

SHOULD A HUNGER-STRIKING PRISONER BE ALLOWED TO DIE?

The hunger-strike¹ has long been utilized by prisoners to gain public attention for causes or beliefs important to them.² Recently, this medium of protest was the subject of at least three suits before state courts.³ In *Zant v. Prevatte*,⁴ *Von Holden v. Chapman*⁵ and *State ex rel. White v. Narick*,⁶ petitions were brought before state courts requesting injunctions either to authorize or prevent prison officials from force-feeding⁷ an inmate on a hunger strike.⁸ In each case, the prisoner asserted that his constitutional guarantees of due process under the fourteenth amendment and of free expression under the first amendment allowed him to refuse any intrusion upon his person.⁹ The prison officials in

¹ A "hunger strike" in the context of this note is the "action of one, especially a prisoner, who refuses to eat anything or enough to sustain life so as to obtain compliance with his demands." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1103 (3d ed. 1971).

² This technique often has been used for political causes. For example, Emmeline Goulden Pankhurst, British feminist and leader of the militant suffrage movement, staged the first of her many hunger strikes during her imprisonment in Holloway Gaol in 1912. 18 COLLIER'S ENCYCLOPEDIA 392 (1977). Pankhurst's strike brought the suffragette movement to the attention of the public and portended the expansion of the franchise to women. *Id.*

Another important figure who adopted this technique was Mahatma Gandhi. See TRUTH AND NONVIOLENCE REPORT OF THE UNESCO SYMPOSIUM ON TRUTH AND NONVIOLENCE IN GANDHI'S HUMANISM 153 (1970). Through his hunger strikes, Gandhi brought world attention to the problems of a country attempting to emerge from the colonial era. *Id.* Gandhi used his hunger strikes as a nonviolent form of protest, which eventually helped establish an independent India. *Id.* at 1-14.

A recent hunger striker to attract world attention was Bobby Sands of the Irish Republican Army. See Levin & Donosky, *Death Wish in Ulster*, NEWSWEEK, May 4, 1981, at 40-41. While imprisoned in Maze Prison near Belfast, Sands began his strike in protest of the British occupation of Northern Ireland. *Id.* at 40. Sands' strike and resulting death brought international attention to the situation in Northern Ireland. *Id.*

³ *Zant v. Prevatte*, 248 Ga. 832, 286 S.E.2d 715 (1982) (petition by state prison health superintendent for authority to force-feed hunger-striking prisoner to prevent prisoner's death); *Von Holden v. Chapman*, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982) (petition by state prison psychiatric director for authority to force-feed prisoner who had not eaten for twenty-two days); *State ex rel. White v. Narick*, 292 S.E.2d 54 (W. Va. 1982) (petition by hunger-striking prisoner for injunctive relief preventing prison officials from force-feeding him).

⁴ 248 Ga. 832, 286 S.E.2d 715 (1982) [hereinafter cited as *Zant*]. For a discussion of *Zant*, see *infra* notes 37-63 and accompanying text.

⁵ 87 A.D.2d 66, 450 N.Y.S.2d 625 (1982) [hereinafter cited as *Chapman*]. For a discussion of *Chapman*, see *infra* notes 64-90 and accompanying text.

⁶ 292 S.E.2d 54 (W. Va. 1982) [hereinafter cited as *Narick*]. For a discussion of *Narick*, see *infra* notes 91-122 and accompanying text.

⁷ "Force-feeding" in the context of this note is the act of feeding a prisoner by forcible administration of food. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 887 (3d ed. 1971). It can be accomplished in several ways, including intravenously and by means of a nasal gastric tube. See *Chapman*, 87 A.D.2d at 67, 450 N.Y.S.2d at 625.

⁸ *Zant*, 248 Ga. at 832, 286 S.E.2d at 715; *Chapman*, 87 A.D.2d at 67, 450 N.Y.S.2d at 625; *Narick*, 292 S.E.2d at 55.

⁹ *Zant*, 248 Ga. at 833, 286 S.E.2d at 716; *Chapman* 87 A.D.2d at 66, 450 N.Y.S.2d at 624; *Narick*, 292 S.E.2d at 57-58. Each of the prisoners attempted to invoke his right to privacy as guaranteed by the due process clause of the fourteenth amendment. *Zant*, 248 Ga. at 833, 286 S.E.2d at 716; *Chapman*, 87 A.D.2d at 66, 450 N.Y.S.2d at 624; *Narick*, 292 S.E.2d at 57-58. The right to privacy was violated, according to the prisoners, by each state's nonconsensual invasion of their persons by the force-feedings. *Zant*, 248 Ga. at 833, 286 S.E.2d at 716; *Chapman*, 87 A.D.2d at 66, 450 N.Y.S.2d at

each case claimed that the interests of the state outweighed the restricted constitutional rights of the inmate.¹⁰ Despite somewhat similar analyses, the three state courts reached different results. Two of the courts held that the state's compelling interests in the sanctity of life¹¹ justified the state's force-feeding of the hunger-striking prisoner,¹² while the third court expressly found that the prisoner's substantive due process rights outweighed any of the claimed interests of the state.¹³

Zant, *Chapman*, and *Narick*, the only United States decisions addressing the constitutional implications of a hunger-strike,¹⁴ represent the exploration of a new direction in due process and prisoners' rights.¹⁵ The decisions involve the difficult task of determining exactly when and under what circumstances prison officials can compel a hunger striker to eat. There are a number of issues which a court faced with a hunger-strike case must resolve. Initially, the court must determine what constitutional rights — if any — protect a hunger striker.¹⁶ Next, the court must identify and evaluate the relevant state interests as

624; *Narick*, 292 S.E.2d at 57-58. Moreover, the prisoners' right to self-determination was allegedly violated by each state's refusal to permit the hunger striker to pursue his chosen course of conduct. *Zant*, 248 Ga. at 833, 286 S.E.2d at 716; *Chapman*, 87 A.D.2d at 66, 450 N.Y.S.2d at 624; *Narick*, 292 S.E.2d at 57-58. For a discussion of this privacy right contention, see *infra* notes 138-89 and accompanying text.

¹⁰ *Zant*, 248 Ga. at 833, 286 S.E.2d at 716; *Chapman*, 87 A.D.2d at 67, 450 N.Y.S.2d at 624; *Narick*, 292 S.E.2d at 56.

¹¹ For a discussion of the state's interest in the sanctity of life, see *infra* notes 249-87 and accompanying text.

¹² *Chapman*, 87 A.D.2d at 71, 450 N.Y.S.2d at 627; *Narick*, 292 S.E.2d at 58. The courts in *Chapman* and *Narick* ruled that the state's interests outweigh the prisoner's right to privacy and thus authorized the prison officials to force-feed the hunger strikers. *Id.*

¹³ *Zant*, 248 Ga. at 834, 286 S.E.2d at 717. The *Zant* court upheld the right of an inmate to refuse force-feedings by virtue of his privacy right. *Id.*

¹⁴ As of March 1, 1984, these cases were the only United States decision found which addressed the constitutional implications surrounding this issue. One federal case, however, *Boyce v. Petrovsky*, No. 81-3322 (W.D. Mo. Sept. 16, 1981) (available August 15, 1982, on LEXIS, Genfed library, Dist. file), also involved a hunger strike. *Id.* Christopher John Boyce, an inmate at the United States Medical Center for Federal Prisoners, filed a petition for a writ of habeas corpus alleging that the defendant, Warden John Petrovsky, had violated his first, fifth, sixth, and eighth amendment rights by force-feeding him against his will. *Id.* The court dismissed the petitioner's constitutional claims summarily and held that the government had a constitutional obligation under the eighth amendment to provide necessary medical treatment for those punished by incarceration. *Id.* The district court ruled that "the government cannot be relieved of that constitutional obligation by the unreliable whims of individual prisoners. Since this court would not permit a prisoner to submit willingly to cruel or unusual punishment, it will not permit a prisoner to waive his right to receive necessary medical treatment." *Id.* The *Boyce* decision, therefore, is more accurately read as a refusal to recognize the prisoner's decision as a competent one. In fact, the whole issue of the prisoner's constitutional rights was summarily dismissed by the court when it found the prisoner's decision to be an unreliable whim. See *id.* Without a competent waiver of the prisoner's right to receive medical treatment, the constitutional issues did not need to be reached. See *infra* notes 138-93 and accompanying text. Thus, the *Boyce* decision does not apply to the issues discussed in this note.

¹⁵ There has been a perceived lack of standards involving all rights possessed by inmates of penal institutions. See George, *Standards Governing Legal Status of Prisoners*, 59 DEN. L.J. 93 (1981). The Supreme Court has developed a general standard which provides that prisoners retain the rights of free citizens except when restrictions are required to assure orderly confinement and the physical safety of the inmates and the public generally. See *infra* notes 298-308 and accompanying text. The hunger-strike cases, therefore, provide the first judicial attempt to define the limits on prisoners' rights to self-determination.

¹⁶ See *infra* notes 134-222 and accompanying text.

they apply to the case of a hunger striker.¹⁷ Finally, the courts must decide, at least implicitly, the extent to which the inmate's status as a prisoner acts to limit his constitutional rights.¹⁸

This note will address the constitutional issues which confront courts presented with hunger-strike cases. The first section examines the three 1982 cases and analyzes their methodology and use of authority.¹⁹ Based on this analysis, the note suggests that the methodologies of the state courts are inadequate, the important constitutional guarantees involved in hunger-strike cases warranting fuller analysis.²⁰ This note then undertakes a full analysis of the issue.²¹ First, the constitutional rights of individuals — to substantive due process under the fourteenth amendment²² and free expression under the first amendment²³ — which potentially may protect a prisoner's hunger strike are discussed.²⁴ Second, the effect of the inmate's status as a prisoner of a penal institution on his constitutional protections is explored.²⁵ Next, the relevant state interests are identified and categorized.²⁶ The Massachusetts case of *Superintendent of Belchertown State School v. Saikewicz*²⁷ is used as a guidepost to illustrate the interests of the state in the substantive due process context.²⁸ In addition, the United States Supreme Court decision of *Procunier v. Martinez*²⁹ is used to illustrate the array of state's interests arising from its duty to maintain its penal institutions.³⁰ Finally, the current judicial approach to alleged constitutional infractions in the prison context is examined.³¹

As with many constitutional issues, the proper resolution of a hunger-strike case entails a careful balancing of the individual's rights against the interests of the state.³² Thus, after defining and describing the individual's rights and the state's interests, this note undertakes the mandated balancing process.³³ The rights and interests will be analyzed and balanced in the context of a prisoner who has refused to eat.³⁴ It is submitted that the right to self-determination should be extended to encompass the right to hunger strike.³⁵ Moreover, an analogy to the recognized right to refuse medical treatment will be drawn to demonstrate the impropriety of state infringement upon such life and death decisions.³⁶

¹⁷ See *infra* notes 243-318 and accompanying text.

¹⁸ See *infra* notes 223-42 and accompanying text.

¹⁹ See *infra* notes 37-133 and accompanying text.

²⁰ See *infra* notes 125-33 and accompanying text.

²¹ See *infra* notes 134-479 and accompanying text.

²² See *infra* notes 138-93 and accompanying text.

²³ See *infra* notes 194-222 and accompanying text.

²⁴ See *infra* notes 134-222 and accompanying text.

²⁵ See *infra* notes 223-42 and accompanying text.

²⁶ See *infra* notes 243-318 and accompanying text.

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

²⁸ See *infra* notes 249-87 and accompanying text.

²⁹ 416 U.S. 396 (1974).

³⁰ See *infra* notes 288-318 and accompanying text.

³¹ See *infra* notes 319-49 and accompanying text.

³² See, e.g., *Roe v. Wade*, 410 U.S. 113, 154 (1973) (balance between individual's right to self-determination and state's interest in preservation of life); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (balance between individual's right to privacy and state's interest in promoting public welfare).

³³ See *infra* notes 350-479 and accompanying text.

³⁴ See *infra* notes 350-479 and accompanying text.

³⁵ See *infra* notes 480-99 and accompanying text.

³⁶ See *infra* notes 485-500 and accompanying text.

I. THE HUNGER STRIKE CASES

In *Zant v. Prevatte*,³⁷ the Supreme Court of Georgia considered a petition from the Superintendent of the Georgia Diagnostic and Classification Center seeking authorization to force-feed a hunger-striking prisoner.³⁸ Ted Anthony Prevatte had been on a hunger strike for twenty-three days when he refused to allow prison doctors to examine him.³⁹ The prison doctors felt that Prevatte was in ketosis⁴⁰ and that his life was in danger.⁴¹ Prevatte's hunger strike was an attempt to gain the attention of prison officials.⁴² He believed that his life was in danger from other inmates who wanted to kill him as a result of racial tensions during a previous prison term.⁴³ Prevatte wanted to be transferred to a North Carolina prison where he felt he would be safe.⁴⁴

Prevatte argued that constitutional guarantees enabled him to refuse force-feedings.⁴⁵ He contended that he had a right, derived from the substantive due process clause of the fourteenth amendment, to control his own body.⁴⁶ He also argued that his right to express himself through a hunger strike was entitled to first amendment protection.⁴⁷ Prevatte's argument concluded, therefore, that the state's attempt to compel nourishment unconstitutionally encroached upon his protected rights.⁴⁸ The state countered Prevatte's argument by asserting that its interests outweighed the prisoner's rights and therefore justified the force-feeding.⁴⁹ Georgia claimed that it had a duty to protect the health of those incarcerated in the state penal system.⁵⁰ In addition, the state contended that it had a compelling interest in the preservation of life.⁵¹

Considering these opposing arguments, the *Zant* court agreed that the state was obliged to protect prisoners in its custody,⁵² but nevertheless refused to allow the state to force-feed a sane prisoner on that basis.⁵³ The court recognized that the prisoner's incarceration acted as a limitation on his constitutional rights.⁵⁴ The court stated, however, that a prisoner does not relinquish his privacy right because of his status.⁵⁵ Balancing

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

³⁸ *Id.* at 832, 286 S.E.2d at 715.

³⁹ *Id.* 286 S.E.2d at 716.

⁴⁰ *Id.* at 833, 286 S.E.2d at 716. Ketosis is a condition where the human body metabolizes its own proteins for food in the prolonged absence of normal nourishment. A. LEHNINGER, *BIOCHEMISTRY* 847 (1975). This process has been referred to as "self-cannabilization." *Id.*

⁴¹ 248 Ga. at 833, 286 S.E.2d at 716. The prison doctors believed that unless he was force-fed, Prevatte would die within three weeks. *Id.*

⁴² *Id.*

⁴³ *Id.* Prevatte feared for his safety although no attempt had been made on his life, nor could he identify any of his prospective murderers. *Id.* He attributed the plan to kill him to racial conflicts he experienced during a previous prison term of several years in a Georgia state prison. *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 834, 286 S.E.2d at 716.

⁵² *Id.* at 833-34, 286 S.E.2d at 716-17. The state court cited two Georgia Court of Appeals cases in recognition of the state's duty to keep its prisoners from harm. *Id.* (citing *Thomas v. Williams*, 105 Ga. App. 321, 327, 124 S.E.2d 409, 412 (1962); *Kendrick v. Adamson*, 51 Ga. App. 402, 403, 180 S.E. 647, 648 (1935)).

⁵³ *Zant*, 248 Ga. at 833-34, 286 S.E.2d at 716-17.

⁵⁴ See *id.* at 833, 286 S.E.2d at 716.

⁵⁵ *Id.* at 833-34, 286 S.E.2d at 716.

Georgia's contention that there exists a compelling state interest in the preservation of human life,⁵⁶ the court declared that such a compelling interest does not outweigh the prisoner's constitutional right of privacy.⁵⁷ Thus, the court ruled that a prisoner's right to self-determination may not be frustrated even by the state's compelling interest in the preservation of life.⁵⁸ In support of this important principle, however, the only authority cited by the *Zant* court was three state court cases involving the right of seriously ill patients to refuse life-saving medical treatment.⁵⁹ The *Zant* court thus concluded that a state may not compel a hunger-striking prisoner to eat.⁶⁰ In reaching its decision, the court balanced two individual constitutional rights⁶¹ and two state interests,⁶² and adopted a new expansive interpretation of the privacy right without the aid of any constitutional authority.⁶³

In *Von Holden v. Chapman*,⁶⁴ a New York appeals court⁶⁵ considered a petition brought by the Director of the New York Psychiatric Center.⁶⁶ The director, Martin H. Von Holden, had applied to the Special Term of the New York Supreme Court — the state trial court — for an order authorizing him to feed a prisoner intravenously or by means of a nasal gastric tube.⁶⁷ The prisoner — Mark David Chapman, convicted murderer of John Lennon, the former Beatle⁶⁸ — had not eaten for twenty-two days.⁶⁹ Chapman's asserted purpose in hunger-striking was to draw public attention to the plight of starving children in the world.⁷⁰ The trial court adjudged Chapman competent, even though he had frequently expressed an intent to commit suicide.⁷¹ The court granted the director's petition and Chapman appealed to the state appeals court.⁷²

⁵⁶ *Id.* at 834, 286 S.E.2d at 717.

