



2017

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### Recommended Citation

Sara Cloon, *Competent Hunger Strikers: Applying the Lessons from Northern Ireland to the Force-Feeding in Guantanamo*, 31 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383 (2017).

Available at: <https://scholarship.law.nd.edu/ndjlepp/vol31/iss2/5>

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# COMPETENT HUNGER STRIKERS: APPLYING THE LESSONS FROM NORTHERN IRELAND TO THE FORCE-FEEDING IN GUANTANAMO

SARA CLOON\*

## ABSTRACT

*The United States allows force-feeding of prisoners, regardless of their state of mind or mental health because they deem preservation of life as paramount. In the United Kingdom, a prisoner who is of a sound mind “can be allowed to starve himself to death.”<sup>1</sup> This difference is due to the balance between the importance of preservation of life and of the right to self-determination and autonomy in medical decisions. My note will first briefly explore the history of force-feeding prisoners who are protesting for political purposes in both countries, and the relevant cases and statutes that led up to the differing viewpoints on force-feeding. I will then look into and compare the specific cases of force-feeding in the recent Guantanamo Bay hunger strike and the 1981 hunger strike in Northern Ireland where ten prisoners were allowed to starve to death. Finally, I will explore what is the more ethical answer to the question of force-feeding – whether it is better to let a prisoner of sound mind choose to die or to preserve their life through force?*

## I. INTRODUCTION

A hunger strike allows a prisoner or detainee to peacefully protest an alleged injustice through the only means left under his or her control—denial of food. Force-feeding controversially impedes this right in order to preserve life. International law, medical ethics, and case law all understand that patients have a right to refuse medical treatment when they are mentally competent. The United Kingdom recognizes this right of medical autonomy, but the United States asserts that preservation of life and penological interests overrule this fundamental right. This Note compares these different views in the context of the 1981 Northern Ireland hunger strike in the Maze Prison and the current strike in Guantanamo Bay to find a solution as to which approach is the better ethical response to a hunger strike. This answer will then be applied to United States law and instruct how the courts can best

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1. *R (On the Application of Wilkinson) v. The Responsible Medical Officer Broadmoor Hospital*, [2001] E.W.C.A. Civ. 1545 (October 22, 2001).

respond through a new legal test to better appreciate the ethical dilemma of force-feeding.

Part II explains the definition of a competent hunger striker and the process of force-feeding. Parts III and IV recount the history of the strikes in Northern Ireland and Guantanamo to put the issues in context. Part V outlines the current law in the United States and the United Kingdom on force-feeding a competent patient or prisoner. Part VI analyzes the pertinent court cases involving force-feeding in Guantanamo Bay, and Part VII recounts the Parliamentary debates in the United Kingdom to show the Government's views on the strikers and their medical autonomy. Part VIII reveals medical, international, and religious viewpoints on force-feeding to determine if it is considered torture or a sanctioned medical necessity. Finally, Part IX analyzes which response to force-feeding is ethically preferable and argues that the two main reasons validating force-feeding in the United States, preservation of life and penological interests, are not sufficient to justify force-feeding. The *Cruzan* test, instead of the current *Turner* test, is the best way to assess whether force-feeding is necessary and implement a more just approach in the United States judicial system.

## II. BACKGROUND

### A. *What Constitutes a Competent Hunger Striker?*

A hunger strike is a refusal of food as a form of protest or demand and requires the striker to be competent.<sup>2</sup> The striker's refusal of food must be for a "significant period" and a physician is usually called to assess a prisoner after seventy-two hours.<sup>3</sup> According to Hernan Reyes of the International Committee of the Red Cross, three factors are required to determine a hunger strike: fasting, voluntariness, and a stated purpose.<sup>4</sup> Yet, the World Medical Association has a broader definition: "A hunger striker is a mentally competent person who has indicated that he has decided to embark on a hunger strike and has refused to take food and/or fluids for a significant interval."<sup>5</sup> The United States Government, under the Federal Bureau of Prisons, defines a hunger strike as a communication to the staff or an observation by the staff that the person has refrained from eating for "a period of time, ordinarily in excess of 72 hours."<sup>6</sup> Neither the United States Government nor the World Medical Association requires a stated purpose, which is also true in Guantanamo. Officials at Guantanamo declare a

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2. Sondra S. Crosby et al., *Hunger Strikes, Force-feeding, and Physicians' Responsibilities*, 298 J. AM. MED. ASS'N 563 (2007).

3. *Id.* (citing WMA Declaration of Malta on Hunger Strikers Preamble, (Nov. 1991), <http://www.wma.net/en/30publications/10policies/h31/>).

4. George J. Annas, *Hunger Strikes at Guantanamo — Medical Ethics and Human Rights in a "Legal Black Hole,"* 13 N. ENGL. J. MED. 1377, 1378 (2006); *See also* Marlynn Wei & Rebecca W. Brendel, *Psychiatry and Hunger Strikes*, 23 HARV. HUM. RTS. J. 75, 78 (2010).

5. Annas, *supra* note 3, at 1379 (citing WMA Declaration of Malta on Hunger Strikers). This definition does not require a specific goal, unlike the ICRC.

6. Wei & Brendel, *supra* note 3, at 80 (citing 28 C.F.R. § 549.61). This statute will be examined further in Part V.

detainee is on hunger strike if he refrains from eating for three consecutive days.<sup>7</sup>

The requirement of competency involves “understanding the nature and consequences of his or her actions.”<sup>8</sup> Competency is defined through one’s decision-making capacity, which has four conditions: the ability to express a consistent preference (here, refusing food), an understanding of the facts surrounding the decision (medical risks and response of authorities), an expression of the appreciation of the facts (including the risks and benefits of action versus non-action), and the ability to rationally manipulate data in the decision making process.<sup>9</sup> A hunger striker must be aware of the possibility of death, but his or her intent cannot be to commit suicide.<sup>10</sup> It is important to note that “[a] hunger strike alone does not create a presumption of mental illness or suicidality,” and that most strikers are not mentally ill but motivated to protest abuses or for religious reasons.<sup>11</sup> Many hunger strikers have depression, but depression alone does not make a striker incompetent.<sup>12</sup> In evaluating competency, the effect of the Government’s actions should also be considered. For instance, in Guantanamo, many detainees suffer from post-traumatic stress disorder or other psychological disabilities due to alleged abuse, but this does not render them mentally incompetent to perform a competent hunger strike.<sup>13</sup>

### B. *Process of Force-Feeding*

Force-feeding is performed under two methods. The most common method is nasogastric feeding, used in Guantanamo. The prisoner is forcibly restrained,<sup>14</sup> and a tube with liquid nutrients is inserted through a nasal passage and runs down the esophagus into the stomach.<sup>15</sup> The second option, intravenous feeding, is where a catheter is injected into the blood stream.<sup>16</sup> For this procedure, a prisoner should be fully sedated because he or she could obstruct the treatment by pulling out the needle, which can lead to severe blood loss and death within three to four minutes and can also lead to a greater risk of infection.<sup>17</sup> Considering these risks, nasogastric feeding is preferred. Yet, insertion of a tube through the nasal passage comes with its own risks. If the tube is inserted incorrectly, the liquid nutrients could be pumped

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7. *Id.* at 81.

8. Crosby, *supra* note 1, at 563.

9. Wei & Brendel, *supra* note 3, at 96.

10. *Id.* at 97.

11. *Id.* at 103. These motivations are key factors in Guantanamo.

12. *Id.*

13. *Id.* at 104.

14. Guantanamo uses a six-pointed restraint chair, *see infra* Part VI.

15. Heidi G. Kim, *Applying International Human Rights Laws to Force-Feeding Prisoners: Effort to Create Domestic Standards in the United States*, 28 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 389, 394 (2015).

16. *Id.*

17. Mara Silver, *Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation*, 58 STAN. L. REV. 631, 637–38 (2005).

into the lungs, which can lead to death.<sup>18</sup> Other physical complications of force-feeding include pneumonia, syncope, major infections, collapsed lung, and pancreatic problems. Force-feeding also leads to physiological complications as it intensifies distress when a hunger strike is the last means of asserting one's bodily integrity.<sup>19</sup>

### III. A BRIEF HISTORY OF THE HUNGER STRIKES IN NORTHERN IRELAND

The Troubles in Northern Ireland between the Unionists/Loyalists/Protestants and the Nationalists/Republicans/Catholics led to the violent responses of bombings and shootings, but also to peaceful protests inspired by the Civil Rights Movement in the United States led by Martin Luther King Jr. The conflict in Northern Ireland led to a form of peaceful protest found throughout history—the hunger strike. This form of protest harkens back to a pre-Christian era, where it has special importance in Ireland. With a tradition of oral legal codes, a direct means of redress for creditors would be to “fast against” the debtor by “taking up a place close to the debtor’s dwelling and going on hunger strike.”<sup>20</sup> This process allowed the creditor to peacefully protest the debt until he or she was paid. Hunger strikes became ritualized with the introduction of Christianity, and the theme of self-sacrifice grew in the resurrection of the Gaelic cultural tradition in the post-famine era.<sup>21</sup> This theme influenced and, in part, inspired one of the largest hunger strikes in Irish history in 1923 with more than 8,000 political prisoners striking to protest the 1921 Anglo-Irish Treaty, which ended the Irish War of Independence.<sup>22</sup> In an effort to stifle the power of the hunger strike in its creation of martyrs, the British authorities force-fed Thomas Ashe, a republican imprisoned for seditious speech, in 1917. Ashe died after one day of force-feeding.<sup>23</sup>

Ireland’s long history of hunger strikes and self-sacrifice influenced members of the Irish Republican Army (“IRA”) in their prison protests. The policy of internment began in 1971 when suspected paramilitary group members could be arrested and detained without trial. In four years, internment led to the detainment of 1,981 people, of whom 1,874 were Republican.<sup>24</sup> The year 1976 triggered a five-year protest in the Maze Prison when the paramilitary members had their special cate-

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18. *Factsheet: Force-feeding under International Law and Medical Standards*, PRISONER SUPPORT AND HUM. RTS. ASS’N (Nov. 16, 2015), <http://www.addameer.org/publications/factsheet-force-feeding-under-international-law-and-medical-standards>. This complication was the cause of the Irish Republican Thomas Ashe’s death in 1917. See also George Sweeney, *Irish Hunger Strikes and the Cult of Self-Sacrifice*, 28 J. CONTEMP. HIST. 421, 426 (1993).

