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AUTHOR Sneed, Don; Stonecipher, Harry W.
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ABSTRACT

The ultimate test of the speech-action dichotomy, as it relates to symbolic speech to be considered by the courts, may be the fasting of prison inmates who use hunger strikes to protest the conditions of their confinement or to make political statements. While hunger strikes have been utilized by prisoners for years as a means of protest, it was not until 1982 that the courts attempted to define the rights of such protestors or to sort out the countervailing state interests leading to force-feeding, the state's usual response to such dissent. The central question is: How have the courts in recent decisions balanced the expression and privacy claims of the fasting prisoner with the state's interest in suicide prevention, maintaining order and security in prisons, and the state's obligation to protect the health and welfare of persons in its custody? Recent court decisions that involve inmate hunger-strikers who claim that their fasting deserves constitutional protection as symbolic speech and that force-feeding amounts to an invasion of privacy indicate that the balance has tipped strongly in favor of prison officials who carry out state interests. It is also evident from recent cases that when free expression consists largely of conduct, the courts feel that the state has a broad power to regulate such conduct without infringing upon First Amendment protection. (Eighty-eight notes are included.) (MS)

PRISONER FASTING AS SYMBOLIC SPEECH

THE ULTIMATE SPEECH-ACTION TEST

Don Sneed
Department of Journalism
San Diego State University

Harry W. Stonecipher
Professor Emeritus
School of Journalism
Southern Illinois University

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THE ULTIMATE SPEECH-ACTION TEST

Essential to an understanding of the scope of First Amendment protection, it is argued, is the distinction between speech and action.[1] It is generally assumed that speech as expression is entitled to full First Amendment protection,[2] but it also has been observed that when common sense distinctions are attempted between "expressing" and "doing" that most conduct falls into both categories.[3]

This is particularly true of such "speech-plus" conduct as labor picketing, which has been held to be protected when "peaceful,"[4] lunch-counter sit-ins during the 1960s in the South, which were found to be protected so long as they caused no "disturbance,"[5] and civil rights protests in the public streets and other public areas, which generally were found to be guaranteed by the concept of the "public forum."[6] Such speech-plus activities, which include both speech (expression) and conduct (physical action), have been categorized as "constitutional hybrids."[7] But when a particular kind of activity is essentially communicative in character, it has been argued, then perhaps it should be viewed for what it is--symbolic speech.[8]

Indeed, the U.S. Supreme Court has held, both explicitly and implicitly, that for expression to fall within the First Amendment gambit it need not be either verbal or written.[9] The idea of symbolic speech was first endorsed in 1931 when the Court struck down, on First Amendment grounds, a California statute that prohibited the act of

displaying a communist flag.[10] Subsequently, such actions such as refusing to salute the American flag in a public school,[11] burning an American flag on a street corner to protest the Vietnam War,[12] wearing of a small American flag on the seat of one's pants,[13] and the hanging of a flag upside down outside of a college student's window with a peace symbol attached,[14] were all found to be forms of symbolic speech protected by the First Amendment.

The Supreme Court has likewise held that a war protestor may wear an obscene sign on his jacket,[15] and that high school students may wear black armbands to school as a means of protest.[16] The court, however, has refused to sanction the burning of a draft card as a symbolic protest against the Vietnam War, noting: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[17]

Nevertheless, symbolic speech activities have continued to expand from claims of public nudity as a form of expression entitled to First Amendment protection[18] to the display of the swastika by a cadre of the American Nazi Party who planned a march through Skokie, a predominantly Jewish suburb of Chicago.[19] This expansion of symbolic speech activity is based in part, it has been suggested, upon the truism that the unusual, the dramatic, or even the bizarre can generally be counted upon to attract the attention of the press and the public to both the activity and its meaning.[20]

The ultimate test of the speech-action dichotomy as it relates to symbolic speech to be considered by the courts, however, may be the

fasting of prison inmates who use hunger strikes to protest the conditions of their confinement or to make political statements.[21] Ultimate in that fasting carried to its limits would result in death by suicide.[22] Also ultimate in terms of the high degree of government control exercised over prison inmates.[23] While hunger strikes have been utilized by prisoners for years as a means of protest,[24] it was not until 1982 that the courts attempted to define the rights of such protestors or to sort out the countervailing state interests leading to force-feeding, the state's usual response to such dissent.[25]