⁵⁷ *Id.* Thus, the *Zant* court held in favor of the prisoner on the basis of his privacy claim. *Id.* Since the court found the prisoner's asserted privacy right dispositive, it did not even discuss the right of free expression as a potential protection of the right to hunger-strike. *See id.* at 832-34, 286 S.E.2d at 715-17.

⁵⁸ *Id.* at 834, 286 S.E.2d at 717.

⁵⁹ *Id.* (citing *Lane v. Candura*, 6 Mass. App. Ct. 377, 376 N.E.2d 1232 (1978) (77-year-old woman allowed to refuse life-saving operation involving amputation of her gangrenous leg); *In re Quakenbush*, 156 N.J. Super. 282, 383 A.2d 785 (1976) (72-year-old man allowed to refuse amputation of both legs even though he would die without operation); *In re Yetter*, 62 Pa. D. & C.2d 619 (Dist. Ct. 1973) (patient allowed to refuse surgical removal of breast even though death would result without surgery)).

⁶⁰ *Id.* at 834, 286 S.E.2d at 717.

⁶¹ *Id.* at 833-34, 286 S.E.2d at 716. The court recognized the individual's right to self-determination and bodily integrity. *Id.*

⁶² *Id.* The court identified the state's interests in the preservation of life and the duty to protect its prisoners. *Id.*

⁶³ *See id.* at 833-34, 286 S.E.2d at 716-17. The Court held that "Prevatte, by virtue of his right of privacy, can refuse to allow intrusions on his person, even though calculated to save his life." *Id.* at 834, 286 S.E.2d at 717. In reaching this result in a case involving important applications of substantive due process in the prison context, the court cited and relied on only five cases, all of which were state trial or intermediate-appellate court decisions. *See supra* notes 52 and 59.

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

⁶⁵ The Fourth Department of the Appellate Division of the New York Supreme Court.

⁶⁶ 87 A.D.2d at 66, 450 N.Y.S.2d at 624.

⁶⁷ *Id.* at 67, 450 N.Y.S.2d at 625.

⁶⁸ *Id.* at 66, 450 N.Y.S.2d at 624.

⁶⁹ *Id.*

⁷⁰ *Id.* at 67, 450 N.Y.S.2d at 625.

⁷¹ *Id.*

⁷² *Id.* at 66, 450 N.Y.S.2d at 624.

The appeals court in *Chapman* rejected the prisoner's contention that his right to privacy allowed him to refuse intrusions on his person.⁷³ The court, citing no authority, simply concluded it is "self-evident" that the right to privacy does not include the right to commit suicide.⁷⁴ The court cited two United States Supreme Court decisions — *Palko v. Connecticut*⁷⁵ and *Roe v. Wade*⁷⁶ — for the principle that only personal rights which can be deemed "fundamental" or "implicit in the concept of ordered liberty" are within the guaranteed privacy right.⁷⁷ These principles led the appeals court in *Chapman* to conclude that it would be "ludicrous" to give self-destructive acts constitutional protections.⁷⁸ Furthermore, the court reasoned that the compelling interest of the state in preventing suicide would outweigh any privacy right Chapman might possess.⁷⁹ Thus, the appeals court allowed New York to force-feed the hunger-striking prisoner, Chapman.⁸⁰

Having reached its decision against the prisoner, the *Chapman* court then proceeded to distinguish the contrary result in the *Zant* decision.⁸¹ According to the court, *Zant* erroneously relied on cases involving the right to refuse radical surgery.⁸² The *Chapman* court held that the state's compelling interest in the prevention of suicide clearly distinguished hunger strike cases from refusal-of-medical-treatment cases.⁸³ Under this reasoning, the *Chapman* court believed *Zant* to have been incorrectly decided.⁸⁴

In addition, the *Chapman* court reached the free expression claim not discussed by the *Zant* court.⁸⁵ Chapman asserted that his hunger strike was symbolic speech entitled to the protections of the first amendment.⁸⁶ Relying on the United States Supreme Court's decision in *Bell v. Wolfish*,⁸⁷ however, the state appeals court in *Chapman* concluded that the legitimate ends of prison security and administration may justify reasonable limitations on the inmate's first amendment rights.⁸⁸ The *Chapman* court held that in the case at bar the state had a legitimate interest in the maintenance of order and discipline within the prison.⁸⁹ Thus, the court held that the state's interest outweighed any restricted free expression right of the inmate.⁹⁰

In *State ex rel. White v. Narick*,⁹¹ the prisoner, Jesse White, sought injunctive relief to prevent prison officials from force-feeding him.⁹² White commenced his strike to protest prison conditions at the West Virginia State Penitentiary.⁹³ When prison officials first

⁷³ *Id.* at 70, 450 N.Y.S.2d at 626-27.

⁷⁴ *See id.* at 68, 450 N.Y.S.2d at 625.

⁷⁵ 302 U.S. 319 (1937).

⁷⁶ 410 U.S. 113 (1973).

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

⁷⁸ *Id.*

⁷⁹ *Id.* at 67, 450 N.Y.S.2d at 624.

⁸⁰ *Id.* at 71, 450 N.Y.S.2d at 627.

⁸¹ *Id.* at 69, 450 N.Y.S.2d at 626.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 70, 450 N.Y.S.2d at 627.

⁸⁶ *Id.*

⁸⁷ 441 U.S. 520 (1979).

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

⁸⁹ *Id.* at 70-71, 450 N.Y.S.2d at 627.

⁹⁰ *Id.* at 71, 450 N.Y.S.2d at 627.

⁹¹ 292 S.E.2d 54 (W. Va. 1982).

⁹² *Id.* at 55.

⁹³ *Id.* Shortly after the case was argued, White voluntarily ended his fast. *Id.* at 55 n.1. He began working as a cook in the prison kitchen and regained fifty pounds in his first four months on the job.

announced their intention to feed White intravenously, he sought an injunction from the state trial court.⁹⁴ The trial court denied the petition and White sought a writ of prohibition against the trial court judge, Narick, from the West Virginia Supreme Court.⁹⁵

The *Narick* court undertook a detailed examination of case law concerning prisoners' rights.⁹⁶ First, the court's review of case precedent established that inmates retain their constitutional rights while in the state's custody — such as the rights to receive political publications,⁹⁷ to enjoy equal protection of laws,⁹⁸ to practice their religion⁹⁹ and to engage in free speech.¹⁰⁰ Second, the *Narick* court noted that these rights are by necessity limited by the requirements of prison custody.¹⁰¹ The court cited several examples where limitations were upheld including limits on the access of the media,¹⁰² the right to receive outside publications,¹⁰³ and the right to free association.¹⁰⁴ In its review of the precedent, however, the *Narick* court did not discuss the right to privacy as it relates to inmates in state custody.¹⁰⁵

Following its general discussion of the scope of prisoners' constitutional rights, the *Narick* court considered the reasoning of the Georgia Supreme Court in *Zant*.¹⁰⁶ The West Virginia court quoted a passage from *Zant* in which the Georgia court concluded that the state could not force-feed a hunger-striking prisoner,¹⁰⁷ and then distinguished the passage from *Zant* on two general grounds.¹⁰⁸ First, the *Narick* court disagreed with the

Id. The court nevertheless refused to deem the issue moot, noting that the controversy fell within the "capable of repetition, yet evading review" exception employed by the courts. *Id.* Cf. *Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 514-15 (1911) (short-term ICC orders would otherwise avoid review altogether since they ordinarily would expire before case could be heard).

⁹⁴ 292 S.E.2d at 55.

⁹⁵ *Id.*

⁹⁶ See generally *id.* at 56. The *Narick* court cited nine United States Supreme Court cases and eight lower federal court cases which generally stood for the proposition that some constitutional protections are fully retained by prison inmates, while others are limited. *Id.* For a brief discussion of some of these cases see *infra* notes 97-104 and accompanying text.

⁹⁷ 292 S.E.2d at 56 (citing *Walker v. Blackwell*, 411 F.2d 23, 28 (5th Cir. 1969)).

⁹⁸ 292 S.E.2d at 56 (citing *Lee v. Washington*, 390 U.S. 333, 333-34 (1968)).

⁹⁹ 292 S.E.2d at 56 (citing *Cruz v. Beto*, 405 U.S. 319, 322 (1972)).

¹⁰⁰ 292 S.E.2d at 56 (citing *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974)).

¹⁰¹ 292 S.E.2d at 56.

¹⁰² *Id.* (citing *Houchins v. KQED*, 438 U.S. 1, 15-16 (1978)).

¹⁰³ 292 S.E.2d at 56 (citing *Bell v. Wolfish*, 441 U.S. 520, 550 (1979)).

¹⁰⁴ 292 S.E.2d at 56 (citing *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 133 (1977)).

¹⁰⁵ 71, 292 S.E.2d at 54.

¹⁰⁶ *Id.* at 56-57.

¹⁰⁷ *Id.* (citing *Zant*, 248 Ga. at 833-34, 286 S.E.2d at 716-17).

¹⁰⁸ 292 S.E.2d at 56-57. The *Narick* court adopted an unusual method to distinguish *Zant*. The court incorporated its own comments (in italics) into the passage quoted from *Zant*. *Id.*

A prisoner does not relinquish his constitutional right to privacy because of his status as a prisoner. *One could hardly conceive of a more drastic curb on privacy than being in prison.* The state has no right to monitor this man's physical condition against his will; neither does it have the right to feed him to prevent his death from starvation if that is his wish. *Could it immunize him against his will to prevent the spread of disease to other prisoners?*

The state argued in this proceeding that there is a compelling state interest in preserving any human life. The Court notes that Prevatte was at one time under a death sentence. To take the State's argument to its logical conclusion, were Prevatte still under a death sentence the state would ask the Court to keep him alive against his will so it could later kill him. *This argument fails if the state has no death penalty.*

Zant court's conclusion that incarceration did not preclude limitations on a prisoner's privacy right, stating instead that imprisonment necessarily entails drastic curbs on that right.¹⁰⁹ Second, contrary to the conclusion in *Zant*, the *Narick* court held that one of the state's major tasks is deciding life and death issues, even where such decisions affect a prisoner's right to self-determination.¹¹⁰ In addition, the *Narick* court faulted the *Zant* decision for failing to consider the state's compelling interest in the preservation of life.¹¹¹

After satisfying itself that *Zant* was distinguishable, the *Narick* court turned to a discussion of state interests acting as limitations on the right to privacy.¹¹² The *Narick* court adopted its list of state interests from a Massachusetts Supreme Judicial Court opinion involving a decision to refuse life-saving medical treatment.¹¹³ In *Superintendent of Belchertown State School v. Saikewicz*,¹¹⁴ the Massachusetts high court articulated a number of state interests which were intended to be balanced against the individual's constitutional right to privacy.¹¹⁵ The *Narick* court, however, adopted only the *Saikewicz* court's list, and, having identified those interests, did not engage in the careful balancing process arguably required.¹¹⁶ Moreover, while the *Narick* court cited decisions which allowed competent patients to refuse medical treatment,¹¹⁷ the court distinguished those cases from the case of a hunger striker on the basis of the "dim prognosis" theory.¹¹⁸

In conclusion, the *Narick* court held that the state interests in the preservation of human life and the prevention of suicide easily outweighed White's right to self-determination.¹¹⁹ In this manner, the court dismissed the prisoner's privacy claim.¹²⁰ The

Such approaches to legal questions point out the perils of the state becoming involved in deciding life or death issues. *One of its major tasks!* The state can incarcerate one who has violated the law and, in certain circumstances, even take his life. But it has no right to destroy a person's will by frustrating his attempt to die, if necessary, to make a point . . . *Nothing could destroy a person's will more than death.* Under these circumstances, we hold that Prevatte, by virtue of his right of privacy, can refuse to allow intrusions on his person, even though calculated to preserve his life. The state has not shown such a compelling interest in preserving Prevatte's life as would override his right to refuse medical treatment.

We do not agree with Zant.

Id. (citing *Zant*, 248 Ga. at 833-34, 286 S.E.2d at 716-17) (*Narick* court's comments in italics).

¹⁰⁹ 292 S.E.2d at 56.

¹¹⁰ *Id.* at 56-57.

¹¹¹ *Id.* at 57. *But see Zant*, 248 Ga. at 834, 286 S.E.2d at 716, where the Georgia court expressly recognized the state's compelling interest in the preservation of life.

¹¹² 292 S.E.2d at 57.

¹¹³ *Id.* (citing *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 729, 370 N.E.2d 417, 419 (1977)).

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

¹¹⁵ *See Saikewicz*, 373 Mass. at 741, 370 N.E.2d at 425.

¹¹⁶ *See Narick*, 292 S.E.2d at 57.

¹¹⁷ *Id.* (citing *Satz v. Perlmutter*, 363 So.2d 160 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So.2d 359 (Fla. 1980); *Lane v. Candura*, 6 Mass. App. Ct. 377, 376 N.E.2d 1232 (1978); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976); *In re Quackenbush*, 156 N.J. Super. 282, 383 A.2d 785 (1978); *In re Yetter*, 62 Pa. D. & C.2d 619 (Dist. Ct. 1973)).

¹¹⁸ 292 S.E.2d at 58. The "dim prognosis" theory recognizes a limited right to die only in those cases where there is no hope of a long-term recovery. *Id.* The *Narick* court noted that "people cannot be forced to live through excruciating pain . . . protestations for causes however, are emotional commitments as various and unpredictable as the winds." *Id.* For a discussion of the dim prognosis theory, see *infra* notes 485-99 and accompanying text.

¹¹⁹ 292 S.E.2d at 58. The *Narick* court cited John Updike's novel, *RABBIT IS RICH*, as authority for the proposition that the state's interest in the preservation of human life is at "the very core of

court also summarily dismissed White's claim of free expression.¹²¹ In the final paragraph of the opinion, the court concluded that such first amendment rights were clearly inferior to the interests of the state.¹²²

In summary, the three 1982 hunger strike cases have not yielded consistent law. Rather, the courts have held concerns or rights determinative.¹²³ A fully developed analytic framework for treating hunger-strike cases remains to be developed. This note, therefore, will attempt to frame and apply the appropriate constitutional analysis.¹²⁴ The next section begins building the appropriate constitutional framework.

II. THE CASE OF THE HUNGER-STRIKING PRISONER: A FRAMEWORK FOR ANALYSIS

From the foregoing description, it is arguable that each of the courts in *Zant*, *Chapman* and *Narick* inadequately examined the constitutional questions raised by the hunger striker's action.¹²⁵ Hunger striking, however, is a common incident in prisons throughout the country,¹²⁶ and is likely to be the subject of several suits in the near future.¹²⁷ This section, therefore, proposes an analytical framework within which the case

civilization." 292 S.E.2d at 58. The "persuasive" authority for the court's shibboleth against suicide is spoken through the character of Harry Angstrom in Updike's novel:

Maybe I haven't done everything right in my life, I know I haven't. But I haven't committed the greatest sin. I haven't laid down and died.

Who says that's the greatest sin?

Everybody says it. The Church, the government . . .

292 S.E.2d at 58 n.4 (citing J. UPDIKE, *RABBIT IS RICH* (1981)).

¹²⁰ 292 S.E.2d at 58.

¹²¹ *Id.*

¹²² *Id.* The court placed emphasis upon the availability of other channels of protest, most notably, legal proceedings. *Id.* at 58 & n.7.

¹²³ See *supra* notes 37-122 and accompanying text.

¹²⁴ See *infra* notes 125-479 and accompanying text.

¹²⁵ See *supra* notes 37-124 and accompanying text.

¹²⁶ Besides the four hunger-strike cases already discussed, there have been at least 23 other cases where the courts have taken judicial notice of prisoners' hunger strikes as a form of protest. See *Paxton v. United States*, No. 83-1197, slip op. (8th Cir. Feb. 17, 1984) (available March 1, 1984, on LEXIS, Genfed library, Cir. file); *United States v. Toner*, No. 83-1287, slip op. (2d Cir. Feb. 14, 1984) (available March 1, 1984, on LEXIS, Genfed library, Cir. file); *Sanchez v. United States*, No. 83-6356, slip op. (2d Cir. Jan. 5, 1984) (available March 1, 1984, on LEXIS, Genfed library, Cir. file); *Walker v. Engle*, 703 F.2d 959, 968 (6th Cir. 1983); *In re Sessions*, 672 F.2d 564, 567 (5th Cir. 1982); *Africa v. Zimmerman*, 622 F.2d 1025, 1028 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 1756 (1982); *Jones v. Marquez*, 526 F. Supp. 871, 873 (D. Kan. 1981); *Adams v. Wainwright*, 512 F. Supp. 948, 952 (N.D. Fla. 1981); *Maxton v. Johnson*, 488 F. Supp. 1030, 1032 (D.S.C. 1980); *Perrote v. Percy*, 444 F. Supp. 1288, 1289 (W.D. Wis. 1978); *Hearn v. Rhay*, 68 F.R.D. 574, 577 (E.D. Wash. 1975); *United States v. Bracey*, 368 F. Supp. 1186, 1187 (E.D. Pa. 1973); *Williams v. United States*, 353 F. Supp. 1226, 1229 (E.D. La. 1973); *Elie v. Henderson*, 340 F. Supp. 958, 964 (E.D. La. 1972); *Chandler v. United States*, 332 F. Supp. 397, 398 (D. Md. 1971); *Cullen v. Grove Press*, 276 F. Supp. 727, 730 (S.D.N.Y. 1967); *Cruse v. State*, No. 1 Div. 639, slip op. (Ala. Crim. App. January 19, 1984) (available March 1, 1984, on LEXIS, states library, Omni file); *Freudak v. United States*, 408 A.2d 364, 377 (D.C. 1979); *Costello v. Strickland*, 421 So.2d 33, 33-34 (Fla. Dist. Ct. App. 1982); *In re Linder*, 96 Misc. 2d 234, 236, 408 N.Y.S.2d 920, 921 (Sup. Ct. 1978); *Washington v. Hartzog*, 96 Wash. 2d 383, 386, 635 P.2d 694, 696 (1981); *In re Young*, 95 Wash. 2d 216, 218, 622 P.2d 373, 374 (1980); *Emerson v. Nehls*, 94 Wis. 2d 196, 197, 287 N.W.2d 808 (1980).

