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The "hunger strike" conjures images of starving young men in Northern Ireland and zealous suffragettes in England. One of the few weapons available to prisoners, it has received little judicial attention in the United States. Three state courts, however, have recently faced the legal and moral quandary presented by a competent, adult prisoner who refuses to eat.[1] Each court responded to the inmate's constitutional claims to privacy and freedom of expression with a superficial analysis of a complex problem.[2] The conflict between the incarcerated individual's right to bodily autonomy and the competing state interests is not easily resolved. Thorough analysis involves careful consideration of policies underlying the state interest in preventing the inmate's death and evaluation of the inmate's ultimate right to "be let alone."[3]

The Georgia Supreme Court was confronted with a hunger-striking inmate in *Zant v. Prevatte*.[4] Basing its decision on the right to privacy, it affirmed the superior court's order refusing authorization to force feed the inmate.[5] At the time of the lower court's hearing, Prevatte had not eaten for twenty-nine days and was refusing further physical examinations.[6] The lower court, noting that Prevatte was rational and apparently sane, suggested that his actions were motivated by a desire to gain attention from prison officials and to obtain a transfer to a different prison.[7]

The state sought authorization to force feed based on its duty to protect the health of inmates and its interest in preserving life. The superior court agreed that the state has a duty to protect prisoners and to provide them with medical care. This duty, the court noted, includes preventing harm to a prisoner when it is reasonable to believe he may harm himself. The court held, however, that this duty does not extend to forced feeding because forced feeding violates the inmate's constitutional right to privacy.[8] The court also re-

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

2. This comment will address only the inmate's right to privacy. For a discussion of nonverbal acts as symbolic expression, see J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 817-23 (1978). For a discussion of limitations on the prisoner's freedom of speech, see Comment, *A Review of Prisoners' Rights Under the First, Fifth, and Eighth Amendments*, 18 DUQ. L. REV. 683, 684-88 (1980).

3. *See infra* note 39 and accompanying text.

4. 248 Ga. 832, 286 S.E.2d 715 (1982).

5. *Id.* at 834, 286 S.E.2d at 717.

6. *Id.* at 832 n.1, 286 S.E.2d at 716 n.1. An original motion to expedite was denied since Prevatte had begun to eat. A second motion was granted after Prevatte again stopped eating on December 29, 1981. At the date of the supreme court's opinion he had not terminated his hunger strike.

7. *Id.* at 833, 286 S.E.2d at 716. Prevatte contended that his life was endangered by other inmates.

8. *Id.* at 833-34, 286 S.E.2d at 716. The court stated that a prisoner does not relinquish this constitutional right because of his status as a prisoner. The court's discussion of the right to privacy was brief, however, and the court did not elaborate on the relevance of privacy to forced feeding.

jected the state's argument that its interest in preserving life compelled intervention: "To take the State's argument to its logical conclusion, were Prevatte still under a death sentence the State would ask the Court to allow it to keep him alive against his will so it could later kill him."[9] While the court acknowledged the state's right to incarcerate and to apply the death penalty, it declined to extend this right to "destroy a person's will."[10]

In affirming the lower court's decision the supreme court observed that Prevatte was competent and had no dependents. Under those circumstances, Prevatte's right to privacy allowed him to refuse bodily intrusion.[11] The court noted that other courts have reached similar results, citing cases in which courts refused to compel medical treatment.[12]

The Appellate Division of the New York Supreme Court reached a different result in *Von Holden v. Chapman*.[13] The court unanimously affirmed a lower court order authorizing the Director of the New York Psychiatric Center to force feed Mark David Chapman in order to sustain his life.[14] At the time of the hearing, Chapman, who was competent, had not eaten for twenty-two days. Aware that his refusal to eat would result in death, Chapman stated he was attempting to draw attention to the world's starving children.[15]

The court rejected Chapman's claim to a constitutional right to privacy on two grounds. First, it equated a hunger strike to suicide, saying "the right to privacy does not include the right to commit suicide."[16] On the contrary, the state has a duty to care for persons in its custody and may be liable for failure to do so. The court also noted that the state has traditionally shown an interest in preventing self-destruction, evidenced by statutes that address aiding, abetting, and preventing suicide. The court emphasized the high social value of preservation of life, characterizing suicide as "a grave public wrong."[17] Second, the court perceived important differences between the right to decline medical treatment, which is based on a privacy interest, and the right to take one's life. The court concluded that Chapman had no privacy interest in maintaining a hunger strike.[18]

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

10. *Id.* at 834, 286 S.E.2d at 717.

11. *Id.*

12. The *Prevatte* court cited Lane v. Candura, 6 Mass. App. Ct. 377, 376 N.E.2d 1232 (1978); *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785 (Morris County Ct. 1978); *In re* Yetter, 62 Pa. D. & C.2d 619 (C.P. Northampton County 1973). None of these cases addressed an inmate's right to refuse medical treatment.

13. 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982).

14. *Id.* at 71, 450 N.Y.S.2d at 627. Chapman was transferred to the state psychiatric center from Attica Correctional Facility after two examining physicians certified that he was suffering from a mental illness likely to result in serious harm.

15. *Id.* at 67, 450 N.Y.S.2d at 625. The court stated that Chapman had frequently expressed an intention to commit suicide.

16. *Id.* at 68, 450 N.Y.S.2d at 625.

17. *Id.*, 450 N.Y.S.2d at 626 (quoting Stiles v. Clifton Springs Sanitarium, 74 F. Supp. 907, 909 (W.D.N.Y. 1947)).

18. *Id.*, 450 N.Y.S.2d at 625-26. The court concluded that even if a hunger strike qualifies as symbolic speech, maintenance of order and discipline within the prison precluded Chapman's claim to a first amendment right. *Id.* at 70-71, 450 N.Y.S.2d at 627.

The New York court's refusal to recognize a privacy right in these circumstances was sufficient grounds for its decision. The court had an additional concern, however: the effect of Chapman's hunger strike on the institution. The hunger strike had caused unit procedural disruption, resentment, and starvation attempts by other inmates.[19] The court thus held that there were three countervailing considerations which outweighed the asserted rights of the prisoner: the state's obligation to protect the health and welfare of persons in its custody, the state's interest in the preservation of life, and the state's interest in maintaining rational and orderly procedures in its institutions.[20]

The Supreme Court of Appeals of West Virginia also authorized forced feeding, but based its decision on slightly different grounds from those in *Chapman*. In *State ex rel. White v. Narick* the court refused an inmate's prayer for injunctive relief against forced feeding.[21] White, a murderer serving a life sentence, began a hunger strike to protest prison conditions in Moundsville State Penitentiary. Having lost more than one hundred pounds, he voluntarily ended his fast shortly after the case was argued.[22] The court decided the issue because it was capable of repetition, holding West Virginia's interest in preserving life superior to White's personal privacy right, which was limited by incarceration.[23]

Beginning its analysis with an evaluation of the inmate's constitutional rights, the court concluded that these rights are limited. The court disagreed with the *Prevatte* decision, noting that "[t]he Georgia court failed to consider compelling reasons for preserving life, not the least being civility."[24] The individual's right to privacy, the court said, must be balanced against the state interest in preserving life.[25] The court recognized that the state interest may be subordinate to the individual's privacy right in some circumstances. Competent, rational patients may refuse medical treatment. The court distinguished the patient from the inmate, however. The patient who faces "certain, painful, uninvited death" may have a protected right of privacy.[26] The inmate who refuses food in protest for a cause that may be "various and unpredictable" has no such right.[27] Like the *Chapman* court, the court in *White* was concerned with the effect of a hunger strike on the prison system. The court

19. *Id.* at 67, 450 N.Y.S.2d at 625.