This article will explore prisoner fasting as a form of symbolic speech. While the focus will be upon the First Amendment speech rights of prisoners, when such claims relating to fasting fail and force-feeding results, the question of the inmates' right to privacy arises, thereby broadening the constitutional issues at state. The central question then becomes: How have the courts in recent decisions balanced the expression and privacy claims of the fasting prisoner with the state's interest in suicide prevention, maintaining order and security in prisons, and the state's obligation to protect the health and welfare of persons in its custody?

I. CONSTITUTIONAL RIGHTS IN A PRISON CONTEXT

A. Speech Rights of Prison Inmates

The nineteenth century view that a prisoner is "the slave of the state"[26] has long been discarded. Indeed, the American Bar Association's Standards of Criminal Justice states as "general

principle" that "Prisoners retain all the rights of free citizens except those on which restriction is necessary to assure their orderly confinement or to provide reasonable protection for the rights and physical safety of all members of the prison community."[27] That principle has been reinforced by two 1974 U.S. Supreme Court decisions. In Procunier v. Martinez[28] the Court held that "the limitation of First Amendment freedoms in prison must be no greater than necessary or essential to the protection of the particular governmental interest involved." In the second case, Pell v. Procunier,[29] the Court held that "A prison inmate retains all those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Few Supreme Court decisions, however, have addressed the free speech guarantees of prisoners.[30] Indeed, the court has yet to examine a claim of First Amendment protection for symbolic speech in a prison context.

There is little doubt, however, that the Supreme Court in 1974 departed from its earlier "hands off" approach in dealing with the rights of prisoners, i.e., avoidance of any consideration of a prisoner's constitutional rights by denying jurisdiction to hear the claims.[31] Indeed, in 1974 all federal courts were given a mandate by the Supreme Court to "discharge their duty" to protect the constitutional rights of prisoners.[32] A recent survey of both federal and state litigation involving the rights of prisoners to freedom of expression in inmate newspapers[33] indicates that the lower courts are heeding that mandate. Additionally, both the ABA's 1980 Standards

Relating to the Legal Status of Prisoners and the Uniform Law Commissioners' 1978 Model Sentencing and Corrections Act call for what one authority notes is a "fairly liberal interpretation of First Amendment rights for prisoners in the area of written communication."[34] How liberal an interpretation the lower courts have given to the claims of fasting prisoners that their conduct is protected as symbolic speech is the subject of Section III of this article.

B. The Right of Privacy Versus Force-Feeding

It was not until 1965 that the Supreme Court first recognized the right to privacy or "personhood" as an independent constitutional right.[35] From this first express recognition of a constitutional right of privacy, one scholar has noted, the Supreme Court in Roe v. Wade[36] found the right "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[37] In a 1977 case, Whalen v. Roe, a unanimous Court observed that the right to privacy encompassed something beyond the least common denominator of the court's prior decisions with respect to family and procreation,[38] and in fact embraced both an "individual interest in avoiding disclosure of personal matters" as well as a general, but nonetheless distinct, "interest in independence in making certain kinds of decisions."[39]

Since the Supreme Court's decision in Roe v. Wade in 1973, many lower federal courts and state appellate courts have recognized that involuntary medical treatment, of which force-feeding is one type, may intrude upon an individual's right to privacy, i.e., upon his right to

make independent decisions about intimate issues.[40]

In many of the so-called "right-to-die" cases both force-feeding and privacy concerns are at issue. In 1985 the New Jersey Supreme Court, for example, held that an 84 year-old nursing home resident's interest in freedom from nonconsentual invasion of her bodily integrity[41] outweigh any state interest in preserving her life or in safeguarding the integrity of the medical profession. Bedridden with serious and irreversible physical and mental impairments and a limited life expectancy, the resident's primary conduit for nutrients was a nasogastric feeding tube.[42] Likewise, in 1986 the Supreme Judicial Court of Massachusetts held that the request of the wife of a hospital patient in a persistent vegetative state for physicians to remove or clamp the patient's gastrotomy tube should be honored, and if not, the patients could be removed from the hospital.[43]

These right-to-die cases differ, however, from the hunger strike utilized by prison inmates who are fasting to gain public attention for causes or beliefs. In the right-to-die cases force-feeding may be involved and, as in the two cases discussed above, invasion of privacy or violation of one's personhood is generally involved, but only in the hunger-striking cases is symbolic speech and First Amendment expression guarantees involved.

