441 U.S. 520, 559 (1979); Camara v. Municipal Court, 387 U.S. 523, 537 (1967); Terry v. Ohio, 392 U.S. 1, 26 (1968); W. Ringel, *supra* note 132, § 2.2.

134. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 545, 566-67 (1976) (routine stopping of vehicles for brief questioning at permanent checkpoint near border is permissible absent individualized suspicion, considering limited intrusion); United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975) ("Because of the limited nature of the intrusion, stops of this sort [stopping and questioning occupants of an automobile] may be justified on facts that do not amount to the probable cause required for an arrest.").

135. *See* Terry v. Ohio, 392 U.S. 1, 25-26 (1968); United States v. Nembhard, 676 F.2d 193, 202 (6th Cir. 1982); United States v. Black, 675 F.2d 129, 133 (7th Cir. 1982), *petition for cert. filed*, 50 U.S.L.W. 3984 (U.S. June 3, 1982) (No. 81-2239). In *Terry*, a frisk incident to police questioning, which the Court said "must be limited to that which is necessary for the discovery of weapons . . . and may realistically be characterized as something less than a 'full' search," 392 U.S. at 26, was held permissible absent probable cause because the intrusion on the suspect's privacy right is not too great. *Id.* Additionally, the governmental interest in protecting police from the use of weapons justified the lesser standard. *Id.* at 26-27.

The Supreme Court has stated that probable cause requires "more than bare suspicion: Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

The Supreme Court has required probable cause for automobile searches because such searches are a "substantial invasion of privacy." United States v. Ortiz, 422 U.S. 891, 896 (1975); *accord* Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973); Chambers v. Maroney, 399 U.S. 42, 51 (1970).

136. See *supra* notes 125-26 and accompanying text.

search, applying such a standard would violate the admonition in *Jones v. North Carolina Prisoners' Labor Union*[137] that prison officials must not be required to "compile a dossier on the eve of a riot."[138] Rather, a standard similar to the one required in certain less intrusive invasions, such as in "stop and inquiry" cases,[139] should be applied. This standard, "reasonable suspicion,"[140] requires the government to show "articulable facts which, taken together with rational inferences from those facts," reasonably support its suspicion.[141] A prison official would thus be required to provide facts from which a court may determine whether there is a reasonable basis to believe that force-feeding is necessary to prevent a riot.[142]

For example, observations of the prison staff including the prison official, statements by inmates, and any petitions or letters circulating among the prisoners should be considered. Additionally, as the Supreme Court stated, a prisoner's purpose in exercising a right is a relevant factor "in determining whether [such an exercise] is likely to be a disruptive influence."[143] It may be that a prisoner who is hunger striking for solely personal reasons is less likely to cause disruption than one who is hunger striking for the purpose of making demands, particularly when the latter has the support of fellow inmates. A court should take these factors into account, together with the experience of the prison official making the assertion,[144] in determining whether

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137. 433 U.S. 119 (1977).

138. *Id.* at 133.

139. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975); Adams v. Williams, 407 U.S. 143, 145 (1972); Terry v. Ohio, 392 U.S. 1, 25-26 (1968); United States v. Black, 675 F.2d 129, 133 (7th Cir. 1982), *petition for cert. filed*, 50 U.S.L.W. 3984 (U.S. June 3, 1982) (No. 81-2239).

140. United States v. Allen, 675 F.2d 1373, 1383 (9th Cir. 1981); *see* Reid v. Georgia, 448 U.S. 438, 441 (1980); Terry v. Ohio, 392 U.S. 1, 27 (1968); Babula v. Immigration & Naturalization Serv., 665 F.2d 293, 297 (3d Cir. 1981); United States v. Sears, 663 F.2d 896, 903 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 1731 (1982).

141. Terry v. Ohio, 392 U.S. 1, 21 (1968); *accord* United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

142. *Cf.* Brown v. Texas, 443 U.S. 47, 51-52 (1979) (unconstitutional to stop defendant because police officer "was unable to point to any facts" to support his "suspicion" of criminal activity); United States v. Brignoni-Ponce, 422 U.S. 873, 884-86 (1975) (mere fact occupants of car were of Mexican descent did not create a reasonable suspicion for border patrol to stop car); Terry v. Ohio, 392 U.S. 1, 27-28 (1968) (frisk incident to questioning was constitutional as "facts and circumstances" warranted officer's fear for his safety).

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

144. Prison security is "peculiarly within the province and professional expertise of corrections officials." Pell v. Procunier, 417 U.S. 817, 827 (1974); *accord* Bell v. Wolfish, 441 U.S. 520, 547 (1979); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 128 (1977); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974); *cf.* Brown v. Texas, 443 U.S. 47, 52 n.2 (1979)(observations of trained police officer

there is a reasonable basis to believe that prison discipline and security is threatened.

