William & Mary Law Review

Volume 62 (2020-2021)
Issue 2

Article 7

11-2020

Force-Feeding Pretrial Detainees: A Constitutional Violation

Bryn L. Clegg

FORCE-FEEDING PRETRIAL DETAINEES: A CONSTITUTIONAL VIOLATION

TABLE OF CONTENTS

INTRODUCTION

On August 22, 2019, a federal judge granted United States Immigration and Customs Enforcement's (ICE) request for an Emergency Temporary Restraining Order to force-feed Evgenii Ivanov, a Russian detainee who had refused food for more than two weeks.[1] ICE did not disclose Ivanov's reasons for striking.[2] Instead, ICE proffered various reasons that Ivanov's hunger strike might result in serious injury and death, stating that the Government's interests "clearly outweigh whatever interest [Ivanov] has in pursuing a hunger strike."[3] After performing a cursory balancing test of Ivanov's rights, the court held that ICE was likely to succeed in proving this.[4]

Ivanov is one of many pretrial detainees who has gone on hunger strike only to find that the government response is force-feeding. A demonstration in El Paso, Texas, drew massive public pressure after ICE employees engaged in force-feeding detainees.[5] The Associated Press reported that the detainees in El Paso were experiencing nosebleeds and frequent vomiting as a result of the force-feeding.[6] During one hearing, an ICE doctor testified that the process was widely viewed as medically unethical and that "[t]here wouldn't be

---

1. City News Serv., *Judge Grants ICE Request to Force-Feed Detainee on Hunger Strike*, FOX 5 NEWS (Aug. 22, 2019, 4:57 PM), https://fox5sandiego.com/2019/08/22/judge-grants-ice-request-to-force-feed-detainee-on-hunger-strike/ [https://perma.cc/E9HN-E9EY].

2. *See id.*

3. *Ex parte* Application for Emergency Temp. Restraining Ord. & Request for Expedited Preliminary Injunction Hearing at 6, U.S. Dep't of Homeland Sec., Immigration & Customs Enf't v. Ivanov, No. 3:19-cv-01573-DMS-MDD (S.D. Cal. Aug. 21, 2019).

4. U.S. Dep't of Homeland Sec., Immigr. & Customs Enf't v. Ivanov, No. 3:19-cv-01573-DMS-MDD, slip op. at 2 (S.D. Cal. Aug. 22, 2019) (granting plaintiff's ex parte application for emergency restraining order).

5. *ICE Stops Force-Feeding Immigrant Detainees*, VOA NEWS (Feb. 14, 2019, 9:54 PM), https://www.voanews.com/usa/immigration/ice-stops-force-feeding-immigrant-detainees [https://perma.cc/TJY9-48PL].

6. Clara Long, *ICE Force-Feeding Immigrant Detainees on Hunger Strike: Force-Feeding Is Cruel, Inhuman and Degrading*, HUM. RTS. WATCH (Feb. 1, 2019, 9:22 AM), https://www.hrw.org/news/2019/02/01/ice-force-feeding-immigrant-detainees-hunger-strike [https://perma.cc/4HY3-942X].

anyone in a hospital who would do it."[7] She then said ICE regulations required the practice.[8]

Furthermore, hunger strikes are on the rise. Between January and March of 2019, at least six hunger strikes were initiated at detention centers, which represents an unprecedented increase in frequency.[9] As most strikes were initiated because detainees were denied bond,[10] increasing bond denials in immigration cases may exacerbate the problem.[11]

ICE's response here is predictable—requesting a court order to force-feed.[12] However, whether a judge issues such an order should rely upon a nuanced balancing test acknowledging not only the detainee's constitutional right to refuse lifesaving hydration and nutrition, but also the individual's unique status as a pretrial detainee. Instead, pretrial detainees have been analyzed like convicted prisoners.[13] Although this is particularly relevant in the immigration detainment context, this argument is equally relevant for any pretrial detainee.

This Note argues that the status of all pretrial detainees (whether detained pretrial or for immigration purposes) cannot be ignored in this balancing framework. This status should afford detainees heightened scrutiny, not the bare rationality review that is ordinarily applied to convicted prisoners. Such heightened review would protect the detainees' due process rights—such as the fundamental right to die and the detainee's right not to be punished—while still affording jails and prisons the latitude to address real security threats. Part I will provide background regarding a person's fundamental right to refuse lifesaving hydration and nutrition, the

---

7. Robert Moore, *ICE Doctor Defends Force-Feeding Detainees on Hunger Strike as 'Uncomfortable' but Necessary*, TEXASMONTHLY (Aug. 16, 2019), https://www.texasmonthly.com/news/ice-doctor-force-feeding-detainees-on-hunger-strike/ [https://perma.cc/3X9V-DZ83].

8. *See id.*

9. *See* Michael Issac Stein, *Hunger Strikes at ICE Detention Centers Spread as Parole, Bond Are Denied*, NPR (Apr. 19, 2019, 8:43 AM), https://www.npr.org/2019/04/19/713910647/hunger-strikes-at-ice-detention-centers-spread-as-parole-bond-is-denied [https://perma.cc/MS4B-L9NL].

10. *See id.* ("For several of the hunger strikes, the detainees' central demand was to be released while their cases were adjudicated.").

11. *See* Applicability of INA to Matter of M-S-, 27 Op. Att'y Gen. 509, 519 n.8 (2019).

12. *See* U.S. IMMIGR. & CUSTOMS ENF'T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, at 256 (2016) [hereinafter PBNDS].

13. *See infra* Part I.C.2.

history of force-feeding, the treatment of fundamental rights within prisons, and the distinctions between pretrial detainees and prisoners. Part II will argue for a heightened standard of review for the fundamental right when applied to pretrial detainees. Part III will argue that force-feeding punishes detainees in violation of their right not to be punished prior to adjudication of guilt. Under these arguments, force-feeding pretrial detainees is unconstitutional.

I. HISTORY AND BACKGROUND

Colloquially referred to as the "right to die," individuals have the right to exert control over their own medical care when they have become incapacitated.[14] Studying the origin of this right—as well as the history of constitutional rights and hunger striking within prisons—lays the foundation for understanding why force-feeding pretrial detainees is problematic.

A. Development of a Fundamental Right

In *Cruzan v. Director, Missouri Department of Health*,[15] and *Washington v. Glucksberg*,[16] the Supreme Court addressed the constitutional parameters of an individual's right to act in a way that will cause death.[17] The Supreme Court rooted this right in the Fourteenth Amendment's substantive due process guarantees.[18] Both *Cruzan* and *Glucksberg* follow a trend of using due process to protect unenumerated fundamental rights.[19] These rights are found

14. Richard A. Leiter, *Right to Die*, *in* NATIONAL SURVEY OF STATE LAWS 863, 863 (8th ed. 2019); *see also* CONG. RSCH. SERV., 97-244 A, THE "RIGHT TO DIE": CONSTITUTIONAL AND STATUTORY ANALYSIS 3 (2005) ("Although the popular term 'right to die' has been used as a label to describe the current political debate over end-of-life decisions, the underlying issues include a variety of legal concepts.").

15. 497 U.S. 261, 285 (1990).

16. 521 U.S. 702, 738 (1997) (O'Connor, J., concurring).

17. For a broader discussion of the "right to die," see Yvonne Lindgren, *From Rights to Dignity: Drawing Lessons from Aid in Dying and Reproductive Rights*, 2016 UTAH L. REV. 779, 790-92 (2016).

18. *Cruzan*, 497 U.S. at 278.

19. *See* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1510 (1999).

in the "traditions and conscience of our people."[20] In order to find the existence of the right, therefore, the Court had to find that there was a traditional right worth protecting and that it could be articulated.[21]

Because substantive due process was used to protect unenumerated rights, the road to protecting the right to die started much earlier than *Cruzan*. Although each aspect of the right to die debate[22] has its own history and justifications,[23] the right for an individual to refuse medical treatment arises out of the common law doctrine of battery.[24] The tort of battery itself is rooted in the plaintiff's dignitary interests and personal autonomy,[25] and prior to the Court's holding in *Cruzan*, lower courts analyzed prisoner starvation cases under similar rationales.[26] Force-feeding policies trace back to 1909,[27] but there were no reported decisions regarding prisoner's rights until 1982.[28] However, the strongest arguments regarding a prisoner's right to die came after *Cruzan*.[29]

In *Cruzan*, the Supreme Court did not explicitly hold that a fundamental right to refuse lifesaving medical treatment existed. Instead, the Court "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."[30] Nancy Cruzan was not competent.[31] After a car accident left Cruzan in a permanent

---

20. Griswold v. Connecticut, 381 U.S. 479, 489 (1965) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

21. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.").