In Zant v. Prevatte, a 1982 hunger-striking case, for example, the inmate, fearing for his life in the Georgia prison system, initiated his hunger strike to attract attention to his request for a transfer out of the state.[44] A right-to-die was not at issue, although at the time of the suit doctors predicted that the prisoner would starve to

death within three weeks if the fast continued.[45] The primary argument was that the First Amendment's speech clause protected the prisoner's hunger strike. It was also argued that monitoring the prisoner's physical condition against his will or force-feeding him to prevent his death from starvation would violate his constitutional right to privacy.

Despite arguments that the state had a duty to protect the health of those who are incarcerated in its penal system, the Georgia Supreme Court concluded: "The State can incarcerate one who has violated the law and, in certain circumstances, even take his life. But it has no right to destroy a person's will be frustrating his attempt to die if necessary to make a point."[46] As will be demonstrated in Section III, however, the efforts of most hunger-striking prisoners have been thwarted as the courts have recognized a growing number of state interests applicable to such cases.

II. GOVERNMENTAL INTERESTS IN FORCE-FEEDING

In attempting to balance the competing constitutional interests of hunger-striking prisoners with state interests, the courts have utilized a number of potentially compelling state interests. One comprehensive review of such cases identifies six compelling governmental interests. They are: (1) the preservation of life, (2) the prevention of suicide, (3) the protection of innocent third parties' or dependents' interests, (4) the maintenance of the ethical integrity of the medical profession, (5) the fulfillment of the

institutional duty to provide medical care, and (6) the enforcement of prison security, order, and discipline.[47] The study treats each of these interests in turn, analyzing the cases that have held particular state interests sufficient to justify force-feeding against claims of symbolic speech and the right to privacy.

Another study, while identifying several state interests applicable to the case of a hunger-striking prisoner, argues that these interests fall into one of two general types. The first of these general categories is referred to as "paternal" interests, those premised on a belief in the sanctity of human life. The second general category is labeled the "institutional" interest of the state, such as the preservation of internal order and discipline, and maintenance of institutional security against escape and unauthorized entry, and the rehabilitation of prisoners.[48]

After examining three 1982 cases dealing with the question of whether the force-feeding of prisoners is constitutionally permissible, a third study suggests four justifications as a framework for analysis. First is the state's interest in the prevention of suicide, which requires an examination of both the intent of the inmate involved in such fasting as well as a determination of whether fasting under the circumstances is a criminal act. Second is the state's interest in the preservation of life, an interest based upon the state's police power which encompasses the means to protect the health and safety of all its citizens, including prisoners. Third is the state's obligation to protect the health of persons in its custody, including the common law duty to provide medical treatment to

prison inmates. Fourth is the state's interest in maintaining security and order, which is a prison administration's primary task. While each of these interests has been judicially recognized as an appropriate basis to force-feed protesting inmates, the prisoner may have equally compelling constitutional interests protecting his right of expression, albeit symbolic in nature, and his right to privacy against the intrusion of state sanctioned force-feeding.[49]

Two cases are frequently cited by the courts as well as in the studies discussed above in connection with the identification of state interests involved in inmate fasting cases, neither of which directly involves hunger-striking prisoners. One is Superintendent of Belchertown State School v. Saikewicz,[50] a 1977 Massachusetts Supreme Court decision that examined the right of a mentally retarded person in a state institution to refuse life-saving medical treatment even though he would undoubtedly die of leukemia, a disease of the blood requiring chemotherapy. After examining four state interests--the preservation of life, the prevention of suicide, the protection of the interests of the innocent third parties, and the maintenance of the ethical integrity of the medical profession--and weighing them against the patient's privacy interests, the court determined that none of the interests were sufficient to justify forced treatment.[51]