19. Malgorzata Starzomska & Marek Smulczyk, *Behavioral Consequences of Force-Feeding*, in 3 HANDBOOK OF BEHAVIOR, FOOD AND NUTRITION 1603, 1609 (Victor R. Preedy et al. eds., 2011).

20. Sweeney, *supra* note 17, at 422.

21. *Id.* at 422–23.

22. *Id.* at 421.

23. *Id.* at 426.

24. Martin Melaugh, *Internment - Summary of Main Events*, CAIN, <http://cain.ulst.ac.uk/events/intern/sum.htm> (last modified Sept. 1, 2016).

gory status revoked. The process of “criminalization” led to those convicted for terrorist offenses being treated as ordinary criminals, which first sparked the blanket protests. During this protest, 300 Republican prisoners refused to wear the prisoner uniform rather than their own clothing and instead wore only blankets.<sup>25</sup> This led to the “no wash” or “dirty protests” in 1978, when prisoners refused to leave their cells to wash or use the bathroom because they were beaten by prison guards. These protests caused horrible conditions within the cells where prisoners lived in their own waste, but also created an even stronger sense of camaraderie and loyalty that would be key in the future hunger strikes.<sup>26</sup> O’Rawe, a blanketman and leader in the hunger strike, wrote, “the brutality only ensured that the famous blanket *esprit de corps* made us soulmates rather than mere cellmates: we became indestructible.”<sup>27</sup>

These events culminated in their most extreme form of peaceful protest, the hunger strike. On October 27, 1980, seven Republican prisoners went on strike and were later joined by twenty-three other members, including three women prisoners in Armagh.<sup>28</sup> The strike ended after fifty-three days with no deaths because the strikers believed in the existence of a document conceding to their demands.<sup>29</sup> Yet, they were not granted special category status. The second hunger strike began on March 1, 1981, the fifth anniversary of the end of special category status.<sup>30</sup> The next day, the blanket and dirty protests were abandoned to avoid drawing attention away from the hunger strike.<sup>31</sup> This strike had the same five demands as the 1980 strike: (1) the right not to have to wear the prison uniform, (2) the right not to do prison work, (3) free association with fellow prisoners, (4) full fifty percent remission of their sentences, and (5) normal visits, parcels, as well as educational and recreational facilities.<sup>32</sup> The strikers hoped to create a more successful outcome and to keep up morale by staggering the participants to join every two weeks rather than all at once, so they would not all die together.<sup>33</sup> Bobby Sands, the Officer Commanding of the IRA in the Maze, was the first man to go on hunger strike and died after sixty-six days, followed by nine other men.<sup>34</sup> After forty days on hunger strike, Sands was elected to Parliament, but Margaret Thatcher and the British Government refused to concede to the five demands, and Sands died.<sup>35</sup>

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25. Martin Melaugh, *The Hunger Strike of 1981 - A Chronology of Main Events*, CAIN, <http://cain.ulst.ac.uk/events/hstrike/chronology.htm> (last modified Sept. 1, 2016).

26. DAVID BERESFORD, *TEN MEN DEAD: THE STORY OF THE 1981 IRISH HUNGER STRIKE* 17 (1987).

27. *Id.* at 118.

28. TOM COLLINS, *THE IRISH HUNGER STRIKE* 79–83 (1986).

29. *Id.*

30. PETER TAYLOR, *PROVOS: THE IRA AND SINN FEIN* 238 (1997).

31. Melaugh, *supra* note 24.

32. RICHARD O’RAWE, *BLANKETMEN: AN UNTOLD STORY OF THE H-BLOCK HUNGER STRIKE* 103–04 (2005).

33. TAYLOR, *supra* note 30, at 237.

34. Melaugh, *supra* note 24.

35. TAYLOR, *supra* note 30, at 241.

The 1981 hunger strike ended before their five demands were met. On July 31, the mother of hunger striker Paddy Quinn directed medical intervention and he survived.<sup>36</sup> Three months later another mother intervened to save her son's life. This meant that five strikers were receiving medical treatment due to family intervention once the striker was unconscious. A week later the hunger strike, rather than the strikers, died.<sup>37</sup> Three days later, James Prior, the Secretary of State for Northern Ireland, announced concessions that allowed prisoners to wear their own clothes, remitted time lost during the protests by fifty percent, and permitted greater freedom of association among prisoners.<sup>38</sup> The Government also met the demands for improved mail and visiting privileges and promised to review the issue of prison work. Yet, there was never a formal recognition of political status.<sup>39</sup>

#### IV. AN ACCOUNT OF THE HUNGER STRIKES IN GUANTANAMO BAY

The detention camp in Guantanamo Bay also has a history of hunger strikes since opening in 2002 for suspected terrorists involved in the War on Terror.<sup>40</sup> Alleged terrorists, mainly from Afghanistan and Iraq, are indefinitely detained without trial or charge, similar to the lack of due process for many Northern Irish prisoners under the policy of internment.<sup>41</sup> While many controversies underlie Guantanamo, this Note focuses solely on the issue of hunger strikes and force-feeding.

With little possibility of legal redress, hunger strikes are the only way for the detainees to protest and are numerous in Guantanamo's brief history. The first hunger strike began on February 28, 2002 when roughly two thirds of the detainees protested the ban against wearing turbans, which was then lifted.<sup>42</sup> In 2005, 131 detainees participated in a hunger strike,<sup>43</sup> demanding fair trials, cessation of the desecration of the Qur'an, the release of those cleared by the Combatant Status Review Tribunal, the abandonment of solitary confinement for juvenile prisoners, and the improvement of basic living conditions relating to unsanitary water and inedible food.<sup>44</sup> Other hunger strikes began in April 2007 to protest the opening of the new high security Camp Six,

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36. *Id.* at 249.

37. *Id.* at 251.

38. *Id.* at 252.

39. *Id.*

40. Before its use as a camp in this context, Guantanamo was known as Camp Bulkeley, a detention camp that held Haitian refugees with HIV from 1991 to 1993. These refugees also held a hunger strike, which successfully closed the camp. Wei & Brendel, *supra* note 3, at 85–86.

41. Cindy Domingo, *Guantanamo's Past & Present: From Treaties to Torture*, PEACE & FREEDOM Fall 2010, at 9.

42. *Guantanamo Timeline: Key Events and Decisions*, NPR, <http://www.npr.org/2011/04/25/135690498/guantanamo-timeline-key-events-and-decisions> (last updated Apr. 25, 2011).

43. George J. Annas, *Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror*, 87 B.U. L. REV. 427, 445 (2007).

44. *Detention and Trial at Guantanamo Bay and other US Detention Centres*, INT'L B. ASS'N 3233 (2009).

and another strike occurred in April 2008.<sup>45</sup> An attorney representing one of the detainees stated that nearly one in five detainees were on hunger strike as of 2009.<sup>46</sup>

A widespread hunger strike occurred in 2013 with a peak of 106 of the 166 detainees on strike. This particular strike was sparked by an intrusive search of the detainees' cells for contraband, during which guards searched the detainees' Qur'ans.<sup>47</sup> The continued frustration of detention was the foundation for all of the strikes. Detainees were force-fed throughout these strikes, and the status of the hunger strikes is currently unknown since as of 2013, the U.S. military continues to refuse disclosure of this information to the public.<sup>48</sup> Guantanamo is the host of a fourteen-year long on and off hunger strike, during which some detainees have been on strike for years. For example, Tariq Ba Oda has refused food since February 2007 and, as of 2015, weighs less than seventy-five pounds.<sup>49</sup> As of January 2016, there are ninety-three detainees in Guantanamo.<sup>50</sup>

## V. LAWS ON FORCE-FEEDING IN THE UNITED STATES AND THE UNITED KINGDOM

### A. *United States*

The Code of Federal Regulations justifies force-feeding in the United States. Section 549.65(c) 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. Staff shall document their treatment efforts in the medical record of the inmate.<sup>51</sup>

This excerpt illustrates that the consent of the inmate, or here the detainee, is not a requirement. The physician must first determine that the inmate's life or health is at risk.<sup>52</sup> § 549.65(b) then encourages the staff to convince the inmate to "voluntarily accept treatment,"<sup>53</sup> but

45. *Id.* at 33.

