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What They Can Do About It: Prison Administrators' Authority to Force-Feed Hunger-Striking Inmates

Tracey M. Ohm *

I. INTRODUCTION

Prison inmates throughout history have employed hunger strikes as a means of opposition to authority.¹ Inmates engage in hunger strikes for a variety of reasons, often in an attempt to gain leverage against prison officials² or garner attention for the inmate's plight or cause.³ Suicide is a motivating factor for some inmates.⁴ When a

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1. This Note examines hunger strikes undertaken by competent prison inmates. Analysis of hunger strikes by incompetent individuals or nonprisoners invokes different considerations. For more information about these differences, see Julie Levinsohn Milner, *Dignity or Death Row: Are Death Row Rights to Die Diminished? A Comparison of the Right to Die for the Terminally Ill and the Terminally Sentenced?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 279 (1998).

2. B. JAYE ANNO, U.S. DEP'T OF JUSTICE, CORRECTIONAL HEALTH CARE: GUIDELINES FOR THE MANAGEMENT OF AN ADEQUATE DELIVERY SYSTEM 85 (2001); see also Illinois ex rel. Ill. Dep't of Corr. v. Millard, 782 N.E.2d 966, 968 (Ill. App. Ct. 2003) (listing motivating reasons for an inmate's hunger strike as protest of a transfer, protest of treatment while in prison, and protest of continued imprisonment with an intent to continue strike until he was transferred back, released, or dead); *Georgian Prisoners End Hunger Strike*, RUSS. & CIS GEN. NEWSWIRE, Jan. 12, 2006, available at <http://www.lexis.com> (reporting prison hunger strikes had been organized by heads of criminal groups who were trying to exert control over inmates).

3. 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS 224–25 (3d ed. 2002); see also Zant v. Prevatte, 286 S.E.2d 715, 716 (Ga. 1982) (stating reason for prisoner's hunger strike was his desire to be transferred to North Carolina due to fear for his life inside the Georgia prison system); Mason Stockstill, *Four Inmates Claim Hunger Strike for Poor Conditions*, SUN (San Bernardino, Cal.), Dec. 29, 2005, available at <http://www.lexis.com> (featuring prison administrators explaining that prisoners sometimes declare themselves to be on hunger strikes despite the fact that they are still eating).

4. MUSHLIN, *supra* note 3, at 224–25; see also Laurie v. Senecal, 666 A.2d 806, 809 (R.I. 1995) (“In respect to an incarcerated prisoner, we believe that there is no right under either the State or the Federal Constitution to override the compelling interest of the state in the preservation of his or her life and the prevention of suicide.”); cf. Steven C. Bennett, Note, *The Privacy and Procedural Due Process Rights of Hunger Striking Prisoners*, 58 N.Y.U. L. REV.

hunger strike progresses to the stage where the inmate's health or life is in danger prison officials are faced with the decision whether to force-feed the inmate.⁵ In the majority of situations, prison administrators only intervene when the hunger strike becomes life-threatening.⁶ Scholarly discussions of the subject of force-feeding invariably include an examination of conflicting interests: the concerns of prison administrators (often defined in terms of the state's interest) in contrast with the rights of the inmate engaging in the hunger strike.⁷ By far the most media attention about hunger strikes in recent history has been focused on Guantanamo Bay, Cuba. Beginning in July 2005 detainees held in Guantanamo Bay by the United States conducted mass hunger strikes in protest of the purpose and conditions of their imprisonment.⁸ Prison hunger strikes are occasionally reported by the news media if they involve a large number of inmates or an infamous prisoner. For example, in August

1157, 1157 n.1 (1983) (listing four "sometimes overlapping categories" of hunger strikes).

5. MUSHLIN, *supra* note 3, at 225. There are three main methods of force-feeding: nasogastric tube feeding, intravenous feeding, and gastrotomy ("direct surgical access to the stomach"). Bennett, *supra* note 4, at 1176-77. Nasogastric tube feeding is the most common method. *Id.*

6. MUSHLIN, *supra* note 3, at 225.

7. *Id.*; see also D. Sneed & H. Stonecipher, *Prisoner Fasting as Symbolic Speech: The Ultimate Speech-Action Test*, 32 HOW. L.J. 549, 551-60 (1989) (examining how courts have balanced "the expression and privacy claims of the fasting prisoner" and the state's interests); Richard Ansbacher, Note, *Force-Feeding Hunger Striking Prisoners: A Framework for Analysis*, 35 U. FLA. L. REV. 99, 100 (1983) ("The individual's constitutional rights in preventing a forced feeding will be examined in juxtaposition to the state interests."); Bennett, *supra* note 4, at 1163-64 (recommending a hearing before force-feeding where a "judge should balance the inmate's right to privacy—as well as other individual rights that may be implicated by force-feeding—against the state's potentially compelling interest in maintaining prison security"); Joel K. Greenberg, Note, *Hunger Striking Prisoners: The Constitutionality of Force-Feeding*, 51 FORDHAM L. REV. 747, 748-65 (1983) (comparing "bodily integrity" against a "compelling state interest"); Glen Allan Ludwig, Note, *Hunger Striking: Freedom of Choice or the State's Best Interest?*, 10 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 169, 174-81 (1984) (discussing the "state's interest in preserving life" and the "competent person's right to refuse life-sustaining treatment").

8. Mike Mount, *Hunger Strike at Guantanamo Grows*, CNN.COM, Sept. 13, 2005, <http://cnn.com/2005/WORLD/americas/09/13/gitmo.strike>; see also Charlie Savage, *46 Guantanamo Detainees Join Hunger Strike*, BOSTON GLOBE, Dec. 30, 2005, at A2; Jane Sutton, *75 Prisoners Join in Hunger Strike at U.S. Base at Guantanamo Bay*, WASH. POST, May 30, 2006, at A7 (reporting that the recent hunger striking detainees join a few who have been refusing food since August 2005); Letta Taylor, *'People Will Definitely Die'; Guantanamo Inmates Resolute in Second Month of Hunger Strike*, NEWSDAY (Melville, N.Y.), Sept. 10, 2005, at A14.

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2005 a judge in Montgomery County, Maryland ordered force-feeding for Washington, D.C., sniper John Allen Muhammad to end his hunger strike in protest of a prison transfer.⁹ Even former dictator Saddam Hussein engaged in several hunger strikes during his trial for war crimes in Iraq, the longest resulting in voluntary feeding through a tube.¹⁰

This Note will examine the authority allocated to prison administrators in the United States to force-feed hunger striking inmates. It will explore the guidelines provided to administrators by the judicial system, penological organizations, and legislative bodies. Part II examines three sources presently in place from which prison administrators can derive guidance on when and how to respond to hunger-striking inmates: the courts, penological organizations, and legislation.