The second case, Procunier v. Martinez, involved California prison inmates who challenged a prison regulation that allowed censorship of their mail. In its 1974 opinion, the U.S. Supreme Court identified three state interests--the preservation of internal order and discipline, the maintenance of institutional security against escape

and unauthorized entry, and the rehabilitation of prisoners--in upholding the regulations. These state interests have been utilized in other areas where restrictions on prisoner rights have been challenged, as well as in determining when and under what circumstances fasting prison inmates may constitutionally engage in hunger strikes to protect either the conditions of their confinement or to make political statements.[52] This balancing of competing interests is examined in recent cases involving fasting as symbolic speech in a prison context.

III. INMATE FASTING AS SYMBOLIC SPEECH: RECENT CASES

Only a handful of United States decisions addresses the First Amendment symbolic speech implications of the hunger-striking prisoner. The cases include a trilogy of 1982 cases the Zant decision,[53] State ex rel. White v. Narick,[54] and Von Holden v. Chapman[55]. Other decisions include a 1983 case, In re Sanchez,[56] a 1984 case, In re Caulk,[57] and a 1981 case, Boyce v. Petrovsky.[58] In each case, prison officials have claimed that the interests of the state outweigh the restricted constitutional rights of the inmate, and inmates have argued that their First Amendment freedom of expression rights have been infringed and/or privacy invaded by the prison authorities' decision to force-feed them.

Only one state court has upheld the prisoner's claims, ruling that a hunger-striking inmate should be allowed to die from fasting. The Zant court held that an inmate who began his fast as a protest over

conditions is entitled to constitutional protection under the First Amendment's speech clause. Furthermore, the court noted that "by virtue of his right to privacy, the inmate can refuse to allow intrusions on his person, even though calculated to preserve his life."[59] The state argued that it has a duty to protect the health of those incarcerated in the state penal system an that a compelling state interest to preserve human life exists. The court emphasized that the question in case was: "Does this duty authorize the state to force medical treatment and food on a sane prisoner who does not want such treatment or food?" In upholding the inmate's right to express himself in terms of symbolic speech of a hunger strike, the court concluded that a prisoner does not relinquish his constitutional right to privacy because of his status as a prisoner, and that the state cannot monitor a prisoner's health against his will or force-feed him to prevent his death through starvation.

In all other cases in this section, however, the courts ruled in favor of prison authorities, refusing to extend constitutional protection to hunger-striking inmates who sought to use fasting as a form of protected freedom of expression or symbolic speech. For example, the Supreme Court of West Virginia, in another 1982 case, State ex rel. White v. Narick, balanced the hunger-striking prisoner's right of privacy against several state interests in keeping him alive: preservation of life and its converse, preventions of suicide, protection of the interests in innocent third parties, and maintenance of medical ethical integrity.[60]

Furthermore, the court said that a prisoner's constitutional rights

can be restricted when the substantially interfere with orderly prison administration.[61] The court acknowledged that the U.S. Supreme Court has stated that "no iron curtain is drawn between the Constitution and the prisons of this country,"[62] but, at the same time, the court noted that a prisoner is not entitled to all constitutional rights and that the unique nature and requirements of prison custody allow a state to impose certain limitations on those rights.[63] The court also vehemently disagreed with the Zant ruling, stating: "We do not agree with Zant. The Georgia court failed to consider compelling reasons for preserving life, not the least being civility."[64]

Continuing, the court noted: "What sense does it make for a state to allow a prisoner to kill himself, urging as its justification his right-of-privacy to refuse medical treatment for his voluntary debilitation; and yet preserve unto itself the right to kill him, the ultimate violation of his privacy right."[65] The court also emphasized that preservation of human life is "a concern at the very core of civilization,"[66] and then concluded that privacy rights and the symbolic speech activity represented by the hunger strike are outweighed by the state interest in preserving life: "West Virginia's interest in preserving life is superior to White's personal privacy (severely modified by his incarceration) and his freedom of expression right."[67]