46. Wei & Brendel, *supra* note 3, at 7677.

47. Charlie Savage, *Guantanamo Hunger Strike is Largely Over, U.S. Says*, N.Y. TIMES (Sept. 23, 2013), [http://www.nytimes.com/2013/09/24/us/guantanamo-hunger-strike-largely-over-us-says.html?\\_r=0](http://www.nytimes.com/2013/09/24/us/guantanamo-hunger-strike-largely-over-us-says.html?_r=0).

48. *Guantanamo Detainees' Hunger Strikes Will no Longer be Disclosed by U.S. Military*, WASH. POST (Dec. 4, 2013), [https://www.washingtonpost.com/world/national-security/guantanamo-detainees-hunger-strikes-will-no-longer-be-disclosed-by-us-military/2013/12/04/f6b1aa96-5d24-11e3-bc56-c6ca94801fac\\_story.html](https://www.washingtonpost.com/world/national-security/guantanamo-detainees-hunger-strikes-will-no-longer-be-disclosed-by-us-military/2013/12/04/f6b1aa96-5d24-11e3-bc56-c6ca94801fac_story.html).

49. *Chronology of Coverage*, N.Y. TIMES, <http://topics.nytimes.com/top/news/national/usstatesterritoriesandpossessions/guantanamobaynavalbasecuba/index.html> (last visited Jan. 22, 2016).

50. *Guantanamo by the Numbers*, HUMAN RIGHTS FIRST (Jan. 2016), <https://www.humanrightsfirst.org/sites/default/files/gtmo-by-the-numbers.pdf>.

51. 28 C.F.R. § 549.65(c) (2016) (emphasis added).

52. *Id.* at § 549.65(a).

53. *Id.* at § 549.65(b).



after such “reasonable efforts”<sup>54</sup> the medical staff is justified in force-feeding.<sup>55</sup> These regulations require a physician, not military or prison authorities, to make the determination about the striker’s health status.<sup>56</sup>

### B. *United Kingdom*

The now relevant law regarding force-feeding came about five years after the strike in the Maze Prison. The Mental Health (Northern Ireland) Order 1986 specifies in § 69 that: “The consent of a patient shall not be required for any medical treatment given to him for the mental disorder from which he is suffering . . . if the treatment is given by or under the direction of the responsible medical officer.”<sup>57</sup> This statute can be used to justify the force-feeding of patients who suffer from mental disorders such as anorexia, but it does not justify the force-feeding of a competent inmate who is on hunger strike because he or she does not suffer from a mental disorder.<sup>58</sup>

*Secretary of State for the Home Department v. Robb* puts this concept into practice. The court determined that since the prisoner was of sound mind and understood the consequences of his refusal of hydration and nutrition, the prison and the Home Office had no duty to feed him against his will.<sup>59</sup> The court emphasized, “[e]very person’s body is inviolate and proof against any form of physical molestation,” and that under the principle of self-determination, “[r]espect must be given to the wishes of the patient.”<sup>60</sup> Due to self-determination, the court also states that a patient who refuses treatment and dies does not commit suicide nor does the doctor aid or abet a suicide.<sup>61</sup>

During the 1981 hunger strike there was no statute forbidding force-feeding, as shown by the force-feeding of four prisoners convicted of the Old Bailey bombings in 1974.<sup>62</sup> An Irish Republican, Michael Gaughan, was also force-fed and died in 1975.<sup>63</sup> The British Government’s decision to not force-feed Bobby Sands and his fellow hunger strikers will be explored later in this Note.

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54. *Id.* at § 549.65(c).

55. Force-feeding does not violate an inmate’s constitutional rights. The government interests of preservation of life, prevention of suicide, and enforcement of prison security are legitimate reasons to justify force-feeding. *See* Grand Jury Subpoena John Doe v. United States, 150 F.3d 170 (2d Cir. 1998). Yet, a threat to prison security is not a requirement. *See In re Sanchez*, 577 F. Supp. 7 (S.D.N.Y. 1983).

56. Annas, *supra* note 3, at 1379. In Guantanamo, military commanders often decide to force-feed and this directly violates the rules of the Bureau of Prisons.

57. The Mental Health Order 1986 Act 595 § 69/1986. This Act was amended in 2004. Note also that England and Wales have an identical statute The Mental Health Act of 1983, § 63, which was amended in 2007.

58. *UK When is Force-Feeding Allowed?*, BBC (Oct. 29, 1999), <http://news.bbc.co.uk/1/hi/uk/493713.stm>.

59. Sec’y of State for the Home Dep’t v. Robb [1994] Fam. 127, 129–130 (Eng.).

60. *Id.* at 130.

61. *Id.* at 130, 132.

62. O’RAWE, *supra* note 32, at 106.

63. *Id.*

## VI. THE PRESERVATION OF LIFE IN GUANTANAMO

This Part focuses on three cases from the extensive Guantanamo Bay litigations to explain the United States' current approach to force-feeding suspected terrorists where the preservation of life and Government interests trump the fundamental rights of the detainees.

Shaker Aamer, a Saudi Arabian who is a British resident, was seized in Afghanistan in 2001 and cleared for release from Guantanamo in 2007. He was unable to return to England until he was released in 2015.<sup>64</sup> Abu Dhiab, a Syrian, was seized by Pakistani police in 2002 and was released from Guantanamo to Uruguay in 2014.<sup>65</sup> Pakistani authorities also seized Ahmed Belbacha in 2002, and he waited twelve years until his release to Algeria in 2014.<sup>66</sup> These three suspected terrorists committed no acts of terror, and all protested their detainment through hunger strikes. In 2013, they moved for a preliminary injunction against their force-feeding.<sup>67</sup> The district court denied this request, claiming that it lacked jurisdiction, but the circuit court determined that it had subject-matter jurisdiction over habeas corpus challenges.<sup>68</sup> Dhiab, Belbacha, and Aamer were designated as hunger strikers by medical staff in March 2013 according to the Federal Bureau's guidelines.<sup>69</sup> Dhiab and Belbacha had been regularly fed through nasogastric tubes. Aamer chose to consume the "minimal amount of nutrition necessary to avoid such treatment."<sup>70</sup> At the time of the appeal, only Dhiab retained his status as a hunger striker.<sup>71</sup>

Appellants first argued that force-feeding violated their freedom from unwanted medical treatment, a constitutionally protected liberty interest.<sup>72</sup> As evidence of this claim, they cited *Cruzan v. Director, Missouri Dept. of Health*, in which the U.S. Supreme Court established "a constitutionally protected liberty interest in refusing unwanted medical treatment."<sup>73</sup> In *Cruzan*, a guardian sought to cease nutrition and hydration of a person in a vegetative state, but the Court determined that such action required clear and convincing evidence of the patient's wish to discontinue nourishment, a standard that was unmet.<sup>74</sup> The

64. *Who is Shaker Aamer, the Last British Resident to be held at Guantanamo Bay*, TELEGRAPH (Oct. 2015), <http://www.telegraph.co.uk/news/politics/11349489/Who-is-the-last-British-resident-held-at-Guantanamo-Bay.html>.

65. Uki Goñi, *Guantanamo Prisoners Released to Uruguay: "We are so Happy to be Here"*, THE GUARDIAN (Dec. 2014), <http://www.theguardian.com/world/2014/dec/11/guantanamo-prisoners-uruguay-jose-mujica-happy>.

66. Kevin Rawlison, *US Government Releases Ahmed Belbacha from Guantanamo Bay*, THE GUARDIAN (Mar. 2014), <http://www.theguardian.com/world/2014/mar/14/american-government-ahmed-belbacha-guantanamo-bay>.

67. *Aamer v. Obama*, 742 F.3d 1023, 1026 (D.C. Cir. 2014).

68. *Id.*

69. *Id.* at 1027.

70. *Id.*

71. *Id.*

72. *Id.* at 1039. Since the government did not press the issue, the court assumed, for the purposes of this case, that this constitutional right extends to nonresident aliens in Guantanamo. *Id.*

73. *Id.* 1038 (citing *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 278 (1990)).

74. *Cruzan*, 497 U.S. at 285.

Court assumed that “the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.”<sup>75</sup> The Court’s opinion is “steeped in pro-autonomy language,”<sup>76</sup> but it also emphasizes that a liberty interest must be balanced against the state’s relevant interests, i.e., the protection and preservation of human life.<sup>77</sup> The Court asserted that a state is not required to remain neutral “in the face of an informed and voluntary decision by a physically able adult to starve to death.”<sup>78</sup> This statement highlights the importance the Court places on prevention of suicide. Yet, applying this case to hunger strikers could have different results because their goal is not to die, but to be heard. However, a person in a vegetative state who showed that he or she no longer wished to receive nutrition has the goal of ending life. This case requires a high standard of proof to allow a competent patient to discontinue hydration and nutrition, but it is possible if the patient’s wishes are clearly known. Yet, an inmate’s clearly competent wish to discontinue hydration and nutrition is not respected. This Note later argues that *Cruzan* is the preferable standard to apply to future force-feeding cases.