22. *See* CONG. RSCH. SERV., *supra* note 14, at 3 (noting that the issues underlying the right-to-die debate "include a variety of legal concepts").

23. *See id.* at 8-27.

24. *See id.* at 10; *see also* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269-70 (1990).

25. *See* Craig M. Lawson, *The Puzzle of Intended Harm in the Tort of Battery*, 74 TEMP. L. REV. 355, 368 (2001).

26. Mara Silver, Note, *Testing* "Cruzan"*: Prisoners and the Constitutional Question of Self-Starvation*, 58 STAN. L. REV. 631, 639 (2005).

27. IAN MILLER, A HISTORY OF FORCE FEEDING: HUNGER STRIKES, PRISONS, AND MEDICAL ETHICS, 1909-1974, at 18 (2016) (describing English policies).

28. *See* Tracey M. Ohm, Note, *What They Can Do About It: Prison Administrators' Authority to Force-Feed Hunger-Striking Inmates*, 23 WASH. U. J.L. & POL'Y 151, 155 (2007).

29. *See* Silver, *supra* note 26, at 639.

30. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990).

31. *Id.* at 265.

vegetative state,[32] her parents requested the hospital cease providing her with artificial hydration and nutrition.[33] While Missouri recognized that a surrogate could choose to withdraw lifesaving hydration and nutrition, the state had established safeguards to ensure that such withdrawal conformed with the patient's wishes.[34] The Supreme Court held that such safeguards did not violate the U.S. Constitution.[35]

Although Nancy Cruzan's parents did not obtain a court order granting the termination of medical treatment,[36] the Court confirmed that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."[37] Thus, one can infer such a right from the Court's other cases.[38] The dissent in *Cruzan* argued that this acknowledgment did not reach far enough, emphasizing that self-autonomy rationales meant the right was fundamental[39] (a holding the Court would not reach until *Glucksberg*).[40] Severe consequences never vitiate fundamental rights:

> It is "a well-established rule of general law ... that it is the patient, not the physician, who ultimately decides if treatment—any treatment—is to be given at all.... The rule has never been qualified in its application by either the nature or purpose of the treatment, or the gravity of the consequences of acceding to or foregoing it."[41]

Traditionally, therefore, surrounding circumstances could not curtail the patient's ability to refuse medical treatment.

The Court articulated the standard more readily in *Glucksberg*. After examining a Washington statute prohibiting physician-assisted suicide, the Court held that the act of refusing medical

---

32. *Id.* at 266.
33. *Id.* at 267.
34. *Id.* at 280.
35. *Id.*
36. *See id.* at 287 (O'Connor, J., concurring).
37. *Id.* at 278.
38. *See id.*
39. *See id.* at 305 (Brennan, J., dissenting).
40. *See* Washington v. Glucksberg, 521 U.S. 702, 725 (1997).
41. *Cruzan*, 497 U.S. at 306 (Brennan, J., dissenting) (quoting Tune v. Walter Reed Army Med. Hosp., 602 F. Supp. 1452, 1455 (D.D.C. 1985)).

treatment and that of committing assisted suicide were distinct.[42] In explaining how, the Court stated that "[t]he right assumed in *Cruzan* ... was not simply deduced from abstract concepts of personal autonomy.... [O]ur assumption was entirely consistent with this Nation's history and constitutional traditions."[43] As *Glucksberg* reinforced, *Cruzan* therefore established a broad substantive due process right to refuse unwanted medical care, specifically lifesaving hydration and nutrition.

B. Hunger Strikes and the Practice of Force-Feeding

One of the most common reasons a person might refuse food and water is participation in a hunger strike.[44] Hunger striking has long been used to protest perceived injustices,[45] perhaps beginning as far back as the ancient Celts, when people wronged by the wealthy would fast on their doorsteps in order to shame them.[46] In more modern times, political actors (such as the suffragettes) have utilized hunger strikes.[47] The hunger strike at Guantanamo Bay, which has been the source of much continued controversy, included up to 106 detainees.[48] Pretrial detainees are now using hunger strikes to protest their immigration detainment.[49]

But what is a hunger strike? "Colloquial definitions" focus on two aspects: (1) refusal of food and (2) purpose or intent to protest.[50] Similarly, the World Medical Association (WMA) considers competent people to be hunger strikers when they "ha[ve] indicated

---

42. *Glucksberg*, 521 U.S. at 725.

43. *Id.*

44. *See* MILLER, *supra* note 27, at 167 (charting recorded motivations for hunger striking in English prisons between 1913 and 1940).

45. *See* Silver, *supra* note 26, at 633-36 (stating that "[h]unger strikes by prisoners are by no means a purely modern form of protest" and listing examples of prominent hunger strikes).

46. *See* Denis O'Hearn, *Hunger Strike: The Irish Experience*, BIANET (Nov. 5, 2012, 1:32 PM), http://bianet.org/english/human-rights/141857-hunger-strike-the-irish-experience [https://perma.cc/DJX5-NH2D].

47. *See* June Purvis, *Cat and Mouse: Force Feeding the Suffragettes*, HISTORYEXTRA (Nov. 26, 2018, 9:00 AM), https://www.historyextra.com/period/edwardian/cat-mouse-force-feeding-suffragettes-hunger-strike/ [https://perma.cc/EAM4-GW53].

48. *See* MILLER, *supra* note 27, at 1.

49. *See* Stein, *supra* note 9.

50. *See* Amanda Gordon, Note, *The Constitutional Choices Afforded to a Prisoner on Hunger Strike: Guantanamo*, 9 SANTA CLARA J. INT'L L. 345, 349-50 (2011); *see also Hunger Strike*, THE NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005).

that ... [they have] decided to embark on a hunger strike and ha[ve] refused to take food and/or fluids for a significant interval."[51]

For the Federal Bureau of Prisons (BOP), that "significant interval" is only seventy-two hours.[52] The BOP considers a person on hunger strike if a staff member observes that individual refraining from eating.[53] Procedures generally include placing the hunger striker in a locked room for close monitoring and subsequent medical evaluation.[54]

ICE has developed similar standards, which require staff to monitor the detainee's health, including measuring such physical characteristics as height and weight, taking vital signs, and performing urinalysis.[55] While ICE recognizes that "[a]n individual has a right to refuse medical treatment," the standards specify that involuntary medical treatment can be administered when "the detainee's life or health is at risk."[56] The standards also require ICE to seek a court order before administering involuntary medical treatment.[57]

Involuntary medical treatment generally means force-feeding.[58] However, few people know what force-feeding really entails.[59] The first step requires the subject to be restrained.[60] Then, after lubricating the tubes and providing pain killers in some instances, the doctor places the feeding tube in the stomach by passing it through the nasal passage.[61] The tube must go down the esophagus and not the windpipe, which is difficult and may involve the use of additional technology, such as x-rays.[62] Some guidelines state that the

---

51. Mary A. Kenny, Derrick M. Silove & Zachary Steel, *Legal and Ethical Implications of Medically Enforced Feeding of Detained Asylum Seekers on Hunger Strike*, 180 MED. J. AUSTL. 237, 237 (2004) (quoting WORLD MED. ASS'N, DECLARATION OF MALTA ON HUNGER STRIKERS (rev. 1992)).

52. 28 C.F.R. § 549.61 (2018).

53. *Id.*

54. *Id.* §§ 549.62(b), 63.

55. PBNDS, *supra* note 12, at 254-55.

56. *Id.* at 255.

57. *Id.* at 256.

58. *See id.* at 253, 256.

59. Esther Inglis-Arkell, *Here Is What Really Happens When You Force-Feed Someone*, GIZMODO (Apr. 21, 2015, 2:20 PM), https://io9.gizmodo.com/heres-what-really-happens-when-you-force-feed-someone-1699078018 [https://perma.cc/2D65-WPU3].