Von Holden v. Chapman completes the trilogy of 1982 cases. In that case, a New York court ruled that the state's obligation to protect the health of persons in its custody, its interest in the preservation of life, and its interest in maintaining order in its institutions

outweighed the privacy rights and freedom of expression guarantees claimed by the inmate hunger-striker, Mark David Chapman, who was serving a life sentence for murdering John Lennon, the former member off the Beatles singing group. Chapman claimed that his fasting was not an attempt at suicide but instead was symbolic speech entitled to First Amendment protection.[68] In that regard, he claimed that he was attempting to draw public attention to the starving children of the world.[69]

However, the court rejected Chapman's claim, noting: "Whereas a prisoner's right of expression may not be circumscribed to an extent greater than that required for the legitimate ends of prison security and administration, those legitimate interests clearly include the need to prevent a prisoner's suicide even if cloaked in the guise of First Amendment expression."[70] In addition, the court said that Chapman's hunger strike had caused disruption in the procedures of his prison unit, has created resentment among other patients, and had resulted in other inmates adopting the starvation technique in order to gain attention.[71] The court not only rejected Chapman's claim that his fasting was symbolic speech, but is also noted that "it is self-evident that the right to privacy does not include the right to commit suicide."[72] The court then cited several statutes aimed at preventing suicide and referred to cases in which the issue of whether the right to privacy includes the right to commit suicide by starvation while in state custody had been denied constitutional protection.[73]

While the Von Holden case perhaps represents the strongest support for prison officials in cases involving hunger-striking prisoners

claiming a First Amendment infringement from force-feeding, the two remaining cases do not contain such strong wording.

In the 1983 case In re Sanchez the courts acknowledged that "the question of force-feeding under any circumstances...raises serious constitutional questions regarding the individual's right to control his own body and the validity of First Amendment rights as an expression of views."[74] The court even noted that "...a prisoner on a hunger strike, weakened to the point of physical incapacity, does not present a threat to prison security, although, of curse, the extra medical attention that such an individual may require creates an administrative burden."[75] However, the Sanchez court granted the state an application to force-feed the inmate, reasoning that the prisoner was not demonstrating on behalf of a political or religious cause but instead want to bring pressure on a judge to make a ruling.[76]

A New Hampshire court ruled in the 1984 case In re Caulk that the state's interest in maintaining an effective criminal justice system and in preserving life would prevail over a hunger-striking inmate's claims that the First Amendment protected his actions.[77] While the court said that the defendant did not completely forfeit his right to privacy be reason of his incarceration, it said that he subjected himself to state interests of institutional order and administrative control. The court concluded that "Prisoners are not permitted to die on their own without adversely and impermissible affecting the state's legitimate authority over inmates."[78]

On the other hand, a dissenting judge in Caulk noted that "the

state has not demonstrated a compelling interest so as to override Mr. Caulk's fundamental liberty right to fast until his natural death without governmental intervention."[79] The dissenter added: "Privacy and bodily integrity in one's person vis-a-vis the government is certainly at the core of the concept of liberty."[80] To support his contention, the dissenting judge referred to a dissent in the case Olmstead v. United States in which Justice Louis Brandeis of the U.S. Supreme Court wrote: "The makers of our Constitution conferred, as against the government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men."[81]

Furthermore, the dissent quoted form On Liberty by John Stuart Mill who set out the nature and limits of authority that can legitimately be exercised over an individual by society: "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forebear because it will be better for him to do so, because it will make him happier, because, in the opinion of other, to do so would be wise, or even right."[82]

Finally, in a 1981 case, Boyce v. Petrovsky,[83] a U.S. District Court denied claims from an inmate hunger-striker that force-feeding had violated his First, Fifth, Sixth, and Eighth Amendment rights. The court ruled that the "petitioner's claimed right to bodily privacy as a federal prisoner is subject to the government's constitutional and statutory obligation to provide necessary medical care and the court will approve the Magistrate's conclusion that the provision of

necessary medical treatment to an unwilling inmate does not violate any of that inmate's constitutional rights."[84]

IV. CONCLUSION

REcent court decisions that involve inmate hunger-strikers who claim that their fasting deserves constitutional protection as symbolic speech and that force-feeding amounts to an invasion of privacy indicate that the balance has tipped strongly in favor of prison officials who carry out state interests in suicide prevention, maintenance of order and security in prisons, and providing for the health and welfare of persons in state custody.