Part III analyzes the adequacy of the authorization given to prison administrators dealing with inmate hunger strikes. Part IV proposes that because the majority of guidelines, laws, and judicial rulings allow for prison intervention in cases of hunger striking inmates, prison authorities could benefit from greater standardization in the area of hunger strike response. It further proposes that the *Turner* rule, which presents a framework for determining to what degree prison administrators can infringe on inmates' constitutional rights, is applicable to hunger striking inmates. Further, a leading penological organization such as the ACA should develop a set of standards on hunger strike response that uses *Turner* as a basis to ensure constitutional validity. These standards should then be adopted by state legislatures and the federal Bureau of Prisons. Alternatively, the

9. Allan Lengel, *Sniper Goes on Hunger Strike*, WASH. POST, Aug. 26, 2005, at B1 (quoting Judge James L. Ryan as saying Muhammad was "in imminent danger of very serious bodily harm, including death, if he does not begin to receive nourishment within the next several days"); see also *Convicted Sniper 'Must Be Fed'*, BBC NEWS, Aug. 26, 2005, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/4186638.stm> (noting that Muhammad was "reportedly upset with the food he was being served in Maryland and the handling of his legal material"); Tarron Lively, *Lawyer Expects Hunger Strike to End*, WASH. TIMES, Aug. 27, 2005, at A9. A hunger strike by Iraqi prisoners in December 2005 led to an altercation with British soldiers when soldiers tried to force the prisoners to end their hunger strike to coincide with Prime Minister Tony Blair's visit to Basra. *Prisoners Clash with British Guards Over Hunger Strike*, BBC INT'L REP., Dec. 28, 2005, available at <http://www.westlaw.com>.

10. Julian E. Barnes & Zainab Hussein, *Hussein is Hospitalized, Being Fed After Collapse*, L.A. TIMES, July 24, 2006, at A6.

Bureau of Prisons should use the *Turner* framework to supplement existing procedures.

II. EXAMINATION OF AUTHORIZATION AND DIRECTION PROVIDED TO PRISON AUTHORITIES IN REGARD TO INMATE HUNGER STRIKES

Hunger strikes have long been a tool of protest for prisoners throughout the world.¹¹ In the United States, hunger strikes gained notoriety in 1917 with suffragists who were jailed for their protests in support of women's voting rights.¹² Taking a page from British suffragists who had some success with the tactic,¹³ many of the women who were jailed went on hunger strikes to protest their imprisonment.¹⁴ Prison officials responded by force-feeding the hunger-striking suffragists three times a day.¹⁵

Several decades later the actions of Irish paramilitary prisoners brought world-wide media attention to the practice of hunger strikes.¹⁶ In 1981 members of the Irish Republican Army (IRA) held in British prisons engaged in hunger strikes demanding treatment as

11. Mara Silver, Note, *Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation*, 58 STAN. L. REV. 631, 633 (2005). Prisons in Turkey have frequently seen hunger strikes by groups of prisoners. *Id.* at 634–35. For a description of the experience of a physician dealing with a hunger-striking prisoner in a Turkish prison, see N.Y. Oguz and S.H. Miles, *The Physician and Prison Hunger Strikes: Reflecting on the Experience in Turkey*, 31 J. MED. ETHICS 169 (2005).

12. Sally Hunter Graham, *Woodrow Wilson, Alice Paul, and the Woman Suffrage Movement*, 98 POL. SCI. Q. 665, 676 (1983). National Woman's Party leader Alice Paul "managed to smuggle notes describing her treatment to Woman's Party members outside the jail. In her messages, she demanded to be treated as a political prisoner, a strategy calculated to provoke public sympathy for the alleged 'victims of political oppression' and thus to embarrass the Wilson administration." *Id.*

13. "[Alice Paul's] plan was based on a tactic used to great effect by British militant suffragists: Paul and the other suffrage prisoners would refuse to eat." *Id.*

14. Janice L. Richter, *We Have Waited So Long: The Story of Alice Paul*, N.J. LAW. (South Plainfield, N.J.), Sept. 1995, at 25, 28.

15. *Id.* Force-feeding through nasogastric tube was an experience that Alice Paul, head of the National Woman's Party, feared "dreadfully." *Id.* In Paul's words, "One feels so forsaken when one lies prone and people shove a pipe down one's stomach." DORIS STEVENS, *JAILED FOR FREEDOM* 189 (1920); see also SOPHIA A. VAN WINGERDEN, *THE WOMEN'S SUFFRAGE MOVEMENT IN BRITAIN, 1866–1928* 91 (1999) (British suffragists were also force-fed, and several died as a result.); Graham, *supra* note 12, at 676.

16. BBC on This Day: 3 October, 1981, IRA Maze Hunger Strikes at an End, http://news.bbc.co.uk/onthisday/hi/dates/stories/october/3/newsid_2451000/2451503.stm (last visited Oct. 19, 2006).

“special category status” prisoners.¹⁷ Prison authorities did not intervene, and the media zealously covered the situation as ten IRA inmates starved themselves to death.¹⁸ This proved to be one of the most famous incidents of hunger striking to date.¹⁹

When faced with an inmate on a hunger strike, prison administrators in the United States can look to three main sources for guidance on when and how to respond. One source is the courts, as they have determined how much control inmates maintain over their bodies and lives while in prison. Another is penological organizations, which can provide standards of inmate care. The third is legislation, as state and federal governments weigh in on inmate rights.

A. Judicial Attempts to Define Prisoner Rights in Hunger Strike Situations

The United States courts did not attempt to define the rights of a hunger-striking inmate in a reported decision until 1982.²⁰ From the beginning, courts were split over whether individual rights trumped state interests. First, the Supreme Court of Georgia held in *Zant v. Prevatte*²¹ that an inmate could starve himself to death as a result of a hunger strike and the state could not interfere by force-feeding him.²² The court said that although “[t]he State has a duty to prisoners in its custody to keep them safe from harm and to render medical aid when necessary,” an inmate, “by virtue of his right of privacy, can refuse to

17. Daniel F. Mulvihill, *The Legality of the Pardoning of Paramilitaries Under the Early Release Provisions of Northern Ireland's Good Friday Agreement*, 34 CORNELL INT'L L.J. 227, 232-33 (2001). “Special category status” was a kind of prisoner of war status the British government extended to prisoners committing “scheduled terrorist-type” crimes. *Id.* at 231. Irish Republican Army prisoner Bobby Sands began his hunger strike to reinstate special category status five years after its end. *Id.* at 232.

18. BBC on This Day, *supra* note 16.

19. Silver, *supra* note 11, at 635.

20. Ansbacher, *supra* note 7, at 99, 99 n.5 (listing three unreported cases that find a prisoner has no right to commit suicide by starvation while in custody).

21. *Zant v. Prevatte*, 286 S.E.2d 715 (Ga. 1982).

22. *Id.* at 716. Inmate Prevatte began his hunger strike to gain the attention of prison administrators because he wished to be transferred out of the Georgia Prison System. *Id.* Prevatte felt “his life [was] in danger from other inmates” as a result of “conflicts which developed while he was at Reidsville [Prison].” *Id.*

allow intrusions on his person, even though calculated to preserve his life.”²³

Later the same year, in *State ex rel. White v. Narick*,²⁴ the Supreme Court of Appeals of West Virginia, although considering the reasoning in *Zant*,²⁵ disagreed and held that an inmate did not have the right to starve himself to death.²⁶ Instead, the court held, “West Virginia’s interest in preserving life is superior to White’s personal privacy (severely modified by his incarceration) and freedom of expression right.”²⁷

Two years later, in *In re Caulk*,²⁸ the Supreme Court of New Hampshire found that, “the State’s interests in maintaining an effective criminal justice system” outweighed an inmate’s right to engage in a hunger strike leading to his death.²⁹ The dissent in *Caulk* argued that the case was distinguishable from *White* because Caulk’s

23. *Id.* at 716–17 (citations omitted). “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.” *Id.* at 716. The court made its ruling after noting, “Prevatte is not [mentally] incompetent, nor does he have dependents who rely on him for a means of livelihood.” *Id.* at 717. This statement may be a reflection of the court’s consideration of the *parens patriae* doctrine. Ansbacher, *supra* note 7, at 109 n.94. This doctrine requires the state to step into the role of a parent for someone who is mentally incompetent, and may forbid someone who has children to kill themselves, thus leaving the child without a parent. *Id.* at 108–09.