60. *See id.*

61. *See id.*

62. *Id.*

procedure takes between twenty and thirty minutes.[63] One detainee explained the procedure in the following words:

> They tie us on the force-feeding bed, and then they put a lot of liquid into the tubes, and the pressure is immense so we end up vomiting it out.... We can't talk properly, and we can't breathe properly. The pipe is not an easy process, but they try to push it down our noses and throats.[64]

This process is repeated, seemingly until the subject agrees to end the hunger strike or the subject has regained usual body weight.[65]

Medical complications may also arise during the procedure or from the long-term effects of repeated force-feeding.[66] This can include damage to the immediate surrounding tissue, infection, and choking.[67] In some circumstances, force-feeding even kills.[68]

Force-feeding has been subject to intense and sustained criticism. The WMA declared that a competent prisoner "shall not be fed artificially."[69] In 2013, many civil rights organizations, including the American Civil Liberties Union Appeal for Justice, wrote a joint open letter to the Secretary of Defense calling the practice "inherently cruel, inhuman, and degrading."[70] That language has been quoted again in reference to recent immigrant force-feeding in detention facilities.[71] In early 2019, the Geneva-based United Nations human rights office said that the U.S. decision to force-feed

---

63. JOINT TASK FORCE GUANTANAMO BAY, CUBA, MEDICAL MANAGEMENT OF DETAINEES ON HUNGER STRIKE 18 (2013).

64. Garance Burke & Martha Mendoza, *Detainee on Hunger Strike Details Force-Feeding*, ASSOCIATED PRESS (Feb. 3, 2019), https://www.apnews.com/e2ff21606c72407db3197ddf866bd738 [https://perma.cc/H54Y-TK2J].

65. *See, e.g.*, JOINT TASK FORCE GUANTANAMO BAY, CUBA, *supra* note 63, at 23.

66. ADDAMEER PRISONERS' SUPPORT & HUM. RTS. ASS'N ET AL., FACTSHEET: FORCE-FEEDING UNDER INTERNATIONAL LAW AND MEDICAL STANDARDS 15-16 (2015) [hereinafter ADDAMEER]; *see also* Gordon, *supra* note 50, at 354.

67. ADDAMEER, *supra* note 66, at 16.

68. When Palestinian prisoners were force-fed in the 1980s, the tubes were mistakenly inserted in the prisoners' lungs, causing suffocation and death. *Id.*

69. WORLD MED. ASS'N, DECLARATION OF MALTA ON HUNGER STRIKERS 3 (rev. 2017).

70. ACLU ET AL., *Joint Letter to Chuck Hagel on the Force-Feeding of Hunger-Striking Prisoners at Guantánamo Bay*, HUM. RTS. WATCH (May 13, 2013, 5:03 AM), https://www.hrw.org/news/2013/05/13/joint-letter-chuck-hagel-force-feeding-hunger-striking-prisoners-guantanamo-bay [https://perma.cc/W94S-MRK3].

71. Long, *supra* note 6.

immigrant detainees at a detention center in El Paso could violate the U.N. Convention Against Torture.[72]

C. Constitutional Rights Within the Prison System

Striking a balance between these competing interests is difficult for courts. Anyone who has studied constitutional law understands that "no fundamental right is absolute and the state always has the opportunity to justify itself."[73] In other words, the government has an opportunity to explain away any infringement of constitutional rights.[74]

Prisons have always been granted great leeway for infringing on inmates' constitutional rights because of the unique government interest in maintaining order in the prison system.[75] In fact, nineteenth century jurisprudence held that prisoners were "slaves of the State,"[76] and it was a long road for prisoners to establish that their constitutional rights still applied postconviction.[77] Yet *pretrial detainees* are not the same as *convicted felons* because they have not been tried and their guilt has not been established. Even so, courts rarely acknowledge the factors distinguishing a pretrial detainee from a convicted inmate, including how a pretrial detainee's status might affect the strength of the argument.[78]

---

72. *See* Owen Daughtery, *UN Says US Force-Feeding Detained Immigrants May Violate Torture Convention*, HILL (Feb. 7, 2019, 5:35 PM), https://thehill.com/latino/429039-un-says-us-force-feeding-of-detained-immigrants-on-hunger-strike-may-violate-torture [https://perma.cc/XC5U-EFYL]; Garance Burke, *UN: US Force-Feeding Immigrants May Breach Torture Agreement*, AP NEWS (Feb. 9, 2019), https://apnews.com/e0941d7d1b0d413b9d9a0b792c34dd26 [https://perma.cc/QL7P-JV7C].

73. Thomas J. Molony, Roe, Casey, *and Sex-Selection Abortion Bans*, 71 WASH. & LEE L. REV. 1089, 1117 (2014).

74. *See id.* This applies to both citizens and noncitizens. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens.").

75. *See* Washington v. Harper, 494 U.S. 210, 223 (1990).

76. Ruffin v. Commonwealth, 62 Va. (1 Gratt.) 790, 796 (1871).

77. *See* Grace DiLaura, Comment, *"Not Susceptible to the Logic of* Turner*":* Johnson v. California *and the Future of Gender Equal Protection Claims from Prisons*, 60 UCLA L. REV. 506, 513-14 (2012).

78. *See infra* Part I.C.2. *But see* Polk Cnty. Sheriff v. Iowa Dist. Ct., 594 N.W.2d 421, 428-30 (Iowa 1999).

1. Courts Have Applied Rationality Standard of Review

Turner v. Safley, decided in 1987, severely increased the government's ability to infringe on prisoners' fundamental rights by holding that a rational basis standard was the appropriate standard of review for prisoners' constitutional rights.[79] Under this standard, prison officials need only show a rational connection between the regulation and the objective.[80] This standard gives a remarkable amount of deference to prison officials[81]—deference that is rarely available for fundamental rights, which generally require a strict scrutiny standard.[82] Strict scrutiny stands at the opposite end of the spectrum from rationality review and requires a compelling government interest and narrow tailoring.[83] While state regulations typically fail strict scrutiny, providing significant protection to individuals, rationality review is much easier to survive—and sometimes even appears to guarantee the state's success.[84]

The Court in *Turner* applied this standard to two Missouri prison regulations: a rule that limited inmate correspondence, and a rule prohibiting inmates from marrying without permission from the prison warden.[85] The Court found that strict scrutiny was inappropriate, developing a much more permissive standard for inmates' constitutional rights—one that required only a reasonable relationship between the regulation and "legitimate penological interests."[86] Applying the standard to the regulations at issue in the case, the Court found that the correspondence regulation was reasonably

79. 482 U.S. 78, 81, 89-90 (1987).

80. *See id.* at 89.

81. *See* United States v. Bout, 860 F. Supp. 2d 303, 309 (S.D.N.Y. 2012) ("In short, both tests apply a rational basis review.... In conducting this rational basis review, deference is accorded to the BOP's determination.").

82. *See* Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 292 (2015).

83. *See generally* Mariam Morshedi, *Levels of Scrutiny*, SUBSCRIPT LAW (Mar. 6, 2018), https://www.subscriptlaw.com/blog/levels-of-scrutiny [https://perma.cc/VJ85-E9AY].

84. *See* Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 RICH. L. REV. 491, 493 (2011) (criticizing the rational basis standard because "allowing any plausible reason for the legislation to suffice ... has essentially made the rational basis test the equivalent of no test at all").

85. *Turner*, 482 U.S. at 81-83, 89.

86. *Id.* at 89.

related but that the marriage regulation—as a complete ban—was not because it was an "exaggerated response" to the prison's safety concerns.[87]

In other scenarios, the Court has not appeared to question the rationality standard.[88] Specifically, in *Washington v. Harper*, the Court recognized that an inmate has a significant liberty interest in avoiding involuntary antipsychotic medication.[89] The Court applied the *Turner* standard, finding that this standard of review was appropriate for "all circumstances in which the needs of prison administration implicate constitutional rights."[90] Under this standard, dangerous prisoners could be involuntarily medicated if in their own medical interest.[91]

The Court extended *Harper* to pretrial detainees in *Sell v. United States*, stating that a mentally ill defendant who was facing serious criminal charges could also be involuntarily medicated.[92] Instead of using prison order as the government interest, the Court found the state's "interest in bringing to trial an individual accused of a serious crime [was] important."[93] The Court discussed factors for when the medication is solely recommended to render a defendant competent to stand trial.[94] However, the Court did not discuss how non-conviction status affected the applicable standard of review.[95]

2. Legal Distinctions Between Prisoners and Pretrial Detainees

Convicted prisoners and pretrial detainees are incarcerated for different reasons. The very purpose of incarceration for convicted criminals is punishment.[96] However, pretrial detainees are incarcerated because they are not released on bond (either because they

87. *Id.* at 91, 99.

88. *But see* Johnson v. California, 543 U.S. 499, 509 (2005) (striking down an unwritten prison policy under which prison officials segregated prisoners according to race because race did not require compromise).