¹²⁷ Given that at least 27 instances of hunger strikes have been before both federal and state courts, see *supra* note 126, there is no reason to doubt that this trend will continue.

of a hunger-striking prisoner may be decided.¹²⁸ This framework is intended to serve as a guide and analysis to courts faced with the difficult questions posed by a prisoner's desire to die by starvation.

Resolving properly whether a hunger-striking prisoner has a constitutional right to die involves balancing the individual's rights against the interests of the state.¹²⁹ This balancing, in turn, mandates a careful enumeration of all considerations weighing in either the individual's or state's favor. First, the constitutional rights of the prisoner must be described and defined.¹³⁰ Second, the effect of the inmate's "prisoner" status on his constitutional rights must be explored.¹³¹ Next, the relevant state interests in the inmate hunger-strike context must be defined and categorized.¹³² Finally, the interests of the state defined must be balanced against the hunger striker's constitutional rights in the prison context.¹³³ This process, while laborious, ensures consistency in court analysis and provides an avenue for the appropriate resolution of the hunger-strike cases.

A. Constitutional Rights of the Hunger-Striking Prisoner

In *Zant*, *Chapman* and *Narick*, the prisoners all attempted to invoke the protection of the first and fourteenth amendments.¹³⁴ Each claimed that his rights under these amendments prevented prison officials from force-feeding him.¹³⁵ These constitutional privacy and free expression rights, therefore, will be discussed below.¹³⁶ In addition, the prisoner's incarceration will be examined as a limitation on these rights.¹³⁷

1. The Right to Privacy

In each of the hunger strike cases, the prisoner contended that his right to privacy, a constitutional guarantee,¹³⁸ precluded prison officials' efforts to force-feed him.¹³⁹ Specifically, each hunger striker argued that two facets¹⁴⁰ of his privacy right — the rights to

¹²⁸ See *infra* notes 129-349 and accompanying text.

¹²⁹ See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 546 (1979); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 129 (1979).

¹³⁰ See *infra* notes 134-222 and accompanying text.

¹³¹ See *infra* notes 223-42 and accompanying text.

¹³² See *infra* notes 243-318 and accompanying text.

¹³³ See *infra* notes 350-479 and accompanying text.

¹³⁴ See *Zant*, 248 Ga. at 833, 286 S.E.2d at 716; *Chapman*, 87 A.D.2d at 66, 450 N.Y.S.2d at 624; *Narick*, 292 S.E.2d at 57.

¹³⁵ *Zant*, 248 Ga. at 833, 286 S.E.2d at 716; *Chapman*, 87 A.D.2d at 66, 450 N.Y.S.2d at 624; *Narick*, 292 S.E.2d at 57.

¹³⁶ See *infra* notes 138-222 and accompanying text.

¹³⁷ See *infra* notes 223-42 and accompanying text.

¹³⁸ The constitutional right to privacy was expressly recognized by the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). The Court indicated that the constitutional source lies in the penumbras of the first, fourth, fifth, ninth and fourteenth amendments. *Id.* at 484-86. Several "zones of privacy" invoke the protection of the Constitution, including the freedom to obtain contraceptives, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), and decisions whether to bear children. *Roe v. Wade*, 410 U.S. 113, 154 (1973). The Court, however, has also noted that the outer limits of the right to privacy have not yet been defined. *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977).

¹³⁹ *Zant*, 248 Ga. at 833, 286 S.E.2d at 716; *Chapman*, 87 A.D.2d at 67-68, 450 N.Y.S.2d at 625; *Narick*, 292 S.E.2d at 57.

¹⁴⁰ The right to privacy has many different facets, including personal appearance, *Kelley v. Johnson*, 425 U.S. 238, 244 (1976); sexual conduct, *Carey v. Population Services Int'l*, 431 U.S. 678,

self-determination and bodily integrity — would be impinged if nourishment were forced upon him.¹⁴¹ While of all the various components, these two privacy right interests arguably are the most appropriate,¹⁴² their application in the context of inmate hunger strikes requires further exploration.¹⁴³

The right to bodily control and integrity, recognized by the Supreme Court since 1891,¹⁴⁴ provides constitutional assurance for the individual's autonomy over his body, including the right to choose or refuse medical treatment.¹⁴⁵ As a component of the right of privacy, the right to bodily control prohibits intrusion upon an individual's possession and control of his own person, absent authorization by law.¹⁴⁶ In *Union Pacific Railway v. Botsford*,¹⁴⁷ the plaintiff, Botsford, refused to undergo a medical examination at the defendant railroad's request, asserting that her right to control her person enabled her to decline such an examination.¹⁴⁸ The Supreme Court upheld the plaintiff's right to refuse an examination, stating that every individual has the right to possession and control of his own person, free from interference unless by authority of law.¹⁴⁹ The right to bodily integrity was also at issue in *Schloendorff v. New York Hospital*.¹⁵⁰ In that case, the plaintiff complained that the defendant hospital and staff performed surgery upon her without her consent.¹⁵¹ Speaking for the New York Court of Appeals, Justice Cardozo noted that

687-88 (1977); freedom from bodily invasion, *Schmerber v. California*, 384 U.S. 757, 772 (1966); self-determination, *Roe v. Wade*, 410 U.S. 113, 153 (1973); confidentiality of personal information, *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977); and privacy of belief and thought, *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969).

¹⁴¹ See *Zant*, 248 Ga. at 832-34, 286 S.E.2d at 715-17; *Chapman*, 87 A.D.2d at 66-71, 450 N.Y.S.2d at 623-27; *Narick*, 292 S.E.2d at 54-58.

¹⁴² The hunger-strike case, where the prisoner refuses to eat, is similar to refusal of medical treatment cases, where the patient declines further medical efforts. See *Satz v. Perlmutter*, 362 So.2d 160, 164 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So.2d 359 (Fla. 1980). In refusal of medical treatment cases, the rights to self-determination and bodily integrity generally are deemed to protect the patient. *Id.* See also 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) [hereinafter cited as Cantor, *Bodily Integrity*] (describing right to refuse medical treatment under component privacy rights of self-determination and bodily integrity).

¹⁴³ Like the patient in Cantor's article, *supra* note 142, a hunger striker is similarly refusing medical treatment and will claim the same individual rights as the patient. The analysis differs, however, in evaluating the relevant state interests. The hunger striker faces a formidable array of state interests, not the least of which is the strong societal stigma against the termination of an otherwise healthy life. Moreover, the hunger striker is a prisoner of the state, which subjects the analysis to the infusion of a whole new array of state interests. For a discussion of these interests, see *infra* notes 288-318 and accompanying text.

¹⁴⁴ *Union Pacific Ry. v. Botsford*, 141 U.S. 250 (1891).

¹⁴⁵ See Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 Nw. U.L. REV. 461, 490-94 (1977) [hereinafter cited as Plotkin, *Mental Patients' Right to Refuse*]; see also Comment, *The Right to Refuse Medical Treatment: Under What Circumstances Does It Exist?* 18 DUQ. L. REV. 607, 609 (1980) [hereinafter cited as Comment, *Right to Refuse Treatment*].

¹⁴⁶ *Sibbach v. Wilson*, 312 U.S. 1, 11 (1940).

¹⁴⁷ 141 U.S. 250 (1891).

¹⁴⁸ *Id.* at 251. The holding of this case was explained in *Sibbach v. Wilson*, 312 U.S. 1 (1940), where the Court required the plaintiff to undergo a medical exam under the Federal Rules of Civil Procedure. *Id.* at 12. In *Sibbach*, the Court explained that the substantive right described in *Botsford* was still valid. *Sibbach*, 312 U.S. at 11. *Sibbach* illustrates the necessary procedure required to overcome this important substantive right. See *id.*

¹⁴⁹ *Botsford*, 141 U.S. at 251.

¹⁵⁰ *Schloendorff v. New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914).

¹⁵¹ *Id.* at 127, 105 N.E. at 93.

every adult of sound mind has the right to determine what shall be done with his body.¹⁵² The New York high court, therefore, held that the plaintiff's right to bodily control and integrity had been violated by the nonconsensual surgery.¹⁵³

More recently, the United States Supreme Court reiterated its conclusion that the integrity of the person is a cherished value in our society.¹⁵⁴ In *Schmerber v. California*,¹⁵⁵ the Court scrutinized a police-ordered blood test of a suspected drunken driver.¹⁵⁶ The plaintiff, Schmerber, challenged the blood test on the grounds, *inter alia*, that it was an unwarranted invasion of personal privacy and dignity.¹⁵⁷ While upholding the governmental intrusion, the *Schmerber* Court recognized that human dignity and privacy are "fundamental human interests."¹⁵⁸ Moreover, in the years since *Schmerber*, many courts have ruled that the right to bodily integrity is an important component of the right to privacy.¹⁵⁹

The right to bodily integrity and control, as described above, allows an individual to refuse medical treatments or procedures which have an invasive effect on his person, absent authorization by law.¹⁶⁰ Force-feeding is a medical procedure which compels the individual to ingest nutrients intravenously or otherwise.¹⁶¹ Such feedings are manifestly nonconsensual and therefore violate the individual's right to control his own person. Thus, the state must demonstrate that its interests in force-feeding overcome the individual's privacy right for the action to be valid under the Constitution.¹⁶²

The second aspect of the right to privacy asserted by hunger strikers — the right to self-determination — comprises a constitutional guarantee of the individual's right to choose a life-style or course of conduct.¹⁶³ The right to decide upon a course of conduct is a necessary prerequisite to the enjoyment of all other liberties and thus is a fundamental aspect of personal liberty.¹⁶⁴ This fundamental right gives constitutional assurance to the

¹⁵² *Id.* at 129, 105 N.E. at 93.

¹⁵³ *Id.*

¹⁵⁴ *Schmerber v. California*, 384 U.S. 757, 772 (1966).

¹⁵⁵ 384 U.S. 757 (1966).

¹⁵⁶ *Id.* at 759.

¹⁵⁷ *Id.* at 767.

¹⁵⁸ *Id.* at 770.

¹⁵⁹ *In re Osborne*, 294 A.2d 372, 376 (D.C. 1972); *Satz v. Perlmutter*, 352 So.2d 160, 164 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So.2d 359 (Fla. 1980); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 741, 370 N.E.2d 417, 425 (1977); *In re Quinlan*, 70 N.J. 10, 41, 355 A.2d 647, 644, *cert. denied*, 429 U.S. 922 (1976); *In re Yetter*, 62 Pa. D. & C.2d 619, 622 (Dist. Ct. 1973).

¹⁶⁰ See Cantor, *Bodily Integrity*, *supra* note 142, at 241; Plotkin, *Mental Patients' Right to Refuse*, *supra* note 145, at 490-92.

¹⁶¹ See, e.g., *Chapman*, 87 A.D.2d at 67, 450 N.Y.S.2d at 625.

¹⁶² See *infra* notes 350-479 and accompanying text for a detailed discussion of this issue. See also *Chapman*, 87 A.D.2d at 66, 450 N.Y.S.2d at 623, where the New York appellate court weighed the interests of the state in overcoming the individual's privacy right against the prisoner's asserted protections. *Id.*

¹⁶³ Comment, *The Right to Refuse Treatment*, *supra* note 145, at 609.

¹⁶⁴ The right to self-determination is at the core of Western liberal philosophy. John Stuart Mill asserted in *On Liberty* (1849), (*reprinted in THE UTILITARIANS* 473 (1961)) that such individual has absolute sovereignty over his mind and body, with the sole limitation that his acts cannot harm other individuals. *Id.* at 484. According to Mill, the state cannot compel an individual to do an act, even for beneficial purposes, without detracting from the inherent worth of mankind. See *id.* at 597. Jeremy Bentham also placed the right to self-determination at the center of his philosophical framework. Bentham, *An Introduction to the Principles of Morals and Legislation* (1776) (*reprinted in THE UTILITARIANS* 5 (1961)). In Bentham's system of utilitarianism, it is the individual who determines what actions to take by examining their consequences. *Id.* at 17-19.

individual's decision-making process, allowing him to live his life as he chooses, without unwarranted governmental intrusions.¹⁶⁵

Several Supreme Court opinions have discussed an individual's right to self-determination. As early as 1928, Justice Brandeis' formulation of the "right to be let alone" in his dissent in *Olmstead v. United States*¹⁶⁶ evidenced judicial dissatisfaction with state infringements of personal liberty.¹⁶⁷ The full Court, however, first expressly recognized the privacy right to self-determination in *Griswold v. Connecticut*.¹⁶⁸ *Griswold* involved a Connecticut statute which proscribed the distribution of contraceptives to married couples.¹⁶⁹ The petitioner, a physician who distributed contraceptives, challenged the statute on the grounds of the due process clause of the fourteenth amendment.¹⁷⁰ The Court struck down the statute on the basis of the right to privacy, indicating that the constitutional source lay in the penumbra of the first, fourth, fifth, ninth and fourteenth amendments.¹⁷¹

The individual's right to self-determination was also recognized in *Roe v. Wade*.¹⁷² In *Roe*, a pregnant woman brought a class action claiming that the Texas criminal abortion laws violated her class's constitutional right to privacy.¹⁷³ Justice Blackmun, speaking for the Court, held that a woman's right to decide whether to bear a child outweighed any interest the state had in preventing abortion during at least the first trimester.¹⁷⁴ The Court, therefore, struck down the statute as an infringement upon the class's right to self-determination.¹⁷⁵ Thus, the *Roe* Court concluded that the right to self-determination was fundamental.¹⁷⁶

Subsequently, the Court extended the right to self-determination beyond matters of procreation. In *Stanley v. Georgia*,¹⁷⁷ the petitioner challenged his conviction under a state statute which punished mere private possession of obscene matter on grounds that the conviction violated his first and fourteenth amendment rights.¹⁷⁸ In striking down the statute, the Court reasoned that the right to gather and read all information was essential to the development of ideas, since it is from these very ideas that an individual determines

¹⁶⁵ See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *Doe v. Bolton*, 410 U.S. 179, 201 (1973); *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

¹⁶⁶ 277 U.S. 438 (1928).

¹⁶⁷ *Id.* at 478 (Brandeis, J., dissenting). Brandeis' dissent provides the foundation for the present judicial recognition of the constitutional right to privacy. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citing *Olmstead*, 277 U.S. at 378 (Brandeis, J., dissenting)). The eloquent "right to be let alone" passage provides the first articulation of the fundamental right to think, believe and act free from unwarranted governmental intrusion. *Id.*

¹⁶⁸ 381 U.S. 479 (1965).

¹⁶⁹ *Id.* at 480.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 484-86. The Court subsequently extended this privacy right to all individuals in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), a case also involving contraceptives. In that case, the Court refuted the notion that *Griswold* only protected marital privacy: "If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting an individual as the decision whether to bear or beget a child." *Id.*

¹⁷² 410 U.S. 113 (1973).

¹⁷³ *Id.* at 120.

¹⁷⁴ *Id.* at 164.

¹⁷⁵ *Id.* at 162-63.

¹⁷⁶ See *id.* at 152-54.

¹⁷⁷ 394 U.S. 557 (1969).

¹⁷⁸ *Id.* at 568.

his actions.¹⁷⁹ In addition, the Court acknowledged that this right is fundamental and that the individual possesses the right to be free from unwarranted intrusions into his privacy.¹⁸⁰ In *Whalen v. Roe*,¹⁸¹ the Court again found that the right to privacy extended beyond matters of the family and procreation.¹⁸² That case involved a challenge to New York's computerized record-keeping system for the distribution of certain drugs on the grounds that it violated patients' rights to privacy.¹⁸³ While the Court found that the system was justified by legitimate needs of the state, it expressly stated that "some personal rights 'implicit in the concept of ordered liberty' . . . are so 'fundamental that an undefined penumbra may provide them with an independent source of constitutional protection.'"¹⁸⁴ Thus, the Supreme Court has indicated that the privacy right is to be construed as a broad protection of personal liberty.¹⁸⁵

In the context of a hunger-striking prisoner, the right to self-determination may protect the individual's decision not to eat. A hunger striker has evaluated his condition and the conditions of the world around him, and based upon that evaluation, has *decided* upon a specific course of conduct.¹⁸⁶ As long as the individual chooses his own course of action, the government may not interfere because it deems the conduct to be foolish or ill-advised.¹⁸⁷ Such governmental intervention, if allowed on these grounds, would emasculate the right to self-determination by allowing individuals to "choose" only life-styles approved by the government.¹⁸⁸ Thus, the hunger striker must be given the freedom to act out any course of conduct he chooses, absent compelling interests of the state.¹⁸⁹

In summary, a hunger striker may attempt to invoke the constitutional right of privacy to protect his strike by asserting both the right to self-determination¹⁹⁰ and the right to bodily integrity.¹⁹¹ These two components of the constitutional right will, for the

¹⁷⁹ *Id.* at 565. The Court noted that if Stanley's constitutional guarantees "means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.*

¹⁸⁰ *Id.* at 564.