With the exception of the Zant case in which an inmate hunger-striker prevailed, courts have shown great reluctance to recognize the hunger strike as symbolic speech by means of which the prisoner is attempting to communicate. On the Zant court recognized fasting as symbolic speech and thus viewed prison officials' efforts to halt the hunger strike as an infringement upon the inmate's freedom of expression. Therefore, since a hunger strike involves conduct as well as speech, the state has much greater latitude in regulating this type of expression than in regulating actual speech; the state may assert any of its legitimate interests to justify restrictions of free expression.[85]

On the other hand, hunger-striking inmates are more successful arguing that their privacy rights are so strong as to overcome both paternal and institutional interests claimed by the state in keeping

hunger-strikers alive through force-feeding. In fact, this is the argument that allowed the prisoner to win his case in the Zant decision. However, in both Von Holden and White the same privacy evaluations of the relative weight and importance of each of the state interest factors versus the First Amendment claims without articulating in the opinion how the subjective evaluation is arrived at. This subjective evaluation may, in the long run lead to inconsistent results in future decisions involving inmate hunger-strikers.

Whatever happens, it is evident that the inmate hunger-striker will face a heavy burden in trying to overcome a number of state interests. There is also evidence that current judicial climate is unsympathetic to the prisoner's claim of force-feeding as an invasion of privacy and denial of freedom of expression rights--cases outside of the immediate domain of the hunger-striker but cases involving the competing interests of state control versus the individual right of inmates.[86]

It is also evident from recent cases that when free expression consists largely of conduct, the state has a broad power to regulate such conduct without infringing upon First Amendment protection. For example, the Supreme Court held in the Village of Skokie case that conduct, as a means of expression, does not invoke the "absolute" protection usually associated with free speech,[87] and that the state could restrict the First Amendment rights of the Nazi Party members to insure public peace and prevent violence and personal injury.[88]

While the inmate hunger-striker faces formidable challenges in advancing a First Amendment claim to continue his hunger strike and

while state interests such as the preservation of life are highly persuasive, it also is apparent that the state interest diminishes when those interests collide with the privacy of the competent individual who is willing to die. In effect, the state's interest in preventing suicide is one that is predicated upon preventing irrational self-destruction.

Regardless, the question remains as to whether the hunger-strike is a form of protected expression as symbolic speech in a prison context. With the exception of the Zant case and a strongly worded dissent in In re Caulk, the answer is no. Of course, only a few cases have addressed this issue. No U.S. Supreme Court has wrestled with the issue. And yet, the ultimate speech-action test--prison fasting as symbolic speech--was decided in an inmate's favor in Zant. With more subjective evaluations of the relative importance of the various state interests compared to a fasting prisoner's First Amendment claims, the balance could be tipped in favor of those incarcerated and under state custody. Until such time, though, prison officials have a great deal of assurance that hunger strikes will not be viewed as symbolic speech or that force-feeding a hunger-striker will invade his privacy or otherwise infringe his expression of rights.

Notes

1. Donald M. Gillmore and Jerome A. Barron, Mass Communication Law, 4th ed. (St. Paul, Minn.: West Publishing, 1984), p.83.

2. For a discussion of the "absolutist" view of full protection, see Thomas I Emerson, "Toward a General Theory for the First Amendment," Yale Law Journal 72 (April 1963): 914-16.

3. See, e.g., C. Edin Baker, "Scope of the First Amendment Freedom of Speech," UCLA La Review 25 (June 1978): 1010.

4. Milkwagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 293 (1941).

5. Garner v. Louisiana, 368 U.S. 157, 201-02 (1961).

6. Edwards v. South Carolina, 372 U.S. 229 (1963). See also, Harry Kalven Jr., "The Concept of the Public Forum," in Philip B. Kurland (ed.), The Supreme Court Review: 1965 (Chicago: University of Chicago Press, 1965), p. 23.