89. 494 U.S. 210, 221-22 (1989).

90. *Id.* at 224.

91. *Id.* at 227.

92. *See* Sell v. United States, 539 U.S. 166, 179 (2003).

93. *Id.* at 180.

94. *See id.* at 180-81.

95. *See id.* at 177-83.

96. *See* Teresa K. Scarberry, Comment, *The Constitutional Right of Pretrial Detainees: A Healthy Sense of Realism?*, 41 OHIO ST. L.J. 1087, 1087 (1980).

have been denied bail or because they simply cannot afford to pay the bail).[97] Although incarceration constitutes punishment for convicted criminals, simple temporary incarceration does not constitute punishment for pretrial[98] and immigrant detainees.[99] However, other conditions imposed on detainees while incarcerated could amount to punishment.[100]

The Supreme Court case *Bell v. Wolfish*, decided in 1979, addressed the constitutionality of detention conditions in a New York City correctional facility.[101] The detainees alleged several injustices, including body-cavity searches after contact visits.[102] In *Bell*, the Court rejected the proposition that such invasions amounted to substantive due process violations because "the detainee's desire to be free from discomfort ... simply does not rise to the level of those fundamental liberty interests" the Court had discussed in prior cases.[103] A principle of accommodation between constitutional rights and institutional needs "applies equally to pretrial detainees and convicted prisoners ... [because a] detainee simply does not possess the full range of freedoms of an unincarcerated individual."[104] Because pretrial detainees and convicted prisoners posed identical security risks, the Court saw no reason to treat pretrial detainees any differently.[105] This stance has justified lower courts in failing to account for detainees' unique status.[106]

However, even if substantive due process does not provide the detainee with protection, the detainee still has the right to be free from punishment under procedural due process.[107] This is true even

---

97. *Id.*

98. Bell v. Wolfish, 441 U.S. 520, 536-37 (1979).

99. *See* Wong Wing v. United States, 163 U.S. 228, 235 (1896); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1351-52 (2014).

100. *See Wong Wing*, 163 U.S. at 236-37 (finding that the imposition of hard labor on Chinese immigration detainees amounted to punishment and could not be imposed without adjudication of guilt).

101. 441 U.S. at 523.

102. *Id.* at 530.

103. *Id.* at 534.

104. *Id.* at 546.

105. *Id.* at 546 n.28.

106. *See, e.g.*, Casey v. Ellegood, No. 2:11-cv-587-FtM-36SPC, 2011 U.S. Dist. LEXIS 165516, at *5-7 (M.D. Fla. Nov. 8, 2011) (finding that, under *Bell*, detainees did not have an established liberty interest in their "particular classification, prison assignment," or "corresponding restrictions").

107. *See Bell*, 441 U.S. at 534-35.

when an aspect of pretrial detention does not violate an express guarantee of the Constitution;[108] therefore, the prohibition against punishment still applies even if the state's behavior does not impermissibly infringe on the detainee's fundamental rights.[109]

The question then becomes, what is punishment?[110] Traditional purposes of punishment apply in determining whether government action amounts to punishment.[111] In fact, punishment can be ascertained from the following considerations:

> [w]hether the sanction ... comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, ... whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[112]

Later scholarly formulations of the *Bell* test reduced it to three prongs: "(1) whether the detention condition [has] a punitive purpose; (2) if not, whether there is a legitimate government interest justifying the condition; and (3) if there is a legitimate interest, whether the condition appears excessive in relation to the government interest."[113] Therefore, the *Bell* Court once again adopted a version of rationality review.[114] In formulating this test, *Bell* cited several punishment cases,[115] including the 1896 case *Wong Wing v. United States*, in which Chinese immigrants had been subjected to hard manual labor.[116]

---

108. *See id.* at 534.

109. *See id.* at 535-37.

110. The standard prohibiting punishment of pretrial detainees arises under the Fourteenth Amendment, not the Eighth Amendment. *See* Kyla Magun, Note, *A Changing Landscape for Pretrial Detainees? The Potential Impact of* Kingsley v. Hendrickson *on Jail-Suicide Litigation*, 116 COLUM. L. REV. 2059, 2069 (2016). *Compare* U.S. CONST. amend. VIII, *with* U.S. CONST. amend. XIV.

111. *See Bell*, 441 U.S. at 537-38.

112. *See id.* (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).

113. *See* Coleman Gay, Comment, *Hour Late on Your Bail, Spend the Weekend in Jail: Substantive Due Process and Pretrial Detention*, 60 B.C. L. REV. 237, 242 (2019).

114. *See Bell*, 441 U.S. at 585 (Stevens, J., dissenting).

115. *See id.* at 536 n.17.

116. *See id.* at 535 & n.17 (citing Wong Wing v. United States, 163 U.S. 228, 237 (1896)).

Justice Stevens notably dissented from the majority because he believed the *Bell* definition of punishment was too permissive.[117] A rational basis standard gave detainees "virtually no protection" by reducing the constitutional prohibition against punishment to "nothing more than a prohibition against ... barbaric treatment."[118] Justice Stevens believed that even the deprivations contested in *Bell* amounted to punishment.[119]

In *Fuentes v. Wagner*, a case decided in 2000, the Third Circuit held that a restraint chair did not conclusively amount to punishment.[120] However, the court noted that the record contained sufficient evidence for a jury to find that this was punishment, including that the chair was "used for behavior modification and control," the chair was "used to abate an inmate's behavior," and "there [was] nothing the inmate [could] do to affect the amount of time [the inmate would] remain in the chair."[121] Determination of punishment has therefore relied historically upon intent to modify behavior.[122]

Recent cases have also focused on excessive force as amounting to punishment.[123] This follows the line of cases beginning with the punishment formulation in *Bell*, which the Supreme Court addressed in *Kingsley v. Hendrickson*.[124] Under the standard articulated in *Kingsley*, pretrial detainees need only show that the force used against them was excessive under an objective standard, not that the state actor applying the force was subjectively aware of the unreasonableness.[125]

Therefore, in summary, pretrial detainees have a fundamental right under *Cruzan* to refuse lifesaving hydration and nutrition.[126] When pretrial detainees choose to hunger strike, the government typically responds by force-feeding, which is a degrading and

---

117. *Id.*
118. *Id.* at 585-86.
119. *Id.* at 595.
120. 206 F.3d 335, 343 (3d Cir. 2000).
121. *Id.*
122. *See id.*
123. *See Prisoners' Rights*, 47 GEO. L.J. ANN. REV. CRIM. PROC. 1131, 1179-80 n.3124 (2018).
124. 576 U.S. 389, 396-98 (2015).
125. *Id.* at 396-97.
126. *See supra* Part I.A.

painful process that carries associated health risks.[127] Under *Turner* and its progeny, the Court has applied a rational basis standard of review to the prison's actions, despite the fact that these actions implicate a fundamental right that should be protected under substantive due process.[128] Lastly, pretrial detainees are protected under procedural due process from being punished prior to adjudication of guilt.[129] Therefore, the test for whether a detainee has been punished arises out of the *Bell* standard,[130] and the government's force-feeding practice implicates this standard.[131]

II. ADOPTING A HEIGHTENED STANDARD OF SCRUTINY FOR INFRINGEMENTS UPON A PRETRIAL DETAINEE'S FUNDAMENTAL RIGHT NOT TO BE FORCE-FED

Pretrial detainees have a fundamental right, as articulated under *Cruzan*, to refuse lifesaving hydration and nutrition.[132] Force-feeding constitutes a shocking invasion of this privacy interest.[133] The only countervailing state interest that could possibly account for this invasion is the government's interest in maintaining prison order.[134] Other alternative state interests, such as force-feeding detainees to preserve them for trial, fall short because detainees are generally competent when they strike.[135] Because the invasion is so shocking, and because of detainees' unique pretrial status, the government should be required to meet a heightened level of scrutiny before force-feeding pretrial detainees.

A. Force-Feeding Constitutes a Shocking Invasion of Pretrial Detainees' Fundamental Rights

When the Supreme Court briefly considered pretrial detainees' privacy interests in *Bell*, the Court rejected the argument that the

127. *See supra* Part I.B.
128. *See supra* Part I.C.1.
129. *See supra* Part I.C.2.
130. *See supra* notes 111-13 and accompanying text.
131. *See infra* Part III.
132. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990).
133. *See supra* Part I.B; *infra* Part II.A.
134. *See infra* Part II.B.
135. *See infra* Part II.B.3.

alleged violations comprised unconstitutional violations of the detainees' rights to bodily integrity.[136] In making this decision, the Court assumed the detainees' complaints arose from a "desire to be free from discomfort."[137] Still, the prison regulation requiring body-cavity searches gave the Court "pause" and caused them to require more support for this practice than for the other nonphysical practices.[138] If a body-cavity search was enough to give the Court concern, then forcible insertion of a feeding tube into a detainee's body should cause courts to stop approving force-feeding altogether. This practice causes much more than discomfort.