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

25. The court said, “The Georgia court failed to consider compelling reasons for preserving life, not the least being civility.” *Id.* at 57.

26. *Id.* at 58. White embarked on his hunger strike to protest the conditions at the state penitentiary where he was incarcerated, and as a result lost more than one hundred pounds over a period of five months. *Id.* at 55.

27. *Id.* at 58. The court also noted that White had given up his hunger strike before the case was decided. *Id.* at 55 n.1. The court rendered a decision despite this fact “because it [was] capable of repetition.” *Id.*; see also *Von Holden v. Chapman*, 450 N.Y.S.2d 623, 626–27 (N.Y. App. Div. 1982) (distinguishing desire to commit suicide from right to refuse medical treatment, and holding that the interests of the state outweigh any claimed rights of Chapman, serving a sentence for the murder of former Beatle John Lennon, to prevent prison administrators from force-feeding him to end his hunger strike). For an analysis of *Zant*, *White*, and *Von Holden*, see Ansbacher, *supra* note 7, at 100–02.

28. *In re Caulk*, 480 A.2d 93 (N.H. 1984).

29. *Id.* at 97. Caulk was serving a life sentence in prison and decided to quit eating so he could die instead of living the rest of his life behind bars. The court said, “The State’s interest in the preservation of human life and the prevention of suicide are also implicated in this situation.” *Id.* at 96.

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motivation was death rather than manipulation of the penal system, and that the inmate should be permitted to die.³⁰

Over the five years following *Zant* only a small number of other courts considered the issue of force-feeding prison inmates.³¹ In 1987 the United States Supreme Court, in *Turner v. Safley*,³² introduced a test to determine when prison administrators have the right to infringe on the constitutional rights of inmates.³³ The *Turner* test requires that prison administrators show the infringement is “reasonably related” to “legitimate penological interests” in preventing the inmates from exercising their rights.³⁴ In order to determine whether a policy is reasonably related to legitimate penological interests, the Court looked to four factors: (1) a “valid rational connection” between the regulation and the governmental interest put forth to justify it; (2) an “alternative means of exercising the right” available to the prisoner; (3) the “impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally”; and (4) the “absence [or presence] of ready

30. *Id.* at 98 (Douglas, J., dissenting). The majority said, “[Caulk] has purposely selected this method of dying so that he can remain competent. He wants to think, to feel and to understand his death. He insists that he is not committing suicide but rather is allowing himself to die.” *Id.* at 94 (majority opinion). The dissent argued, “The State is not being manipulated in such instances as it may be if political or private demands are being sought by a hunger strike.” *Id.* at 100 (Douglas, J., dissenting). See generally Sneed & Stonecipher, *supra* note 7, at 556–60 (analyzing cases in terms of hunger strikes as symbolic speech).

31. See *In re Sanchez*, 577 F. Supp. 7, 9 (S.D.N.Y. 1983) (upholding order for force-feeding because prisoner’s reason behind hunger strike was to put pressure on judge who would hear his motion to vacate a contempt order); *Von Holden*, 450 N.Y.S.2d at 627 (holding that prisoner’s First Amendment right did not extend to suicide).

32. *Turner v. Safley*, 482 U.S. 78, 89–91 (1987).

33. *Id.* *Turner* was based on challenges to a Missouri prison mail policy restricting “non-family, non-legal correspondence” at the discretion of prison administrators and a marriage regulation forbidding inmates to marry without the prison superintendent’s permission, given only with “compelling reason.” *Id.* at 81–82. The Court held that, “a lesser standard of scrutiny is appropriate in determining the constitutionality of the prison rules” than the strict scrutiny standard applied by the Court of Appeals for the Eighth Circuit. *Id.* at 81.

34. *Id.* at 89. In the course of developing the reasonableness test, the Court identified two principles first set out in *Procunier v. Martinez*, 416 U.S. 396 (1974): “The first of these principles is that federal courts must take cognizance of the valid constitutional claims of prison inmates.” *Turner*, 482 U.S. at 84. “A second principle identified in *Martinez*, however, is the recognition that ‘courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.’” *Id.* (quoting *Martinez*, 416 U.S. at 405).

alternatives” for prison administrators.³⁵ *Turner’s* four-part test has been applied to a variety of prison regulation challenges since its creation.³⁶

Despite the influence of *Turner* on cases concerning inmate rights, modern courts are split on the issue of force-feeding for hunger strikes.³⁷ The majority of cases still permit force-feeding, holding that state and prison interests outweigh the inmate’s right to hunger strike.³⁸ Within this majority, two Illinois state courts have considered the *Turner* decision in the process of analyzing an inmate’s right not to be force-fed to end his hunger strike. In *Illinois ex rel. Illinois Department of Corrections v. Millard*³⁹ the Illinois Court of Appeals loosely framed the situation of a hunger-striking inmate in terms of the *Turner* test, and expressly disagreed with the

35. *Turner*, 482 U.S. at 89–91. In *Turner*, the Court found that there was a legitimate penological interest in banning inmate-to-inmate correspondence. *Id.* at 91. “The prohibition on correspondence is reasonably related to valid corrections goals. The rule is content neutral, it logically advances the goals of institutional security and safety identified by Missouri prison officials, and it is not an exaggerated response to those objectives.” *Id.* at 93. The Court also held that the prison’s regulation prohibiting inmates from marrying was not supported by legitimate penological interests. *Id.* at 91. “No doubt legitimate security concerns may require placing reasonable restrictions upon an inmate’s right to marry, and may justify requiring approval of the superintendent. The Missouri regulation, however, represents an exaggerated response to such security objectives.” *Id.* at 97–98.

36. See *Overton v. Bazzetta*, 539 U.S. 126, 132–36 (2003) (prisoner visitation policy found to be reasonable); *Washington v. Harper*, 494 U.S. 210, 223–27 (1990) (antipsychotic medication policy found to be reasonable); *Veney v. Wyche*, 293 F.3d 726, 732–35 (4th Cir. 2002) (policy forbidding homosexual male inmates from sharing double-occupancy cells found to be reasonable); *Altizer v. Deeds*, 191 F.3d 540, 548–49 (4th Cir. 1999) (opening of outgoing mail found to be reasonable); *Roe v. Crawford*, 439 F. Supp. 2d 942, 953 (W.D. Mo. 2006) (policy forbidding transportation for nontherapeutic abortions found to not be reasonable); *Thompson v. Vilsack*, 328 F. Supp. 2d 974, 980 (S.D. Iowa 2004) (co-payment requirement for kosher meals found to not be reasonable); *Nolley v. County of Erie*, 776 F. Supp. 715, 732–33 (W.D.N.Y. 1991) (“red sticker” policy of automatically segregating HIV-positive inmates found to not be reasonable).

37. Compare *Singletary v. Costello*, 665 So.2d 1099, 1110 (Fla. Dist. Ct. App. 1996) (holding “Costello, as a prison inmate, had the legal right to refuse medical treatment where the need for treatment stemmed from a self-induced hunger strike”), with *Illinois ex rel. Ill. Dep’t of Corr. v. Millard*, 782 N.E.2d 966, 972 (Ill. App. Ct. 2003) (holding “the Department may force-feed a hunger-striking inmate, whose only purpose is to attempt to manipulate the system so as to avoid disruptive or otherwise detrimental effects to the orderly administration of our prison system”).