20. *Id.* at 66-67, 450 N.Y.S.2d at 625. The court had already refused to recognize that the right to privacy includes the right to starve oneself. Therefore, it was not necessary to weigh these countervailing considerations.

21. 292 S.E.2d 54 (W. Va. 1982).

22. *Id.* at 55 n.1. The court stated that White had not suffered serious physical deterioration.

23. *Id.* at 58. West Virginia's interest in preserving life was also deemed superior to White's freedom of expression.

24. *Id.* at 57.

25. *Id.* at 57-58. The court relied on Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977). In *Saikewicz*, the court identified the preservation of life as an important state interest, which is balanced against an individual's privacy interest in determining the right to refuse medical treatment.

26. 292 S.E.2d at 58.

27. *Id.*

noted that hunger strikes in prisons are commonly used to gain attention and to manipulate prison administrators.

To evaluate a hunger striking inmate's right to reject forced feeding, one must examine the nature of the right to privacy. It is this right that allows an individual to determine for himself when bodily intrusions will occur. The scope of the right "to be let alone" has long been a subject of legal comment.[28] Although there is no "right to privacy" specifically articulated in the Constitution,[29] the Supreme Court has found this unwritten constitutional guarantee in the "penumbras" of the Bill of Rights, "formed by emanations from those guarantees that help give them life and substance."[30]

The individual's right to control his body as an aspect of privacy has been addressed by the Supreme Court in a line of cases extending from *Griswold v. Connecticut*[31] through *Roe v. Wade*.[32] In *Griswold* the Court held a Connecticut statute forbidding the use of contraceptives by married persons violative of the right to privacy, which resides in the penumbra of specific guarantees within the Bill of Rights. The Court stated that these "[v]arious guarantees create zones of privacy."[33] In *Roe v. Wade* the Court addressed a woman's

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28. Samuel D. Warren and Louis D. Brandeis noted the following in their seminal article on the individual's right to privacy:

> Gradually the scope of . . . legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.

Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). The right to make decisions about one's body is an important value long protected by common law. In Union Pacific Ry. v. Botsford, 141 U.S. 250, 251 (1891), the Court stated 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." The right to bodily integrity and autonomy has traditionally received protection under the rule that a physician may not operate on a patient without consent: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914).

29. For general information about the right to privacy, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 886-990 (1978); Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977); Huff, *Thinking Clearly About Privacy*, 55 WASH. L. REV. 777 (1980); Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173.

30. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). According to Professor Tribe:

> [Privacy] rights have been located in the "liberty" protected by the due process clauses of the fifth and fourteenth amendments. They have been cut from the cloth of the ninth amendment—conceived as a rule against cramped construction—or from the privileges and immunities clauses of article IV and of the fourteenth amendment. Encompassing rights to shape one's inner life and rights to control the face one presents to the world, they have materialized like holograms from the "emanations" and "penumbras"—most recently dubbed simply the "shadows"—of the first, third, fourth, and fifth amendments. They elaborate the "blessings of liberty" promised in the Preamble, and have been held implicit in the eighth amendment's prohibition against cruel and unusual punishments. Wherever located, they have inspired among the most moving appeals to be found in the judicial lexicon.

L. TRIBE, *supra* note 29, at 893-94.

31. 381 U.S. 479 (1965).

32. 410 U.S. 113 (1973).

33. 381 U.S. at 484. This right was extended to unmarried persons in Eisenstadt v. Baird, 405 U.S. 438, 453 (1972): "If the right of privacy means anything, it is the right of the *individual*,

right to terminate her pregnancy. The opinion reviewed the decisions defining and developing a right to privacy. In defining this right, the Court stated: "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy."[34] Governmental regulations limiting fundamental rights may be justified only by compelling state interests. In *Roe v. Wade* the Supreme Court concluded that the constitutional right to privacy includes a woman's qualified right to terminate her pregnancy. The right is qualified by two state interests—preservation of the pregnant woman's health and protection of the potentiality of human life.[35] The first interest becomes compelling when the risk of injury to the woman posed by abortion is greater than that posed by childbirth; the second interest must be protected when the fetus becomes viable. At either point the state may infringe on the woman's decision.[36]

The privacy right evolving from *Griswold* to *Roe v. Wade* has as its core the right to control decisions about one's body.[37] The Court has neither precisely defined "fundamental right" nor described what rights it considers "implicit in the concept of ordered liberty." It has yet to decide a case involving a person refusing to consent to medical treatment. Some hint of at least one Justice's position may be found, however, in then Circuit Court Judge Burger's dissenting opinion in *Application of the President & Directors of Georgetown College*, in which he characterized the right to privacy as encompassing a right to refuse medical treatment.[38] His statement was an interpretation of Justice Brandeis' discussion in *Olmstead v. United States* of the right to "be let alone."[39] In *Georgetown* the court compelled a blood transfusion against a patient's wishes and later denied a petition for rehearing. Disagreeing with this denial, Judge Burger said:

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married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

34. 410 U.S. at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

35. *Id.* at 162.

36. *Id.* at 164-66. The Court discussed in some detail the extent and impact of the state's interests at different stages of a woman's pregnancy.

37. One commentator, defining privacy as autonomy or control over the intimacies of personal identity, suggests the following:

> All of this comes in the end to a control over the most basic vehicle of selfhood: the body. For control over the body is the first form of autonomy and the necessary condition, for those who are not saints or stoics, of all later forms. Any plausible definition of privacy, then, whatever the sources of its normative commitments, must take the body as its first and most basic reference for control over personal identity.

Gerety, *supra* note 29, at 266.

38. 331 F.2d 1010, 1015 (D.C. Cir.) (Burger, J., dissenting), *denying reh'g to* 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

39. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347, 352-53 (1967):

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

> Nothing in this utterance suggests that Justice Brandeis thought an individual possessed these rights only as to sensible beliefs, valid thoughts, reasonable emotions, or well-founded sensations. I suggest he intended to include a great many foolish, unreasonable, and even absurd ideas which do not conform, such as refusing medical treatment even at great risk.[40]

One ramification of the right to privacy cases was increased recognition of the right to refuse medical treatment. A New Jersey court analogized to *Roe v. Wade* in *In re Quinlan*,[41] recognizing the right to decline medical treatment under some circumstances as an element of the right to privacy. The *Quinlan* court weighed the state interest in preserving life against the patient's privacy right. The court concluded that the right grows and the state interest weakens as the degree of bodily invasion increases and the prognosis becomes more pessimistic. There comes a point, then, when the individual's rights prevail.[42] Thus, the *Quinlan* court considered the physical condition of the patient and the type of treatment needed as essential factors to be weighed in the balancing process.