The process of force-feeding is physically painful.[139] Any characterization of the procedure as uncomfortable is a gross and likely self-serving understatement,[140] particularly in light of the myriad prisoner accounts describing the experience.[141] Although unnecessary to reestablish that the procedure infringes upon a fundamental right,[142] it is relevant to note that force-feeding would likely pass the older "shocks the conscience" test established in *Rochin v. California*.[143] There, the police forcibly extracted the contents of the suspect's stomach in a way that was "bound to offend even hardened sensibilities."[144] The parallels from *Rochin* to force-feeding are unmistakable: instead of removing the contents of an individual's stomach, the government is forcing contents in.[145]

Courts should consider the severity of this infringement when balancing detainees' interests against the government's purported interest. Doing so would allow courts to consider and respect both interests, as courts frequently modify fundamental rights without eliminating the rights entirely.[146] One such example against which force-feeding has been compared is free speech, where the government may restrict the exercise of the right with appropriate time,

136. Bell v. Wolfish, 441 U.S. 520, 534 (1979).
137. *Id.*
138. *See id.* at 558.
139. *See supra* Part I.B.
140. *See, e.g.*, Moore, *supra* note 7.
141. *See generally* MILLER, *supra* note 27.
142. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).
143. *See* 342 U.S. 165, 172 (1952).
144. *Id.*
145. *See* Joel K. Greenberg, Note, *Hunger Striking Prisoners: The Constitutionality of Force-Feeding*, 51 FORDHAM L. REV. 747, 750 n.26 (1983).
146. *See, e.g.*, *id.* at 766 (discussing freedom-of-speech constraints).

place, and manner regulations while still leaving open alternative avenues of expression.[147] Force-feeding is vastly different because it constitutes "an 'all or nothing' intrusion."[148] Therefore, the right either exists or the government extinguishes that right: prisons cannot force-feed someone halfway. In this way, it bears marked similarities to the marriage regulation in *Turner*, in which the Court responded negatively to a regulation that almost amounted to a complete ban.[149] Therefore, courts should remember that this type of infringement lacks any built-in safety provisions. Once approved, the strings are cut.

Although force-feeding is a shocking infringement, the Supreme Court never intended to extend the *Cruzan* right to incompetent individuals.[150] This restriction exerts pressure on physicians to ensure competency. If there are generally more mental health concerns in prison,[151] and if lack of trust between physicians and patients compounds these concerns,[152] physicians may be handicapped in determining whether detainees are competently exercising their rights.[153] Although prisons likely do have more authority in determining whether a prisoner is making a competent decision, once a detainee has been deemed competent, courts should be careful when evaluating any government interests purported to countervail this fundamental right.

147. *Id.*; *see also* Rebecca A. Taylor, *The First Amendment*, A.B.A. (July 1, 2014), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2014/july_2014/the_first_amendment/ [https://perma.cc/Q69J-9644].

148. *See* Greenberg, *supra* note 145, at 766.

149. *See* Turner v. Safley, 482 U.S. 78, 99 (1987).

150. Force-feeding incompetent individuals does not raise the same constitutional concerns. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279-80 (1990).

151. *See* Anisha Lewis, *Incarceration and Mental Health*, CTR. FOR PRISONER HEALTH & HUM. RTS., https://www.prisonerhealth.org/educational-resources/factsheets-2/incarceration-and-mental-health/ [https://perma.cc/U8JH-SFQC].

152. *See* Frederick R. Parker & Charles J. Paine, *Informed Consent and the Refusal of Medical Treatment in the Correctional Setting*, 27 J.L. MED. & ETHICS 240, 244 (1999).

153. *See id.* at 248 (noting that "the free world template, which tips the scales in favor of patient autonomy, does not necessarily fit the prison mold," and arguing for heightened scrutiny for consent).

B. The Government Should Be Required to Provide More Proof of Its Interests in Force-Feeding Under a Heightened Scrutiny Standard

The only government interest that can likely support force-feeding of pretrial detainees is maintaining order within the prison system.[154] Although courts often discuss a series of other interests—including "preserving life, ... [p]rotecting the interests of innocent third parties, [and m]aintaining the ... integrity of the medical profession"[155]—maintaining order is the only interest that does not simultaneously exist for unincarcerated individuals.[156] If force-feeding is not a generally acceptable practice outside of the prison context, which it is not,[157] then only those rationales entirely peculiar to prisons should ever be compelling to courts. The state does not try to force-feed (or even litigate) cases in which competent,

---

154. *See* Greenberg, *supra* note 145, at 770. Although there are many interests that prison officials could proffer to support force-feeding (limited only by officials' imaginations and the facts of the cases), maintaining prison order is the superstar and is usually mentioned first. *See, e.g.*, Abdulmutallab v. Sessions, 2019 U.S. Dist. LEXIS 35915, at *23 (D. Colo. Mar. 6, 2019); McNabb v. Dep't of Corr., 180 P.3d 1257, 1265 (Wash. 2008). Furthermore, to the extent that another interest is mentioned—such as preserving life—that interest is generally related to maintaining order. *See, e.g.*, Wis. Dep't of Corr. v. Saenz (*In re* Saenz), 728 N.W.2d 765, 771 (Wis. Ct. App. 2007) ("If prisoners were allowed to kill themselves, prisons would find it even more difficult than they do to maintain discipline, because of the effect of a suicide in agitating the other prisoners." (quoting Freeman v. Berge, 441 F.3d 543, 546-47 (7th Cir. 2006))). Lastly, the Supreme Court has endorsed this interest. *See* Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."). Life is perhaps mentioned as a close second to prison order and security. *See* Lantz v. Coleman, No. HHDCV084034912, 2010 Conn. Super. LEXIS 621, at *64 (Conn. Super. Ct. Mar. 9, 2010); Commonwealth v. Kallinger, 580 A.2d 887, 890 (Pa. Commw. Ct. 1990). However, that interest in this context is flawed. *See infra* note 159.

155. *See, e.g.*, Polk Cnty. Sheriff v. Iowa Dist. Ct., 594 N.W.2d 421, 426-29 (Iowa 1999).

156. *See, e.g.*, Steven C. Sunshine, Note, *Should a Hunger-Striking Prisoner Be Allowed to Die*?, 25 B.C. L. REV. 423, 440-43 (1984).

157. For example, experts advise parents to avoid force-feeding their children because of the negative psychichological effects such behavior can have on children's development. *See* Raj Raghunathan, *The Nurturer's Curse: Why Force-Feeding Kids Backfires and Tips on Kicking the Nasty Habit*, PSYCH. TODAY (Mar. 5, 2014), https://psychologytoday.com/us/blog/sapient-nature/201403/the-nurturers-curse [https://perma.cc/Q2ZB-AZMG]; *Pressure to Eat*, CHILD FEEDING GUIDE, https://www.childfeedingguide.co.uk/tips/common-feeding-pitfalls/ pressure-eat/ [https://perma. cc/VCQ2-9XA5].

unincarcerated adults refuse to eat.[158] If interests such as preserving life (which is supremely important)[159] are not enough to permit the state to force-feed competent adults outside of prison,[160] then only maintaining order inside those prisons remains an option for argument.

In evaluating the government's interest in prison order as applied to pretrial detainees, it is important first to acknowledge the general lack of evidence supporting the argument that force-feeding prevents riots and copycats.[161] Once that is acknowledged, it becomes clear that the government has an alternative: releasing pretrial detainees on bail, which would reduce detainees' desire to hunger strike and also relieve the prison of certain medical responsibilities.[162] Lastly, the differences between force-feeding and involuntary medication indicate that the government is acting beyond its scope as a detainment entity with regards to pretrial detainees.[163]

---

158. Hunger strikes outside of prison are rare; when they occur, the government typically does nothing. *See, e.g.*, Paige Skinner, *A Local Woman Is Staging a Hunger Strike Until Netflix Renews 'The OA,'* L.A. MAG. (Aug. 28, 2019), https://www.lamag.com/culturefiles/save-the-oa-strike/ [https://perma.cc/JU6C-DH2S].