38. MUSHLIN, *supra* note 3, at 225.

39. *Millard*, 782 N.E.2d 966.

holding in *Zant*.⁴⁰ The court determined the Department's interest in controlling "an orderly and disciplined institution" outweighed the inmate's rights when the inmate's intent was to manipulate the prison system.⁴¹ Another appellate court case in Illinois, *People ex rel. Department of Corrections v. Fort*,⁴² applied the *Turner* test to force-feeding, holding that "'the preservation of life, prevention of suicide, and the enforcement of prison security, order, and discipline' are legitimate penological interests."⁴³

In contrast, in 1993 the Supreme Court of California, in *Thor v. Superior Court*,⁴⁴ denied a petition from a prison physician holding that a quadriplegic inmate had the right to refuse medical treatment, including food administered by force.⁴⁵ The court found that prison health care administrators had no duty to provide further treatment after the inmate's refusal.⁴⁶ In 1996 the District Court of Appeal of

40. *Id.* at 971–72. "The Georgia court failed to consider compelling penological objectives such as the preservation of life, prevention of suicide, and the enforcement of prison security, order, and discipline. We not only acknowledge those interests . . . but hold that they are superior to the constitutional rights asserted by defendant in this case." *Id.*

41. *Id.* at 972.

42. *People ex rel. Dep't of Corr. v. Fort*, 815 N.E.2d 1246 (Ill. App. Ct. 2004).

43. *Id.* at 1250 (quoting *Millard*, 782 N.E.2d at 971). The court goes on to say, "Further, these interests are superior to the constitutional rights of an inmate whose hunger strike is an attempt to manipulate [the Department of Corrections]." *Fort*, 815 N.E.2d at 1250. Fort, who began his hunger strike to "protest[] his transfer to and treatment at" Pontiac Correctional Center, declared that he wished to maintain control over his life and death, and adamantly claimed that although his hunger strike might kill him, he was not suicidal. *Id.* at 1249–50.

44. *Thor v. Superior Court*, 855 P.2d 375 (Cal. 1993).

45. *Id.* at 378–79.

46. *Id.* at 390. The court said,

In summary, we conclude that a competent, informed adult, in the exercise of self-determination and control of bodily integrity, has the right to direct the withholding or withdrawal of life-sustaining medical treatment, even at the risk of death, which ordinarily outweighs any countervailing state interest. The right does not depend upon the nature of the treatment refused or withdrawn; nor is it reserved to those suffering from terminal conditions. Once a patient has declined further medical intervention, the physician's duty to provide such care ceases.

Id. at 387. The Court also considered the restrictions on Thor's patient as a prisoner, but determined,

Thus, [w]hile both of the . . . state interests in life are certainly strong, in themselves they will usually not foreclose a competent person from declining life-sustaining medical treatment This is because the life that the state is seeking to protect in such a situation is the life of the same person who has competently decided to forego

Florida agreed with *Thor* and the earlier case of *Zant* in *Singletary v. Costello*: “Costello’s privacy right to refuse medical intervention must be balanced against only the state interest in the preservation of life. This interest, in and of itself, cannot overcome the fundamental nature of Costello’s privacy right.”⁴⁷

In 2005 the Court of Appeals of Washington said in *McNabb v. Department of Corrections*⁴⁸ that the Department of Corrections “may force-feed a starving inmate, whose actions are undertaken with the intent to cause his own death and have the potential of disrupting the internal order of our prison system.”⁴⁹ The court did not apply the *Turner* test to reach their decision.

the medical intervention; it is not some other actual or potential life that cannot adequately protect itself.

Id. at 384 (citations omitted); see also April Lerman, *California Supreme Court Survey: October 1992–October 1993: Health and Safety Law*, 21 PEPP. L. REV. 637, 646–47 (1994) (suggesting that future courts will use the balancing test in *Thor* to determine when a patient can refuse medical treatment); Shirley A. Padmore, Comment, *California’s Limits on the Right to Refuse Life-Saving Treatment—“No Holds Barred?”* *Thor v. Superior Court*, 46 WASH. U. J. URB. & CONTEMP. L. 369, 380 (1994) (concluding, “*Thor* opens the door to erosion of prison interests vis-à-vis the interests of prisoners”).

47. *Singletary v. Costello*, 665 So. 2d 1099, 1110 (Fla. Dist. Ct. App. 1996). The court employed the same three-part analysis as *Thor*, first determining whether Costello had a constitutional right to decide whether to stop eating, then analyzing that right in light of his status as a prisoner, and finally balancing that right against the prison’s concerns. *Id.* at 1103–09. The court considered, but found no compelling state interest in the prevention of suicide, protection of third parties, maintenance of the ethical integrity, or maintenance of an orderly and secure penal institution. *Id.* Thus the only consideration was the state’s interest in the preservation of life. *Id.* at 1110. However, the court also said, “Our resolution of this case should not be interpreted as universally holding that a prison inmate has the right to starve to death.” *Id.*

48. *McNabb v. Dep’t of Corr.*, 112 P.3d 592 (Wash. Ct. App. 2005).

49. *Id.* at 595. McNabb claimed that force-feeding was an unconstitutional invasion of his privacy. *Id.* at 593. The court distinguished the otherwise healthy McNabb’s conscious decision not to eat from a situation “where he is suffering from a terminal and incurable illness and thus chooses to avoid highly invasive and intrusive procedures to postpone his death.” *Id.* at 595; see also *Laurie v. Senecal*, 666 A.2d 806, 809 (R.I. 1995) (holding that the state’s interests outweigh the prisoners’ right to continue a hunger strike); *Commonwealth v. Kallinger*, 580 A.2d 887, 893 (Pa. Commw. Ct. 1990) (holding that interests of the commonwealth in prison security, order, and discipline combined with duty to provide medical care “clearly outweigh any diminished right to privacy held by Kallinger”).

*B. Penological Organization Efforts to Set Standards for the Care of
Hunger-Striking Inmates*

There are several organizations that develop standards for health care within penal institutions. The American Correctional Association (ACA)⁵⁰ publishes a guide called *Performance-Based Standards for Correctional Health Care in Adult Correctional Institutions*.⁵¹ This guide does not specifically address the issue of force-feeding or proper hunger strike response.⁵² The standards in the guide regarding unwanted medical care defer to applicable state and federal law.⁵³ The ACA also publishes *Standards for Adult Correctional Institutions*,⁵⁴ which addresses hunger strikes under the heading “Threats to Security” and recommends a written plan to deal with “situations that threaten institutional security.”⁵⁵ The standard gives a general outline, but does not elaborate on the specific procedures recommended for the written plan.⁵⁶

50. According to its website, the ACA is “the oldest and largest international correctional association in the world.” American Correctional Association, <http://www.aca.org> (last visited Feb. 17, 2007).

51. AM. CORR. ASS’N, PERFORMANCE-BASED STANDARDS FOR CORRECTIONAL HEALTH CARE IN ADULT CORRECTIONAL INSTITUTIONS (2002). The purpose behind the development of these standards “was not only to create standards that ensure higher quality health care programs but also to give agencies a self-monitoring system that would give clinical and correctional managers usable information.” *Id.* at vii. The ACA “continues its mission of improving practices in correctional facilities by helping agencies provide incarcerated populations with safe and effective health care.” *Id.*

52. The ACA standards include a section on “Informed Consent,” which may be applicable to force-feeding. The section states, “When health care is rendered against the patient’s will, it is in accordance with state and federal laws and regulations. Otherwise, any offender may refuse (in writing) medical, dental, and mental health care.” *Id.* at 30.