¹⁸¹ 429 U.S. 589 (1977).

¹⁸² *Id.* at 599-600. The court stated that cases concerning privacy "have in fact involved at least two different kinds of interests. 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." *Id.*

¹⁸³ *Id.* at 872.

¹⁸⁴ *Id.* at 876 n.23.

¹⁸⁵ See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 15-1-15-14 (1978). Tribe divides the right of privacy into several separate freedoms, including liberty of conscience, *id.* at § 15-5, freedom of inquiry and education, *id.* at § 15-6, freedom from physical invasion, *id.* at § 15-9, freedom to make decisions about death, *id.* at § 15-11, and freedom of choice of a life plan or style, *id.* at § 15-12.

¹⁸⁶ See, e.g., *Zant*, 248 Ga. at 832, 286 S.E.2d at 715, where the prisoner believed that his life was in danger. Cognizant of his situation as a prisoner of the state, Zant embarked on the only course of conduct that he thought proper. See *id.*

¹⁸⁷ *Lane v. Candura*, 6 Mass. App. Ct. 377, 383, 376 N.E.2d 1232, 1235 (1978) ("The law protects her right to make her own decision to accept or reject treatment whether that decision is wise or unwise."); *In re Brooks*, 32 Ill. 2d 361, 373, 205 N.E.2d 435, 442 (1965) ("Even though we may consider appellant's beliefs unwise, foolish or ridiculous . . . we may not permit interference therewith . . ."); see also *Stanley v. Georgia*, 397 U.S. 557, 565 (1969).

¹⁸⁸ See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-12 (1978).

¹⁸⁹ For a balancing of the state's interests against the individual's privacy right, see *infra* notes 355-411 and accompanying text.

¹⁹⁰ See *supra* notes 163-89 and accompanying text.

¹⁹¹ See *supra* notes 144-62 and accompanying text.

purposes of this note, be referred to as the right of personal privacy.¹⁹² Hence, the prisoner may assert this right of "personal privacy" as a bar to the attempts of prison officials to force-feed him, and thereby put an end to his hunger strike.¹⁹³

2. The Right of Free Expression

Along with the right to privacy, the hunger striker may attempt to invoke protection under the first amendment.¹⁹⁴ The first amendment protects the individual from state actions which abridge freedom of speech.¹⁹⁵ To be protected under the first amendment, therefore, the hunger strike must be viewed as symbolic speech¹⁹⁶ by means of which the prisoner is attempting to communicate.¹⁹⁷ Once so viewed, an attempt to force-feed the inmate would disrupt the hunger strike's symbolic speech, and would constitute an infringement of the prisoner's right to free expression.¹⁹⁸ Under this reasoning, the hunger striker would argue that he is protected from the actions of the prison officials by the first amendment.¹⁹⁹

Generally, the right to free expression includes the right to communicate views or ideas to any willing listener.²⁰⁰ Moreover, the manner of communication need not be written or verbal, since conduct constituting symbolic speech has long been accorded first amendment protection.²⁰¹ The Supreme Court has recognized, however, that the constitutional guarantee of free expression does not protect every kind of conduct intended as an expression of an idea.²⁰² For example, in *United States v. O'Brien*,²⁰³ the Court held

¹⁹² See Cantor, *Bodily Integrity*, *supra* note 142, at 241.

¹⁹³ See, e.g., *Zant*, 248 Ga. at 833, 286 S.E.2d at 713; *Chapman*, 87 A.D.2d at 66-67, 450 N.Y.S.2d at 625; *Narick*, 292 S.E.2d at 57. Each of the prisoners in *Zant*, *Chapman*, and *Narick* argued that his right to privacy protected his hunger strike. *Id.* This protection, each prisoner asserted, allowed him to refuse force-feedings by prison officials. *Id.* 292 S.E.2d at 57. It seems reasonable to assume that any future hunger striker will attempt to invoke the right to privacy.

¹⁹⁴ See, e.g., *Zant*, 248 Ga. at 833, 286 S.E.2d at 713; *Chapman*, 87 A.D.2d at 66, 450 N.Y.S.2d at 624; *Narick*, 292 S.E.2d at 58. The prisoners in *Zant*, *Chapman*, and *Narick* each argued that his first amendment right of free expression protected his hunger strike. *Id.* The state's attempt to force-feed him, each prisoner contended, was an unconstitutional restriction of that freedom. *Id.*

¹⁹⁵ U.S. Const. amend. I. The first amendment states: "Congress shall make no law . . . abridging freedom of speech" *Id.*

¹⁹⁶ Symbolic speech can be defined as conduct which by its very nature is "so intertwined with expression" as to bring the first amendment into play. See *Cowgill v. California*, 396 U.S. 371, (mutilated flag held not to be protected symbolic speech); *Maynard v. Wooley*, 406 F. Supp. 1381, 1386 (D.N.H. 1976) ("Live Free or Die" on New Hampshire license plate is symbolic speech); *Crosson v. Silver*, 391 F. Supp. 1081, 1086 (D. Ariz. 1976) (burning of flag is symbolic speech within first amendment protection).

¹⁹⁷ The hunger strikers in *Zant*, *Chapman* and *Narick* all intended their refusal to eat to be a protest against a specific condition. See *Zant*, 248 Ga. at 833, 286 S.E.2d at 716; *Chapman*, 87 A.D.2d at 67, 450 N.Y.S.2d at 625; *Narick*, 292 S.E.2d at 55. Prevatte wanted to alert prison officials that someone was trying to kill him. *Zant*, 248 Ga. at 833, 286 S.E.2d at 716. *Chapman* was trying to focus world attention on the plight of starving children. *Chapman*, 87 A.D.2d at 67, 450 N.Y.S.2d at 625. White's hunger strike was in protest of prison conditions. *Narick*, 292 S.E.2d at 55.

¹⁹⁸ See, e.g., *Chapman*, 87 A.D.2d at 66, 450 N.Y.S.2d at 624.

¹⁹⁹ *Id.* at 70, 450 N.Y.S.2d at 627.

²⁰⁰ *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

²⁰¹ *Spence v. Washington*, 418 U.S. 405, 409-10 (1974); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 505-14 (1969); *Board of Ed. v. Barnette*, 319 U.S. 624, 632 (1943).

²⁰² *Spence v. Washington*, 418 U.S. 405, 409 (1974) (involving first amendment challenge to criminal conviction for improper display of American flag); *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

²⁰³ 391 U.S. 367 (1968).

that the public burning of a draft card did not constitute protected speech.²⁰⁴ In *O'Brien*, the defendant burned his selective service card as a statement against the war in Vietnam.²⁰⁵ The act violated a selective service regulation.²⁰⁶ The defendant argued that the first amendment cloaked his action, since it was intended as a political statement.²⁰⁷ The *O'Brien* Court rejected the argument, reasoning that the incidental effect of the selective service regulation on *O'Brien's* first amendment rights was justified by the important governmental interest in raising armies.²⁰⁸

The Supreme Court has also recognized that where free expression consists of the commission of public acts, the scope of the permissible regulation increases.²⁰⁹ For example, in *California v. LaRue*,²¹⁰ the appellees asserted that state restrictions preventing the sale of alcohol in nightclubs with "live entertainment" consisting of "bottomless dancers" was violative of their first amendment rights as nightclub owners and dancers.²¹¹ The Court rejected this argument, reasoning that when free expression consists largely of conduct, the state has broad power to regulate such conduct without infringing the protections of the first amendment.²¹² Thus, the Court upheld the state regulations, even though it recognized a limited effect on the appellees' free expression rights.²¹³ In addition, the Court has held that conduct, as a means of expression, does not invoke the "absolute" protection usually associated with free speech.²¹⁴ For example, in *Village of Skokie v. National Socialist Party of America*,²¹⁵ a group of party members were held to be entitled to write and disseminate pamphlets expressing their political views, but were prevented from marching through a predominantly Jewish neighborhood.²¹⁶ The party members claimed that the local government's refusal to issue a permit to march violated their first amendment associational and free expression rights.²¹⁷ The Court ruled that the state could legitimately restrict the first amendment rights of the party members to insure public peace and prevent violence and personal injury.²¹⁸

Applying these first amendment principles to the hunger-strike context, the first question is whether the hunger strike is a form of protected expression.²¹⁹ A hunger strike, as both conduct and speech, allows the state much broader authority to limit the speech element.²²⁰ The second question, then, is whether the state's interest in regulating the conduct element of a hunger strike justifies the incidental restriction of the speech element.²²¹ As in *Village of Skokie*, the free expression rights of the individual may be

²⁰⁴ *Id.* at 386.

²⁰⁵ *Id.* at 369-70.

²⁰⁶ *Id.* at 370.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 377.

²⁰⁹ *California v. LaRue*, 409 U.S. 109, 117 (1972).

²¹⁰ 409 U.S. 109 (1972).

²¹¹ *Id.* at 119.

²¹² *Id.* at 118.

²¹³ *Id.* at 119.

²¹⁴ See *O'Brien*, 391 U.S. at 376.

²¹⁵ 69 Ill. 2d 605, 373 N.E.2d 21 (1977), *rev'd on other grounds*, 432 U.S. 43 (1977).

²¹⁶ *Id.* at 612, 619, 373 N.E.2d at 23, 26.

²¹⁷ *Id.*

²¹⁸ See generally *id.* at 612-19, 373 N.E.2d at 22-26.

²¹⁹ See, e.g., *Chapman*, 87 A.D.2d at 71, 450 N.Y.S.2d at 627. The *Chapman* court characterized the prisoner's hunger strike as the act of suicide, rather than as symbolic speech. *Id.*

²²⁰ See *supra* notes 209-18 and accompanying text.

²²¹ See *supra* notes 178-218 and accompanying text.

overcome by a demonstration of important and conflicting state interests.²²²

3. The Constitutional Rights in the Prison Context

As a prison inmate, the hunger striker's constitutional protections may be limited.²²³ The prisoner, however, does not shed all of his rights at the prison gate.²²⁴ The Supreme Court has stated that lawful imprisonment necessarily restricts the rights and privileges ordinarily inhering in the individual,²²⁵ and has frequently upheld restrictions upon prisoners' constitutional rights.²²⁶ For example, in *Wolff v. McDonnell*,²²⁷ the Court allowed prison officials to open inmates' mail to search for contraband.²²⁸ Similarly, inmates' right to free association was limited in *Jones v. North Carolina Prisoners' Union*,²²⁹ where the Court held that the prison officials could prevent the union from meeting.²³⁰ Moreover, in *Bell v. Wolfish*,²³¹ the Court ruled that body cavity searches, prohibitions upon the receipt of packages, and the "double-bunking" of inmates in a single occupancy cell were not violations of the inmates' constitutional protections.²³² Thus, as these cases demonstrate, a prisoner's incarceration results in a contraction of his normal constitutional protections.²³³

In determining the extent of this contraction, however, the Court has stated that there must be a mutual accommodation between the needs and objectives of the prison system and the provisions of the Constitution.²³⁴ To achieve this, the Court has articulated the following standard: the prisoner retains only those constitutional rights not inconsistent with his status as prisoner or with the legitimate penological goals of the corrections system.²³⁵ This standard was employed first in *Pell v. Procunier*²³⁶ to test the validity of restrictions on an inmate's right to mail and receive correspondence,²³⁷ and was again applied in *Jones* to guide the Court in its examination of the first amendment associational rights of prisoners.²³⁸ Using this standard, the Court in each case found the restrictions to be justified by the needs of the prison system.²³⁹ The Court's standard demonstrates that the extent of a prisoner's constitutional rights can only be measured in relation to the interests of the state in administering its prisons.²⁴⁰ Thus, the weighing and balancing of the interests of the state against the prisoner's asserted rights becomes the

²²² See *supra* notes 209-18 and accompanying text.

²²³ *Price v. Johnston*, 334 U.S. 266, 285 (1948).

²²⁴ *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

²²⁵ *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).

²²⁶ See *infra* notes 227-33 and accompanying text. This restriction is usually justified by reference to the considerations underlying the penal system. *Price*, 334 U.S. at 285.

²²⁷ 418 U.S. 539 (1974).

²²⁸ *Id.* at 574-77.

²²⁹ 433 U.S. 119 (1977).

²³⁰ *Id.* at 136.

²³¹ 441 U.S. 520 (1979).

²³² *Id.* at 562-63.

²³³ See *supra* notes 223-32 and accompanying text.

²³⁴ *Jones*, 433 U.S. at 129.

²³⁵ *Bell*, 441 U.S. at 546; *Jones*, 433 U.S. at 129.

²³⁶ 417 U.S. 817 (1974).

²³⁷ *Id.* at 824.

²³⁸ *Jones*, 433 U.S. at 129.

²³⁹ *Bell*, 441 U.S. at 562-63; *Jones*, 433 U.S. at 136.

²⁴⁰ See *supra* notes 223-39 and accompanying text.

focus of constitutional analysis.²⁴¹ The next section, therefore, will discuss and categorize the interests of the state.²⁴²

B. Interests of the State

The courts have recognized several state interests applicable to the case of a hunger-striking prisoner.²⁴³ These interests fall into one of two general types.²⁴⁴ The first of these general categories of state interests may be referred to as "paternal" interests. Paternal interests derive from the state's concern for the welfare of each individual.²⁴⁵ General concepts about the sanctity of life fall into this category.²⁴⁶ The second general category may be labeled the "institutional" interests of the state. These interests derive from the state's need to administer its penal system.²⁴⁷ Each of the two categories encompasses a number of legitimate state concerns assertable in the hunger-strike context which must be carefully examined.²⁴⁸

1. Paternal Interests of the State

The paternal interests of the state are premised on the belief in the sanctity of human life.²⁴⁹ Two of the three hunger-strike cases expressly adopted the paternal interests cited by the Massachusetts Supreme Judicial Court in *Superintendent of Belchertown State School v. Saikewicz*.²⁵⁰ *Saikewicz* examined the right of an individual to refuse lifesaving medical treatment.²⁵¹ In that case, the guardian *ad litem* for the mentally retarded party in interest, Saikewicz, recommended that the treatment for leukemia be discontinued even though the patient would undoubtedly die.²⁵² The *Saikewicz* court examined four interests of the state, which it weighed against the individual's right to personal privacy.²⁵³ The four

²⁴¹ See, e.g., *Jones*, 433 U.S. at 129.

²⁴² See *infra* notes 243-318 and accompanying text.

²⁴³ None of the hunger-strike cases, however, provide a comprehensive list of the state interests involved. In *Zant*, the Georgia court identified only two state interests: the duty to protect prisoners in custody, and preservation of life. *Zant*, 248 Ga. at 833-34, 286 S.E.2d at 716. In *Chapman*, the court also recognized several relevant state interests: the protection of the health and welfare of persons in its care and custody, the preservation of life and the preservation of internal order in state institutions. *Chapman*, 87 A.D.2d at 66-67, 450 N.Y.S.2d at 624. In *Narick*, the court discussed the following state interests: the preservation of life, the prevention of suicide, the protection of dependents and the maintenance of the ethical integrity of the medical profession. *Narick*, 292 S.E.2d at 57.

²⁴⁴ For a discussion of the state's interests see *infra* notes 249-318 and accompanying text.

²⁴⁵ See Cantor, *Bodily Integrity*, *supra* note 142 at 243; see also Comment, *The Right to Refuse Treatment*, *supra* note 145, at 616.

²⁴⁶ Cantor, *Bodily Integrity*, *supra* note 142, at 243.

²⁴⁷ See *infra* notes 288-318 and accompanying text. These institutional interests spring from Supreme Court decisions defining the constitutional rights of prisoners. *Id.* and accompanying text. All of these interests focus on considerations necessary to operate the penal system. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 398 (1974) (constitutional challenge to prison regulations restricting prisoners' first and fourteenth amendment rights. In *Procunier*, the following three factors were identified: the preservation of internal order and discipline, institutional security and the prevention of escape, and the rehabilitation of prisoners. *Id.* at 412.

²⁴⁸ See *infra* notes 249-318 and accompanying text.

²⁴⁹ Cantor, *Bodily Integrity*, *supra* note 142, at 243.

²⁵⁰ 373 Mass. 728, 370 N.E.2d 417 (1977). Both *Chapman* and *Narick* relied on *Saikewicz*. *Chapman*, 87 A.D.2d at 69, 450 N.Y.S.2d at 626; *Narick*, 292 S.E.2d at 57.