159. Nothing in this Note should imply that human life is not valuable. Life is precious.

160. *See supra* note 157. Force-feeding competent adults in order to preserve life is paternalistic at best. *See supra* Part II.A. At worst, it deprives detainees of the rights recognized under *Cruzan*, in which case preservation of life did not compel a different outcome. *See supra* Part I.A. Furthermore, hunger striking's purpose is not suicide—it is symbolism. *Compare* Vinay Kumar V, *Irom Sharmila: Manipur's Iron Lady Or Mengoubi (The Fair One)*, FEMINISM IN INDIA (Mar. 13, 2020), https://feminisminindia.com/2020/03/13/irom-sharmila-manipurs-iron-lady-mengoubi/ [https://perma.cc/G4HY-2C54] (detailing Irom Sharmila's incredible story of hunger striking and being force-fed for sixteen years as she became "a symbol, an icon, and a beacon of hope for her resilience"), *with* Nancy Schimelpfening, *Why Do People Commit Suicide?*, VERYWELL MIND (Mar. 20, 2020), https://www.verywellmind.com/why-do-people-commit-suicide-1067515 [https://perma.cc/9KWZ-Z2FE] (providing reasons for suicide, including mental illness and hopelessness). Therefore, the separate purposes of hunger striking and suicide, combined with the lack of doctrinal support in *Cruzan*, should reduce any court's willingness to rely on this government purpose.

161. *See infra* Part II.B.1.

162. *See infra* Part II.B.2.

163. *See infra* Part II.B.3.

1. Little Evidence Suggests that Force-Feeding Prevents Riots and Copycats

Prisons typically posit their interest in maintaining prisoner order in one of two ways: (1) the hunger strike will incite riots, and (2) the hunger strike will encourage copycats.[164] Courts have acknowledged each of these interests;[165] however, many courts have permitted simple speculation to suffice.[166]

When riots occur, the effects can be devastating, and prison officials are careful about watching for riot warning signs.[167] If hunger striking causes rioting, then the interest in preventing rioting could countervail a detainee's fundamental right.[168] However, the logical link between hunger striking and rioting is not clearly delineated. Prison officials believe that allowing an inmate to starve to death would be the spark.[169] One famous example of rioting occurred after the death of Bobby Sands, a man who was allowed to starve to death while imprisoned in Northern Ireland; notably, however, the rioting occurred outside the prison.[170] Courts generally do not cite specific prison riots that hunger strikers incited as justification for force-feeding inmates.[171] At the pretrial stage, this is a particularly cogent fact. Pretrial detainees are (theoretically) being held only for a short time, and emotional ties are less likely to develop between detainees in the same way that

---

164. *See* Silver, *supra* note 26, at 648.

165. *See, e.g.*, Polk Cnty. Sheriff v. Iowa Dist. Ct., 594 N.W.2d 421, 430 (Iowa 1999).

166. *See* Singletary v. Costello, 665 So. 2d 1099, 1110 (Fla. Dist. Ct. App. 1996) ("[A]rguments concerning the effect of [the inmate's] conduct are nothing more than speculation and conjecture."). Although beneficial that at least some courts have required a greater showing from the government, one of the judicial system's greatest virtues is consistency. *See* Adam S. Chilton & Mila Versteeg, *Courts' Limited Ability to Protect Constitutional Rights*, 85 U. CHI. L. REV. 293, 303 (2018).

167. *See generally* BERT USEEM, CAMILLE GRAHAM CAMP, GEORGE M. CAMP & RENIE DUGAN, RESOLUTION OF PRISON RIOTS 1-4, 7 (1995), https://www.ncjrs.gov/pdffiles/prisriot.pdf [https://perma.cc/5KN3-PV27].

168. *See* Greenberg, *supra* note 145, at 765.

169. *See id.*

170. *See* Steven C. Bennett, Note, *The Privacy and Procedural Due Process Rights of Hunger Striking Prisoners*, 58 N.Y.U. L. REV. 1157, 1208-09 nn.335-36 (1983) (arguing that force-feeding is equally disruptive); MILLER, *supra* note 27, at 2.

171. *See* Silver, *supra* note 26, at 649. *But see* Feaster v. Mueller, No. 1:18-2705-JMC-SVH, 2018 WL 6045263, at *1 (D.S.C. Oct. 10, 2018) (noting that plaintiff *claimed* that hunger strikers caused the riot from which he was charged with assault).

they might for convicted prisoners who potentially serve the length of their sentences with the same people. Therefore, if copycatting is a questionable justification for convicts living out long prison sentences, it is even more unstable as justification for pretrial detainees.

Furthermore, scholars have argued that force-feeding itself disrupts the prison environment.[172] It is a costly procedure,[173] and medical staff have to monitor the detainee throughout the hunger strike.[174] Monitoring itself can be disruptive as detainees can be isolated or transferred to a medical facility.[175] In fact, force-feeding might *cause* a riot if detainees feel that prisons are threatening their personal autonomy.[176] Disruption of this sort may pose a greater risk in the pretrial context because, without a determination of guilt, detainees may believe on a personal level that they have a greater right to such autonomy. Beyond such hypotheticals, however, public criticism indicates that the government's response to hunger striking is just as likely to incite passionate responses as the reasons detainees give for the hunger strike.[177]

It is also unclear that force-feeding prevents copycats. Force-feeding may actually encourage copycats "if they know they will not have to pay the ultimate price of death."[178] Hunger striking can also be a very private thing. For instance, although several hunger strikers grouped together in the ICE facility in El Paso,[179] Ivanov fasted alone.[180] Furthermore, the simple fact that a copycat exists should not be threatening to the government; after all, other fundamental rights—such as free speech—are more robust when many people exercise the right, or, in other words, the right becomes more developed and defined through the litigation process.[181] Therefore, without additional facts to support the government's interest in

172. *See* Bennett, *supra* note 170, at 1208-09 nn.335-36 (arguing that force-feeding is equally disruptive).

173. *See id.* (noting a $100,000 cost to force-feed an inmate in a 1983 case).

174. *See* PBNDS, *supra* note 12, at 254.

175. *See id.* at 255.

176. *See* Silver, *supra* note 26, at 651; Bennett, *supra* note 170, at 1209 n.336.

177. *See supra* notes 69-72 and accompanying text.

178. Silver, *supra* note 26, at 650.

179. *See supra* notes 5-6 and accompanying text.

180. *See supra* note 1 and accompanying text.

181. *See generally* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989) (setting out justifications supporting free speech).

prison order, courts should not find that interest sufficiently compelling.

2. The Availability of Bond as an Alternative to Confinement Undermines the Government's Interest in Force-Feeding Detainees

The fact that bond is a valid alternative for pretrial detainees further undermines the government's position.[182] Detainees, like convicted prisoners, are often housed in jails.[183] However, while both convicted prisoners and pretrial detainees are housed in jails, they are typically not housed together.[184] Separation allows the state "to provide the most appropriate prison conditions for each category of detainees."[185] With ICE detainees, the different housing is even more obvious as those detainees are held in entirely separate detainment facilities.[186] As such, the state has the obligation to assess the risks differently for each group.[187] For the purposes of this assessment, detainees are unique because of the nature of a hunger-striking prisoner's demands and the relative seriousness of the crime, which together make bail a reasonable alternative to force-feeding.

First, the nature of detainee demands during a hunger strike differs from convicted prisoners. While convicted prisoners generally attack conditions of confinement (targeting prison reform),[188]

---

182. *See* Alex Nowrasteh, *Alternatives to Detention Are Cheaper than Universal Detention*, CATO INST. (June 20, 2018, 7:00 PM), https://www.cato.org/blog/alternatives-detention-are-cheaper-indefinite-detention [https://perma.cc/B96B-PQLJ].

183. *See, e.g.*, Michael Haugen, *In Rural Areas, Jail Populations Are Skyrocketing—Including Pretrial Detainees*, TEX. PUB. POL'Y FOUND. (July 3, 2018), https://www.texaspolicy.com/in-rural-areas-jail-populations-are-skyrocketing-including-pretrial-detainees/ [https://perma.cc/S9ZE-48FA].

184. *See* 28 C.F.R. § 551.104 (2020).

185. *Separation of Detainees*, DETENTION FOCUS, https://www.apt.ch/en/knowledge-hub/detention-focus-database/safety-order-and-discipline/separation-detainees [https://perma.cc/4WWL-G6P9].