The appellants in *Aamer* also highlighted the disapproval of international organizations and medical associations regarding the practice of force-feeding. They referred to it as an abuse of medical ethics.<sup>79</sup> The court in *Aamer* admitted, “[w]e have no doubt that force-feeding is a painful and invasive process that raises serious ethical concerns.”<sup>80</sup> Yet, it deemed this issue irrelevant to the decision making process:

For petitioners to be entitled to injunctive relief . . . it is not enough for us to say that force-feeding may cause physical pain, invade bodily integrity, or even implicate petitioners’ fundamental individual rights. This is a court of law, not an arbiter of medical ethics, and as such we must view this case through *Turner’s* restrictive lens.<sup>81</sup>

Under *Turner v. Safely*, a prison regulation that impinges on constitutional rights can still be valid.<sup>82</sup>

In *Turner*, an inmate-to-inmate correspondence rule between institutions prohibited prisoners from writing one another unless they were family.<sup>83</sup> The Supreme Court determined that this rule was justified

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75. *Id.* at 279.

76. Silver, *supra* note 16, at 640.

77. *Cruzan*, 497 U.S. at 280.

78. *Id.* Note that *Cruzan* is reinforced by *Washington v. Glucksberg*, which distinguished assisted suicide from refusal to accept medical treatment and stated, “Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation’s history and constitutional traditions.” Silver, *supra* note 16, at 640 (citing *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997)).

79. *Aamer v. Obama*, 742 F.3d 1023, 1039 (D.C. Cir. 2014)

80. *Id.*

81. *Id.* (citing *Turner v. Safely*, 482 U.S. 87 (1987)).

82. *Id.* (citing *Turner*, 482 U.S. at 87).

83. *Turner*, 482 U.S. at 81–83.

since it was reasonably related to security concerns.<sup>84</sup> Mail between institutions can be used to form escape plans or arrange assaults, and the Missouri Division of Corrections has a problem with prison gangs. The rule was then meant to restrict communication between gang members.<sup>85</sup> Since there was no other easy alternative and the rule was related to valid corrections goals, the Court determined that the rule was justified.<sup>86</sup> Yet, an inmate-marriage regulation, in which a prison superintendent must determine if there are compelling reasons to allow an inmate to marry another inmate or even a civilian, was not justified under legitimate penological interests.<sup>87</sup> A compelling reason was generally pregnancy or birth of a child. The Court noted that this rule was an exaggerated response and that there were easy alternatives, such as generally permitting marriage unless the warden finds a threat to security.<sup>88</sup> Even if force-feeding burdens a fundamental right, a court cannot intervene under *Turner* if the regulation is reasonably related to penological interests.<sup>89</sup>

In using *Turner*, the Government in *Aamer* outlined two interests that the court found persuasive: preservation of life for those in their custody and maintaining security and discipline.<sup>90</sup> Case law conflicts regarding the latter reason. The court in *Aamer* outlined how suicide could agitate other prisoners<sup>91</sup> and could be seen as giving into the inmate's demands, encouraging others to copy the tactic.<sup>92</sup> Yet, cases in Georgia and California forbid force-feeding of a mentally competent inmate.<sup>93</sup> However, the court in *Aamer* found the majority of cases pointed in the direction of allowing force-feeding to achieve the governmental interest of preserving life.<sup>94</sup> Although dying by hunger strike does not clearly demonstrate a threat to the security and discipline of a prison,<sup>95</sup> the court placed a greater importance on the preservation of life to justify force-feeding.

The appellants attempted to distinguish their case by emphasizing that their specific force-feeding facilitated a violation of fundamental human rights because it prolonged an indefinite detention.<sup>96</sup> The court did not find this persuasive and quickly cited the Authorization for the Use of Military Force to justify the appellants' lawful continued

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84. *Id.* at 87.

85. *Id.* at 92.

86. *Id.* at 93.

87. *Id.* at 94.

88. *Id.* at 99.

89. *Aamer v. Obama*, 742 F.3d 1023, 1039 (D.C. Cir. 2014).

90. *Id.* at 1040.

91. *Id.* (citing *Freeman v. Berge*, 441 F.3d 543 (7th Cir. 2006)). Note that the court and previous courts classify death by hunger strike as a suicide, whereas *Robb*, [1994] Fam. 127 specifically denied this classification.

92. *Id.* (citing *Bezio v. Dorsey*, 989 N.E.2d 942 (N.Y. 2013)).

93. *Id.* (citing *Zant v. Pevatte*, 286 S.E.2d 715 (Ga. 1982)); 4 CAL. CORR. HEALTH CARE SERV. INMATE MEDICAL SERV. POLICES & PROCEDURES 22.2, 4–5, (2016) <http://www.cphcs.ca.gov/docs/imspp/IMSPP-v04-ch22.2.pdf>.

94. *Aamer*, 742 F.3d at 1041.

95. *See infra* Part IX.

96. *Aamer*, 742 F.3d at 1041.

detention. The court equated the appellants' situation with inmates in any state or federal prison.<sup>97</sup>

Appellants' second argument stated that force-feeding violated their rights under the Religious Freedom Restoration Act (RFRA) by preventing them from communal prayer at Ramadan. This claim does not hold against *Rasul v. Myers*, which determined that RFRA does not apply to Guantanamo detainees as they are not protected persons but nonresident aliens.<sup>98</sup>

The court in *Aamer* concluded that the balance of equities weighed in favor of denying the injunction because if its ruling was later determined incorrect, the detainees could then go on an uninterrupted hunger strike. Yet, if a court later determined the *Aamer* court was incorrect, the detainees could possibly have died before the ruling.<sup>99</sup> Therefore, the court erred on the side of caution and chose to preserve "the status quo"<sup>100</sup> by allowing the continued use of force-feeding where preservation of life is more important than fundamental rights.

Dhiab filed a second application for preliminary injunction in 2014, which no longer protested the overall controversy of force-feeding but alleged specific objections to the procedure of force-feeding.<sup>101</sup> In *Dhiab v. Obama*, the court ultimately denied his claims because he did not satisfy the deliberate indifference to serious medical needs standard under *Estelle v. Gamble*.<sup>102</sup> Dhiab argued that *Turner* was the appropriate test, but the court denied this standard because Dhiab did not identify any constitutional rights that were offended by the challenged practices.<sup>103</sup> Dhiab challenged the day-to-day procedure of force-feeding, rather than a constitutional claim under *Turner*, so the court chose to use the *Estelle* test, which is specifically about prisoners challenging medical care.<sup>104</sup>

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97. *Id.*

98. *Id.* at 1043 (citing *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009)).

99. *Id.* at 1044.

100. *Id.* at 1043.

101. *Dhiab v. Obama*, 74 F. Supp. 3d 16, 20 (D.D.C. 2014). These objections first included the use of a five point restraint chair (A five or six point restraint chair was introduced in Guantanamo in 2006 as an "emergency restraint chair" described by its inventor as a "padded cell on wheels." Annas, *Hunger Strikes at Guantanamo*, *supra* note 3, at 1377. In the opinion of George J. Annas, an attorney with a masters degree in public health, this chair "can never be ethically, legally, or medically justified" even when the prisoner is deemed incompetent. *Id.* at 1381. A prisoner who needs to be restrained is not weak enough to justify force-feeding. Annas states, "[t]he primary justification . . . seems to be punishment rather than medical care." *Id.*). Other objections were forcible extraction from Dhiab's cell, prevention of using a wheelchair or crutches to and from force-feeding, insertion and withdrawal of the tube rather than leaving it in place, non-medical personnel's ability to determine whether detainees are force-fed, and force-feeding before detainees are at risk of imminent death or great bodily harm. *Dhiab*, 74 F. Supp. 3d at 21.

102. *Id.* at 23 (citing *Estelle v. Gamble*, 429 U.S. 97 (1976) where a prisoner filed a complaint against prison officials for failure to provide adequate medical care concerning a back injury sustained during prison work).

103. *Id.*

104. *Id.*

While Judge Kessler denied the injunction in *Dhiab*, she ended her opinion with a critique of the Government's actions:

Mr. Dhiab is clearly a very sick, depressed, and desperate man. It is hard for those of us in the Continental United States to fully understand his situation and the atmosphere at Guantanamo Bay. He has been cleared for release since 2009 and one can only hope that that release will take place shortly.<sup>105</sup>

This end to another denial of preliminary injunction illustrates the court's limited ability to provide relief when political disagreements confine men to detainment even after being cleared. Judge Kessler does not regret or opine in her opinion regarding the issue of force-feeding, but does emphasize that "common sense and compassion" calls for a better treatment of such detainees, even just the simple use of a wheelchair.<sup>106</sup>

Mohammad Ahmed Ghulam Rabbani also attempted to fight force-feeding through a preliminary injunction in 2014, but, like his fellow detainees, he was unsuccessful.<sup>107</sup> Rabbani, a citizen of Pakistan, was transferred from CIA prisons to Guantanamo, where he remains.<sup>108</sup> While the Department of Defense designated Rabbani a high threat as an admitted al-Qaida facilitator,<sup>109</sup> he denies these allegations.<sup>110</sup> Rabbani has participated in hunger strikes since 2005.<sup>111</sup> He contested in his petition that the process of force-feeding is unconstitutionally "forcible and violent."<sup>112</sup> Contrary to *Aamer*, the main issue in the *Rabbani* case was whether the "specific manner" of force-feeding was unlawful, and so is more similar to the *Dhiab* case.<sup>113</sup>

Rabbani's main argument focused on the Fifth Amendment due process right to refuse medical treatment, citing *Cruzan*.<sup>114</sup> Yet, this due process argument ultimately failed as Rabbani's action challenged an individual procedure and did not rise to a constitutional claim.<sup>115</sup> The Government has an established interest in keeping the detainees alive, so the question becomes whether force-feeding Rabbani is reasonably related to the interest of preserving his life.<sup>116</sup> The court identified four factors in its analysis based on the standard *Turner* test: (1) a

105. *Id.* at 29–30.