Several courts have allowed patients not facing a dim prognosis to refuse medical treatment. In these cases the patient's right to be free of bodily invasion was respected even though the treatment could have prevented death. The courts in *Lane v. Candura*[43] and *In re Quackenbush*[44] refused to authorize amputation of patients' gangrenous limbs. The court in *In re Yetter* stated that the right to privacy includes a right to die even though the decision might be foolish, unwise, or ridiculous.[45] Other courts, however, have balanced the interests involved and reached a different result to prevent a patient's death.[46]

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40. 331 F.2d at 1017 (Burger, J., dissenting).

41. 70 N.J. 10, 38-42, 355 A.2d 647, 662-64 (1976). The court appointed the father as guardian of his daughter, who was in a persistent vegetative state, and authorized suspension of extraordinary medical procedures. The court's recognition of this right to refuse treatment implies that the patient's right to make such a decision is a "fundamental" one. According to Professor Tribe:

> 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.

L. TRIBE, *supra* note 29, at 921.

42. 70 N.J. at 41, 355 A.2d at 664. In *Quinlan* the life support system constituted a significant bodily invasion. The patient was in a chronic vegetative state with little or no chance of improvement.

43. 6 Mass. App. Ct. 377, 376 N.E.2d 1232 (1978).

44. 156 N.J. Super. 282, 383 A.2d 785 (Morris County Ct. 1978) (extent of bodily invasion involved was sufficient to render the state interest in preservation of life inferior to patient's privacy right).

45. 62 Pa. D. & C.2d 619, 623 (C.P. Northampton County 1973). The patient in *Yetter* refused to authorize either a surgical biopsy or any additional surgery needed as a possible treatment for breast cancer. Although she was a patient of a state hospital and diagnosed as schizophrenic, the court found that, at the time of her decision, she was lucid, rational, and understood the consequences. The court thus refused to compel treatment.

46. *See* Application of the President & Directors of Georgetown College, 331 F.2d 1000, 1009 (D.C. Cir.) (final and compelling reason for authorizing blood transfusion was that a life hung in the balance), *cert. denied*, 377 U.S. 978 (1964); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971) (interest of hospital, staff, and state in preserving life

The interests involved in forced feeding and compelled medical treatment are similar. For this reason, courts are tempted to rely on the right to refuse treatment cases as precedent in cases involving forced feeding. Forced feeding is closely analogous to medical treatment when the former procedure becomes necessary to protect the inmate's health and sustain his life. At that time, the inmate is like the patient who must submit to treatment or surgery to save his life. But there are also significant differences between the two. One obvious dissimilarity is that forced feeding becomes necessary because of the inmate's own omission. The patient, on the other hand, has not deliberately placed himself in the position of needing medical treatment. A second difference is that the inmate is in the custody of the state. The patient, however, may choose to enter or not to enter a hospital.

Despite these differences, in analyzing the issues raised by forced feeding it is useful to consider the state interests identified in the right to refuse treatment cases. These state interests must be examined, however, in the particular context of a hunger strike during incarceration.[47] The two most compelling state interests discussed in right to refuse treatment cases are the prevention of suicide and the preservation of life.[48] A third state interest in orderly prison

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warranted blood transfusion); Raleigh Fitkin—Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 423, 201 A.2d 537, 538 (per curiam) (court ordered blood transfusion because welfare of pregnant mother and child inseparable), *cert. denied*, 377 U.S. 985 (1964).

For a general discussion of the right to refuse medical treatment, see Bryn, *Compulsory Life-saving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1 (1975); Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228 (1973); Richards, *Constitutional Privacy, the Right to Die and the Meaning of Life: A Moral Analysis*, 22 WM. & MARY L. REV. 327 (1981); Comment, *The Right of Privacy and the Terminally Ill Patient: Establishing the "Right to Die,"* 31 MERCER L. REV. 603 (1980).

47. Issues in right to refuse treatment cases have also been used to analyze a death row inmate's right to refuse appeal. *See* Note, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575 (1981).

48. These two state interests were identified in Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977). The question presented to the court was whether to order treatment of Joseph Saikewicz (who had leukemia) with chemotherapy, a method that involves significant side effects and discomfort. Saikewicz was sixty-seven years old, profoundly mentally retarded, and a resident of state institutions since 1923. The court held that his rights to privacy and self-determination were entitled to protection. Because Saikewicz was incompetent, a guardian was appointed to ascertain his interests and preferences. There was sufficient evidence to support the guardian's determination that Saikewicz would have refused treatment.

Two additional state interests were discussed in *Saikewicz*, but received little attention in the three forced feeding cases. The first is maintenance of the ethical integrity of the medical profession. Several courts that authorized medical treatment emphasized the responsibility of the hospital and doctors to care for their patients. *See* Application of the President & Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir.) (patient is hospital's responsibility), *cert. denied*, 377 U.S. 978 (1964); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971) (hospital, acting as an involuntary host, should be permitted to act according to professional standards). *Cf. In re* Yetter, 62 Pa. D. & C.2d 619, 623 (C.P. Northampton County 1973) (patient committed to state hospital for mental illness allowed to refuse unrelated treatment: "the present case does not involve a patient who sought medical attention from a hospital and then attempted to restrict the institution and physicians from rendering proper medical care.").

This interest was not discussed in *Prevatte*, *White*, or *Chapman*. In those cases, the inmate did not refuse necessary medical treatment after voluntarily entering a hospital. Professional ethics, nevertheless, must be considered since the hunger striking inmate will probably be transferred to a prison hospital when he exhibits symptoms of starvation. The physician faces an ethical and

administration becomes relevant when the analysis shifts from refused medical treatment to forced feeding of inmates.

The first state interest, the prevention of suicide,[49] was the basis of the *Chapman* court's decision.[50] Equating the inmate's refusal to eat with slow suicide, the court found that the right to privacy does not include the right to commit suicide. Suicide is neither a fundamental right nor implicit in the concept of ordered liberty; it is therefore not protected by a guarantee of personal privacy. The court further stated that "[t]o characterize a person's self-destructive acts as entitled to that Constitutional protection would be ludicrous,"[51] particularly when the state has a duty to protect persons in its custody. In support of its condemnation of suicide, the court cited statutes prohibiting suicide and cases illustrating that suicide is a "grave public wrong."[52]

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moral dilemma when faced with the choice between the risks and invasive nature of forced feeding, on the one hand, and the death of the inmate, on the other. He or she may be given statutory authority to proceed with medical treatment without the inmate's consent. For example, N.C. GEN. STAT. § 148-46.2 (Cum. Supp. 1981) authorizes the chief medical officer of a prison hospital or institution to give consent on behalf of a prisoner who refuses to consent to treatment of an intentionally self-inflicted injury. The constitutionality of this statute has not been tested. On the other hand, N.C. GEN. STAT. § 148-22.2 (Cum. Supp. 1981) requires inmate consent for surgery except in emergency situations.