186. *See Detention Management*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detention-management [https://perma.cc/4WJ2-XHG7].

187. *See id.*

188. *See, e.g.*, Julia Conley, *With US Prison Strike on Third Day, Reports of Hunger Strikes and Work Stoppages Nationwide*, COMMON DREAMS (Aug. 23, 2018), https://www.commondreams.org/news/2018/08/23/us-prison-strike-third-day-reports-hunger-strikes-and-work-stoppages-nationwide [https://perma.cc/VJ78-Z6TK].

pretrial detainees often protest being held indefinitely (demanding their own cases be heard).[189] A clear example is provided with ICE detainees, of whom fewer and fewer detainees are being released on bail.[190] While in 2016, 43.7 percent of bond hearings were denied, by 2019, that number had risen to 51.6 percent.[191] Bail-reform advocates have also collected data regarding the increase for state courts. One case study reports that in the last twenty years, Texas's ratio has grown from one out of three defendants being held pretrial to three out of four.[192] If the government is serious about reducing hunger strikes among detainees, then the government can be more generous in granting bond.

While the government might fear that detainees would then use bond as a way to manipulate the system—which seems to be a common concern with courts[193]—such a fear should not be so compelling as to give the state license for an invasion of such magnitude. In *Bezio v. Dorsey*, a justice for the New York Court of Appeals believed her colleagues had decided the case based on the prisoner's intent to manipulate the system.[194] Of the inmate, she said, "He was undoubtedly manipulative, but all civil disobedience is manipulative. Manipulativeness, obviously, is not a sufficient predicate for forced feeding by the State."[195]

Second, the seriousness of the crimes of which detainees are accused has changed significantly since the Court's holding in *Bell*. When *Bell* was decided in 1979, the Court noted that detention was necessary "because no other less drastic means" ensured appearance at trial because detainees either had prior records or had been

189. *See, e.g.*, Stein, *supra* note 9.

190. *See supra* note 11 and accompanying text.

191. *See Immigration Court Bond Hearings and Related Case Decisions*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/bond/ [https://perma.cc/KV2R-VZCH]. Although this represents a steady rise in denials over the last several years, this is not the highest on record. *See id.*

192. *See* NAT'L TASK FORCE ON FINES, FEES, & BAIL PRACS., BAIL REFORM: A PRACTICAL GUIDE BASED ON RESEARCH AND EXPERIENCE 63 (2019).

193. *See, e.g.*, Thor v. Superior Court, 855 P.2d 375, 389 (Cal. 1993) (holding that the inmate had a right to refuse nutrition but refusing to condone attempts to manipulate the prison system); Polk Cnty. Sheriff v. Iowa Dist. Ct., 594 N.W.2d 421, 431 (Iowa 1999) (noting that in most cases, inmates' primary goal is to manipulate the prison system).

194. 989 N.E.2d 942, 960 (N.Y. 2013) (Lippman, J., dissenting).

195. *See id.*

charged with "serious crimes."[196] However, bail is no longer reserved for only violent criminals; in fact, one scholar has noted that policies surrounding detainment have turned it "into a modern-day debtor's prison."[197] When release is based on financial status, rather than a prediction of violence, the risk of violent rioting seems obscure. The risk seems particularly obscure with ICE detainees, of whom 58 percent have no criminal record.[198] Only 20 percent have been convicted of a felony, and the most frequent crime is illegal entry followed by conviction for driving under the influence.[199] Generally speaking, ICE detainees are not committing the "serious crimes" that the Court likely contemplated in *Bell*.[200]

Lastly, advances in technology have made physical detention less necessary. One of the options frequently touted as an alternative is electronic monitoring.[201] If the government has a choice between placing people on house arrest or violating their constitutional rights, that violation looks even less reasonable; the government cannot argue that it had no alternative to achieve its objectives.[202] Therefore, if detainees are hunger striking most frequently in an attempt to secure bond more easily, and if detainees at large are charged with less serious offenses, the fact that bail exists undermines the reasonableness of any government interest in force-feeding detainees.

196. *See* Bell v. Wolfish, 441 U.S. 520, 546 n.28 (1979).

197. See Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1318-21 (2012).

198. *See Profiling Who ICE Detains—Few Committed Any Crime*, TRAC IMMIGR. (Oct. 9, 2018), https://trac.syr.edu/immigration/reports/530/ [https://perma.cc/B6NU-366A].

199. *See id.*

200. *Bell*, 441 U.S. at 546 n.28. Even if the detainee has a violent history, scholars and judges have seriously questioned the accuracy of any predictions of future violence. *See* Appleman, *supra* note 197, at 1336-40.

201. *See* Jesse Kelley, Opinion, *Active Electronic Monitoring a Viable Alternative to Pretrial Detention*, HILL (June 18, 2018, 5:15 PM), https://thehill.com/opinion/criminal-justice/392857-active-electronic-monitoring-a-viable-alternative-to-pretrial [https://perma.cc/KH8S-Q4EP].

202. *See* Nowrasteh, *supra* note 182.

3. Government Interest in Preserving a Detainee's Life to Trial

Another motivation lurks in the background here, and that is one originating from *Harper* and *Sell*.[203] Although never applied to force-feeding cases, *Sell* allowed a detainee to be medicated in order to render him competent to stand trial.[204] Trial interests are important interests on the part of the government.[205] However, the difference between involuntary medication and involuntary nutrition is significant.

An active-passive distinction exists between these two scenarios. Hunger striking is a voluntary and affirmative action, while a mentally ill inmate does not choose psychosis.[206] One court phrased it this way:

> [M]ental illness sometimes robs a person of the capacity to make informed treatment decisions. Only when a court finds that a person is incompetent to make informed treatment decisions do we permit the state to act in a paternalistic manner, making treatment decisions in the best interest of the patient.[207]

Therefore, while an inmate suffering from psychosis is incompetent, a hunger-striking inmate must already be competent in order to assert a fundamental right at all under *Cruzan*.[208]

Furthermore, ethical concerns arise from preserving a life simply to exact punishment in the future.[209] This is most clearly seen in the medication-for-execution cases.[210] Force-feeding a person for trial is similarly questionable. After all, because the detainee remains in state custody both before and after any criminal adjudication, assuming that the detainee is found guilty, some might argue that

---

203. *See* Sell v. United States, 539 U.S. 166, 179 (2003); Washington v. Harper, 494 U.S. 210, 227 (1990).

204. *Sell*, 539 U.S. at 179.

205. *See* Illinois v. Allen, 397 U.S. 337, 347 (1970) (Brennan, J., concurring).

206. *See, e.g.*, Julie D. Cantor, *Of Pills and Needles: Involuntarily Medicating the Psychotic Inmate when Execution Looms*, 2 IND. HEALTH L. REV. 119, 123 (2005).

207. *See* Steele v. Hamilton Cnty. Cmty. Mental Health Bd., 736 N.E.2d 10, 21 (Ohio 2000).

208. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990).

209. *See* Brian C. Kalt, *Death, Ethics, and the State*, 23 HARV. J.L. & PUB. POL'Y 487, 534 (2000).

210. *See id.*

force-feeding has punitive intent itself.[211] However, while the *Sell* Court was concerned detainees might be "free[d] without punishment" if the state does not medicate them, that same fear does not exist for detainees who are on hunger strike.[212] An interrupting stage happens between detainment and trial, which is the detainee's own choice; whatever decision hunger-striking detainees make, they do not end up in the outside world before they stand trial.

Lastly, *Sell* applies only to criminal defendants "facing serious criminal charges."[213] In deciding this, the Court cited a "human need for security."[214] In many cases, detainees are not charged with crimes that require the government to reassure its citizens that life in this country is still safe.[215] For example, ICE detainees charged with immigration crimes are usually nonviolent.[216] More broadly, the majority of state pretrial detainees are likely held for nonviolent offenses.[217] The fact that many detainees are not held for serious charges undermines the government's interest in force-feeding as a general rule without a heightened level of scrutiny, and the government's desire to preserve a detainee's life to trial actually undermines its stated interest in maintaining order.

In conclusion, the government clearly has other interests besides prison order at play; if the government were truly interested only in prison order, the fit between the stated interest and reality would not be so loose. In other areas of the law, the Supreme Court has been willing to find that the *Turner* standard is not appropriate and that a heightened standard of review should apply.[218] This should be one such area: heightened scrutiny should be required before the government is permitted to force-feed detainees. Heightened scrutiny would allow the courts to review whether the government has

---

211. *See infra* Part III.A.