²⁵¹ 373 Mass. at 729, 370 N.E.2d at 419.

²⁵² *Id.* at 730, 370 N.E.2d at 419.

²⁵³ *Id.* at 741-45, 370 N.E.2d at 425-26.

interests identified by the *Saikewicz* court were the preservation of life,²⁵⁴ the prevention of suicide,²⁵⁵ the protection of the interests of innocent third parties²⁵⁶ and the maintenance of the ethical integrity of the medical profession.²⁵⁷ After a careful balancing, the Massachusetts high court ruled that *Saikewicz's* privacy right outweighed these state concerns and that treatment could be refused.²⁵⁸

Saikewicz is generally recognized as the leading case articulating the paternal interests of the state in cases involving an individual's decision to die.²⁵⁹ For example, in *Severns v. Wilmington Medical Center*,²⁶⁰ the Supreme Court of Delaware approvingly quoted a passage which stated that there is a general consensus supporting the principles elaborated in *Saikewicz* concerning invasions of personal privacy.²⁶¹ Moreover, *Saikewicz* has been cited approvingly by several courts in this context.²⁶² The *Saikewicz* holding, therefore, will be used as a guidepost in the discussion of the paternal interests of the state.²⁶³

The first state interest identified in *Saikewicz* was the preservation of life.²⁶⁴ The rationale behind this interest is that the state has an obligation to protect the individual's welfare.²⁶⁵ The criminal law and police power are focused precisely on this concern.²⁶⁶ Indeed, several governmental agencies are intended to protect the health and safety of the population.²⁶⁷ It is the state's duty, therefore, to prevent the death of any of its citizens under this line of thought.²⁶⁸ Moreover, the state's interest in the preservation of life has been characterized as compelling by most courts.²⁶⁹

The second state interest articulated in *Saikewicz* was the prevention of suicide.²⁷⁰ The underlying state interest in this area is the prevention of irrational self-destruction.²⁷¹ The principal objective of the suicide statutes is to secure assistance for the individual

²⁵⁴ *Id.* at 741-42, 370 N.E.2d at 425-26.

²⁵⁵ *Id.* at 743, 370 N.E.2d at 426.

²⁵⁶ *Id.* at 742-43, 370 N.E.2d at 426.

²⁵⁷ *Id.* at 743-44, 370 N.E.2d at 426.

²⁵⁸ *Id.* at 759, 370 N.E.2d at 435.

²⁵⁹ See generally Riga, *Euthanasia, The Right to Die and Privacy: Observations on Some Recent Cases*, 11 LINCOLN L. REV. 109 (1980).

²⁶⁰ 421 A.2d 1334 (Del. 1980).

²⁶¹ *Id.* at 1341.

²⁶² *Rumple v. Bloomington Hosp.*, — Ind. App. —, —, 422 N.E.2d 1309, 1312-13 (1981); *Leach v. Akron Gen. Medical Center*, 22 Ohio Op. 3d 49, 55-57, 426 N.E.2d 809, 813-15 (Com. Plea. 1980); see also *A Patient's Right to Refuse Treatment Allegedly Necessary to Sustain Life*, 93 A.L.R.3d 67 (1979) [hereinafter cited as 93 A.L.R.3d 67].

²⁶³ See *infra* notes 264-87 and accompanying text.

²⁶⁴ *Saikewicz*, 373 Mass. at 741, 370 N.E.2d at 425.

²⁶⁵ Cantor, *Bodily Integrity*, *supra* note 142, at 243.

²⁶⁶ *Id.*

²⁶⁷ For example, building and health inspectors, police departments, fire prevention agencies, state hospitals, consumer product safety laws, etc., all evidence this affirmative duty on the part of the state. In addition, the federal government also acts to protect the welfare of the individual through medicare, Occupational Health and Safety Act, unemployment insurance, food and drug laws, etc.

²⁶⁸ Cantor, *Bodily Integrity*, *supra* note 142, at 243.

²⁶⁹ See generally, Cantor, *Bodily Integrity*, *supra* note 142, at 243; Comment, *The Right to Refuse Treatment*, *supra* note 145, at 609-11; 93 A.L.R.3d 67, *supra* note 262, at 69-74.

²⁷⁰ *Saikewicz*, 373 Mass. at 741, 370 N.E.2d at 425.

²⁷¹ *Id.* at 743 n.11, 370 N.E.2d at 426 n.11. See *Eichner v. Dillon*, 73 A.D.2d 431, 467, 426 N.Y.S.2d 517, 544 (1980), where the New York appellate court held that a competent decision by a guardian to withdraw life-sustaining devices did not fall within the purview of the state suicide statute since the termination "cannot be deemed 'irrational' in the sense generally connoted by the term 'suicide.'" *Id.*

whose suicidal attempts are the product of rash, unbalanced or confused judgments.²⁷² Thus, this interest is intended solely to protect the class of despondent individuals contemplating self-destruction, and consequently is much narrower than the state interest in the preservation of life among the general population.²⁷³

The third state interest identified in *Saikewicz* was the protection of dependents.²⁷⁴ According to the *Saikewicz* court, the rationale behind this concern is that it is desirable to prevent minors and incompetents from being left without support and thereby becoming a burden on the state.²⁷⁵ Similarly, other courts have characterized this concern as a duty of the patient to the community to care for his dependents.²⁷⁶ Most courts have accorded this state interest great significance in the refusal of medical treatment cases.²⁷⁷ Indeed, courts have even found that this interest, standing alone, was sufficient to displace the individuals' privacy right.²⁷⁸ These decisions reflect judicial concern for the dependents an individual would leave behind, and attempt to prevent the dependents from becoming wards of the state.²⁷⁹

The final state interest treated by the *Saikewicz* court was the maintenance of the ethical integrity of the medical profession.²⁸⁰ Besides the Massachusetts court, several state courts have recognized that a medical staff acts in contradiction to accepted medical practices when it allows an individual to die.²⁸¹ Prevailing medical ethics, however, do not without exception demand that all lifesaving efforts be undertaken in all circumstances.²⁸² Rather, the acceptance of a right to terminate treatment may be consistent with accepted medical practices under limited conditions.²⁸³ The fourth state interest accords the medical community the freedom to practice medicine under common professional standards without undue interference by the judiciary.²⁸⁴

These four concerns comprise the paternal interests of the state,²⁸⁵ and the state may assert all four to countervail an individual's claimed constitutional protections.²⁸⁶ The state, however, is not limited to these four concerns; it may also claim a variety of institutional interests.²⁸⁷

²⁷² Cantor, *Bodily Integrity*, *supra* note 142, at 256.

²⁷³ *See id.* at 257.

²⁷⁴ *Saikewicz*, 373 Mass. at 742, 370 N.E.2d at 426.

²⁷⁵ *Id.*

²⁷⁶ Application of the President and Directors of Georgetown College, 331 F.2d 1000, 1008 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

²⁷⁷ *See* Comment, *The Right to Refuse Treatment*, *supra* note 145, at 615-18.

²⁷⁸ *See* Application of the President and Directors of Georgetown College, 331 F.2d 1000, 1008 (D.C. Cir. 1964); Raleigh Fitkin — Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 423, 201 A.2d 537, 538, *cert. denied*, 377 U.S. 985 (1964).

²⁷⁹ *See* cases cited *supra* notes 271-78.

²⁸⁰ *Saikewicz*, 373 Mass. at 743, 370 N.E.2d at 426.

²⁸¹ *See* Application of the President and Directors of Georgetown College, 331 F.2d 1000, 1000 (D.C. Cir. 1964); United States v. George, 239 F. Supp. 752 (D. Conn. 1965); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971).

²⁸² *See* Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1, 31 (1975).

²⁸³ *Id.* *See also* *In re Quinlan*, 70 N.J. 10, 42-50, 355 A.2d 647, 664-68, *cert. denied*, 429 U.S. 922 (1976).

²⁸⁴ *Saikewicz*, 373 Mass. at 743, 370 N.E.2d at 426.

²⁸⁵ *See supra* notes 249-84 and accompanying text. The *Saikewicz* court distilled the case law and determined that these four general categories represented the interests of the state in this context. *Id.*

²⁸⁶ *See supra* notes 249-85 and accompanying text.

²⁸⁷ *See infra* notes 288-318 and accompanying text.

2. Institutional Interests of the State

As a duly convicted criminal, an inmate is a ward of the state,²⁸⁸ is incarcerated in a governmental institution and is obligated to obey its rules and regulations.²⁸⁹ Hence, the state may restrict the prisoner's constitutional rights in the interest of maintaining its penal system.²⁹⁰ In *Procunier v. Martinez*,²⁹¹ the Supreme Court considered the institutional objectives of the state in the administration of its prison system.²⁹² *Procunier* involved a first amendment challenge by prison inmates to a California prison regulation which allowed the censorship of mail.²⁹³ The state interests were articulated and applied by the Court to uphold the restrictions on the prisoners' rights caused by the regulation.²⁹⁴ The *Procunier* Court identified three state interests in the prison context: the preservation of internal order and discipline,²⁹⁵ the maintenance of institutional security against escape and unauthorized entry,²⁹⁶ and the rehabilitation of prisoners.²⁹⁷

Moreover, these institutional interests described in *Procunier* have been used by the Court in other instances where restrictions on prisoners' rights have been challenged.²⁹⁸ Prison regulations have been upheld in the name of these interests which required inmates to undergo body cavity searches,²⁹⁹ prevented the receipt of packages,³⁰⁰ prevented the prisoners from associating freely,³⁰¹ and prevented the prisoners from receiving uncensored and unsearched mail.³⁰² In a proceeding against a hunger striker, therefore, the state may also assert these interests as limitations on the rights of the inmate.³⁰³

The first institutional interest — the preservation of internal order and discipline — recognizes the need for prison officials to maintain control within prison walls.³⁰⁴ Restrictions on an inmate's rights have been upheld in the name of internal order and discipline in several instances: segregation of an inmate from the rest of the prison population,³⁰⁵ creation of penalties and deterrents by prison administrators,³⁰⁶ denial of

²⁸⁸ *Houchins v. KQED*, 438 U.S. 1, 8 (1978).

²⁸⁹ See *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 125 (1977).

²⁹⁰ *Id.* at 129.

²⁹¹ 416 U.S. 396 (1974).

²⁹² *Id.* at 412.

²⁹³ *Id.* at 398.

²⁹⁴ *Id.* at 412-15.

²⁹⁵ *Id.* at 412.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 546-47 (1979) (restrictions on pre-trial detainees challenged on first and fourteenth amendment grounds); *Jones*, 433 U.S. at 133 (prohibition against prisoners' union's meetings challenged as first amendment violation); *Pell v. Procunier*, 417 U.S. 817, 826 (1974) (restrictions on prison correspondence challenged on first amendment grounds).

²⁹⁹ *Bell*, 441 U.S. at 558-60.

³⁰⁰ *Id.* at 548-50.

³⁰¹ *Jones*, 433 U.S. at 129-33.

³⁰² *Pell*, 417 U.S. at 823-28.

³⁰³ See, e.g., *Chapman*, 87 A.D.2d at 70-71, 450 N.Y.S.2d at 627. In *Chapman*, the court stated: "Whereas a prisoner's right of expression may not be 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." *Id.* (citations omitted).

³⁰⁴ *Bell*, 441 U.S. at 547.

³⁰⁵ *United States ex rel. Walker v. Mancusi*, 467 F.2d 51, 53 (2d Cir. 1972); *Evans v. Mosley*, 455 F.2d 1084 (10th Cir.), cert. denied, 409 U.S. 889 (1972).

³⁰⁶ *LaReau v. MacDougall*, 473 F.2d 974, 977 (2d Cir. 1972), cert. denied, 414 U.S. 878 (1973); *United States ex rel. Tyrrell v. Speaker*, 471 F.2d 1197, 1201 (3d Cir. 1972), on remand sub nom. *Tyrrell v. Taylor*, 394 F. Supp. 9 (E.D. Pa. 1975), modified, 505 F.2d 823 (3d Cir. 1976).

religious meetings,³⁰⁷ and limited censorship of prisoners' mail.³⁰⁸ Thus, this institutional state concern will act as a potent limitation on prisoners' rights.

The second state interest identified in *Procunier* — prison security and the prevention of unauthorized entry³⁰⁹ — frees prison officials to take appropriate action to prevent escape from the correctional facility.³¹⁰ Applying this interest, prison regulations have been approved which prevent the receipt of packages which might contain concealed weapons,³¹¹ and allow prison officials to segregate potentially dangerous inmates.³¹² The state's institutional concern in preventing escapes, therefore, will authorize prison officials to restrict inmates' constitutional rights even more closely.

The final institutional interest identified by the *Procunier* Court was the rehabilitation of prisoners.³¹³ Prison officials have a legitimate interest in rehabilitation and may restrict the freedoms of prisoners to further this interest.³¹⁴ Inmates can be required to work in a prison industry³¹⁵ and to participate in educational programs³¹⁶ in the interest of rehabilitation. Thus, this third state concern may also act to curtail an individual's rights in the prison context.

The prison context, therefore, causes an infusion of institutional state interests.³¹⁷ These interests provide legitimate justifications for restrictions on a prisoner's constitutional rights.³¹⁸ Taken together, the paternal and institutional interests of the state present a formidable counterweight to the asserted rights of the inmate.

3. Judicial Standards in the Prison Context

In the balancing process, the prisoner must overcome a host of state interests.³¹⁹ In addition to the numerous state interests, both paternal and institutional, which may defeat the hunger striker, the current judicial climate is unsympathetic to the prisoner's claims.³²⁰ The Supreme Court has repeatedly recognized that due to the difficulties of running a penal institution, prison officials are entitled to great judicial deference.³²¹ For example, in *Saxbe v. Washington Post*,³²² the Court was faced with a challenged prison

³⁰⁷ *Walker v. Blackwell*, 411 F.2d 23, 24 (5th Cir. 1969); *Sharp v. Sigler*, 408 F.2d 966, 971-72 (8th Cir. 1969).

³⁰⁸ *Procunier*, 416 U.S. at 415; *Taylor v. Sterrett*, 532 F.2d 462, 468 (5th Cir. 1976).

³⁰⁹ *Procunier*, 416 U.S. at 412.

³¹⁰ *Bell*, 441 U.S. at 547.

³¹¹ *Id.* at 548-51.

³¹² See *United States ex rel. Walker v. Mancusi*, 467 F.2d 51, 53 (2d Cir. 1972).

³¹³ *Procunier*, 416 U.S. at 412.

³¹⁴ *Brown v. Peyton*, 437 F.2d 1228, 1231 (4th Cir. 1971).

³¹⁵ *Clayborne v. Long*, 371 F. Supp. 1320, 1323 (M.D. Ala. 1974); *Laaman v. Hancock*, 351 F. Supp. 1265, 1270 (D.N.H. 1972); *Wilson v. Kelley*, 294 F. Supp. 1005, 1012 (N.D. Ga.), *aff'd*, 393 U.S. 266 (1968).

³¹⁶ *Jackson v. McLemore*, 523 F.2d 838, 839 (8th Cir. 1975); *Rutherford v. Hutto*, 377 F. Supp. 268, 272 (E.D. Ark. 1974).

³¹⁷ See generally *Bell*, 441 U.S. at 520; *Jones*, 433 U.S. at 119.

³¹⁸ See *supra* notes 288-316 and accompanying text.

³¹⁹ See *supra* notes 243-318 and accompanying text.

³²⁰ *Singer, Prisoners' Rights Litigation: A Look At the Past Decade, and a Look at the Coming Decade*, 44 FED. PROB., Dec. 1980, 1, 8.

³²¹ *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 128 (1977); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 849 (1974); *Pell v. Procunier*, 417 U.S. 817, 827 (1974).

³²² 417 U.S. 843 (1974). *Saxbe* involved a challenge by newsmen and inmates of a federal prison regulation prohibiting interviews between the media and individually designated inmates. *Id.* at 844.

regulation which restricted media access to the inmates.³²³ In upholding the restriction, the Court expressly relied on the "expert and professional" judgment of the prison administrator, who believed that interviews could lead to disciplinary problems.³²⁴ Similarly, the Court upheld the same type of regulation in *Pell v. Procunier*,³²⁵ while also relying on the judgment of prison officials.³²⁶ Accordingly, prison officials are given great latitude in the day-to-day administration of a correctional facility,³²⁷ and this deference impacts upon prisoners' assertions of constitutional rights.

The Court's policy of deference to the prison officials shifts the burden of proof to the party against whom the officials are attempting to enforce their regulations.³²⁸ The Court has repeatedly held that in the absence of substantial evidence to the contrary, the validity of prison administrators' judgments will be upheld.³²⁹ In *Jones v. North Carolina Prisoners' Union*,³³⁰ the Court allowed a ban on inmate solicitations for group meetings because it was rationally related to the reasonable objectives of orderly prison administration.³³¹ The rational relation standard was also applied in *Bell v. Wolfish*.³³² *Bell* involved a challenge by inmates of several prison policies which were alleged to violate the prisoners' privacy rights.³³³ Applying the rational relation standard, the Court upheld all of the challenged policies.³³⁴

These cases illustrate the effect of a prisoner's incarceration on the adjudication of his constitutional rights.³³⁵ Normally, state regulations impinging constitutional privacy rights would mandate a strict judicial examination.³³⁶ In the prison context, however, the prisoner, due to his incarceration will be denied the heightened judicial protection he would otherwise be afforded.³³⁷ Instead, the appropriate judicial scrutiny for alleged

³²³ *Id.* at 848.