53. *Id.*

54. AM. CORR. ASS’N, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (4th ed. 2003). A Bureau of Justice Statistics questionnaire gives insight into how penological organizations categorize hunger strikes. It asks state and federal prisoners to rate the number of occurrences of various situations in their facility. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, THE SURVEY OF INMATES IN STATE CORRECTIONAL FACILITIES AND THE SURVEY OF INMATES IN FEDERAL CORRECTIONAL FACILITIES QUESTIONNAIRE (1999).

55. “Such situations include but are not limited to riots, hunger strikes, disturbances, and taking of hostages.” AM. CORR. ASS’N, *supra* note 54, at 62.

56. “The plans should designate the personnel who are to implement the procedures, when and which authorities and media should be notified, how the problem should be contained, and the procedures to be followed after the incident is quelled.” *Id.*

Another influential organization is the National Commission on Correctional Health Care (NCCHC).⁵⁷ It publishes several sets of penological standards including, most relevantly, *Standards for Health Services in Prisons*.⁵⁸ Like the ACA standards, the NCCHC standards do not contain provisions for dealing with hunger strikes or administering food by force.⁵⁹ The NCCHC provision about the right to refuse treatment acknowledges that the law regarding consent differs between states and recommends the development of a policy based on the applicable laws.⁶⁰

Although the NCCHC standards do not address hunger strikes or force-feeding⁶¹ another NCCHC publication, *Correctional Health Care: Guidelines for the Management of an Adequate Delivery System*, does contain a section on hunger strikes.⁶² These guidelines recognize an inmate's right to refuse treatment, saying "[f]orce-feeding the inmate clearly would violate his or her wishes and concepts of patient autonomy."⁶³ These guidelines also identify the

57. According to its website, NCCHC is an organization that "is committed to improving the quality of health care in jails, prisons, and juvenile confinement facilities." National Commission on Correctional Health Care, <http://www.ncchc.org/about/index.html> (last visited Feb. 18, 2007).

58. NAT'L COMM'N ON CORR. HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN PRISONS (2003). This publication is a revised version of standards the American Medical Association first published in 1979. *Id.* at vii. The standards represent "NCCHC's recommended minimum requirements for prison health services." *Id.* at viii. The organization says, "Once implemented, the standards can lead to increased efficiency of health services delivery, greater organizational effectiveness, better overall health protection for inmates, reduced risk of liability related to health services, and NCCHC health services accreditation." *Id.*

59. *Id.*

60. *Id.* at 133-34. The "Right to Refuse Treatment" standard states, "An inmate may refuse specific health evaluations and treatments." *Id.* at 133. The standard mentions that one alternative to be explored in the case where an inmate is refusing treatment is to "seek a court order forcing treatment, but only if the individual's clinical condition warrants such an extreme measure." *Id.*

61. ANNO, *supra* note 2, at 85. "None of the sets of national standards specifically addresses hunger strikes." *Id.*

62. The guidelines state, "Although [hunger strikes] are rare in corrections, health professionals often seek guidance when confronted with them." *Id.*

63. *Id.* The section provides,

It is recommended that serious hunger strikes (i.e., those lasting more than 2 or 3 days) be supervised by an interdisciplinary committee of correctional and noncorrectional personnel. A committee formed to scrutinize life-threatening refusals of care also might be appropriate for this task. If the committee agrees that the inmate has made a

point when the patient is comatose as the truly controversial area.⁶⁴ The guidelines seem to suggest that NCCHC supports the view that inmate rights outweigh institutional concerns up to (and possibly beyond) the point where the inmate slips into a coma.⁶⁵

In the case of “detainees,” as opposed to prisoners, the guidelines are much more developed. The Detention Standards of the former United States Immigration and Nationalization Services (INS)⁶⁶ apply to detainees held in “[s]ervicing [p]rocessing [c]enters,” “[c]ontract [d]etention [f]acilities,” and “[s]tate or local government facilities used by INS through Intergovernmental Service Agreements to hold detainees for more than 72 hours.”⁶⁷ The standards include a set of guidelines for hunger strikes.⁶⁸ They require close monitoring and possible segregation of persons suspected of being on a hunger strike.⁶⁹ The standards also encourage administrators to attempt to obtain the consent of the detainee before implementing any medical

careful, considered, voluntary decision based on a principled position—and not as a response to mental illness—the inmate should be permitted to continue.

Id.

64. *Id.* The guidelines recognize that many cases “suggest the contrary; i.e., that correctional officials have a duty not to allow an individual to die” and recommend “[u]ntil this issue is settled, correctional and medical authorities would do well to have a prior written policy and to seek a court order when confronted with a serious hunger-striking inmate.” *Id.*

65. The publication includes a disclaimer that states, “Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.” *Id.* at copyright page. For a discussion of official United States Department of Justice policies, see *infra* notes 72–76 and accompanying text.

66. The former INS has been absorbed into the Department of Homeland Security. Department of Homeland Security, History, http://www.dhs.gov/xabout/history/editorial_0133.shtm (last visited Feb. 17, 2007). The INS detention standards now fall under the United States Bureau of Immigration and Customs Enforcement (ICE). United States Immigration and Customs Enforcement, About ICE, <http://www.ice.gov/about/index.htm> (last visited Feb. 17, 2007).

67. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, INS DETENTION STANDARD: HUNGER STRIKES 1 (2000), <http://www.ice.gov/doclib/partners/dro/opsmanual/hunger.pdf> [hereinafter INS HUNGER STRIKES].

68. *Id.* The standards define a hunger strike as, “[a] voluntary fast undertaken as a means of protest; medical evaluation of hunger-striking detainee is standard after 72 hours or earlier, at the discretion of medical staff.” U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, INS DETENTION STANDARD: DEFINITIONS 5 (2000), <http://www.ice.gov/doclib/partners/dro/opsmanual/defin.pdf> [hereinafter INS DEFINITIONS].

69. INS HUNGER STRIKES, *supra* note 67, at 2–3. They also include a “monitoring instrument” consisting of a list of questions that should be marked “yes” or “no” when examining a detainee suspected of hunger striking. *Id.* at 3.

treatment.⁷⁰ Currently, a new rule has been proposed by the Bureau of Immigration and Customs Enforcement.⁷¹ This rule would supersede the Detention Standard for Hunger Strikes.

On the federal prison landscape, the Bureau of Prisons has implemented regulations for “the medical and administrative management of inmates who engage in hunger strikes.”⁷² The Bureau of Prisons created the regulations in 1980 and they were amended in 1994.⁷³ The regulations require observation, evaluation of the inmate’s mental and physical condition, and delivery of food and water to the inmate.⁷⁴ One section of the regulations addresses a hunger-striking inmate’s refusal to accept treatment when the inmate’s life or health is in danger, stating, “[T]he physician shall give consideration to forced medical treatment of the inmate.”⁷⁵

C. Legislative Forays into Managing Prison Hunger Strikes

The ACA and NCCHC standards give great deference to “applicable laws and regulations.”⁷⁶ While many states may have

70. *Id.* The standards provide, “Forced medical treatment shall be administered in accordance with applicable laws; and only after medical staff determines that the detainee’s life or permanent health is at risk.” *Id.* In addition, the standards provide a procedure for how to properly seek approval from the INS District Director, the Division of Immigration Health Services Chief of Medical Staff, the INS District Counsel, and the United States Attorneys Office to determine whether a court hearing or INS authorization to implement force-feeding is necessary. *Id.* at 4.