Another state interest articulated in *Saikewicz* is the protection of innocent third parties. Several courts have considered the effect of the patient's death on dependent minors in deciding whether to compel medical treatment. This extension of the *parens patriae* doctrine provided the basis for several decisions upholding forced treatment. *See* Application of the President & Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir.) (state as *parens patriae* will not allow parent to abandon child), *cert. denied*, 377 U.S. 978 (1964); Raleigh Fitkin—Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964) (blood transfusion necessary to save life of mother and unborn child). *But see In re* Osborne, 294 A.2d 372 (D.C. 1972) (children's material needs taken care of so court did not authorize father's treatment). The *Prevatte* court considered the inmate's lack of dependents. The *White* and *Chapman* courts did not refer to the inmate's marital or parental status.

The states are concerned with preventing economic and emotional abandonment of minor children. Cantor, *supra* note 46, at 231-35. An inmate's circumstances suggest a modified evaluation of this interest. Because he is incarcerated, the inmate may have little to contribute to his dependents' financial support. Many inmates' children are already supported by the state through governmental assistance programs. While in prison, an inmate is also limited in his ability to participate in family activities. The family's deprivation is, of course, dependent on the length of the inmate's sentence.

Assuming that the death of an inmate who stops eating would be harmful to his child, courts should question whether the state interest in the protection of minors justifies intervention in a hunger strike. It may be instead only one factor to consider in balancing the individual's right to privacy against the interests of the state.

49. One author suggests that a court's labelling of the refusal of treatment as suicide may be determinative: "It will be submitted that where there is an approximate equilibrium between these [personal] rights and [state] interests, courts often ground their decisions upon whether they are able to characterize the patients' actions as attempted suicide." Note, *Suicide and the Compulsion to Lifesaving Medical Procedures: An Analysis of the Refusal of Treatment Cases*, 44 BROOKLYN L. REV. 285, 286 (1978).

50. The court noted that Chapman expressed an intention to commit suicide. 87 A.D.2d at 67, 450 N.Y.S.2d at 625.

51. *Id.* at 68-69, 450 N.Y.S.2d at 625.

52. *Id.*, 450 N.Y.S.2d at 625-26. Death by self-imposed starvation is within the legal definition of suicide expressed by the Supreme Court: "In the popular, as well as the legal, sense, suicide means, as we have seen, the death of a party by his own voluntary act . . . ." Bigelow v. Berkshire Life Ins. Co., 93 U.S. 284, 287 (1876). The inmate who refuses to eat will eventually cause his death by voluntary omission. The starving inmate may not really intend to die; he may

Antipathy toward suicide stems from both religious beliefs[53] and the English common law, which attached both criminal and civil penalties to suicide or attempted suicide.[54] Public attitudes toward the act, however, have markedly changed in recent years.[55] This is illustrated by changes in the criminal law that make suicide no longer punishable.[56] In the majority of states attempted suicide is no longer forbidden by the criminal law.[57] Reflecting this change in societal attitude, the Model Penal Code does not recognize suicide or attempted suicide as a crime.[58] Continued public concern is illustrated, however, by state statutes that prohibit aiding and abetting suicide and allow the use of force to prevent suicide.[59]

Although attitudes toward suicide may have changed, an inmate who commits a suicidal act differs from his counterpart outside the prison environment. Because the act occurs during incarceration, an additional consideration is whether the state's duty to care for persons in its custody includes an affirmative duty to prevent suicide.[60] Several decisions indicate that prison officials must exercise reasonable care to prevent harm to the inmate when a self-destructive act is foreseeable.[61] Violation of this duty may result in civil

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instead seek to elicit a response from the public or prison administrators. This distinction, however, is arguably insignificant, since the inmate intentionally deprives himself of food, knowing that this deprivation will result in death. Thus, the inmate's refusal of food qualifies as a suicidal act.

53. N. ST. JOHN-STEVAS, LIFE, DEATH AND THE LAW 248-50 (1961). One who committed suicide was traditionally denied burial rights.

54. Blackstone recorded that the body was buried in the highway with a stake driven through it. *Id.* at 233-36. Suicide resulted in forfeiture of goods to the king if the suicide was not a result of insanity. G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 261-64 (1957).

55. Cantor, *supra* note 46, at 245-46. *See generally* Comment, *The Punishment of Suicide—A Need for Change*, 14 VILL. L. REV. 463 (1969).

56. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 74, at 568 (1972). N.C. GEN. STAT. § 14-17.1 (1981) abolishes the common-law crime of suicide as an offense.

57. According to the American Law Institute, in 1980 thirty-four enacted or proposed codes contained references to offenses related to suicide. None treated attempted suicide as a crime. MODEL PENAL CODE § 210.5 comment 2, at 94 & n.10 (1980); *see also* G. WILLIAMS, *supra* note 54, at 289. The North Carolina Supreme Court stated in State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961), that an attempt to commit suicide is an indictable offense. Since suicide is no longer a crime in North Carolina, *see supra* note 56, however, attempted suicide is no longer an offense. "To constitute a criminal attempt, it is necessary that the act which is attempted be a crime." 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE 155 (1957), *cited with approval in Willis*, 255 N.C. at 474, 121 S.E.2d at 854-55. *But see* Penney v. Municipal Court, 312 F. Supp. 938 (D.N.J. 1970) (constitutional challenge to state penal legislation against attempted suicide dismissed; court lacked jurisdiction for want of federal question).

58. "[I]t is clear that the intrusion of the criminal law into such tragedies is an abuse." MODEL PENAL CODE § 210.5 comment 2, at 94 (1980).

59. *E.g.*, PA. STAT. ANN. tit. 18, § 2505 (Purdon 1973) (causing another to commit suicide is criminal homicide; intentionally aiding or soliciting suicide is a felony); WIS. STAT. ANN. § 940.12 (West 1982) (intentionally assisting person to take his own life is a felony). For additional discussion and listing, see MODEL PENAL CODE § 210.5 comment 2; Note, *Suicide and the Compulsion of Lifesaving Medical Procedures: An Analysis of the Refusal of Treatment Cases*, 44 BROOKLYN L. REV. 285, 306 nn. 118-19 (1978).