7. C. Herman Pritchett, The American Constitution, 3rd ed. (New York: McGraw-Hill, 1977), p.316.

8. Gillmore and Barron, Mass Communication Law, p.88.

9. See, e.g., Brown v. Louisiana, p. 88.

10. Stromberg v. California, 283 U.S. 359 (1931).

11. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

12. Street v. New York, 394 U.S. 624 (1969).

13. Smith v. Goguen, 415 U.S. 56 (1974).

14. Spence v. Washington, 418 U.S. 405 (1974) (per suriam).

15. Cohen v. California, 403 U.S. 15 (1971).

16. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

17. United States v. O'Brien, 391 U.S. 367, 376 (1968).

18. See, e.g., California v. LaRue, 409 U.S. 109 (1972).

19. Village of Skokie v. National Socialist Party, 373 N.E.2d 21 (Ill. 1978).

20. Daniel W. Pfaff, "The Symbolic Speech Cases: An Analysis," Journalism Quarterly 49 (Autumn 1972): 551.

21. See generally, Richard Ansbacher, "Force-Feeding of Hunger-Striking Prisoners: A Framework for Analysis," University of Florida Law Review 35(Winter 1983): 99-129; Steven C. Bennett, "The Privacy and Procedural Due Process Rights of Hunger-Striking Prisoners," New York University Law Review 58 (November 1983): 1157-1230; Joel K. Greenberg,"Hunger Striking Prisoners: The Constitutionality of Force-Feeding," Forham Law Review 51 (March 1983): 747-70; and Steven C. Sunshine, "Should a Hunger-Striking Prisoner Be Allowed to Die?" Boston College Law Review 25 (March 1984): 423-58.

22. A complete fast, refusal of all food and water, can lead to death from dehydration within a few days. As a general matter, a normal, healthy man will die within 60 days if he takes no food but drinks water and stays quiet. See, Bennett, "Rights of Hunger-Striking Prisoners," p. 1158, n.3.

23. For a discussion of the constitutional rights of inmates in a prison context, see James J. Gobert and Neil P. Cohne, Rights of Prisoners (New York: McGraw-Hill, 1981), pp. 99-142, 188-91; Sunshine, "Should a Hunger-Striking Prisoner Be Allowed to Die?" pp. 437-40.

24. See, e.g., Cullen v. Gove Press, 276 F. Supp. 727, 730 (S.D. N.H. 1967). For a listing of cases in which the court took judicial notice of protection of hunger strikes of inmates as a form a protest, see Sunshine, "Should a Hunger-Striking Prisoner Be Allowed to Die?" p.431 n. 126.

25. Ansbacher, "Force-Feeding Hunger-Striking Prisoners," p. 99.

26. Ruffin v. Commonwealth, 62 Va. (21 Gratt) 790, 796 (1871).

27. ABA Joint Committee on the Legal Status of Prisoners, "The Legal Status of Prisoners," (Tent. Draft 1977) American Criminal Law Review 14, Sec. 1.1, p. 417.

28. 416 U.S. 396, 412 (1974).

29. 417 U.S. 817, (1974).

30. In addition to Pell v. Procunier, 417 U.S. 817 (1974) (upholding ban against face-to-face interviews), see Bell v. Wolfish, 441 U.S. 520 (1979) (upholding a publishers-only rule for prisoners' receipt of hard cover books); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (upholding regulation

against bulk mailing); and Wolff v. McDonnell, 418 U.S. 539 (1974) (upholding prison practice of inspecting mail.)

31. For a discussion of the various approaches taken by the courts in consideration of the claims of constitutionality of prisoners, see Sheldon Krantz, The Law of Corrections and Prisoners' Rights (St. Paul, Minn., West Publishing, 1986), pp. 292-310; Gobert and Cohen, Rights of Prisoners, pp. 99-142, 188-91; Emily Calhoun, "The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal," Hastings Constitutional Law Quarterly 4 (1977): 219-44.

32. Procunier v. Martinez, 416 U.S. at 405-06.

33.

34. Krantz, The Law of Corrections and Prisoner's Rights, p. 326.

35. Griswold v. Connecticut, 381 U.S. 479 (1965) (rights of married couples to privacy recognized). The term "personhood" has been defined as "those attributes to an individual that are irreducible to his selfhood." Lawrence Tribe, American Constitutional Law (Mineola, N.Y.: Foundation Press, 1978), p.889.

36. 410 U.S. 1134 (1973).