³²⁴ *Id.* at 849. There was no suggestion, however, that this particular prison administration possessed any more "expertise" than any other prison administration. *See id.* at 848.

³²⁵ 417 U.S. 817, 835 (1974).

³²⁶ *Id.* at 827.

³²⁷ *Cruz v. Beto*, 405 U.S. 319, 321 (1972).

³²⁸ *Jones*, 433 U.S. at 128; *Pell*, 417 U.S. at 827.

³²⁹ *Bell*, 441 U.S. at 548; *Jones*, 433 U.S. at 128; *Pell*, 417 U.S. at 827.

³³⁰ 433 U.S. 119 (1977).

³³¹ *Id.* at 129. In *Jones*, the prisoners claimed that several of their first amendment rights were violated by prison officials, such as the prevention of the prisoners' union from meeting and solicitation of inmates for the union, and mail restrictions. *Id.* at 122.

³³² *See Bell*, 441 U.S. at 538.

³³³ *Id.* at 525-27. In *Bell*, the prisoners challenged the Metropolitan Correctional Center's policies of "double bunking" inmates in a single occupancy cell, prohibiting them from receiving books and packages not directly from the supplier, and routine body cavity searches of prisoners. *Id.*

³³⁴ *Id.* at 550-59.

³³⁵ *See supra* notes 288-334 and accompanying text.

³³⁶ *United States v. Carolene Products*, 304 U.S. 144 (1938). In *Carolene Products*, the Court explained that it reserves the application of strict judicial scrutiny for the examination of governmental policies which act to restrict the political process, or which are aimed at discrete and insular minorities. *Id.* at 152 n.4. Footnote four in *Carolene Products* articulates the approach adopted by the Supreme Court in its application of different levels of scrutiny. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6 (1978). This doctrine has been extended to allow strict judicial examination of situations where the fundamental constitutional rights of the individual are infringed. *Id.* at § 11-4. *See also Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (strict scrutiny of statute prohibiting possession of obscene materials within home); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (strict scrutiny of statute prohibiting distribution of contraceptives).

³³⁷ *See supra* notes 223-40 and accompanying text.

violations of a prisoner's fundamental rights shifts to the rational relation standard.³³⁸ Under this standard, the prisoner will find it difficult to overcome the asserted interests of the state.³³⁹ This difficulty is illustrated by the Massachusetts case of *Commissioner of Corrections v. Meyers*.³⁴⁰ In *Meyers*, the prisoner asserted his privacy right to prevent state officials from administering hemodialysis against his will.³⁴¹ The court stated that taken together, the paternal interests of the state and Meyer's privacy right yield a "very close balance" of interests.³⁴² The *Meyers* court concluded, however, that consideration of the state's institutional interests, with its resultant shift in judicial scrutiny, decisively tipped the balance in favor of the state.³⁴³ As *Meyers* demonstrates, therefore, the fact of a prisoner's incarceration will significantly influence the weight accorded his constitutional rights, often tipping the balance in favor of the state.

In sum, a prisoner who attempts to establish his right to hunger strike is faced with formidable obstacles.³⁴⁴ His rights will be limited and restricted by an array of paternal and institutional state interests.³⁴⁵ Moreover, he faces a judicial climate which favors the prison administration.³⁴⁶ To prevail, the prisoner must prove that his constitutional rights overcome all of these obstacles.³⁴⁷ Under current constitutional analysis, a court must balance the rights of the individual against the interests of the state.³⁴⁸ The next section will undertake this balancing process.³⁴⁹

III. APPLICATION OF THE FRAMEWORK: THE BALANCING PROCESS

The proper judicial approach to a hunger strike case entails the balancing of the prisoner's constitutional rights to privacy and free expression against the interests of the state in the correctional facility context. To evaluate the requisite balancing, this section will apply the constitutional framework to a hypothetical hunger-striking prisoner.³⁵⁰ The rights to privacy and of free expression will be analyzed according to the following scheme. The relative weight of the prisoner's constitutional rights will be briefly discussed.³⁵¹ Next, each state interest will be separately applied and its relative merit

³³⁸ See *supra* notes 319-34 and accompanying text.

³³⁹ Most cases seem to be won or lost on the court's choice of the proper judicial scrutiny. Once the rational relation standard is adopted, the outcome is usually against the party challenging the state regulation. See *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179-80 (1980), *reh'g denied*, 450 U.S. 960 (1980); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 159 (1973); *Railway Express Agency v. New York*, 336 U.S. 106, 111 (1949); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 196 (1938). Conversely, if strict judicial scrutiny is applied, the government can rarely justify its statute or regulation. See *Mobile v. Bolden*, 446 U.S. 55, 76 (1980); *Zablocki v. Redhail*, 434 U.S. 374, 391 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977); *Graham v. Richardson*, 403 U.S. 365, 383 (1971).

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

³⁴¹ *Id.* at 257, 399 N.E.2d at 453.

³⁴² *Id.* at 263, 399 N.E.2d at 457.

³⁴³ *Id.* at 264, 399 N.E.2d at 457.

³⁴⁴ See *supra* notes 243-343 and accompanying text.

³⁴⁵ See *supra* notes 243-318 and accompanying text.

³⁴⁶ See *supra* notes 319-343 and accompanying text.

³⁴⁷ See, e.g., *Meyers*, 379 Mass. at 255, 399 N.E.2d at 452, in which the court held that the prisoner's constitutional right to privacy was not strong enough to outweigh the combined interests of the state.

³⁴⁸ See *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 125-27 (1977).

³⁴⁹ See *infra* notes 350-479 and accompanying text.

³⁵⁰ See *infra* notes 355-479 and accompanying text.

³⁵¹ See *infra* notes 355-62 and 451-56 and accompanying text.

evaluated.³⁵² Finally, the individual's rights and all the state interests will be considered *in toto* to complete the balancing process.³⁵³ After this balancing of constitutional rights against state interests, a proposal for a new evaluation of the personal privacy right will be discussed.³⁵⁴

A. Right to Privacy Versus the Interests of the State

The hunger strikers in *Zant*, *Chapman*, and *Narick* claimed that their right to privacy entitled them to refuse force-feedings by the state officials.³⁵⁵ As previously indicated, the right to privacy in the context of a hunger strike involves two components: the right to bodily integrity and the right to self-determination.³⁵⁶ The right to bodily integrity allows the individual to prevent intrusions upon his person.³⁵⁷ This right, therefore, may be invoked by a prisoner who is threatened with force-feedings, either intravenously or by means of a gastric nasal tube. In both types of treatment, the prisoner's person has been violated without his consent. Such nonconsensual medical procedures are in contradiction to the doctrine of informed consent and infringe the individual's right to bodily integrity.³⁵⁸ Thus, the right to bodily integrity weighs heavily for the prisoner in the hunger strike situation.

The right to self-determination also provides great support to the prisoner. A hunger strike is a decision by the prisoner to pursue a specific course of action.³⁵⁹ From the nature of hunger striking, it can be presumed that a prisoner will undertake such a course of conduct only if he strongly believes in his purpose.³⁶⁰ The fundamental right of the individual to hold any belief he wishes and to pursue a course of conduct accordingly is at the core of the right to self-determination.³⁶¹ Many scholars have found this right so essential that it has been considered the prerequisite for the enjoyment of all other liberties.³⁶² When prison officials compel a hunger striker to eat, they act to curtail the

³⁵² See *infra* notes 363-428 and accompanying text.

³⁵³ See *infra* notes 430-79 and accompanying text.

³⁵⁴ See *infra* notes 480-500 and accompanying text.

³⁵⁵ *Zant*, 248 Ga. at 833, 286 S.E.2d at 716; *Chapman*, 87 A.D.2d at 66, 450 N.Y.S.2d at 624; *Narick*, 292 S.E.2d at 58.

³⁵⁶ See *supra* notes 138-93 and accompanying text.

³⁵⁷ See Cantor, *Bodily Integrity*, *supra* note 142, at 237.

³⁵⁸ See generally Note, *Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship*, 79 YALE L.J. 1533 (1970).

³⁵⁹ See, e.g., *Chapman*, 87 A.D.2d at 67, 450 N.Y.S.2d at 625, where the prisoner *chose* not to eat because of his desire to draw attention to the plight of starving children throughout the world.

³⁶⁰ Given the profound effects of an individual's decision to hunger-strike, it is clear that the prisoner strongly believes in his purpose. Presumably, if the individual wavers in his purpose, he will begin to eat again. Thus, the "strength" of the belief is easily determined by the prisoner's adherence to his strike. As to the nature of the belief, it is not for any court to evaluate subjectively the "importance" of the prisoner's belief. In *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980), a case involving a challenge to a state fornication law, the Pennsylvania Supreme Court noted that the state's "police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality, not to enforce a majority morality on others." *Id.* Similarly, with respect to *ideas* protected by the first amendment, Justice Marshall stated in his majority opinion in *Stanley v. Georgia*, 394 U.S. 557 (1966): "The constitutional guarantee is not confined to the expression of ideas that are conventional or shared by a majority." *Id.* at 566. Thus, the right to self-determination, as a constitutional guarantee, would be meaningless if the prisoner's ability to express himself were subject to evaluation of the "worth" of his purpose.

³⁶¹ See *supra* notes 163-93 and accompanying text.

³⁶² See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("the right

actions of an individual which are premised on his fundamental beliefs. Force-feeding, therefore, impinges the individual's right to self-determination.

The prisoner, after invoking his personal privacy right, will have to contend with the asserted interests of the state. Each state interest, therefore, must be separately considered in the hunger strike context.³⁶³ Moreover, the relative importance of these state interests³⁶⁴ must be considered and balanced against the privacy right of the individual.³⁶⁵ In this respect, the first of the state's paternal interests — the preservation of life — weighed heavily against the hunger strikers in *Zant*, *Chapman*, and *Narick*.³⁶⁶ Since a hunger strike, if carried to the extreme, will end in death, this interest will act as a strong limitation against a prisoner's right to strike under a traditional mode of analysis.³⁶⁷ As such, it may be compelling enough to tip the balance against the prisoner in many instances.

The state's interest in the preservation of life, however, is premised on the assumption that citizens want to enjoy uninterrupted life.³⁶⁸ Where a competent individual declines life-saving medical treatment, the normal congruity of interests between individual welfare and state protection is disrupted.³⁶⁹ The presumption that the citizen demands self-preservation is no longer operative.³⁷⁰ This argument applies with equal force to the hunger striker. His decision not to eat is a denial of the wish to continue living. This is not to say, of course, that every prisoner who initiates a hunger strike intends to die.³⁷¹ A great number of cases involve strikes by prisoners with no intent to die.³⁷² There is, however, no better way to test the resolution of a prisoner than by letting him continue his hunger strike uninterrupted. Any prisoner who has not made a serious and fundamental personal decision will begin to eat again. Those hunger strikers who persist in refusing to eat will demonstrate the conflict of interests between the individual and society described above.³⁷³

The state might also argue that its interest in the preservation of life includes promotion of respect for the general sanctity of human life.³⁷⁴ Yet it is clear that our society has some values which apparently outweigh its general concern for human life.³⁷⁵

to be let alone" is the most comprehensive of rights and the right most valued by civilized men); see also Cantor, *Bodily Integrity*, *supra* note 142, at 241.

³⁶³ See *infra* notes 368-426 and accompanying text.

³⁶⁴ *Id.*

³⁶⁵ See *infra* notes 427-79 and accompanying text.

³⁶⁶ *Zant*, 248 Ga. at 834, 286 S.E.2d at 716; *Chapman*, 87 A.D.2d at 68, 450 N.Y.S.2d at 626; *Narick*, 292 S.E.2d at 58.

³⁶⁷ See, e.g., *Narick*, 292 S.E.2d at 58, in which the court expressly held that the state's interest in preservation of life outweighed the prisoner's right.

³⁶⁸ Cantor, *Bodily Integrity*, *supra* note 142, at 243.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ Although there have been many reported instances of hunger-striking, see *supra* note 126, the cases highlighted in this note represent the only instances where the prisoner refused to eat for a substantial period of time.

³⁷² See *supra* note 371.

³⁷³ See Cantor, *Bodily Integrity*, *supra* note 142, at 243.

³⁷⁴ See *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. at 728, 370 N.E.2d at 417.

³⁷⁵ See Friedman, *Interference with Human Life: Some Jurisprudential Reflections*, 70 COLUM. L. REV. 1058, 1065-67 (1970). Professor Friedman argues that society, through the instrument of the state, has shortened or otherwise terminated individuals' lives on the basis of "natural law" concepts. *Id.* The reasons advanced for interference with human life include wars of self-defense, medical experimentation, euthanasia, and the police power. *Id.* at 1067-75.

Self-determination is such a value.³⁷⁶ In *Saikewicz*, the court recognized that the right to self-determination was what gave value to human life.³⁷⁷ That court reasoned that the value of life so perceived is lessened by the refusal to allow the individual the right of choice.³⁷⁸ Thus, while on its face the state interest in the preservation of life appears to weigh heavily against the hunger striker, upon closer examination the importance of the state interest diminishes when measured against the privacy right of the competent individual who is willing to die. When viewed in terms of these arguments, this first paternal interest should not be accorded great significance in the context of a hunger-striking individual.³⁷⁹

The second paternal interest of the state is the prevention of suicide.³⁸⁰ The *Chapman* court relied heavily on this state interest in rejecting Chapman's privacy claim.³⁸¹ That court held that Chapman's attempt to assert constitutional protections for his hunger strike was "ludicrous" in light of the state's legitimate and compelling interest in the prevention of suicide.³⁸² The hunger striker, as one who is attempting to bring about his own demise, must always overcome the state's assertion of this interest. As *Chapman* illustrates, this task will often be difficult to accomplish.³⁸³

The state's interest in the prevention of suicide, however, is actually an interest in preventing irrational self-destruction.³⁸⁴ The principal objective of the suicide statutes is to secure assistance for the individual whose suicide attempts are the products of rash, unbalanced, or confused judgments.³⁸⁵ If the individual has made a deliberate choice to die, the state's interest acts only as a temporary postponement, for a determined individual can likely find several alternatives.³⁸⁶ A hunger strike requires unwavering determination over a period of weeks.³⁸⁷ Thus, a decision by a prisoner to refuse food cannot be said to be a product of rash action. Competency, therefore, is the key to weakening the impact of this state interest. In *Zant* and *Chapman* each hunger striker was expressly adjudged to be competent, thereby eliminating the concern that his decision not to eat was an unbalanced one.³⁸⁸

A hunger striker also might argue that his conduct did not fall within the statutory definition of suicide.³⁸⁹ The *Saikewicz* court defined suicide as consisting of both an intent

³⁷⁶ *Id.* Courts have often implicitly found the right to self-determination to outweigh society's concern when they have allowed an individual or his guardian to choose a course of conduct which would result in death. See *In re Osborne*, 294 A.2d 372, 376 (D.C. 1972); *In re Schiller*, 148 N.J. Super. 168, 174, 372 A.2d 360, 363 (1977); *In re Melideo*, 88 Misc. 2d 974, 975, 390 N.Y.S.2d 523, 524 (Sup. Ct. 1976).

³⁷⁷ *Saikewicz*, 373 Mass. at 742, 370 N.E.2d at 426.

³⁷⁸ *Id.*

³⁷⁹ See *supra* notes 359-78 and accompanying text.

³⁸⁰ *Saikewicz*, 373 Mass. at 741, 370 N.E.2d at 425.

³⁸¹ *Chapman*, 87 A.D.2d at 68, 450 N.Y.S.2d at 625.

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Saikewicz*, 373 Mass. at 743 n.11, 370 N.E.2d at 426 n.11.

³⁸⁵ Cantor, *Bodily Integrity*, *supra* note 142, at 256.

³⁸⁶ WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 293 (1956).

³⁸⁷ Note that all three hunger strikers discussed herein had resolutely held to their refusals to eat for at least three weeks before the prison administrators initiated proceedings. *Zant*, 248 Ga. at 833, 286 S.E.2d at 716; *Chapman*, 87 A.D.2d at 67, 450 N.Y.S.2d at 625; *Narick*, 292 S.E.2d at 55.

³⁸⁸ *Zant*, 248 Ga. at 833, 286 S.E.2d at 716; *Chapman*, 87 A.D.2d at 67, 450 N.Y.S.2d at 625; see also *Narick*, 292 S.E.2d at 55.