60. There is a duty owed by one who takes custody of another to preserve him from unnecessary harm. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

61. *See* Lee v. Downs, 641 F.2d 1117 (4th Cir. 1981); Thomas v. Williams, 105 Ga. App. 321, 124 S.E.2d 409 (1962); Dezort v. Village of Hinsdale, 35 Ill. App. 3d 703, 342 N.E.2d 468 (1976).

liability.[62] For example, in *Dezort v. Village of Hinsdale* the court reversed a summary judgment for the defendant in a wrongful death action in which a police officer who knew the jail inmate to be suicidal had neglected to remove the inmate's belt.[63] The sheriff's liability was a question for the jury in *Wilson v. Sponable*, in which an inmate attempted to strangle himself with gauze.[64] It is unclear, however, whether this duty extends beyond a search for dangerous objects and observation to include more intrusive acts.

Since the social and criminal stigma surrounding suicide is becoming less severe, the policies underlying governmental intervention must be examined to determine if they warrant intervention in an inmate's hunger strike. Government action is generally for the purpose of securing assistance for the individual. This assistance is justified when it prevents an irrational act from resulting in death.[65] It is widely recognized that many attempts at suicide are cries for help rather than determined efforts to die.[66] The behavior may be impulsive, or it may result from temporary depression.[67] Sound policy supports state intervention in such cases. Prison officials, therefore, have a duty to prevent impulsive acts with such serious and irreparable consequences. Inmates who hang themselves, slash their wrists, or set fire to their cells usually do not have an opportunity to reevaluate their decision. The daily refusal to eat, on the other hand, is a choice that tests the sincerity and stability of an inmate's commitment to his hunger strike.[68] The hunger strike is not an instantaneous act that can result in immediate, extreme harm. The inmate has a chance to change his mind and reverse the physical toll of the hunger strike.[69] Unlike a rash attempt at self-destruction, a hunger strike involves prolonged commitment and physical endurance.[70]

A second reason for the state interest in preventing suicide involves the large number of people who kill themselves each year.[71] The sheer frequency

62. *See* Thomas v. Williams, 105 Ga. App. 321, 124 S.E.2d 409 (1962); Dezort v. Village of Hinsdale, 35 Ill. App. 3d 703, 342 N.E.2d 468 (1976); Wilson v. Sponable, 81 A.D.2d 1, 439 N.Y.S.2d 549, *appeal dismissed*, 54 N.Y.2d 834 (1981).

63. 35 Ill. App. 3d 703, 712, 342 N.E.2d 468, 475 (1976).

64. 81 A.D.2d 1, 5-6, 439 N.Y.S.2d 549, 552, *appeal dismissed*, 54 N.Y.2d 834 (1981).

65. Cantor, *supra* note 46, at 256.

66. G. WILLIAMS, *supra* note 54, at 285.

67. *Id.* at 292.

68. Zellick, *Forcible Feeding of Prisoners: An Examination of the Legality of Forced Therapy*, 1976 PUB. L. 153, 171-72.

69. Up to a point, the effects of starvation are reversed by eating.

70. The physical effects of starvation are painful. After three weeks of lack of food the body goes into a "starvation adoptive state." Interview with Dr. Lawrence J. Hak, Associate Professor, School of Pharmacy, University of North Carolina at Chapel Hill, in Chapel Hill (Sept. 21, 1982). The condition becomes critical when there is a loss of 30% lean body mass (protein). Steffee, Malnutrition in Hospitalized Patients, 244 J. AM. MED. ASS'N 2630, 2633 (1980). At approximately 42 days, nystagmus, a loss of muscular control due to severe vitamin deficiency, occurs. Nystagmus is manifested by eye gyration, vomiting, and dizziness. These physical reactions end after four or five days and are followed by slurred speech, failed hearing, and slow blindness. Finally, there is unconsciousness. In 1920, Terence MacSwiney, an Irish hunger striker, fasted for 74 days before dying. Ajemian, *Ready to Die in the Maze*, TIME, Aug. 17, 1981, at 46, 47-48.

71. Cantor, *supra* note 46, at 256-57.

of suicide in our society indicates that it is a serious problem.[72] Accordingly, suicide clearly warrants government concern. Although hunger strikes raise serious difficulties in prisons when they occur, inmate starvation does not reach the statistical proportions of irrational acts of self-destruction. Of those inmates who begin a hunger strike, many voluntarily abandon it because of the discomforting physical effects of starvation.[73] Thus, while there is ample basis to justify governmental intervention in attempted suicide cases and to impose a duty on prison officials to prevent suicide, this basis may be inadequate to justify forced feeding of an inmate.

The second interest addressed in most right to refuse treatment cases is the state's interest in preserving life. The interest was rejected as not compelling in *Prevatte*. The interest in preserving life, however, was a consideration in *Chapman* and the basis for the court's decision in *White*. Noting that concern for life is at the core of civilization, the *White* court conceded that it may be subordinate when a patient faces certain and painful death. The court concluded, however, that the state interest in preservation of life is determinative when applied to an inmate who is making an unpredictable, emotional protest.[74]

The state's interest in preserving life was one of the qualifying factors in *Roe v. Wade*.[75] This was manifested by the Court's concern for the mother's health and the potentiality of life. Concern for preservation of life is also illustrated by criminal law and state police power, which focus on ensuring public safety.[76] If one accepts the premise that such governmental authority rests on the individual's desire for bodily safety, the assumption is no longer operative when one chooses to decline medical treatment or food. At this point new interests of bodily autonomy, also deserving of protection, arise.[77]

Although the Supreme Judicial Court of Massachusetts in *Superintendent of Belchertown State School v. Saikewicz* identified the preservation of life as the most significant of the state interests asserted, it refused to order chemotherapy treatment for a person in state custody. The court noted that this interest must be reconciled with the interest of the individual: "There is a substantial distinction in the State's insistence that human life be saved where the affliction is curable, as opposed to the State interest where, as here, the issue is not whether but when, for how long, and at what cost to the individual that life may be briefly extended."[78] According to the *Saikewicz* rationale, the

72. In 1978, 12.5 deaths per 100,000 people were a result of suicide. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1981, at 75 (102d ed. 1981). In 1981, there were 28,100 recorded deaths by suicide in the United States. Furthermore, for each recorded suicide, 50 to 100 more are estimated to have been attempted. Blake, *Going Gentle into That Good Night*, TIME, Mar. 21. 1983, at 85.

73. White voluntarily ended his hunger strike. *See supra* note 22 and accompanying text. Prevatte started eating, then stopped again. *See supra* note 6.

74. 292 S.E.2d at 58.

75. *See supra* text accompanying notes 34-36.

76. Cantor, *supra* note 46, at 243.

77. *Id.*

78. 373 Mass. 728, 742, 370 N.E.2d 417, 425-26 (1977).

state interest in preserving the inmate's life would be controlling if the threat to life results from a voluntary decision to stop eating. The "affliction" in such a case is both "curable" and is caused by the inmate's own omissions.