106. *Id.* at 29.

107. *Rabbani v. Obama*, 76 F. Supp. 3d 21 (D.D.C. Cir. 2014).

108. Ahmed Rabbani, *A Pakistani Writes from Inside Guantanamo*, TRIBUNE (Dec. 2014), <http://tribune.com.pk/story/804819/a-pakistani-writes-from-inside-guantanamo/>.

109. *The Guantanamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/1461-mohammed-ahmad-ghulam-rabbani> (last visited Nov. 17, 2016).

110. Rabbani, *supra* note 108.

111. John Holland & Anna Cayton-Holland, *Justice Detained at Guantanamo*, DENV. POST (Nov. 10, 2005), [http://www.denverpost.com/perspective/ci\\_3203612](http://www.denverpost.com/perspective/ci_3203612).

112. Rabbani, 76 F. Supp. 3d at 23.

113. *Id.* at 25.

114. *Id.* at 24.

115. *Id.* The court also stated that the due process right does not apply to "aliens without property or presence in the sovereign territory of the United States." (citing *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009)).

116. *Id.* at 26.

valid and rational connection between force-feeding and the Government's interest in preservation of life, (2) whether there are alternative means, (3) the impact on guards, inmates, and prison resources, and (4) whether there are ready alternatives to force-feeding.<sup>117</sup>

Courts give the most weight to the first requirement in the *Turner* test,<sup>118</sup> which is not a stringent bar for the Government to meet. The Government merely needs to show a logical connection between the regulation and the Government's interest, and that the regulation is not so remote as to render it arbitrary or irrational.<sup>119</sup> With such an essential and lenient standard, the court deemed that Rabbani was unable to demonstrate a likelihood of success that would justify the preliminary injunction.<sup>120</sup> The court then briefly analyzed the remaining three factors, suggesting that an easy alternative would be to eat, that prison resources could not meaningfully be exerted to accommodate more of Rabbani's requests, and that there were no "obvious, easy alternatives" to force-feeding when "an inmate is voluntarily starving himself and nourishment is the only way to keep him alive."<sup>121</sup> Rabbani's motion was therefore denied, and the force-feeding of detainees continues.

These three cases emphasize that while unwanted medical treatment is constitutionally protected and can be considered a fundamental liberty right, the Government's interest in the preservation of life tips the scales in its favor. The opinions acknowledged the painful and difficult circumstances of force-feeding and the overall detainment of these men, but they found no remedy under the law. Without both acknowledging that Government interests cannot outweigh certain fundamental rights and recognizing that *Turner* is not the correct standard to determine the legality of force-feeding, this practice will likely continue.<sup>122</sup>

## VII. MEDICAL AUTONOMY IN NORTHERN IRELAND

The Parliamentary debates surrounding the 1981 strike are examined here to illustrate the British authorities' reasoning in not force-feeding another group of alleged terrorists, the IRA. These debates throughout 1981 focus on various topics, but two main issues will be examined in this Part: that the claim for political status was unwaveringly rejected and Parliament's attitude towards the strikers.<sup>123</sup>

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117. *Id.*

118. *Id.* at 26.

119. *Id.* at 28.

120. *Id.*

121. *Id.* at 29.

122. See *infra* Parts VIII and IX (discussing issues concerning the *Turner* factors).

123. Other topics in the debates include: (1) the Maze Prison is adequate as it is one of the newest and most modern prisons, (2) the fear of the success of IRA propaganda surrounding the hunger strike (Hunger strikes are a form of protest centered on raising awareness, and, without propaganda, the death of a hunger striker has little influence. This fear of propaganda is similar to the United States' decision to no longer release information to the media about the hunger strike in Guantanamo.), (3) the various religious reactions and statements, and (4) the bill disqualifying criminal candidates.

The issue of force-feeding was not contested as the House of Commons, House of Lords, and the Prime Minister fully accepted a prisoner's right to refuse medical treatment.

The Parliamentary debates rejected any possibility of granting political status. On March 3, 1981, the Secretary of State for Northern Ireland, Humphrey Atkins, announced the end of the dirty protests and the beginning of the second hunger strike. He stated:

The claim for political status has been rejected in clear terms by the European Commission of Human Rights, by successive Governments, and by both sides of the House . . . . [W]e shall not give way on the issue of political status under pressure of further protest action, whatever form that takes, and whether it is inside or outside the prisons.<sup>124</sup>

Atkins and other members of Parliament reiterated this stance numerous times throughout 1981. A member of the House of Lords, Lord Elton, emphasized that special category status would lend respectability to those who had committed crimes of violence and murder.<sup>125</sup> Another member of the House of Commons followed this idea by highlighting that terrorism is more dangerous than any other class of crime as it kills and maims innocent people.<sup>126</sup> These statements not only emphasize the impossibility of granting political status, but also reveal the British authorities' opinions toward the prisoners who are disqualified as mere terrorists seeking to hurt the innocent. This viewpoint discredits their goal of seeking independence from Britain. The Prime Minister, Margaret Thatcher, used some of the strongest language in describing the strikers and her unwillingness to negotiate: "They cannot have it [political status]. They are murderers and people who use force and violence to obtain their ends. They have made perfectly clear what they want. They cannot and will not have it."<sup>127</sup> Only Mr. Duffy, a member of the Labour and opposition party, criticized the Government's policy and Thatcher's approach, which had led to the death of four hunger strikers at the time of his speech. Due to Thatcher's "intransigence and unfeeling handling of the crisis" there was a deadly impasse in the Maze, and at great political cost as "she has surrendered the political initiative to the IRA."<sup>128</sup>

In spite of this criticism, the overall attitude in Parliament was disdain for the strikers, which can even be seen by Duffy, who described them as possessing "unscrupulousness, ruthlessness, imagination and determination."<sup>129</sup> This attitude in part explains why preservation of

124. 1000 Parl Deb HC (5th ser.) (1981) col. 131.

125. 417 Parl Deb HL (5th ser.) (1981) col. 1335.

126. 1 Parl Deb HC (6th ser.) (1981) col. 364.

127. 4 Parl Deb HC (6th ser.) (1981) col. 879.

128. 7 Parl Deb HC (6th ser.) (1981) col. 64-65.

129. *Id.* at col. 64. While this statement is not wholly a critique, it does illustrate an opinion that the strikers had a violent and lawless attitude.



life was not contested as more important.<sup>130</sup> Lord Hampton, a member of the House of Lords, stated, “[i]t is serious that one man has declared himself to be on hunger strike. I think that it is part of the attitude of Northern Ireland of treating life cheaply, whether it is one’s own or that of other people.”<sup>131</sup> This attitude was if the strikers treated their lives so cheaply, then what was the point in preserving them. Atkins saw the strike as another form of violence to which the Government was opposed; the only difference was that this violence was self-inflicted.<sup>132</sup> He reiterated that Parliament deplored death of any kind, whether that be upon innocent people or upon one’s self.<sup>133</sup> Yet, the Government decided not to intervene to stop the violence the strikers were inflicting upon themselves.<sup>134</sup>

A striker’s right to refuse nutrition was only mentioned by Lord Elton in reference to Joseph McDonnell, a hunger striker who died one day before Elton’s statement. “The Government view[s] his death, *although it resulted from his own decision to refuse food and medical treatment*, with the deepest regret as they do any death arising from the tensions and unrest which continue to beset the Province.”<sup>135</sup> Elton easily accepted that McDonnell had a right to refuse medical treatment and that this decision caused his death. His reference to continuing tension and unrest highlights how Parliament focused on the unrest surrounding a hunger striker’s death, rather than the death of the striker. For instance, Bobby Sand’s death was only mentioned in Parliamentary debates in the context of a tragic event that took place hours after his death. A milk deliveryman and his son were attacked by rioters who threw stones causing their milk cart to crash, killing them both.<sup>136</sup> Sympathy toward this father and son was clearly justified, yet there was no sympathy toward Sands, again showing an attitude of disdain for the prisoners. There were many riots following the strikers’ deaths, especially Sands, and Joe McCullough, a native of Belfast, remembered the day of Sand’s death as the day he threw his first cocktail bomb. He believed that it was a good decision not to force-feed against the will of the prisoners, and stated, “I’m sure a lot more would have protested if it had been done.”<sup>137</sup> This statement demonstrates the power of protests and riots behind hunger strikes and how further negative propaganda towards the prison and the British Government would have been costly, which perhaps influenced the Government’s decision not to force-feed.