³⁸⁹ *Cf. Satz v. Perlmutter*, 362 So.2d 160 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So.2d 359 (Fla. 1980). The *Satz* court was faced with a request to allow Perlmutter to be disconnected from a

to die and an active setting of the death-producing agent in motion.³⁹⁰ Under this definition, the inmate could assert that he did not intend to die, but only intended his hunger strike as a protest aimed at producing a certain condition. Alternatively, the prisoner could argue that his death would be caused through his nonfeasance, and not by any act he himself has committed.³⁹¹ Neither argument is persuasive. Efforts to distinguish suicide on the basis of misfeasance versus nonfeasance or affirmative acts versus passive refusals have not convinced many commentators.³⁹² Nor is an attempt to argue lack of intent to die effective, because a hunger striker knows with a substantial certainty that the result of his actions will be his own death.³⁹³ Furthermore, even though an act does not fall within the statutory definition of suicide, the state's policy in prevention of suicide still may be relevant.³⁹⁴

Avoidance of characterizing the hunger strike as an attempt to bring about self-destruction, therefore, appears unlikely. As illustrated by the cases, the state does have a legitimate and compelling interest in the prevention of suicide.³⁹⁵ This state interest will weigh heavily against the prisoner in the balancing of rights and interests. Thus, the only way an inmate can overcome this strong state interest is by asserting an even stronger personal constitutional guarantee. This reasoning is precisely the position adopted by some commentators: an individual, by virtue of his personal privacy right, should be permitted to die when his decision is clearly competent and deliberate, regardless of the form of self-destruction.³⁹⁶

The third paternal interest of the state is the protection of dependents.³⁹⁷ The state has a legitimate interest in preventing an individual from dying when it would be forced to assume the burden of supporting that individual's dependents.³⁹⁸ If dependents exist, therefore, this state concern will weigh heavily against the prisoner.³⁹⁹ Thus, the weight

lifesaving device. *Id.* at 160-61. The court held that Perlmutter's wish to terminate treatment was not a statutory suicide attempt, since, if he were disconnected, his death would result from natural causes and not his own acts. *Id.* at 162.

³⁹⁰ *Saikewicz*, 373 Mass. at 743 n.11, 370 N.E.2d at 426 n.11.

³⁹¹ See, e.g., *Satz v. Perlmutter*, 362 So.2d 160, 163 (Fla. Dist. Ct. App. 1978). A similar argument to the one made in *Satz* could be made for the hunger striker. The prisoner would claim that his refusal to eat has the same legal significance as Perlmutter's request to be disconnected from the respirator. See *supra* note 389. Death in both cases would result from natural causes — starvation in the hunger-strike case, and asphyxiation in *Satz*.

³⁹² See, e.g., Cantor, *Bodily Integrity*, *supra* note 142, at 255 n.133; Ford, *Refusal of Blood Transfusions by Jehovah's Witnesses*, 10 CATH. LAW. 212, 225 (1964) [hereinafter cited as Ford, *Refusal of Transfusions*]; Note, *An Adult's Right to Resist Blood Transfusions: A View Through John F. Kennedy Memorial Hospital v. Heston*, 47 NOTRE DAME LAW 571, 574-75 (1972).

³⁹³ W. PROSSER, LAW OF TORTS 32 (4th ed. 1971). With respect to intent, Prosser states that "where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it." *Id.*

³⁹⁴ See *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 101 (Tenn.), *cert. denied*, 424 U.S. 954 (1975). In that case, the court held that the attempt to commit suicide was probably not an indictable offense, but would still be adverse to the state's compelling interest in preventing suicide. *Id.*

³⁹⁵ See *supra* notes 380-94 and accompanying text.

³⁹⁶ See Cantor, *Bodily Integrity*, *supra* note 142 at 258; Ford, *Refusal of Transfusions*, *supra* note 392, at 225; Comment, *Right to Refuse Treatment*, *supra* note 145, at 628.

³⁹⁷ *Saikewicz*, 373 Mass. at 741, 370 N.E.2d at 425.

³⁹⁸ See Comment, *Right to Refuse Treatment*, *supra* note 145, at 615-18.

³⁹⁹ See *Application of the President and Directors of Georgetown College*, 331 F.2d 1000, 1008 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 423, 201 A.2d 537, 538 (1964), *cert. denied*, 377 U.S. 985 (1964).

given to this state concern will vary according to the inmate's particular situation. In *Zant*, *Chapman* and *Narick*, none of the prisoners had dependents and the states were not able to assert this interest.⁴⁰⁰ It seems clear, however, from the related cases of the right to refuse medical treatment that where the state can claim this interest, the balance will be tipped decidedly against the prisoner.⁴⁰¹

The degree of significance accorded the state interest in dependents' financial maintenance, however, could be said to vary with the term of a prisoner's incarceration. That is, a hunger striker who is serving an extended prison term might plausibly argue that his incarceration has deprived his dependents, if he has any, of any financial support he might have provided.⁴⁰² While the inmate is incarcerated, the state will have to support his dependents anyway. If the inmate is serving a shorter term, the state will still be able to claim this interest since the prisoner will be able to work again once he is released. In light of the above arguments, the effectiveness of the state's assertion of this interest will be diminished in those hunger-strike cases where dependents actually exist.

The last paternal interest of the state is the maintenance of the ethical integrity of the medical profession.⁴⁰³ The state may claim it has a legitimate interest in allowing doctors to practice in accordance with accepted mores.⁴⁰⁴ Those mores dictate that doctors prolong the lives of patients in their care.⁴⁰⁵ A number of recent decisions, however, have tended to dismiss the importance of this interest. In *In re Quinlan*,⁴⁰⁶ the New Jersey Supreme Court ruled that the individual's strong personal privacy right was superior to the state's interest in medical ethics.⁴⁰⁷ Similarly, in *In re Quackenbush*,⁴⁰⁸ a New Jersey trial court rejected the state's assertion of this interest as clearly secondary to the individual's constitutional rights.⁴⁰⁹ Moreover, in *Narick*, the court held that this state interest did not apply to the facts of a hunger strike case.⁴¹⁰ Thus, even though it may be contrary to

⁴⁰⁰ See *Zant*, 248 Ga. at 832, 286 S.E.2d at 716; *Chapman*, 87 A.D.2d at 66, 450 N.Y.S.2d at 623; *Narick*, 292 S.E.2d at 54. The application of this interest to the balancing process is notably absent in all three hunger-strike cases. *Id.*

⁴⁰¹ See 93 A.L.R.3d 67, *supra* note 262, at 82-83. Once this interest has been found, the courts have been reluctant to hold in the patient's favor. *Id.*

⁴⁰² For example, a prisoner serving a twenty-year sentence will not be able to provide support to his minor dependents. Admittedly, twenty years is an arbitrary line to draw. After twenty years, however, any minor dependents will be adults and able to support themselves after the prisoner is released. The point remains that as long as the prisoner is incarcerated for an extended time he cannot support anyone. Therefore, the state will be forced to assume the obligation.

⁴⁰³ *Saikewicz*, 373 Mass. at 741, 370 N.E.2d at 425.

⁴⁰⁴ See Comment, *Right to Refuse Treatment*, *supra* note 145, at 619.

⁴⁰⁵ See *John F. Kennedy Memorial Hosp. v. Heston*, 58 N.J. 576, 578, 279 A.2d 670, 671 (1971), in which the patient was an auto accident victim who refused to undergo necessary blood transfusions. The New Jersey Supreme Court held, *inter alia*, that since the hospital was an involuntary host and that its interests were contrary to the beliefs of the patient, it was not unreasonable to permit the staff to act according to its professional ethics. *Id.* at 583, 279 A.2d at 673.

⁴⁰⁶ 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied*, 429 U.S. 922 (1976). In *Quinlan*, the father of a twenty-one year old woman in a persistent vegetative state sought the express power to authorize the discontinuance of treatment. *Id.* at 15, 355 A.2d at 651. The New Jersey court concluded that the father could exercise his daughter's right to self-determination, which included the right to discontinue treatment. *Id.* at 51, 355 A.2d at 669.

⁴⁰⁷ *Id.* at 42-51, 355 A.2d at 664-69.

⁴⁰⁸ 156 N.J. Super. 282, 383 A.2d 785 (1978). In *Quackenbush*, the court upheld a guardian's decision to refuse the amputation of his ward's legs, based on the privacy interests of the patient. *Id.* at 290, 383 A.2d at 790.

⁴⁰⁹ *Id.* at 290, 383 A.2d at 789.

⁴¹⁰ *Narick*, 292 S.E.2d at 57. The West Virginia court, however, did not indicate its reasoning for not applying this interest to the facts of the case. See *id.*

accepted medical practice to let a hunger-striking prisoner die, the state will not be able to use this interest effectively against the inmate. In light of the cases, this state interest is not applicable in the context of a hunger-striking prisoner.⁴¹¹ Thus, even if the state advances this argument, the balancing process should remain unaffected.

While the four paternal interests of the state do not yield a decisive answer when balanced against the rights of the individual,⁴¹² they constitute only part of the state's array of interests. The state may also assert its institutional interests as identified in *Procunier*.⁴¹³ In a proceeding against a hunger-striking prisoner, the state will advance its institutional interests as justifications for its restrictions of the inmate's rights.⁴¹⁴ The first institutional interest — the preservation of internal order and discipline — has been held to allow prison officials to restrict an inmate's constitutional rights.⁴¹⁵ A hunger striker can cause disorder and unrest in a cell block, which may be reason enough to allow prison officials to force-feed him.⁴¹⁶ In *Chapman*, the court noted that the prisoner's hunger strike had caused disruption in the procedures in his unit, resentment among the other inmates and resulted in other prisoners adopting the "starvation technique."⁴¹⁷ Such effects, if alleged and proved by the state, would weigh heavily against the hunger striker.

The second institutional interest of the state — prison security and prevention of unauthorized entry⁴¹⁸ — is of doubtful applicability considering the weakened state of a prisoner who has not eaten for several days.⁴¹⁹ A prisoner confined to a bed in the infirmary, near coma and constantly monitored by the hospital staff, is not a high escape risk.⁴²⁰ Logically, however, prison administrators could argue that the added attention given to the hunger striker detracts from the overall security for the entire prison. Although this argument has never been advanced, it could conceivably militate against the prisoner in light of the current judicial deference accorded to penal administrators.⁴²¹

The third institutional interest of the state is the rehabilitation of prisoners.⁴²² Prison administrators have a legitimate interest in rehabilitation and may restrict freedoms of the prisoner to further this interest.⁴²³ Useful productive labor for all prisoners is seen as a basic element in rehabilitation.⁴²⁴ Moreover, prison labor has been involuntarily imposed upon inmates with the approval of most courts.⁴²⁵ There is no recognized right to decline rehabilitation.⁴²⁶ It can be assumed that a prisoner who hunger strikes until he dies has

⁴¹¹ See *supra* notes 403-10 and accompanying text.

⁴¹² See *supra* notes 355-411 and accompanying text.

⁴¹³ See *infra* notes 414-31 and accompanying text.

⁴¹⁴ See, e.g., *Chapman*, 87 A.D.2d at 67, 450 N.Y.S.2d at 624.

⁴¹⁵ *Procunier v. Martinez*, 416 U.S. 396, 412 (1974).

⁴¹⁶ *Chapman*, 87 A.D.2d at 67, 450 N.Y.S.2d at 625.

⁴¹⁷ *Id.*

⁴¹⁸ *Procunier*, 416 U.S. at 412.

⁴¹⁹ See, e.g., *Zant*, 248 Ga. at 83, 286 S.E.2d at 716, where the prisoner was in ketosis, in a coma, and in danger of dying.

⁴²⁰ In each case discussed herein, the prisoner had been transferred to a medical center, had lost excessive weight and was in danger of dying. *Zant*, 248 Ga. at 833, 286 S.E.2d at 716; *Chapman*, 87 A.D.2d at 67, 450 N.Y.S.2d at 625; *Narick*, 292 S.E.2d at 55.

⁴²¹ See *supra* notes 319-43 and accompanying text.

⁴²² *Procunier*, 416 U.S. at 412.

⁴²³ *Brown v. Peyton*, 437 F.2d 1228, 1231 (4th Cir. 1971).

⁴²⁴ RUBIN, *LAW OF CRIMINAL CORRECTIONS* 326 (2d ed. 1973).

⁴²⁵ Note, *A New Perspective in Prisoners' Rights: The Right to Refuse Treatment and Rehabilitation*, 10 J. MAR. J. PRAC. & PROC. 173, 175 (1976). [hereinafter cited as Note, *New Perspective*].

⁴²⁶ *Id.* at 175-77.

prevented the state from rehabilitating him. Since the state's interest in rehabilitation applies to all prisoners, the inmate cannot avoid the impact of this interest by virtue of his hunger strike. The state's interest in rehabilitation, therefore, runs strongly against the prisoner.

The institutional interests of the state appear to provide a strong argument in favor of the prison administrators against the inmate's right to hunger strike.⁴²⁷ Moreover, the state's position becomes practically insurmountable when viewed in light of the current judicial climate.⁴²⁸ The Supreme Court has required that great deference be given to prison officials.⁴²⁹ Furthermore, the Court has required that challenged penal restrictions need only bear a rational relation to the reasonable objectives of orderly prison administration.⁴³⁰ The institutional interests of the state and the rationale behind them, applied to the case of a hunger striker, suffice to pass a rational relation standard.⁴³¹

The institutional interests of the state, therefore, provide an effective barrier to judicial recognition of a right to hunger strike.⁴³² On the other hand, states' paternal interests do not yield a clear result either way.⁴³³ The state's interests in the preservation of life and the prevention of suicide will be given great weight,⁴³⁴ while the interests in the protection of dependents⁴³⁵ and medical ethical integrity are not entitled to much consideration.⁴³⁶ If the hunger strike was removed from the prison context, the balancing process would be difficult.⁴³⁷ The outcome would depend on the court's evaluation of the relative strength of the personal privacy right.⁴³⁸ In the prison context, however, the balancing process yields a clear result. The injection of the state's strong interests in maintaining order and institutional security and in rehabilitation decisively tip the balance in favor of the state.⁴³⁹ Furthermore, the application of the "rational relation" standard in the prison context renders the prisoner's chances of prevailing in asserting his right extremely unlikely.⁴⁴⁰

A hunger striker might argue that his personal privacy right is so strong that it

⁴²⁷ See *supra* notes 413-26 and accompanying text.

⁴²⁸ See *supra* notes 319-43 and accompanying text.

⁴²⁹ *Saxbe v. Washington Post Co.*, 417 U.S. 843, 849 (1974); *Pell v. Procunier*, 417 U.S. 817, 827 (1974).

⁴³⁰ *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 129 (1977).

⁴³¹ See *supra* notes 413-29 and accompanying text.

⁴³² See *supra* notes 413-31 and accompanying text.

⁴³³ See *supra* notes 366-411 and accompanying text.

⁴³⁴ See *supra* notes 474-95 and accompanying text.

⁴³⁵ See *supra* notes 397-402 and accompanying text. The state's interest in the protection of dependents will probably be of no weight in the balancing process since past experience has shown that the hunger striker does not have any dependents. See *Zant*, 248 Ga. at 834, 286 S.E.2d at 717; *Chapman*, 87 A.D.2d at 67, 450 N.Y.S.2d at 625; *Narick*, 292 S.E.2d at 57. Furthermore, even if dependents exist, this interest may not be entitled to much consideration if the prisoner is serving an extended sentence. See *supra* note 402 and accompanying text. If dependents do exist, and the prison term is short, this interest becomes important and may even be dispositive. *Id.*

⁴³⁶ See *supra* notes 403-11 and accompanying text.

⁴³⁷ See, e.g., *Commissioner of Corrections v. Meyers*, 379 Mass. 255, 399 N.E.2d 452 (1979). The Massachusetts Supreme Judicial Court concluded that, taken together, the state's paternal interests and the individual's personal privacy right "yield a very close balance of interests." *Id.* at 263, 399 N.E.2d at 457. With such a close balance, subjective evaluations of the relative merit of each interest could easily tip the balance in either direction.

⁴³⁸ See *id.*

⁴³⁹ See *id.* at 266, 399 N.E.2d at 458.

⁴⁴⁰ See *supra* notes 319-43 and accompanying text.

overcomes the combined paternal and institutional interests of the state. Indeed, this is precisely the position that the *Zant* court adopted.⁴⁴¹ *Zant* held that the individual's right to personal privacy was superior to the compelling interests of the state.⁴⁴² Yet, both the *Chapman* and *Narick* courts, when faced with identical cases, reached the opposite result.⁴⁴³ These results may indicate the influence of subjective judgments and valuations by the courts that are beyond articulation. The *Zant* court used the same balancing process described above.⁴⁴⁴ The difference in result can probably be attributed to the injection of the court's own subjective evaluation of the relative weight of each factor, none of which were articulated in the opinion.⁴⁴⁵ For future cases, it would seem that subjective evaluations of the strength of each factor might affect the balancing process and lead to inconsistent results.

The problem of subjectivity is answered by the Supreme Court's approach to prisoners' rights. The Court has adopted a rational relation framework,⁴⁴⁶ the purpose of which is to allow courts to avoid making difficult subjective value judgments which may be made more appropriately by another branch of government.⁴⁴⁷ The Court has adopted an approach which gives penal officials the authority to run the prison system with minimal oversight by the courts.⁴⁴⁸ Thus, if prison officials contest the hunger strike with the rational arguments described above, the courts should resolve the case in the state's favor. Under present law, however, the prison administrators may compel a hunger striker to take nourishment, regardless of his claimed privacy rights.