State interest in the preservation of life, however, has not always been determinative when there is a positive prognosis. A decisive factor in applying the balancing test is the magnitude of the bodily intrusion. The courts in *In re Quackenbush*[79] and *Lane v. Candura*[80] based their decisions on the extensive bodily invasion involved in the amputation of a gangrenous limb. These courts declined to authorize surgery, even though it was necessary to save the patients' lives. In deciding whether to compel an inmate to undergo hemodialysis, the Massachusetts Supreme Judicial Court stated that the state interest in preservation of life and the inmate's interest in avoiding significant nonconsensual invasion of his bodily integrity yield a very close balance of interests.[81] The court pointed out that, although hemodialysis does not involve substantial pain or amputation of a limb, the invasion is great. It is a complex procedure that requires the patient's commitment and endurance.

These cases suggest that the procedure used to force feed should be considered in evaluating the prisoner's right to be free from bodily intrusion. There are two methods that may be used to nourish an inmate who refuses to eat. The first method is the insertion of a catheter into the major blood vessel that leads into the heart, which requires precise implantation. An alternative method is the insertion of a nasal gastric tube through the nose and into the stomach. Both procedures involve significant risks and may cause infection or even death.[82] In addition, the inmate will probably resist. If he does, he will have to be sedated or restrained while being artificially fed. Because constant infusion is needed to maintain life, the restraint or sedation would be necessary for a prolonged period.[83] Thus, the magnitude of the bodily invasion may be sufficient to override the state interest in preserving life.

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79. 156 N.J. Super. 282, 290, 383 A.2d 785, 789 (Morris County Ct. 1978).

80. 6 Mass. App. Ct. 377, 378 n.2, 376 N.E.2d 1232, 1233 n.2 (1978).

81. Commissioner of Correction v. Myers, 379 Mass. 255, 399 N.E.2d 452 (1979).

82. The catheter must be cleaned daily to prevent septicimia, a life-threatening infection. Both implantation and cleaning require patient cooperation. Risk of both infection and puncture of the vein are substantial. *See* M. Shils, *Parenteral Nutrition*, in MODERN NUTRITION IN HEALTH AND DISEASE 1125, 1129-30 (6th ed. 1980).

The nasal gastric tube may choke a resisting patient and cause vomiting. Regurgitation may result in aspiration of the solution into the patient's lungs, possibly causing pneumonia. Without immediate appropriate care aspiration involves serious complications. Interview with Dr. Lawrence J. Hak, *supra* note 70.

Use of a peripheral venous site for catheter implantation, such as an arm or leg, is not practical. Because of the solution's high concentration, there is a significant risk of phlebitis (inflammation of the vein). This method would require continual changes of the site. With the slightest movement, the inmate could pull the needle out. *Id.* For a description of the effects of forced feeding on prisoners in England, see Zellick, *supra* note 68, at 156-59.

83. The resisting inmate can pull either the catheter or the nasal gastric tube out of his body. Unless he is too weak to resist, the only way to force feed is to physically restrain or sedate the inmate for the extended period of time needed to provide nourishment. Both procedures require the infusion to run constantly until the inmate chooses to eat. Interview with Dr. Lawrence J. Hak, *supra* note 70. Ironically, if the physician waits until the inmate is too weak to resist, there is a high risk that the patient will die from the artificial feeding itself. *Id.*

There is an additional factor, however, in examining the state interest in preserving a hunger striker's life. Within the penal institution, this interest is evidenced by the state's duty to provide medical care to inmates in its custody.[84] In *Estelle v. Gamble* the Supreme Court held that the government is obligated to provide medical care for those whom it incarcerates.[85] Deliberate indifference to those needs is a violation of the eighth amendment right to be free from cruel and unusual punishment.[86] Both the *Prevatte*[87] and *Chapman*[88] courts mentioned the state's duty to render medical aid to the inmate in their decisions.

Estelle established the state's duty to offer medical care to inmates; it is questionable, however, whether this duty includes forced treatment.[89] Arguably, the eighth amendment right to be free of cruel and unusual punishment requires the state to offer medical care, and the inmate's right to privacy allows him under some circumstances to refuse it. The extent of the state's duty, however, has been at issue with conflicting results. In *Sconiers v. Jarvis* a federal prison inmate contended that the prison psychiatrist and physician had administered medication to him against his will, in violation of his first amendment rights.[90] The trial court granted summary judgment for the physician. The *Sconiers* court interpreted *Estelle* as creating a duty to provide medical care regardless of consent.[91] On the other hand, a civil rights action by a state prisoner alleging that officials administered a drug without his consent was held to state a cause of action in *Mackey v. Procunier*.[92] The Ninth Circuit Court of Appeals stated that the allegations raised serious constitutional questions regarding impermissible tinkering with mental processes.[93] The court of appeals reached a similar result in *Runnels v. Rosendale*, noting that the right to privacy may be violated by forced medical treatment of a prison inmate.[94] The complaint, which alleged that defendant medical officials conducted a

84. *See, e.g.*, State v. Sparks, 297 N.C. 314, 321, 255 S.E.2d 373, 378 (1979) (duty to provide medical care to prisoners); Spicer v. Williamson, 191 N.C. 487, 132 S.E. 291 (1926) (public must care for prisoner who cannot care for himself); N.C. GEN. STAT. § 148-19 (Cum. Supp. 1981) (describes the health services available to inmates).

85. 429 U.S. 97 (1976).

86. *Id.* at 104.

87. 248 Ga. at 833, 286 S.E.2d at 716.

88. 87 A.D.2d at 68, 450 N.Y.S.2d at 625.

89. *See generally* Comment, *A New Perspective in Prisoners' Rights: The Right to Refuse Treatment and Rehabilitation*, 10 J. MAR. J. PRAC. & PROC. 173, 182-86 (1976).

90. 458 F. Supp. 37, 38 (D. Kan. 1978) (inmate had a history of paranoid schizophrenia and psychotic behavior and was a threat to himself and others); *see also* Peek v. Ciccone, 288 F. Supp. 329 (W.D. Mo. 1968) (forcible restraint of inmate to give injection following inmate's refusal of medication held not to constitute cruel and unusual punishment).

91. 458 F. Supp. at 40.

92. 477 F.2d 877 (9th Cir. 1973) (drug administered to inmate without his consent following shock treatment). *See also* Baugh v. Woodward, No. 81-132-CRT (E.D.N.C. Dec. 21, 1982) (pursuant to consent judgment, N.C. Department of Correction adopted policy regarding involuntary administration of psychotropic medication).

93. *Id.* at 878. The court cited cases that developed the right to privacy in order to support its statement. *Id.* n.3.