Murderous and ruthless terrorists did not deserve special treatment in the eyes of Parliament, so the strike could not be successful.

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130. An argument can be made that the United State’s approach is thereby more sympathetic towards suspected terrorists due to their desire to preserve life even when they believe some are violent and dangerous men, such as Rabbani.

131. 417 Parl Deb HL (5th ser.) (1981) col. 1335.

132. 3 Parl Deb HC (6th ser.) (1981) col. 136.

133. 4 Parl Deb HC (6th ser.) (1981) col. 869.

134. This decision was also influenced by the fact that many previous strikers had died by force-feeding.

135. 422 Parl Deb HL (5th ser.) (1981) col. 872 (emphasis added).

136. 4 Parl Deb HC (6th ser.) (1981) col. 869.

137. Interview with Joe McCullough (Dec. 12, 2015).

Overall, the deaths of ten men were not lamented or regretted. Parliament saw it as the prisoners' own decisions to throw away their cheap lives by refusing medical treatment. The United States' decision to force-feed appears more ethical and compassionate when compared to the unsympathetic opinions of Parliament. In spite of Parliament's disdain, it is arguable whether their decision, while perhaps not motivated by the best intentions, is more ethical because it allowed more inmates to make their own medical decisions. This ethical question will be further analyzed later in this Note.

### VIII. TORTURE OR MEDICAL CARE?

Medical, international, and Catholic viewpoints are analyzed to assess whether force-feeding is considered torture or a proper form of medical care. This Part showcases that force-feeding a competent striker is unethical. This argument then applies to Part IX as to why the United States court should change its test to better appreciate the ethical implications of force-feeding.

#### A. *Medical Ethics*

The World Medical Association condemns force-feeding in the Declaration of Tokyo and the Declaration of Malta.<sup>138</sup> The Declaration of Tokyo prohibits physician participation in torture and cruel, inhuman, or degrading treatment. It states, “[w]here a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially.”<sup>139</sup> The Declaration of Malta applies more specifically to hunger strikes, and its Preamble notes that “[h]unger strikers usually do not wish to die but some may be prepared to do so to achieve their aims.”<sup>140</sup> On force-feeding, the Declaration specifies, “[a]rtificial feeding can be ethically appropriate if competent hunger strikers agree to it. It can also be acceptable if incompetent individuals have left no unpressured advance instructions refusing it.”<sup>141</sup> The Declaration of Malta then allows force-feeding when it is a personal decision by the striker, thereby stressing the importance of medical autonomy. An incompetent individual, such as a striker who is no longer responsive, may be artificially fed if he or she did not specify their wishes.<sup>142</sup> The second principle in the Declaration of Malta requires “[r]espect for autonomy” where “[f]orced feeding contrary to an informed and volun-

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138. Am. Soc’y of Int’l Law Proceedings, Remarks, *Is Forced Feeding in Response to Hunger Strikes a Violation of the Prohibition of Torture and Cruel, Inhuman, or Degrading Treatment*, 108 AM. SOC’Y INT’L L. PROC. 200, 203.

139. WMA Declaration of Tokyo art. 8 (1975), <http://www.wma.net/en/30publications/10policies/c18/>.

140. WMA Declaration of Malta Preamble, *supra* note 2.

141. *Id.* at princ. 12.

142. This would have prevented many mothers in Northern Ireland from intervening once their sons became unconscious if they previously stated they did not want medical intervention.

tary refusal is unjustifiable. Artificial feeding with the hunger striker's explicit or implied consent is ethically acceptable."<sup>143</sup> The World Medical Association esteems medical autonomy above any governmental interests. Furthermore, this right comes directly after the first principle in the Declaration of Malta of acting ethically, showing the importance of medical autonomy.<sup>144</sup>

The American Medical Association agrees that a competent patient has a right to refuse medical treatment and states that this rule applies to "every" patient, even prisoners or detainees.<sup>145</sup> Stephen Xenakis, a retired Army Medical Corps officer who has spent time at Guantanamo, stressed the importance that the physician be independent from the authorities, but this is not the case in the detention camp.<sup>146</sup> According to Walter Ruiz, a naval officer and defense attorney for detainees before the Guantanamo Military Committee, the doctor is not the decision-maker, but takes his or her recommendation to the commander of the base, who then asks permission from the commander of the South Command based in Florida.<sup>147</sup> This procedure directly contradicts the Declaration of Malta's fifth principle that requires clinical independence and that a physician remain objective and not allow third parties to influence their medical judgment.<sup>148</sup> The world of medical ethics therefore condemns the practice of force-feeding as directly contrary to the vital right of medical autonomy. Under the Declaration of Tokyo, force-feeding is cruel and inhuman.<sup>149</sup>

### B. *International Opinions*

The International Covenant on Civil and Political Rights (ICCPR) contains a provision that prohibits torture and cruel, inhuman, or degrading treatment from which there can be no derogation.<sup>150</sup> More specifically, Article 10 states, "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."<sup>151</sup> This Article highlights the importance of personal autonomy and can also be applied to medical autonomy. The Convention against Torture (CAT) also bans torture and is more specific in its definition.<sup>152</sup> A shadow report by the ICCPR determined

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143. WMA Declaration of Malta Preamble, *supra* note 2, at princ. 2.

144. *Id.* at princ. 1.

145. Am. Soc'y of Int'l Law Proceedings, *supra* note 138, at 203.

146. *Id.*

147. *Id.* at 207.

148. WMA Declaration of Malta, princ. 5, *supra* note 2.

149. WMA Declaration of Tokyo, *supra* note 139.

150. Kim, *supra* note 14, at 395.

151. *Id.* (citing International Covenant on Civil and Political Rights art. 10.1 (1966), <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>).

152. "[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a

that “[f]orced feeding is well-recognized as degrading treatment amounting [to] torture where the victim experiences severe pain or suffering.”<sup>153</sup> Therefore, under these international conventions, force-feeding is prohibited as torture. Yet, these conventions are not controlling law in the United States, nor in Guantanamo.<sup>154</sup>

The applicable law in Guantanamo is the law of armed conflict (LOAC), which states that force-feeding is not cruel, inhuman, or degrading treatment.<sup>155</sup> Yet, the Bush administration determined that Article 3 of the Geneva Convention is applicable in Guantanamo Bay.<sup>156</sup> This Article prohibits cruel treatment and torture and includes “outrages upon personal dignity, in particular humiliating and degrading treatment.”<sup>157</sup> If force-feeding is considered torture or degrading treatment, as it is by international law and medical opinion, then the force-feeding of detainees in Guantanamo should be prohibited. Yet, the Government rejects this conclusion. Rachel VanLandingham, a visiting professor at Stetson University College of Law and former Chief of International Law at United States Central Command, argued that failing to force-feed when medically necessary to preserve life would be a grave breach under the Geneva Convention because the Convention prohibits the renunciation of the right to health and life.<sup>158</sup> This argument, however, is flawed because it ignores Article 3. Plus, even if force-feeding does not amount to torture from the United States’ perspective, being strapped to a six-point restraint chair and having a painful medical procedure performed against one’s will would certainly amount to an “outrage upon personal dignity.” Furthermore, such practice would be considered “humiliating and degrading treatment” when detainees are required to remain in these chairs for post-feeding observation and are left to urinate and defecate upon themselves.<sup>159</sup>

Although the European Court of Human Rights allows force-feeding if there is a medical necessity, the importance of preventing cruel and degrading treatment is still highly important. The Ukrainian Government force-fed Yevgen Ivanovych Nevmerzhitsky, who was detained from 1997 to 2000 and convicted of forgery.<sup>160</sup> In *Nevmerzhitsky v. Ukraine*, he contested that his force-feeding violated Article 3 of the European Convention on Human Rights, which prohibits torture or

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public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1 (1984), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

153. World Organization for Human Rights USA, ICCPR 2 (June 15, 2006), [http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ICCPR\\_shadow\\_report.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ICCPR_shadow_report.pdf).

154. Kim, *supra* note 14, at 404.

155. The Am. Soc’y of Int’l Law Proceedings, *supra* note 138, at 204.

156. The Associated Press, *Common Article 3 of the Geneva Conventions*, N.Y. TIMES, <http://www.nytimes.com/ref/us/AP-Guantanamo-Geneva-Conventions.html> (last visited Nov. 11, 2016).

157. *Id.* at art. 3(a) and (c).