71. Procedures for Detainee Hunger Strikes, 71 Fed. Reg. 22,714 (Apr. 24, 2006). The comment period for this proposed rule ended in December 2006. *Id.*

72. 28 C.F.R. §§ 549.60–66 (2005). The code defines an inmate on hunger strike as follows:

When he or she communicates that fact to staff and is observed to be refraining from eating for a period of time, ordinarily in excess of 72 hours; or (b) When staff observe the inmate to be refraining from eating for a period in excess of 72 hours. When staff consider it prudent to do so, a referral for medical evaluation may be made without waiting 72 hours.

Id. § 549.61.

73. *Id.* §§ 549.60–66.

74. *Id.*

75. *Id.* § 549.65. The section also states, “When, after reasonable efforts, or in an emergency preventing such efforts, a medical necessity for immediate treatment of a life or health threatening situation exists, the physician may order that treatment be administered without the consent of the inmate.” *Id.*

76. See *supra* text accompanying notes 52 and 60.

policies on how to respond to inmate hunger strikes,⁷⁷ most policies do not appear to be codified in the state codes.⁷⁸ An exception is Illinois Public Act 093-0928.⁷⁹ The law provides:

If a physician providing medical care to a committed person on behalf of the Department advises the chief administrative officer that the committed person's mental or physical health has deteriorated as a result of the cessation of ingestion of food or liquid to the point where medical or surgical treatment is required to prevent death, damage, or impairment to bodily functions, the chief administrative officer may authorize such medical or surgical treatment.⁸⁰

The statute was amended in 2004; instead of requiring a court order to force-feed an inmate, prison administrators could now force-feed upon the recommendation of a physician.⁸¹ This change was partially in response to Millard.⁸²

Although most federal regulations concerning prisons come from the Bureau of Prisons, Congress has taken some action that may affect the treatment of hunger strikes. The Religious Land Use and Institutionalized Persons Act (RLUIPA),⁸³ was passed in 2000. Section 2000cc-1 of RLUIPA addresses the “[p]rotection of religious exercise of institutionalized persons.”⁸⁴ In cases where the

77. Bennett, *supra* note 4, at 1161. Bennett reports that, “many corrections officials indicate that broad principles such as the need to preserve life might lead them to consider force-feeding in an individual case.” *Id.* at 1161 n.6.

78. Several states include policies on “The Right to Refuse Medical Treatment” in their administrative rules. The Oregon Department of Corrections rules require informed consent for any “invasive health care procedure with major adverse health risks,” except “[i]nformed consent is not required in a medical emergency if the inmate is unable to give or to refuse consent and there is an immediate threat to the life or irreversible bodily harm to the inmate . . .” OR. ADMIN. R. 291-124-0080 (1999).

79. 730 ILL. COMP. STAT. 5/3-6-2 (2004).

80. *Id.* § 3-6-2(e-5).

81. Kurt Erickson, *Hunger Strikes Drop at Prisons*, PANTAGRAPH (Bloomington, Ill.), July 23, 2005, at A3.

82. *Id.* “The proposal, which received unanimous support in the General Assembly last year, was aimed at addressing situations such as a hunger strike in 2002 by a former Pontiac Correctional Center inmate [Eldon Millard].” *Id.*; see *supra* notes 37–40 and accompanying text.

83. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5 (2000).

84. *Id.* § 2000cc-1. As seen in *O'Malley v. Litscher*, No. 04-C-0032, 2005 WL 1845110

government “impose[s] a substantial burden on the religious exercise of a person residing in or confined to, an institution,” RLUIPA substitutes a requirement of a “compelling government interest” and imposes a “least restrictive means” tests in place of the legitimate penological interest requirement set forth in *Turner*.⁸⁵ The Ninth Circuit Court of Appeals examined the effect RLUIPA on the *Turner* test in *Warsoldier v. Woodford*.⁸⁶ The court explained that the *Turner* standard was replaced with a higher standard in the case of regulations that are found to “substantially burden” an inmate’s religious freedoms.⁸⁷ In order to further RLUIPA’s purpose of “protecting institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government’s permission and accommodation of their religion”⁸⁸ the *Turner* standard does not apply when inmates exercise their religious freedoms. In 2005 the case of *O’Malley v. Litscher* addressed the application of RLUIPA to hunger strikes.⁸⁹ The Eastern District Court of Wisconsin considered an inmate’s claims that force-feeding violated his religious rights under RLUIPA.⁹⁰ The court pointed out that O’Malley claimed his refusal to eat was a religious fast, while prison administrators considered it a hunger strike.⁹¹ Concluding that the prison health officials met the higher standard, the court said “[t]he defendant[] had a compelling governmental interest in keeping the plaintiff alive and maintaining security, safety and good order in

(E.D. Wis. July 29, 2005), “religious exercise” may include religious fasting, which may be interpreted by prison officials as a hunger strike. *See infra* notes 89–92 and accompanying text.

85. 42 U.S.C. § 2000cc-1. *See generally* Benjamin Pi-wei Liu, Comment, *A Prisoner’s Right to Religious Diet Beyond the Free Exercise Clause*, 51 UCLA L. REV. 1151, 1155 (2004) (recommending that “[t]he simultaneous consideration of multiple constitutional principles could better guide judicial decisions in prison religious diet cases”).

86. *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005).

87. *Id.* at 997–98.

88. *Id.* at 994 (citation omitted); *see also* *Andreola v. Wisconsin*, No. 04-C-0186, 2005 WL 2233995, at *11 (E.D. Wis. Sept. 2, 2005) (noting that “Congress passed RLUIPA, which in effect overruled the Court’s decisions in *Turner* and *O’Lone* as they apply to prison regulations or policies that impact on the religious practices of inmates”).

89. *O’Malley*, 2005 WL 1845110.

90. *Id.* at *1. The court dismissed many of O’Malley’s claims for lack of subject matter jurisdiction because it determined that the plaintiff was seeking reversal of state court decisions in federal court. *Id.* at *9. Only those claims not seeking a reversal of a state court judgment were able to be brought before the district court. *Id.* at *11.

91. *Id.* at *1 n.1.

the prison. Given the circumstances, the defendant[] applied the least restrictive means in furthering those ends.”⁹²

III. THE ADEQUACY OF CURRENT AUTHORIZATION TO COPE WITH HUNGER-STRIKING INMATES

Turner's rule for determining when prison authorities can infringe on inmates' constitutional rights can be applied to inmate hunger strikes. As illustrated above, the competing sides in the question of what authority prison administrators have under the law to force-feed hunger-striking inmates each have compelling arguments. An inmate's argument for why he should be allowed to continue with his hunger strike and not be force-fed is one of constitutional rights.⁹³ In

92. *Id.* at *19. The court then granted summary judgment to the defendant prison administrators. *Id.* The Civil Rights of Institutionalized Persons Act could also have some impact on how state prisons respond to hunger strikes. Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997–1997j (2000). Section 1997a provides a method for the Attorney General to “institute a civil action” against a state for subjecting an institutionalized person to “egregious or flagrant conditions” that:

[D]eprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities.

Id. § 1997a. If the preceding conditions were met it could allow the Attorney General to investigate a state prison's treatment of hunger striking prisoners. However, the Act specifically declines to authorize standards of health care. *Id.* § 1997i. This suggests that the impact of § 1997a of the Act is primarily restricted to the rare case in which a state prison's procedures are so extreme as to be “egregious or flagrant.” *Id.* § 1997a. Section 1997e has an effect on the steps a prisoner has to take in order to bring a § 1983 civil rights complaint against a prison because it requires a prisoner to exhaust all administrative remedies before filing suit. *Id.* § 1997e; see Donald P. Lay, *Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act*, 71 IOWA L. REV. 935 (1986).