94. 499 F.2d 733 (9th Cir. 1974). The court also recognized a constitutional right to be free from unprovoked physical assaults by agents of the state while in the state's custody.

hemorrhoidectomy upon the inmate without his consent, stated a cause of action.[95] The court noted, however, that the surgical procedure was not required to save the inmate's life, and did not further a compelling interest of the state in prison procedure or security.[96]

A third state interest, the maintenance of order and discipline within the prison, can redefine and limit the inmate's constitutional rights.[97] Both the *Chapman*[98] and *White*[99] courts discussed the restriction on constitutional rights imposed by incarceration. The *Prevatte* court, however, did not recognize these limitations under similar circumstances, stating that "a prisoner does not relinquish his constitutional right to privacy because of his status as a prisoner."[100]

The Supreme Court has differentiated between the constitutional rights afforded inmates and those belonging to free citizens. Although inmates retain constitutional rights, they may be limited. In *Wolff v. McDonnell* the Court decided that inmates are entitled to certain due process rights in disciplinary proceedings: "[T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons in this country."[101] The Court in *Wolff* noted that there must be an accommodation between institutional needs and objectives and the provisions of the Constitution. The Court addressed the constitutionality of censorship of inmate mail in *Procunier v. Martinez*, holding that limitations on first amendment rights must further government interests of security, order, and rehabilitation.[102] The limitations must be no greater than necessary to protect the interest involved. In *Pell v. Procunier* the Court held that prohibition of inmate face-to-face interviews with the press is not unconstitutional in light of alternative methods of communication.[103] Institutional considerations, such as security and administrative problems, required that limitations be placed on such visits.[104] The inmate's right to privacy was also limited in *Bell v. Wolfish*.[105] Balancing the institution's significant security interest against the inmate's privacy interest, the Court concluded that visual bodily cavity inspections may be conducted

95. *Id.* at 735. The inmate also alleged that prison medical officials denied him analgesics after surgery.

96. *Id.*

97. *See generally* Comment, *A Review of Prisoners' Rights Under the First, Fifth, and Eighth Amendments*, 18 DUQ. L. REV. 683 (1980).

98. 87 A.D.2d at 70, 450 N.Y.S.2d at 627.

99. 292 S.E.2d at 56.

100. 248 Ga. at 833-34, 286 S.E.2d at 716. The court may have intended this statement to extend only to acts that involve monitoring the inmate's physical condition against his will.

101. 418 U.S. 539, 555-56 (1974).

102. 416 U.S. 396, 413 (1974). The Court held that censorship of inmate mail is permissible only when the restriction furthers an important government interest unrelated to suppression of speech.

103. 417 U.S. 817, 827 & n.5, 828-29 (1974).

104. *Id.* at 826-27.

105. 441 U.S. 520 (1979).

based on less than probable cause.[106] Thus, the Court has determined that an institutional restriction on a constitutional guarantee must be evaluated in light of the objectives of prison administration: safeguarding security and preserving internal order.[107] In defining both the necessity and scope of the constitutional limitations, the Court has emphasized that deference be paid to corrections officials' judgment.[108]

The hunger striker's effect on institutional interests should be examined to determine possible limitations on his privacy right. In *Commissioner of Correction v. Myers* the state interest in upholding orderly prison administration tipped the balance in the court's decision to compel medical treatment.[109] Kenneth Myers was a mentally competent, twenty-four year old male serving several concurrent seven to ten-year sentences in a Massachusetts medium security institution. While in prison he developed a chronic kidney condition requiring hemodialysis and medication. After approximately one year of treatment Myers first withdrew consent, later resumed treatment, and then periodically continued to refuse treatment.[110] The lower court concluded that Myers' refusal of treatment was a protest against placement in a medium security prison.[111]

Subsequent to the superior court's order Myers was transferred and received a kidney transplant. The court, however, thought it appropriate to express an opinion.[112] The court concluded that, while the state interest in preserving life was great, Myers' interest in avoiding nonconsensual bodily invasion was greater because the magnitude of the invasion was extensive.[113] The court nevertheless ordered treatment, based on the state interest in upholding orderly prison administration. According to the court, failure to prevent the death of an inmate who tries to manipulate his placement within the

106. *Id.* at 560. The Court also concluded that the detainee's privacy interest was not violated by periodic room searches. *Id.* at 557.

107. *Id.* at 546-47.

108. Pell v. Procunier, 417 U.S. at 827; *see also* Jones v. North Carolina Prisoners Labor Union, 433 U.S. 119 (1977) (wide-ranging deference accorded to decisions of prison administrators).

109. 379 Mass. 255, 399 N.E.2d 452 (1979). For an analysis of *Myers*, see Case Comment, *Commissioner of Correction v. Kenneth Myers: An Anomaly to Medicolegal Practice*, 6 NEW ENG. J. ON PRISON L. 289 (1980).

110. 379 Mass. at 257-58, 399 N.E.2d at 453-54. Myers could survive three to five days if he refused both dialysis and medication, ten to fifteen days if he took only the medication.

111. *Id.* at 259, 399 N.E.2d at 454. Myers claimed the hemodialysis weakened him, thereby reducing his ability to defend himself.

112. *Id.* at 260, 399 N.E.2d at 455. The court said that Myers' attitude toward past treatment and the need for continued medication made this a viable case. The court noted that, even if the case were moot, the question was one of public importance and capable of repetition.

The Massachusetts Supreme Court later refused to render an advisory opinion as to whether the Commissioner of Correction can by-pass judicial authorization for involuntary lifesaving treatment in Commissioner of Correction v. Ferguson, 1981 Mass. Adv. Sh. 1252, 421 N.E.2d 444 (1981). The court stated that the parole of the inmate, who had refused to take insulin, rendered the case moot: "[T]he issue of the Commissioner's right to compel treatment, absent judicial approval, has not been fully argued in an adversary proceeding. . . ." *Id.* at —, 421 N.E.2d at 446.

113. 379 Mass. at 265-66, 399 N.E.2d at 458.

prison system poses a threat to prison order, security, and discipline.[114]

Inmate refusal of medical treatment is undoubtedly of great concern to prison administrators. In *Myers* the Commissioner of Corrections submitted an affadavit to the court. He stated that an inmate who refuses life-saving medical treatment presents him with two options if treatment is not authorized. Submitting to the inmate's demands would violate his responsibilities and undermine his effectiveness. Allowing an inmate to die, on the other hand, involves practical problems. Faith in the correctional system's ability to protect inmates could be seriously undermined. The inmate's death could cause an explosive reaction among other prisoners. Also, if the right to refuse medical treatment is recognized, many inmates might mutilate themselves and then refuse treatment in order to have their demands met.[115]

Hunger strikes pose similar institutional concerns. Both Prevatte and White began starving themselves to elicit certain action from the administration—Prevatte wanted to be transferred[116] and White wanted prison conditions changed.[117] The *Chapman* court noted the disruptive effect of Chapman's hunger strike on the procedures in his unit and on other inmates.[118]

The hunger strike, however, may be distinguished from self-mutilation or refusal of medical treatment for an existing illness. The body's prolonged and painful reaction to starvation may serve as a deterrent to many inmates attempting to use the hunger strike for manipulation.[119] It may be more difficult to refuse food daily and to tolerate severe bodily reactions to starvation than it is to commit impulsive acts of self-mutilation. The hunger striking inmate also has the ability to reverse the consequences of his act. The inmate who physically harms himself does not. Like White and Prevatte, many hunger strikers may begin eating and voluntarily end the strike. A hunger striking inmate, like any inmate refusing medical treatment, will affect the prison population and disrupt institutional procedures. Administrators, however, must cope with the ramifications of either decision they make—whether they force feed the inmate, or allow him to die.