158. Am. Soc’y of Int’l Law Proceedings, *supra* note 138, at 204.

159. Geneva Convention Article 3(c), *supra* note 156; *See also* Annas, *supra* note 43, at 456.

160. Kim, *supra* note 14, at 398.

inhuman or degrading treatment or punishment.<sup>161</sup> The European Court of Human Rights determined that if force-feeding was a medical necessity to preserve life, then it did not violate the Convention. Here, the Ukrainian Government did not meet the burden of proving this medical necessity. The Court also ruled that handcuffing Nevmerzhit-sky and forcing a tube down his throat violated Article 3.<sup>162</sup> The Court did allow the force-feeding of Swiss prisoner, Bernard Rappaz, by the Swiss Government because it was medically necessary and proper procedural safeguards were in place, including a full medical team and a properly equipped hospital setting.<sup>163</sup> These rulings are similar to the International Criminal Tribunal for the Former Yugoslavia (ICTY) where force-feeding was allowed in 2006.<sup>164</sup> This procedure was deemed not cruel, inhumane, or degrading treatment<sup>165</sup> when it was a “medical necessity, includ[ing] intervention such as a drip-feeding.”<sup>166</sup>

While these cases demonstrate that force-feeding is still allowed in some international settings, the practice is overall prohibited by international organizations and medical opinions. Even under the European Court of Human Rights, it is unlikely Guantanamo’s procedure of force-feeding would meet the Court’s high bar. The procedure would violate Article 3 as the detainees are not merely handcuffed but constrained in a six-point chair that leaves them completely immobile.

### C. *The Catholic Viewpoint*

The Catholic Church was influential in both strikes, and through various means sought solutions to end the strikes and force-feeding. In Northern Ireland, the Catholic Church’s influence was more pronounced as the divide between Catholics and Protestants was one of the factors in finding a solution. Pope John Paul II sent an emissary, Father Magee, to meet with Sands and the other strikers.<sup>167</sup> While this intervention ultimately failed, Father Magee met with Sands multiple times, giving him a papal crucifix.<sup>168</sup> He also met with strikers McCreesh, O’Hara, and Hughes.<sup>169</sup> The Father asked the strikers to end their pro-

161. *Id.* (citing European Convention on Human Rights art. 3 (1953)).

162. *Id.* If handcuffs and forcing a tube violates Article 3 of the Geneva Convention, then it is easily arguable that a six-point restraint chair, forceful tube feeding, and a long period of post-feeding observation also violates the Convention.

163. Press Release, European Court of Human Rights, *The Continued Detention of a Prisoner on Hunger Strike and a Decision to Force-Feed Him do not Necessarily Entail a Violation of the Convention* 3 (Nov. 11, 2013), [http://www.humanrights.ch/upload/pdf/130423\\_EGMR\\_Comm\\_rappaz\\_engl.pdf](http://www.humanrights.ch/upload/pdf/130423_EGMR_Comm_rappaz_engl.pdf). Note that Rappaz ended his hunger strike before actually being force-fed; see also American Soc’y of Int’l Law Proceedings, *supra* note 138, at 216.

164. American Soc’y of Int’l Law Proceedings, *supra* note 138, at 204.

165. Prosecutor v. Seselj, Case No. IT-03-67-T, Urgent Order to the Dutch Authorities Regarding Health and Welfare of the Accused, ¶ 12 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 6, 2006), <http://www.icty.org/x/cases/seselj/tord/en/061206.pdf>.

166. *Id.* at 6.

167. BERESFORD, *supra* note 25, at 89-93; O’RAWE, *supra* note 31, at 141.

168. A. G. Walsh, *Bobby Sands: A Hunger for Justice* 230 (2014) (published Masters of Professional Writing thesis, University of Southern California).

169. *Diary of Events*, 182 FORTNIGHT 11, 12 (Jul–Aug. 1981).

test and attempted to resolve the dispute by meeting with Secretary Atkins, but he was unable to achieve a compromise. This effort illustrates how the Pope and his emissary did not choose a side by condemning the strikers or the Government for their actions, but sought a peaceful solution.

Yet, when Bobby Sands first chose to go on hunger strike, he met with Father Faul who at first attempted to dissuade Sands. Father Faul argued that Sands would cause great grief to his family and turmoil in the community. Sands replied, "greater love than this no man has, than that he lay down his life for his friends."<sup>170</sup> Father Faul responded, "I accept that Bobby and I won't argue with you any further."<sup>171</sup> He determined that Sands was in "good conscience" with the right motives, so he would no longer argue with him.<sup>172</sup> While Father Faul originally did attempt to prevent Sands from striking, he became convinced that Sands was making a competent decision and did not condemn his actions. On the other hand, Roman Catholic Bishop of Derry, Dr. Edward Daly, wrote a letter urging people to not support the hunger strikes and condemned the IRA.<sup>173</sup>

This viewpoint of condemning the strikers was not one supported by the Pope, but the Catholic Church was still controversial in its method of assisting to end the strike. Joe McCullough believes that the Catholic Church fostered guilt upon the mothers to intervene,<sup>174</sup> and this is seen through the influence of Father Faul. He encouraged family members to seek medical intervention when the striker was no longer competent. Described as the "architect of the families' revolt,"<sup>175</sup> Father Faul held a meeting with the families and told them the situation was bleak, squashing hope and planting the idea that the strikers did not truly understand the situation.<sup>176</sup> This statement was untrue, and the allegation that the IRA was forcing the strikers to continue is widely unfounded. The strikers felt that "to accept anything less than what their comrades had died for would be betrayal."<sup>177</sup> Yet, the frustration of the families watching their sons die was growing, so Father Faul used this desperation to encourage the families to intervene. Although Father Faul successfully helped end the hunger strike, he did so through the controversial means of driving a wedge between the families and the strikers.<sup>178</sup>

In Guantanamo Bay, the U.S. Conference of Catholic Bishops addressed the issue of force-feeding. Bishop Richard Pates, who is the chairman of the U.S. Bishops' Committee on International Justice and Peace, wrote a letter to Secretary of Defense, Chuck Hagel, in 2013,

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170. TAYLOR, *supra* note 30, at 239.

171. *Id.*

172. *Id.*

173. 417 Parl Deb HL (5th ser.) (1981) col. 1335.

174. Interview with Joe McCullough, *supra* note 136.

175. TAYLOR, *supra* note 30, at 247.

176. *Id.* at 248.

177. *Id.* at 249.

178. *Id.* at 247.

asking for the closure of Guantanamo.<sup>179</sup> Regarding force-feeding, he critiqued the practice of “shackling and strapping down” the strikers in order to force-feed them.<sup>180</sup> Bishop Pates stated, “[r]ather than resorting to such measures, our nation should first do everything it can to address the conditions of despair that led to this protest.”<sup>181</sup> This opinion reflects the general view by religious figures involved in Guantanamo. They did not condemn strikers for being suicidal, but sought to help end the strike by encouraging the Government and prisoners to find a solution, similar to the approach of Father Magee in Northern Ireland.

Like Pope John Paul II, Pope Francis addressed the issue of Guantanamo during his visit to the United States in 2014. He asked the United States to find a “humanitarian solution.”<sup>182</sup> Cardinal Pietro Parolin, the Vatican Secretary of State, met with U.S. Secretary of State, John Kerry, and discussed the issue of closing Guantanamo. The Vatican spokesman remarked that both secretaries expressed a commitment to closing the detainment center.<sup>183</sup> So far this commitment has yet to become a reality, but hopefully Pope Francis’ influence will be more successful than Pope John Paul II’s intervention in Northern Ireland.

## IX. ETHICS AND HUMAN DIGNITY

While prisoners inherently lose some of their rights due to the crimes they commit, medical autonomy is a fundamental right that should not be lost. The United States argues in favor of force-feeding for two main reasons in the Guantanamo Bay cases: preservation of life and penological interests. This Part analyzes these two justifications to reveal that the United Kingdom’s approach to force-feeding is a better solution considering that medical opinions and international law generally prohibit force-feeding as unethical and effectively torture. After arguing that force-feeding should not be inflicted upon prisoners or detainees, this Part addresses how United States courts can better approach the issue of force-feeding by recognizing that the *Turner* factors apply to cases of mail and marriage, but not to the extreme of force-feeding. *Cruzan* would be a better test as it actually addresses the issue of medical autonomy and nutritional intervention. Even though *Cruzan* concerns a patient, not a prisoner, it should still be applied because, as the United Kingdom recognizes, the case allows prisoners to retain their rights as medical patients. The United States should adopt the approach of the United Kingdom and the factors of *Cruzan*, consid-

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179. Dennis Sadowski, *Guantanamo Bay Prison Poses Moral Dilemma for White House*, NATIONAL CATHOLIC REPORTER (JUN. 29, 2013), <http://ncronline.org/news/peace-justice/guantanamo-bay-prison-poses-moral-dilemma-white-house>.

180. *Id.*

181. *Id.* at 1.

182. The Associated Press, *Pope Francis Calls for ‘Solution’ to Guantanamo Prison*, NEW YORK DAILY NEWS (Dec. 15, 2014), <http://www.nydailynews.com/news/politics/pope-francis-calls-solution-guantanamo-bay-detentio-article-1.2045936>.

183. *Id.*

ering its prisoners as medical patients so that lack of competency is the key factor in justifying force-feeding.