93. See Greenberg, *supra* note 7, at 748–52. The question of which rights are violated has been answered in different ways, depending on the motivating factors behind the prisoner's hunger strike. One issue raised by prisoners is the right to privacy. Bennett, *supra* note 4, at 1163 (“[This] Note argues that force-feeding infringes on the fundamental liberty interest of privacy, that prisoners retain the right to this fundamental interest, and that prisoners must therefore be accorded procedural due process before the state can force-feed them.”). Another issue is First Amendment rights, when viewing hunger striking as “speech-action.” Sneed & Stonecipher, *supra* note 7, at 550 (“The ultimate test of the speech-action dichotomy as it relates to symbolic speech, however, may be the fasting of prison inmates who use hunger strikes to protest the conditions of their confinement or to make political statements.”). Additional issues are introduced by the Eighth Amendment and the consideration of equal protection. MUSHLIN, *supra* note 3, at 524.

the case of prison administrators, courts look at such interests as prison security, maintenance of order, preservation of life, duty to provide medical care, the interests of the state in carrying out justice, and suicide prevention to justify administrative intrusion on an inmate's decision to engage in a hunger strike.⁹⁴

As *Turner* is recognized as the prevailing test for several types of constitutional complaints by inmates,⁹⁵ it makes sense to analyze force-feeding in terms of the four factors *Turner* used to determine whether a regulation is "reasonably related to legitimate penological interests."⁹⁶ The first factor asks whether there is "a valid rational connection" between force-feeding and the government interest put

94. See *Thor v. Superior Court*, 855 P.2d 375, 383–88 (Cal. 1993) (considering preservation of life, prevention of suicide, "maintaining the ethical integrity of the medical profession," "protecting innocent third parties," and "maintaining an orderly and secure penal institution."); *Singletary v. Costello*, 665 So. 2d 1099, 1105–08 (Fla. Dist. Ct. App. 1996) (considering preservation of life, prevention of suicide, protection of innocent third parties, "maintenance of the ethical integrity of the medical profession," and "maintaining an orderly and secure penal institution"); *Zant v. Prevatte*, 286 S.E.2d 715, 716 (Ga. 1982) (considering "duty to protect the health of those who are incarcerated in the state penal system," and preservation of human life); *In re Caulk*, 480 A.2d 93, 96 (N.H. 1984) (considering "the preservation of internal order and discipline and the maintenance of institutional security" and "preservation of human life and the preservation of suicide"); *Von Holden v. Chapman*, 450 N.Y.S.2d 623, 625–27 (N.Y. App. Div. 1982) (considering preventing suicide, preservation of life, and prison security and administration); *Commonwealth v. Kallinger*, 580 A.2d 887 (Pa. Commw. Ct. 1990) (considering preservation of life, prevention of suicide, and enforcement of "prison security, order, and discipline"); *Laurie v. Senecal*, 666 A.2d 806, 808 (R.I. 1995) (considering preservation of life and prevention of suicide); *McNabb v. Dep't of Corr.*, 112 P.3d 592, 594–95 (Wash. Ct. App. 2005) (considering "preserving life and preventing suicide" and "internal order and discipline, as well as maintaining institutional security"); *State ex rel. White v. Narick*, 292 S.E.2d 54, 57 (W. Va. 1982) (considering a test from *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 425 (1977): preservation of life, prevention of suicide, "protection of interests of innocent third parties," and "maintenance of physicians' ethical integrity"). See generally *Sneed & Stonecipher*, *supra* note 7, at 554–60; *Bennett*, *supra* note 4, at 1183–219; *Greenberg*, *supra* note 7, at 752–70; *Ludwig*, *supra* note 7, at 174–81; *Silver*, *supra* note 11, at 642–56.

95. See *supra* note 36.

96. The Court did not rule on how much weight should be placed on each of the factors. *MUSHLIN*, *supra* note 3, at 28. *Mushlin* suggests that if the first factor (analyzing whether there is a valid rational connection between the regulation and the prison administration's interest) falls in favor of the inmate, the regulation should fail. *Id.* at 40. He argues that since the purpose of the overall test is to find a reasonable relationship to the penological interest, "logic compels the conclusion that, if the first test is not satisfied, there is no reason for a court to resolve the remaining three." *Id.* The Supreme Court has also noted that the absence of ready alternatives is "not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating." *Turner v. Safley*, 482 U.S. 78, 90–91 (1987).

forth to justify it.⁹⁷ If one governmental interest is the preservation of the inmate's life, and the hunger strike has progressed to the point where the inmate's life is in danger, the court would likely hold this connection is valid and rational, as was done in *Fort*.⁹⁸ If prison administrators do not take action to feed the inmate and he continues to fast he will die, and his life will not be preserved.

The second factor asks whether there is an alternative way for the prisoner to exercise his right.⁹⁹ This factor depends on which right the inmate is exercising by engaging in the hunger strike. Many inmates claim a right of privacy allows them to continue to fast.¹⁰⁰ When looking to alternative methods to express this right at least one court has held that there are no alternatives to the specific right to privacy claimed.¹⁰¹ The second factor would then fall in favor of the inmate. In the easier case of a hunger strike as a form of speech-action, the court may point out that the prisoner could express his protests verbally or in writing.¹⁰² In this instance the second factor would fall in favor of the prison administrators.

When analyzing the third factor, a court examines the impact that allowing the expressed right to continue would have on the guards, other prisoners, and the general allocation of prison resources.¹⁰³

97. *Turner*, 482 U.S. at 89. The Court "found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." *Id.* at 90.

98. In *Fort*, the court did not analyze the four *Turner* factors, but found the Department of Corrections had legitimate penological interests in seeking to force-feed the hunger striking inmate. *People ex rel. Dep't of Corr. v. Fort*, 815 N.E.2d 1246, 1250 (Ill. App. Ct. 2004).

99. *Turner*, 482 U.S. at 89–90. The Court said the presence of "other avenues" for the inmate to exercise his rights weighs in favor of prison administrators as "courts should be particularly conscious of the measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation." *Id.* at 90 (citations omitted).

100. See, e.g., *Ansbacher*, *supra* note 7, at 118–28 (comparing a hunger striking inmate's privacy, or personhood, rights to various state interests in *Zant*, *Von Holden*, and *White*).

101. The United States District Court for the Western District of New York found that, "under the second *Turner* factor, there is no alternative means for inmates to exercise their right to privacy. Once it is lost, it is lost forever." *Nolley v. County of Erie*, 776 F. Supp. 715, 733 (W.D.N.Y. 1991); cf. *Veney v. Wyche*, 293 F.3d 726, 732 n.5 (4th Cir. 2002) (noting that the "alternative means" factor is not relevant due to the nature of Veney's equal protection claim).

102. See *Greenberg*, *supra* note 7, at 748 ("Because hunger strikers can express their views through alternative means, the First Amendment will not protect them from being force-fed."). First Amendment challenges are a primary application of *Turner*. *MUSHLIN*, *supra* note 3, at 27.