Although the Supreme Court has not formally adopted the reasonable basis standard, it seems to have implicitly endorsed it in *Bell v. Wolfish*.[145] In *Bell*, the Court upheld both a prison rule that prohibited inmates from receiving hard-cover books not mailed directly from publishers, book clubs or book stores,[146] and a prison practice of conducting body cavity searches after every contact visit.[147] In permitting the restriction of first amendment rights, the Court was influenced by the "other avenues" available to the prisoners in obtaining the materials.[148] The prison officials were not required to support their assertion that hard-cover books are a great threat to security.[149] Regarding the body cavity searches, however, the Court began its analysis by noting that "this practice instinctively gives us the most pause."[150] In upholding the prison's practice, the Court did not simply defer to the opinion of a prison official that the body cavity searches were necessary to prison security.[151] Rather, the Court noted that "inmate attempts to secrete [contraband] into the facility by concealing them in body cavities are documented in this record . . . and in other cases."[152]

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should be considered in determining presence of reasonable suspicion); United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975) (same); Terry v. Ohio, 392 U.S. 1, 27, 30 (1968) (same).

145. 441 U.S. 520 (1979). Although the Court was also concerned with the constitutional rights of pretrial detainees, it did not distinguish between them and convicted prisoners. *See id.* at 546 n.28 ("There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates.").

146. *Id.* at 548-52.

147. *Id.* at 558-60.

148. *Id.* at 552. Inmates had the use of a "relatively large" library, and soft-cover books could be obtained from any source. *Id.* Hard-cover books could be received from certain sources. *Id.* The possible increased cost in obtaining the materials elsewhere did not make the restriction unconstitutional. *Id.*

149. *See id.* at 550-51. The Court stated that "hardback books are especially serviceable for smuggling contraband into an institution; money, drugs, and weapons easily may be secreted in the bindings." *Id.*

150. *Id.* at 558.

151. *See id.* at 559.

152. *Id.* Because the body cavity searches furthered a penal interest, the court did not require probable cause. *See id.* at 560. Justice Powell, however, asserted that body cavity searches should not be allowed as a matter of course. *See id.* at 563 (Powell, J., concurring in part, dissenting in part) ("In view of the serious intrusion on one's privacy occasioned by such a search, I think at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described . . . ."); *accord* Lee v. Downs, 641 F.2d 1117, 1120 (4th Cir. 1981) (male prison official had to show necessity of removing female prisoner's underclothing); DiGuiseppe v. Ward, 514 F. Supp. 503, 505-06 (S.D.N.Y. 1981) (prison officials required to point to facts concerning the need to examine inmate's diary); Bowling v. Enomoto, 514 F. Supp. 201, 204 (N.D. Cal. 1981) (showing required for need to have female officers inspect male prisoners).

While the *Bell* Court admonished the judiciary not to " 'second-guess' prison administrators,"[153] it also recognized that prisoners' rights are to be "scrupulously observed."[154] A "reasonable basis" standard represents the "mutual accommodation between institutional needs and objectives and the provisions of the Constitution" as required by the Court in *Bell*.[155]

CONCLUSION

The right of a competent prisoner to be free from the intrusion of force-feeding is based on the constitutional right of privacy. A prisoner may be force-fed only if a governmental interest outweighs the right to bodily integrity. An analysis of the relevant societal and penal interests indicates that only prison discipline and security may outweigh the inmate's right. Prison officials, however, should be required to demonstrate a reasonable basis for an assertion that force-feeding is necessary to prevent prison disruption. Force-feeding would otherwise be an unconstitutional, albeit well-intentioned, intervention to prevent an inmate from taking his own life.

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The *Bell* Court allowed searches of prisoners' rooms based solely on the assertion of prison officials. *See* 441 U.S. at 555-57. The Court stated that prisoners have little or no expectation of privacy regarding their rooms. *Id.* at 557. Substantial deference was therefore proper because the intrusion on prisoners was minimal.

153. 441 U.S. at 545 (quoting lower court).

154. *Id.* at 562.

155. *Id.* at 546 (quoting Wolff v. McDonnell, 418 U.S. 539, 556 (1974)). Furthermore, courts must balance the threat to prison discipline and security against the intrusion of the prisoner's right of privacy. *See* 441 U.S. at 557 (1979). If a prison official establishes a reasonable basis that a riot will ensue if a prisoner is not force-fed, balancing the respective interests will allow force-feeding. If the threat to prison discipline and security, however, is minimal, such as the fighting of two inmates who could be controlled easily, a court should consider requiring prison officials to separate the inmates as an alternative to permitting force-feeding. *Cf.* Weaver v. Jago, 675 F.2d 116, 119 (6th Cir. 1982) (lower court should have balanced prison official's asserted need to restrict hair length against prisoner's right of freedom of religion, which was encroached by the restriction); Dawson v. Kendrick, 527 F. Supp. 1252, 1316-17 (S.D.W. Va. 1981) (female prisoners' right of privacy to be free from being viewed involuntarily by male prisoners outweighs burden of prison to so accommodate).