The three state courts faced with the hunger striking inmate failed to analyze fully the complex issue presented. The *Prevatte*, *White*, and *Chapman* courts touched on some of the interests that should be balanced to decide whether to authorize forced feeding. None of the courts, however, sufficiently evaluated the policies underlying the state interests or examined them in the particular, unique context of a prison hunger strike. The *Chapman* and *White* courts too quickly grasped the state interest in the prevention of suicide and

114. Granting the inmate's demands in order to obtain consent to treatment would also threaten orderly prison administration.

115. 379 Mass. at 266-68, 399 N.E.2d at 459. The prison administrator's dilemma is great even when the first set of demands is of a minor nature, putting pressure on the administrator to submit.

116. 248 Ga. at 833, 286 S.E.2d at 716.

117. 292 S.E.2d at 55.

118. 87 A.D.2d at 67, 450 N.Y.S.2d at 625.

119. *See supra* note 70.

failed to analyze the difference between a prolonged period of starvation, requiring endurance and commitment, and an irrational, spontaneous act of self-destruction. The state's legal duty to prevent an inmate from committing suicide may well encompass nonintrusive acts such as observation and the removal of harmful objects. Arguably, the reasons for state intervention in suicide, however, do not warrant the highly intrusive act of force feeding a competent adult who refuses to eat.

The *Chapman* and *White* courts emphasized the state's strong interest in the preservation of life but failed to evaluate a countervailing consideration—the magnitude of the bodily invasion involved in forced feeding. The procedure is highly intrusive. It can be dangerous.[120] It is difficult to accomplish safe artificial feeding with a resisting patient. Sedation and physical restraint for the prolonged time necessary to force feed are themselves intrusive acts. The procedure may even cause death. Although it is difficult to weigh the interests of the state and the inmate, the courts must at least consider the invasive nature of the forced feeding process itself.

Furthermore, the analogy drawn by the courts to the right to refuse treatment cases was too simplistic. The *Prevatte* court accepted the analogy without exploring possible differences. The *Chapman* court rejected it without looking at similarities. The *White* court acknowledged the right to refuse treatment when patients are terminally ill, but ignored precedent allowing patients to refuse life-saving treatment when bodily invasion was great.

The constitutional right not to be force fed raises issues not easily quantified or easily weighed. Each competing interest, however, deserves serious attention. As with any issue in which personal rights are balanced against competing state interests, much depends on the emphasis the court places on each interest. The *Chapman* court denied that the right to privacy includes starving oneself and focused on the state's interest in the prevention of suicide. The *White* court's main emphasis was on the state's interest in the preservation of life. The *Prevatte* court barely discussed state interests, and did not adequately explain why Prevatte's right to privacy allowed him to continue with his hunger strike.

It may be possible to develop a procedure that will accommodate institutional needs, state interests, and the prisoner's right to be free from bodily intrusion. Such a procedure could further the state's interest in preserving life by setting up mechanisms that would allow continual efforts to persuade the inmate to eat and to impress upon the inmate the seriousness of his choice. In addition, a stated policy may protect the institution from accusations of neglect. Ultimately, it would respect the inmate's right to privacy.

Two regulations might help alleviate the state's concern that hunger strikes will be used as a form of manipulation. First, the state should not force feed a competent adult who is fully able to understand the consequences of his

120. *See supra* note 82.

refusal to eat.[121] Second, demands made by the hunger striking inmate should not be met. This certainty of consequences alone may deter inmates who choose to put the administration in the position of deciding whether to force feed. The decision to ignore the inmate's demands will have already been made. Inmates would know that hunger strikes would not be effective in achieving a particular goal, thereby negating the very reason for refusing to eat. Furthermore, if it is clear that inmates will not be force fed, prisoners will not be able to threaten starvation while calculating that the state will eventually save their lives by force feeding. This knowledge, added to the physical effects of starvation, would emphasize to the inmate the seriousness of his act. The prison population would also know that the hunger-striking inmate is making a conscious choice with full awareness of the state's position. Arguably, this could lessen antagonism toward prison officials if the inmate dies. Finally, the policy not to force feed recognizes the inmate's right to bodily autonomy.

The state can fulfill its duty to provide medical care by nonintrusive means. The administration should continue to provide food and drink according to routine schedule or at any time an inmate terminates his hunger strike. When an inmate's health declines he should be transferred to the prison hospital unit for periodic physical examinations.[122] Because it may be difficult to determine when an inmate's condition is serious enough to warrant hospitalization, the prison administration should consult with a physician and consider a hunger striking inmate's prior physical condition.

Several additional steps can be taken at the prison administrator's discretion, both to effectuate a continued effort to convince the inmate to eat, furthering the state interest in preserving life, and to protect the institution from criticism. The hunger striking inmate's family should be notified and a family member could be permitted to visit the inmate. This would accomplish two purposes: a family member may convince an inmate to abandon his hunger strike, and he or she could ascertain that the inmate is voluntarily refusing to eat. In addition, the administration may allow a physician of the family's choice to examine the inmate at the family's expense. A neutral party could be appointed to visit the inmate periodically to determine the inmate's condition and continued willingness to starve. Both the personal physician and the neutral observer would serve to impress upon the inmate the seriousness of his decision and to insulate the institution from accusations of mistreatment. These additional visits, however, should be granted at the administration's discretion to prevent an inmate from threatening starvation to attain visiting privileges.[123] The visits might also serve as notice to other inmates that the prison

121. Although a psychological examination to determine competency is also intrusive, the degree of intrusion is minimal when weighed against the state's interest in preserving life.

122. The state's duty to care for an inmate and its interest in the preservation of life balanced against the relatively small bodily invasion of an examination should be sufficient to authorize this procedure.

123. The prison administration could also use discretion to exclude visitors who present a security problem.

administration is attempting to prevent the inmate's death without abusing his right to privacy.

The prisoner's right to privacy is illusory if the state is allowed to force feed after an inmate has lapsed into a coma or can no longer physically resist the procedure. The right to determine bodily intrusion must be respected although the inmate can no longer actively assert his denial of consent. Similarly, the state should not be able to punish the inmate for claiming his right. Punishment of the inmate would effectively negate his right to bodily autonomy.

Procedural rules such as these may help resolve the delicate balance between an inmate's privacy right and state interests in preventing suicide, preserving life, and maintaining prison order. Modification may become necessary as problems develop and abuses become apparent. As a compromise, however, the suggested propositions serve several functions. Inmates, the public, and prison administrators would be fully cognizant of the ramifications of an inmate's decision to proceed with a hunger strike. In addition, knowledge of the certainty of the consequences may discourage use of a hunger strike as a form of manipulation. The state could fulfill its duty to care for those in its custody without intrusive bodily invasion. Ultimately, a hunger-striking inmate would retain his right to privacy and take full responsibility for his decision to refuse food.

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