#### A. *Preservation of Life*

The United States' primary justification for force-feeding is preservation of life. A hunger strike is seen as a suicidal mission that must be curbed in the best interests of the prisoner, but medical professionals and hunger strikers continually assert that a strike is the striker's last means of protest and not a death wish. As shown in Part VIII, physicians assert that strikers generally do not wish to die, which is noted in the Preamble of the Declaration of Malta.<sup>184</sup> Tariq al-Odah, a hunger striker in Guantanamo since 2007, wrote, "I do want to eat food just like all human beings. I forgot the taste of food, its saltiness, its sweetness. I've even forgotten the pungent smell of food that used to stay in my fingers after eating."<sup>185</sup> Yet, he persists in his strike:

The hunger strike has nourished me in the sense of resistance and reminded me that the unjust cannot manipulate me as he pleases. He will not succeed in controlling me or controlling my destiny, for I am the one who controls it. Since I learned all these facts, I smiled at the mirror, and that is the reason for which I am on a hunger strike.<sup>186</sup>

The purpose of al-Odah's strike is not death, but rather, the protest against his detainment in the only peaceful means left to him. Hunger strikes are prevalent in prisons because they are often "the only way prisoners can protest the harsh conditions to which they are subjected to in solitary confinement."<sup>187</sup> It is arguable that taking away a peaceful form of protest is also taking away a fundamental right. Ruiz asserts, "these detainees are not rejecting their life. They are calling for life, for a meaningful life, and life is not just an existence."<sup>188</sup> This statement further illustrates how a hunger strike can give a detainee purpose when he is being held for a crime for which he has been cleared. Striking is the only way to give his life a meaningful existence. A hunger strike then becomes not a suicidal mission, but a cry for a better life. Force-feeding undermines this peaceful protest just as tear-gassing destroys a nonviolent march on the streets.

The difference between suicide and a protest that may result in death is best shown through a hypothetical. A prison guard walks into a prisoner's cell to find a prisoner actively hanging himself. In this situation, the guard is bound to prevent the prisoner from committing suicide. Hanging oneself is a clear act with a purpose and intent to die. The goal of this act is death. Yet, if the guard observes a prisoner refusing food, which is an absence of action, then he or she does not have a duty to force food upon the prisoner. The main and overriding goal of

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184. WMA Declaration of Malta Hunger Strikers, *supra* note 2, at Preamble.

185. American Soc'y of Int'l Law Proceedings, *supra* note 138, at 215.

186. *Id.*

187. Kim, *supra* note 14, at 392.

188. American Soc'y of Int'l Law Proceedings, *supra* note 138, at 216.



a hunger strike is not death, but to protest an injustice. This strike may have the secondary effect of death, but that is not the goal. A prison guard then is not justified in forcing nutrition upon a prisoner, which is a form of torture, but the guard does have a duty to cut the rope. Preservation of life can then only be justified as a means to prevent suicide or save a person's life from a medical condition when they competently wish to receive treatment.

### B. Penological Interests

Courts next justify force-feeding for the sake of the penological interests of maintaining security and discipline within the prison.<sup>189</sup> The court in *Aamer* admitted that penological interests override a prisoner's fundamental rights.<sup>190</sup> The court feared the threat of copycats and the growth of a hunger strike.<sup>191</sup>

Mara Silver, in her article, *Testing Cruzan*, argues that the threat of copycats is unfounded. She asserts that force-feeding may actually create this effect because new strikers would know that "they will not have to pay the ultimate price of death."<sup>192</sup> She cites the case, *Singletary v. Costello*, where the judge wrote, "[i]t is hard to imagine that if [Costello] dies as a result of his actions, that inmates will be rushing to imitate him."<sup>193</sup> On the other hand, a prisoner may see the pain and violence that force-feeding causes and also be deterred from striking. Yet, there is no clear evidence or study that points to one conclusion,<sup>194</sup> and an unwanted and invasive procedure cannot be justified without further evidence to clearly show force-feeding prevents a massive hunger strike. Even if it did prevent a prison-wide hunger strike, there is also no evidence that this would undermine prison security, as it is by its nature a peaceful protest.

If evidence were to show that hunger strikes did threaten prison security, there are other means of preventing the spread of strikers other than force-feeding, such as segregating the prisoner, restricting privileges<sup>195</sup> (such as phone access or visiting hours), or changing work duty to hard labor in a labor prison. These alternatives are less invasive and more ethical means of deterrence and should be implemented to prevent the spread of force-feeding, if there is future evidence that shows a threat does exist. Yet, as it stands today, the existence of such a threat is purely an opinion driven by fear. This cannot justify a form of torture or, if one does not agree that it is torture, a medical treatment that is painful and unwanted.

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189. See *Aamer v. Obama*, 742 F.3d 1023, 1040 (D.C. Cir. 2014)

190. See Part VI.

191. *Aamer*, 742 F.3d at 1040 (citing *Bezio v. Dorsey*, 989 N.E.2d 942 (N.Y. 2013)).

192. Silver, *supra* note 16, at 650.

193. *Id.* at 651 (citing *Singletary v. Costello*, 665 So. 2d 1099 (Fla. Dist. Ct. App. 1996)).

194. Silver, *supra* note 16, at 649.

195. *Id.* at 650.

### C. *From Turner to Cruzan*

Since the court's two main reasons fall short to justify force-feeding, a change in the judicial system without statutory intervention can be implemented through a switch from *Turner* to the more applicable *Cruzan*. Both cases are outlined in Part VI. It is unlikely that the legislature would implement a statute similar to the United Kingdom's Mental Health Act, so it is up to the courts to recognize that the *Turner* test is not strict enough to apply to the serious issue of force-feeding. The court in *Aamer* stated that it is an arbiter of the law not of ethics,<sup>196</sup> so even if force-feeding is deemed unethical, the way to rectify this injustice would be through *Cruzan*, not arguments based on human dignity, medical ethics, international law, or religious opinions.

The *Turner* factors again are (1) whether there is a valid and rational connection between the regulation and the legitimate and neutral governmental interest, (2) whether there are alternative means of asserting the constitutional right that remains open to the inmates, (3) whether and to the extent to which accommodation of the asserted right will have an impact on prison staff, inmate's liberty, and the allocation of limited prison resources, and (4) whether the regulation represents an exaggerated response to prison concerns.<sup>197</sup> Yet, the regulation in *Turner* related to mail between inmates and marriage approvals between inmates and civilians. The prevention of mail and marriage does not rise to the serious level of unwanted and violent medical treatment. The Court in *Turner* determined that marriage was a fundamental right and that its prohibition was an exaggeration. If marriage is seen as overriding penological interests, then medical autonomy, as a fundamental right, should also overrule penological interests. Yet, the court in applying these factors in Guantanamo did not come to this conclusion. The *Turner* factors are an inappropriate and insufficient test to apply when the context is vastly different than the original case. Invasive and unwanted medical treatment is not comparable to marriage and mail, so the factors used to justify the prevention of mail between inmates should not be used to justify force-feeding.

*Cruzan* would be a better test because it directly deals with the issue of forced nutrition in the context of a patient. While Nancy Cruzan was unconscious and unable to express her wishes, the detainees in Guantanamo are clearly able to assert their medical wishes. The first *Cruzan* factor that would be applicable to hunger strikes is the beginning assumption that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment,<sup>198</sup> which would then prohibit force-feeding. Then, whether there is a violation of this constitutional right should be determined by balancing the prisoner's liberty interests against the relevant state or prison interests.<sup>199</sup>

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196. *Aamer*, 742 F.3d at 1039.

197. *Turner v. Safley*, 482 U.S. 87, 89–90 (1987).

198. *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 279 (1990).

199. *Id.* at 279.

This test would first and foremost protect medical autonomy, but also recognize the importance of penological interests. If a prisoner were shown to be on hunger strike as a means of suicide, he or she would be incompetent and should be force-fed in the interests of preservation of life. If there is evidence that shows that hunger strikes cause security concerns in prisons, which cannot be rectified by solitary confinement or loss of privileges, force-feeding should be considered.

The *Cruzan* test begins by accepting a fundamental right and creating exceptions for that right in the appropriate circumstances, rather than applying a test regarding mail, which is not a constitutionally protected right. The *Turner* test deems the first factor as the most important but creates a broad scope, which favors the Government, making it an easy bar to overcome.<sup>200</sup> This test has been referred to as an “often lenient . . . standard for evaluating the validity of prison regulations, even when they impose upon a prisoner’s fundamental constitutional rights.”<sup>201</sup> Perhaps this lenient standard is justified when considering an issue of mail between inmates, but a stricter bar should be implemented for force-feeding. The balancing test of *Cruzan* would therefore be more appropriate and applicable.

#### X. CONCLUSION

The United Kingdom, medical opinions, and multiple international law viewpoints all agree that competency is the key to determining the justification for force-feeding. Yet, because it deems the preservation of life as more important, United States law ignores prisoners’ competency and denies them the right of medical autonomy. While it seems ethically noble to protect someone’s life, forcing a tube down someone’s nasal passage in a six-point restraint chair against his will creates a less noble viewpoint. This Note argued that a competent prisoner, who is first and foremost a patient, should not be force-fed, as medical autonomy is a fundamental right that should not be so easily derogated from under the standard of *Turner*. The Guantanamo Bay cases and future force-feeding cases would be better interpreted through the lens of *Cruzan* because it recognizes the right of medical autonomy and carves strict exceptions into this rule. This change in test would create an ethically feasible solution under the law to respect a peaceful protest unless such protest causes irreparable harm, such as legitimate threats to prison security. Force-feeding would then no longer be the rule in the United States, but the exception.

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200. See Part VI.

201. Silver, *supra* note 16, at 641.