B. Right to Free Expression Versus the Interests of the State

The prisoner cannot claim the "absolute" protections of the first amendment.⁴⁴⁹ Since a hunger strike involves conduct as well as speech, the state has much greater latitude in regulating this type of expression than in regulating actual speech.⁴⁵⁰ The state may assert any of its legitimate interests to justify restrictions of free expression.⁴⁵¹ Furthermore, the hunger striker's imprisonment subjects his free expression right to

⁴⁴¹ *Zant*, 248 Ga. at 834, 286 S.E.2d at 717.

⁴⁴² *Id.*

⁴⁴³ *Chapman*, 87 A.D.2d at 71, 450 N.Y.S.2d at 627; *Narick*, 292 S.E.2d at 58.

⁴⁴⁴ See generally *Zant*, 248 Ga. at 833-34, 286 S.E.2d at 715-16.

⁴⁴⁵ See *id.*

⁴⁴⁶ See *supra* notes 319-43 and accompanying text.

⁴⁴⁷ See *New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976); *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963); *Railway Express Agency v. New York*, 336 U.S. 106, 109 (1949). In these cases, the Supreme Court recognized its limitations as a governmental institution. See *Ferguson*, 372 U.S. at 732. Certain judgments require either intensive empirical investigation or the use of subjective value judgments. In the former case, the legislature is better suited to make the investigation through committees or hearings. See *Dukes*, 427 U.S. at 303-04. In the latter case, the subjective value judgments often involve decisions which represent a policy choice rather than an issue of law. See *Railway Express*, 336 U.S. at 109. In these circumstances, the Court defers to the legislature as the decision-making body since they are elected by the people and can be said to represent the wishes of the majority. See *Ferguson*, 372 U.S. at 932.

⁴⁴⁸ See *supra* notes 319-49 and accompanying text. The combination of judicial deference toward prison administrators and the low judicial review standard for justifying those policies provides for minimal judicial oversight. *Id.*

⁴⁴⁹ See *supra* notes 194-222 and accompanying text.

⁴⁵⁰ See *Spence v. Washington*, 418 U.S. 405, 409 (1974); *California v. LaRue*, 409 U.S. 109, 117 (1972).

⁴⁵¹ *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

additional restrictions.⁴⁵² Thus, the free expression right claimed by the prisoner is not strong. Any action by prison officials to prevent a prisoner from conducting a hunger strike would involve, at most, an incidental restriction of free speech.⁴⁵³ A hunger strike is only a medium by which the prisoner carries out his protest.⁴⁵⁴ The prison officials, for the purpose of rendering necessary medical treatment, will act to curtail the medium of protest, but not the idea directly.⁴⁵⁵ The prison policy of rendering necessary medical treatment has only the incidental effect of restricting the inmate's right to free expression by forcing him to take nourishment.

The standard for testing the validity of an incidental restriction on free expression was enunciated in *United States v. O'Brien*.⁴⁵⁶ In *O'Brien*, a college student burned his draft card in protest of the war in Vietnam.⁴⁵⁷ *O'Brien* was convicted of violating a federal statute which proscribed the intentional destruction of selective service registration cards.⁴⁵⁸ *O'Brien* appealed the conviction, claiming the statute abridged his first amendment freedoms.⁴⁵⁹ The *O'Brien* Court therefore developed a standard to test the validity of the federal statute, which had the incidental effect of restricting *O'Brien's* speech activities.⁴⁶⁰ The standard has been repeatedly reaffirmed by the Court as the correct test for determining the validity of regulations that incidentally restrict first amendment freedoms.⁴⁶¹

Under the standard announced in *O'Brien*, a governmental policy or regulation which acts to restrict speech incidentally is justified if four conditions are met.⁴⁶² First, the policy or regulation must be within the constitutional power of the government.⁴⁶³ Second, the policy or regulation must further an important governmental interest.⁴⁶⁴ Third, the governmental interest must be unrelated to the suppression of free speech.⁴⁶⁵ Last, the

⁴⁵² See *supra* notes 288-303 and accompanying text. Notably, all the institutional interests of the state are also present. *Id.*

⁴⁵³ Cf. *O'Brien*, 391 U.S. at 376-77 (governmental regulation prohibiting intentional destruction of draft cards upheld even though incidentally restricting *O'Brien's* protest against Vietnam war). But see *Procunier v. Martinez*, 416 U.S. 396, 413-15 (1974) (censorship of inmates' outgoing correspondence disallowed as impermissible incidental restriction on first amendment rights of prisoners' correspondents).

⁴⁵⁴ See *Zant*, 248 Ga. at 833, 286 S.E.2d at 716; *Chapman*, 87 A.D.2d at 67, 450 N.Y.S.2d at 625; *Narick*, 292 S.E.2d at 55. The prisoners were all hunger-striking to attract attention to the ideas in which they believed. *Id.* Prevatte was attempting to draw the attention of prison officials to his claim that his life was in danger. *Zant*, 248 Ga. at 833, 286 S.E.2d at 716. Chapman's strike was intended to draw world attention to the plight of starving children. *Chapman*, 87 A.D.2d at 67, 450 N.Y.S.2d at 625. White's hunger strike was in protest of prison conditions at the West Virginia State Penitentiary. *Narick*, 292 S.E.2d at 55.

⁴⁵⁵ See, e.g., *Narick*, 292 S.E.2d at 58. In *Narick*, the prison officials were seeking to save the inmate's life. *Id.* They had no intention of suppressing White's speech; in fact, the court noted that several alternative modes of communication were available to the prisoner. *Id.*

⁴⁵⁶ 391 U.S. 367 (1968).

⁴⁵⁷ See *id.* at 369.

⁴⁵⁸ *Id.* at 369-70.

⁴⁵⁹ *Id.* at 370.

⁴⁶⁰ *Id.* at 377.

⁴⁶¹ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) *reh'g denied*, 103 S. Ct. 199 (1983); *Miller v. California*, 413 U.S. 15, 26 n.8 (1973); *California v. LaRue*, 409 U.S. 109, 116 (1972); cf. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (*O'Brien* test used to determine whether campaign contribution statute violative of first amendment).

⁴⁶² *O'Brien*, 391 U.S. at 377.

⁴⁶³ *Id.*

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

incidental restriction on the alleged first amendment freedoms must be no greater than is essential for the furtherance of that interest.⁴⁶⁶ In *O'Brien*, the Court found that all four conditions were met, and the statute was upheld.⁴⁶⁷

Although the issue of the prevention of a hunger strike as an incidental restriction of free expression has not been carefully examined by any court,⁴⁶⁸ such a restriction probably would be upheld. An examination of the validity of a prison policy which prevented hunger strikes must begin with the realization that the inmate's free expression rights are subject to limits and restrictions.⁴⁶⁹ Thus, the *O'Brien* test would be applied in a context where the individual's rights are diminished and subject to the additional institutional interests of the state.⁴⁷⁰ Applying the *O'Brien* test, first, the power to create prison regulations lies within the scope of authority granted to prison officials.⁴⁷¹ Second, the orderly administration of the prisons has been held to be an important governmental interest.⁴⁷² Coupled with this institutional interest, the state may assert its compelling paternal interests.⁴⁷³ Moreover, with the prevailing judicial willingness to defer to the judgment of prison officials,⁴⁷⁴ it appears certain that an important governmental interest will be found. Third, the governmental interest in the prevention of hunger strikes is unrelated to the suppression of speech.⁴⁷⁵ The government seeks to keep the prisoner alive, not to stifle his free expression.⁴⁷⁶ Finally, the restriction against hunger-striking logically appears to be narrowly tailored to accomplish only that goal.⁴⁷⁷ To do anything less than force-feed him would be to let him die. Under the *O'Brien* standard, therefore, the government meets all four prongs of the test. The government would be justified in incidentally restricting a hunger striker's right to free expression to fulfill its important interests.

In summary, under present law, the right to free expression cannot be utilized to prevent prison officials from force-feeding a hunger-striking prisoner.⁴⁷⁸ Since the right to privacy as presently expounded does not authorize the hunger striker to refuse force-feedings either,⁴⁷⁹ it becomes clear that a state may compel a hunger striker to eat.

C. *Proposal for Change: Comparison With the Emerging Right to Refuse Medical Treatment*

Under present law, a state may compel a hunger-striking prisoner to eat.⁴⁸⁰ This amounts to no less than a judicial sanctioning of state interference in the fundamental

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* at 382.

⁴⁶⁸ Of all the hunger strike cases, the *Chapman* decision was the only one in which a court looked into the prisoner's first amendment claims. *Chapman*, 87 A.D.2d at 70, 450 N.Y.S.2d at 627. Unfortunately for *Chapman*, the court only examined this issue long enough to find that his free expression rights are so limited by his incarceration that his claim was insubstantial. *Id.*

⁴⁶⁹ See *supra* notes 194-222 and accompanying text.

⁴⁷⁰ See *supra* notes 288-318 and accompanying text.

⁴⁷¹ See *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 128-33 (1977).

⁴⁷² *Procunier v. Martinez*, 416 U.S. 396, 412 (1974).

⁴⁷³ See *supra* notes 249-87 and accompanying text.

⁴⁷⁴ See *supra* notes 319-43 and accompanying text.

⁴⁷⁵ The state's purpose is not to prevent the prisoner's message from being disseminated. Its purpose is to keep the hunger striker alive. The *Narick* court noted that in the prison context several alternative means of communication were open to the prisoner. *Narick*, 292 S.E.2d at 58.

⁴⁷⁶ See *id.*

⁴⁷⁷ See *id.*

⁴⁷⁸ See *supra* notes 451-77 and accompanying text.

⁴⁷⁹ See *supra* notes 355-448 and accompanying text.

⁴⁸⁰ See *supra* notes 350-479 and accompanying text.

decision-making process of the individual.⁴⁸¹ The decision-making process is the essence of personal liberty and the prerequisite for effective enjoyment of all other liberties.⁴⁸² Even though it reached the wrong result under the present law, the Georgia Supreme Court in *Zant* recognized the importance of self-determination.⁴⁸³ The court stated that although the state could incarcerate and even execute an individual in certain circumstances, it has no right to destroy a person's freedom of self-determination by frustrating his attempt to communicate a belief so strong that he is willing to die for it.⁴⁸⁴ Thus, the Georgia court placed the realm of an individual's choice to die for a belief beyond state intrusion.⁴⁸⁵ As an act of self-determination, a prisoner's competent decision to hunger-strike must be recognized as a protected element of fundamental personal liberty. The recognition of a core area of personal liberty beyond the reach of the state mandates judicial acceptance of a hunger striker's right to die.

An emerging judicial recognition of the right to die by refusing life-saving medical treatment portends a new, expansive definition of the right to self-determination. Until recently, the right to self-determination did not entitle individuals to refuse necessary medical procedures.⁴⁸⁶ In the last few years, however, patients have been allowed to refuse necessary blood transfusions,⁴⁸⁷ remove life-sustaining respiratory devices,⁴⁸⁸ refuse to undergo treatment for leukemia,⁴⁸⁹ refuse to undergo necessary and life-saving surgery⁴⁹⁰ and to discontinue potentially life-saving treatment for cancer.⁴⁹¹ In those cases, the individual was permitted to choose a course of action which proximately resulted in death.⁴⁹² The right to refuse medical treatment is premised on the rights of self-determination and bodily integrity,⁴⁹³ which are the same rights claimed by the hunger striker. This line of cases, therefore, holds that under certain circumstances, the right to personal privacy outweighs the interests of the state and allows the individual a right to die.⁴⁹⁴ So far, a majority of the courts have limited the certain circumstances in which a right to die exists to those situations where the patient's prognosis for survival is dim.⁴⁹⁵ A significant minority of courts, however, rejects this dim prognosis requirement completely.⁴⁹⁶

⁴⁸¹ See Cantor, *Bodily Integrity*, *supra* note 142, at 241.

⁴⁸² *Zant*, 248 Ga. at 834, 286 S.E.2d at 717.

⁴⁸³ *Id.* The Court stated, "We hold that Prevaute, by virtue of his right of privacy, can refuse to allow intrusions on his person, even though calculated to preserve his life." *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.*

⁴⁸⁶ See generally 93 A.L.R.3d 67, *supra* note 249.

⁴⁸⁷ *In re Osborne*, 294 A.2d 372, 376 (D. D.C. 1972).

⁴⁸⁸ *Satz v. Perlmuter*, 362 So.2d 160, 164 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So.2d 359 (Fla. 1980).

⁴⁸⁹ *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 745, 370 N.E.2d 417, 428 (1977) (decision made by a guardian *ad litem*).

⁴⁹⁰ *In re Quackenbush*, 156 N.J. Super. 282, 290, 383 A.2d 785, 790 (1978); *In re Yetter*, 62 Pa. D. & C.2d 619, 622 (Dist. Ct. 1973).

⁴⁹¹ *Suenram v. Soc'y of Valley Hosp.*, 155 N.J. 593, 601, 383 A.2d 143, 148 (1977).

⁴⁹² See, e.g., *Quackenbush*, 156 N.J. Super. at 282, 383 A.2d at 785, where the patient died shortly after he refused to undergo the amputation of both legs.

⁴⁹³ See Cantor, *Bodily Integrity*, *supra* note 142, at 241.

⁴⁹⁴ See *supra* notes 486-93 and accompanying text.

⁴⁹⁵ See, e.g., *Satz v. Perlmuter*, 362 So.2d 160, 162 (Fla. Dist. Ct. App. 1978); *In re Quinlan*, 70 N.J. 10, 41, 355 A.2d 647, 664 (1976), *cert. denied*, 429 U.S. 922 (1976); *Lane v. Candura*, 6 Mass. App. Ct. 377, 380-81, 376 N.E.2d 1232, 1234 (1978) (by implication).

⁴⁹⁶ *Quackenbush*, 156 N.J. Super. at 290, 383 A.2d at 789; see also *Erikson v. Dilgard*, 44 Misc. 2d 27, 28, 252 N.Y.S.2d 705, 706 (N.Y. Sup. Ct. 1962).

The right to die need not be premised on whether a dim prognosis exists.⁴⁹⁷ In cases where the patient's refusal to consent to treatment on the basis of religious beliefs have been upheld, no dim prognosis existed. Nonetheless, several courts have recognized the right to die in this context.⁴⁹⁸ There is no relevant distinction today for a personal decision based on religious beliefs versus one based on strongly-held fundamental personal beliefs of any other kind.⁴⁹⁹ The patient's refusal to allow treatment and the hunger striker's refusal to eat are both the end result of the individual's personal calculus. Admittedly, the hunger striker faces additional state interests that a right-to-die patient does not have to overcome.⁵⁰⁰ The personal privacy right, however, is so essential to personal liberty, that even these additional state interests should not justify the prevention of a hunger strike.

An individual's right to personal privacy must be extended to include the right to hunger strike. The state must not be allowed to intrude on this most fundamental human liberty. Human dignity is promoted not by keeping an individual alive against his will, but by giving him the liberty to determine his own destiny.

CONCLUSION

Despite the fact that at least three state courts have been squarely faced with suits by a hunger-striking prisoner,⁵⁰¹ no court has yet undertaken a thorough analysis of the constitutional issues presented by such a case. The framework for deciding a hunger-strike case is a balancing process of the individual's personal privacy and free expression rights against the paternal and institutional interests of the state. The relevant privacy rights, the rights of self-determination and bodily integrity, are fundamental liberties which protect an individual's exercise of his personal choice. The state's interests, however, in preserving human life and maintaining order in its prisons strongly mitigates against the prisoner's privacy rights. Under the present law, the state's interest in force-feeding a hunger striker outweigh the prisoner's constitutional rights when due deference is given to prison officials in the administration of prisons.

A prisoner, however, should be given the freedom to act on his fundamental beliefs, when, as in the case of a hunger striker, no other prisoners are harmed. The state's curtailment of a prisoner's hunger strike involves an impermissible intrusion into the individual's personal decision-making calculus. The quality of life is not raised by restricting an individual's fundamental decisions, but by allowing each individual to choose his own lifestyle.

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⁴⁹⁷ See, e.g., *Holmes v. Silver Cross Hosp.*, 340 F. Supp. 125, 136 (N.D. Ill. 1972), where the decedent refused blood transfusions on religious grounds. The court upheld the patient's refusal even though there was every hope for a full recovery if he had accepted the transfusions. *Id.*

⁴⁹⁸ *Martin v. Industrial Accident Comm'n*, 147 Cal. App. 2d 137, 141-42, 304 P.2d 828, 830 (1956); *In re Osborne*, 294 A.2d 372, 376 (D.C. 1972); *In re Brooks* 32 Ill. 2d 361, 373, 205 N.E.2d 435, 442 (1965); *In re Melideo*, 88 Misc. 2d 974, 975, 390 N.Y.S.2d 523, 524 (1976).

⁴⁹⁹ See *Cantor, Bodily Integrity*, *supra* note 142, at 263.

⁵⁰⁰ For a discussion of these institutional interests of the state, see *supra* notes 288-318 and accompanying text.

⁵⁰¹ See *supra* note 3 and accompanying text.