103. *Turner*, 482 U.S. at 90. The Court said, "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be

Prison hunger strikes are often designed to put pressure on prison authorities. The use of a hunger strike as a bargaining tactic may have a negative impact on the morale of the guards. Other inmates may be encouraged to engage in hunger strikes, especially if they see that the first inmate's hunger strike is having an effect on guards and other prison authorities, or is gaining attention from the media.¹⁰⁴ There are also medical expenses involved in caring for a starving inmate that affect prison resources.¹⁰⁵

Finally, a court applying the fourth factor in *Turner* would analyze whether there are ready alternatives to force-feeding that prison officials could adopt to satisfy the interests met in ending hunger strikes.¹⁰⁶ One alternative may be to submit to the prisoner's demands, but this alternative would conflict with the penological interests of serving justice and prison safety, and would adversely affect the third factor by encouraging other inmates to adopt the behavior.¹⁰⁷

In general, when the hunger strike has progressed to the point where the inmate's life is in jeopardy, a policy of force-feeding the inmate seems to meet the *Turner* factors and pass the test for a reasonable relationship to legitimate penological interests. However, the specific facts of some cases may affect these factors and tip the balance of the test in the other direction. For example, a court applying the *Turner* test may find that force-feeding does not pass the test when force-feeding is applied as a deterrent to hunger strikes for the mere "convenience" of the prison administrators rather than for

particularly deferential to the informed discretion of corrections officials." *Id.* This would seem to hold true in the case of hunger strikes, where what is perceived as a successful protest by one inmate may inspire others to adopt the behavior, thus creating a larger burden on prison officials.

104. See *Commonwealth v. Kallinger*, 580 A.2d 887, 891 (Pa. Commw. Ct. 1990) ("In the present case, the uncontradicted testimony shows that if Kallinger would be permitted to die, other patients at Farview would almost certainly copy the same tactic, manipulating the system to get a change of conditions, possibly resulting in their death.").

105. See, e.g., *In re Caulk*, 480 A.2d 93, 96 (N.H. 1984) (finding that inmate's "simple" desire to continue his hunger strike "may jeopardize prison discipline and tax prison resources . . . [and] also [does] not reflect the predicament which will be placed at the doorstep of prison personnel and the medical profession when and if he reaches the point of being alive yet comatose").

106. See *supra* note 92 and accompanying text.

107. See *supra* note 103.

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more legitimate state interests such as safety. The ability of prison administrators to force-feed stops inmates from using hunger strikes as leverage and allows prison administrators to avoid the burden of devoting significant medical resources to treating otherwise healthy individuals.

Application of the *Turner* standards shows that force-feeding is “reasonably related to legitimate penological interests” when a hunger strike progresses to the point where the inmate’s life is in danger. While *Turner* does not govern every type of constitutional challenge,¹⁰⁸ its integration into prison regulations regarding the treatment of hunger strikes would help reduce challenges to the constitutionality of force-feeding.

IV. STANDARDS SHOULD BE ARTICULATED FOR PRISON ADMINISTRATORS REGARDING RESPONSES TO HUNGER-STRIKING INMATES

This Note has examined the three major areas that define the authorization that governs prison administrators when they respond to inmate hunger strikes. This Note now recommends that these three areas of authority should combine to create some consistent boundaries within this controversial area. One of the penological organizations previously mentioned should develop a set of detailed standards that provide prison administrators with guidelines for when and how to respond to inmate hunger strikes, including at what point administrators may intervene with force-feeding. These standards should be developed in consideration of the factors provided in *Turner* to determine when prison regulations can infringe on an inmate’s constitutional rights.

A. Penological Organizations Should Create Standards for Inmate Hunger Strikes Based on Turner

Penological organizations such as the ACA and NCCHC do not have specific standards for responding to hunger strikes.¹⁰⁹

108. See *supra* note 36.

109. See *supra* notes 50–61 and accompanying text.

Information about rendering medical attention without consent defers to applicable state and federal laws and regulations in the standards formed by these organizations.¹¹⁰

Prison authorities could benefit from standardized hunger strike procedures. Therefore, one of the leading penological organizations, like the ACA, should create a set of standards that states could adopt. In doing so, the organization should use *Turner* as the threshold of where force-feeding is permitted. This would be at the point where penological interests most clearly meet the test—when the prisoner’s life is in danger.¹¹¹ This high standard would also align with the organization’s commitment to the theory of informed consent and general respect for inmate rights.¹¹²

B. State Legislatures and the Federal Bureau of Prisons Should Adopt the New Standards

If adopted, these standards would help create equality among state and federal prison systems in response to hunger strikes, giving inmates the assurance that they would be treated consistently in any prison in the country.¹¹³ In addition, prison administrators would feel secure in the knowledge that they are acting in accordance with the recommendations of a highly respected penological organization.

Like the ACA and NCCHC standards for health care, the former INS and Bureau of Prisons hunger strike standards also maintain that force-feeding should be conducted in accordance with applicable laws. The Bureau of Prisons regulations generally concur with the results under the *Turner* test, allowing intervention at the point where the inmate’s “life or health” is in danger.¹¹⁴ The former INS standards allow the detainee to exercise his choice not to eat until the point where his choice creates a risk to his “life or permanent health.”¹¹⁵

110. AM. CORR. ASS’N, *supra* note 51, at 30; NAT’L COMM’N ON CORR. HEALTH CARE, *supra* note 58, at 133.

111. *See supra* Part III.

112. *See supra* note 52.

113. Stockstill, *supra* note 3 (claiming failure by prison administrators to follow proper protocol for treatment of hunger strikes).

114. 28 C.F.R. § 549.65 (2005).

115. INS HUNGER STRIKES, *supra* note 67, at 3. Detention centers seem to be the only division that is addressing the issue of hunger strikes in a thorough and pro-active manner. It

There is a question of the extent to which the definition of “danger to health” applies. Therefore, federal prisons could also benefit by the integration of the *Turner* test into the Bureau of Prisons regulations or by adopting the new standards. This would require clarification of when “danger to health” merits the consideration of force-feeding, which as integrated into the new standards formed under *Turner*, would be at the point where the inmate’s life was in danger.¹¹⁶ The benefit of integrating the *Turner* test to the regulations would be the confidence on the part of prison administrators that they are responding in a manner that gives the requisite deference to inmates’ constitutional rights as required by the United States Supreme Court while preserving their interests in the situation.

V. CONCLUSION

By framing the standards in terms of the requirements set out by *Turner*, penological organizations would be acknowledging the constitutional concerns inherent in hunger strikes by allowing force-feeding only when the prison administrators’ desire to do so is reasonably related to legitimate penological interests as defined by the United States Supreme Court. This standardization would allow prison administrators to respond to hunger strikes in a consistent manner without fear of frequent constitutional challenges. This thoughtful and consistent approach would also allow the regulations to be clearly explained to both state and federal inmates before they engage in hunger strikes, thus helping to increase the inmates’ knowledge of how the administration will react to their refusal to eat. Forward knowledge may discourage some prisoners from engaging in hunger strikes at all.¹¹⁷

The integration of the reasonableness test in *Turner* into response standards for prisons may leave some prisoners feeling that their rights have been violated. It also cannot insulate prison authorities

should be interesting to compare the new ICE hunger strike standards being developed to both the former INS standards and the Bureau of Prisons regulations.

116. This would have the effect of making the current phrasing redundant.

117. See generally Erickson, *supra* note 81 (suggesting that new law streamlining the process for force-feeding might have a deterrent effect on prisoners).

from every type of constitutional challenge. However, if implemented correctly, these standards will help demonstrate that leaders in the penological field have considered inmate rights and have attempted to create regulations that give inmates as much deference as possible while still meeting legitimate state concerns. This would help to create some stability in an area that has been inconsistent for decades.