37. Bennett, "Rights of Hunger-Striking Prisoners," p. 1169.

38. Ibid., p. 598 n. 23.

39. Ibid., pp. 599-600. For a further discussion of the origins of the right to privacy, see Bennett, "Rights of Hunger-Striking Prisoners," pp. 1164-71.

40. Ibid., p. 1173. It is noted that between 1973 and 1983 that at least 11 of the 13 courts considering the question held that the right to privacy protected the individual's decision to reject or accept medical treatment. For a listing of these cases, see ibid., p. 1173 n. 87.

41. At least three methods are used in force-feeding. The preferred method is nasogastric tube feeding, accomplished by inserting a tube down the nose through the esophagus and into the stomach. Intravenous feeding, which required insertion of a catheter into a major blood vessel leading to the heart, is considered too slow and requires the patient's cooperation or sedation. The third approach, gastrotomy, is considered the treatment of last resort since it requires direct surgical access to the stomach. For a discussion of the health risks and the concerns about the physical intrusion of such steps, see Bennett, "Rights of the Hunger-Striking Prisoners," pp. 1176-79.

42. In re Conroy, 486 A.2d 1209 (N.J. 1985).

43. Brophy v. New England Sinai Hospital, 497 N.E.2d 626 (Mass. 1986). The court noted: "We are faced again with a case where 'advances in medical science have given doctors greater control over the time and nature of death' and where physicians have developed a 'range of options...to postpone death irrespective of the effect on the patient.'" Ibid., p. 627.

44. 286 S.E.2d 715 (Ga. 1982).

45. Ibid., p. 715.

46. Ibid., p. 717.

47. See Bennett, "Rights of Hunger-Striking Prisoners," pp. 1183-1220.

48. For a fuller discussion of these two general categories of state interests, see Sunshine, "Should a Hunger-Striking Prisoner Be Allowed to Die?" pp. 440-44.

49. For a fuller discussion of this framework of analysis, see Ansbacher, "Force-Feeding Hunger-Striking Prisoners," pp. 102-13.

50. 370 N.E.2d 417 (Mass. 1977).

51. 416 U.S. 396.

52. For a discussion of Procunier as a source of stated institutional interests in a prison context, see Bennett, "Rights of Hunger-Striking Prisoners,: pp. 443-44.

53. 286 S.E.2d 715.

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

55. Von Holden v. Chapman, 450 N.Y.S.2d 623 (N.Y. 1982).

56. In re Sanchez, 577 F.Supp.7 (S.D. N. Y. 1982).

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

58. Boyce v. Petrovsky, No 81-3322-CV-S-WRC, (U.S. Dist. Ct., Western Dist. of Mo. 1981).

59. 286 S.E.2d, at 716-17.

60. 292 S.E.2d, at 55.

61. Ibid.

62. 418 U.S. 539, 555-56.

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

64. 292 S.E.2d, at 57.

65. Ibid.

66. Ibid, at 58.

67. Ibid.

68. 450 N.Y.S.2d, at 627.

69. Ibid.

70. Ibid.

71. Ibid., at 625.

72. Ibid.

73. Ibid., at 626. See, e.g., Matter of Thomas Clauso (Sup. Ct. of N.J., Mercer Co., No. I33141-81 February 1982); White v. Bordenkircher (Cir. Ct. W. Va., Marshall Co., No. 81-C-422N December 1981); Boyce v. Petrovsky (U.S. Dist. Ct., Western Dist. Mo. No 81-3322-CV-S-WRC September 1981).

74. 577 F.Supp. 7, [illegible]

75. Ibid.

76. Ibid.

77. 48 A.2d 93.

78. Ibid., at 96.

79. Ibid., a 97.

80. Ibid., at 98.

81. Olmstead v. united States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

82. John Stuart Mill, On Liberty in 43 Great Books of the Western World, 271, R. Hutchins (ed.).

83. Ibid., n. 58.

84. Ibid.

85. Se Sunshine, "Should a Hunger-Striking Prisoner Be Allowed to Die?" p. 454.

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

87. See, Sunshine, "Should a Hunger-Striking Prisoner Be Allowed to Die?" p. 438.

88. Ibid.