212. *See* Sell v. United States, 539 U.S. 166, 180 (2003).

213. *See id.* at 179.

214. *See id.* at 180.

215. *See supra* notes 198-99 and accompanying text.

216. *See supra* notes 198-99 and accompanying text.

217. *See, e.g.*, Josh Crawford, *New Data Shows Large Number of Pretrial Detainees Are Non-Violent, Low Risk*, PEGASUS BLOG (Oct. 1, 2019), https://www.pegasuskentucky.org/single-post/2019/10/01/New-Data-Shows-Large-Number-of-Pretrial-Detainees-are-Non-Violent-Low-Risk [https://perma.cc/PQ7M-PRBU].

218. *See, e.g.*, Johnson v. California, 543 U.S. 499, 509 (2005).

proven that the hunger strike triggered its interest in safety and security, and thereby ensure that detainees' fundamental rights are not infringed upon based on hypothetical and unsupported fears.

III. FORCE-FEEDING AS PUNISHMENT

If a detainee's pretrial status is not sufficient to gain a heightened level of scrutiny for substantive due process rights, then the fact that pretrial detainees cannot be punished prior to adjudication of guilt under procedural due process should provide additional protection. Procedural due process requires the federal government to provide certain procedural safeguards whenever it denies a person life, liberty, or property.[219] Therefore, punishment is prohibited without the additional process of adjudication of guilt.[220] If a pretrial detainee does not succeed based on the substantive due process analysis, then procedural due process should impede the state's ability to force-feed detainees. This Section argues first that force-feeding will always constitute punishment, thereby triggering due process rights, and second that current hearings are insufficient to render force-feeding constitutional.[221]

A. Force-Feeding Meets Traditional Punishment Objectives, Displaying Government's Punitive Intent

Under the *Bell* test, if the state expresses punitive intent in its treatment of a detainee, then its actions violate the detainee's due process rights.[222] Although some courts have held that the state's actions are facially legitimate and do not (on their face) express punitive intent,[223] force-feeding reveals punitive intent on the part of prison officials because it serves the traditional punishment

219. *See Procedural Due Process*, BOUVIER LAW DICTIONARY (2012).

220. *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979); Johnson v. Recoder, No. 18-cv-00366-WHO, 2020 U.S. Dist. LEXIS 62056, at *6 (N.D. Cal. Apr. 8, 2020) (citing *id.*).

221. Although this Note argues that current hearings are not sufficient, and therefore additional process is due, it is beyond the scope of this Note to itemize this additional process.

222. *See Bell*, 441 U.S. at 535; Gay, *supra* note 113, at 242.

223. *In re* Khatri Chhetri Sher Bahadur, No. EP-19-CV-00357-DCG, 2020 U.S. Dist. LEXIS 33455, at *30 (W.D. Tex. Feb. 27, 2020).

rationale of deterrence[224] and because prison officials require a finding of scienter on the part of detainees.[225]

1. Deterrence

When the Court defined punishment in *Bell*, the Court stated that if the activity promoted traditional punishment goals—including that of deterrence—then the activity could constitute punishment.[226] Deterrence can be understood as happening at two levels: specific deterrence, which targets the individual offender, and general deterrence, which targets a population at large.[227] As a result of the government action—either observed or felt—the individual is less likely to engage in the bad behavior.[228] In the context of hunger striking, force-feeding meets this definition perfectly.

First, force-feeding results in specific deterrence. Once the government begins force-feeding, a detainee has only two options: either stop striking and agree to consume food again, or continue to endure the force-feeding. As one observer noted, "[T]here are only two options in the final analysis.... Either the inmate has to surrender the ... commitment, or else the prison [forces food] through [the inmate's] nose."[229] And this works: people stop hunger striking.[230] In this way, force-feeding mirrors the facts of *Fuentes v. Wagner*, in which the Third Circuit examined a restraint chair that was "used for behavior modification and control."[231] Thus, the policy of force-feeding operates as an effective coercive weapon for "subduing recalcitrant prisoners."[232]

Historical data reveals just how coercive force-feeding really is. Between 1913 and 1940, 44 percent of hunger strikers abandoned their hunger strike after being force-fed just once; 70 percent

224. *See infra* Part III.A.1.

225. *See infra* Part III.A.2.

226. *See Bell*, 441 U.S. at 537-38 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).

227. *See* Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, 80 FED. PROB. J. 33, 33 (2016).

228. *See id.*

229. Benjamin Pi-wei Liu, Comment, *A Prisoner's Right to Religious Diet Beyond the Free Exercise Clause*, 51 UCLA L. REV. 1151, 1171 (2004).

230. *See* MILLER, *supra* note 27, at 153.

231. 206 F.3d 335, 343 (3d Cir. 2000).

232. *See* MILLER, *supra* note 27, at 155.

abandoned the strike within the first day of being force-fed.[233] Only 21 percent of hunger strikes lasted beyond two days of force-feeding.[234] This coercive effect is reflected in modern instances of force-feeding. Ivanov voluntarily agreed to resume eating within a day after ICE obtained an Emergency Temporary Restraining Order granting the agency license to force-feed him.[235] The individuals who choose to stage hunger strikes are not weak-minded individuals; to the contrary, refusing food is a painful process in its own right.[236] If the additional pain of force-feeding is more intense, then how can it not be wholly inappropriate as a tool of persuasion in a civilized society?

Prisons are interested not only in deterring the hunger strike itself but also in deterring the show of autonomy and bid for change that a hunger strike represents. Courts are particularly concerned with any attempt that prisoners make to influence the system.[237] The Appellate Court of Illinois notably held that a prison could force-feed hunger strikers "whose only purpose is to attempt to manipulate the system."[238] In other words, a successful hunger strike could result in real change.[239] Therefore, prisons use force-feeding to deter both a specific hunger striker's action and the underlying purpose for that action.

Fear over manipulating the system also goes to force-feeding's purpose of general deterrence. Prison administrators frequently cite copycats as one of their fears,[240] claiming that copycats disrupt prison order.[241] In *Stouffer v. Reid*, the Court of Special Appeals of

---

233. *See id.* at 161-62.

234. *See id.* at 162.

235. Notice of Dismissal Without Prejudice at 1, U.S. Dep't of Homeland Sec., Immigr. & Customs Enf't v. Ivanov, No. 3:19-cv-01573-DMS-MDD (S.D. Cal. Aug. 23, 2019); *supra* note 1 and accompanying text.

236. *See* Monte Morin, *The Science Behind the Anguish of a Hunger Strike*, L.A. TIMES (July 3, 2013, 7:00 AM), https://www.latimes.com/science/la-sci-hunger-striker-20130703-dto-html story.html [https://perma.cc/3TEP-4J8M].

237. *See supra* note 193; *see also* Silver, *supra* note 26, at 654.

238. People *ex rel.* Ill. Dep't of Corr. v. Millard, 782 N.E.2d 966, 972 (Ill. App. Ct. 2003).

239. *See* Alizeh Kohari, *Hunger Strikes: What Can They Achieve?*, BBC NEWS (Aug. 16, 2011), https://www.bbc.com/news/magazine-14540696 [https://perma.cc/K3JL-TKT5].

240. *See* Silver, *supra* note 26, at 648.

241. *See* Polk Cnty. Sheriff v. Iowa Dist. Ct., 594 N.W.2d 421, 430 (Iowa 1999) (discussing "the chief jailer's concerns that other inmates would 'copycat' [the inmate] as an excuse to get out of jail").

Maryland refused to extend its holding, which permitted an inmate to forego dialysis, to prisoners who were attempting to manipulate prison policies or officials.[242] The court clarified,

> [The] appellee's circumstances are limited and personal. Where inmates attempt to manipulate a prison official or policy by refusing to eat because *all* inmates have to eat and any one of them could go on a hunger strike, permitting one inmate will encourage or incite other inmates to refuse to eat in order to achieve a given objective.[243]

Therefore, the government has not been shy about acknowledging that deterrence is a major incentive in force-feeding. Even if force-feeding does not effectively deter copycats,[244] the government has expressed punitive intent. Under the *Bell* test, this is sufficient to qualify force-feeding as a legal punishment.[245]

Another tangential reason the government may wish to deter hunger strikers is public relations. At common law, prisons have a duty to care for their inmates[246]—and today, the public regards prisoners as deserving of healthcare[247] and voices criticism when quality healthcare is too expensive for them to afford.[248] The stage is set for mass public criticism when the detainee requiring healthcare is a hunger striker because every response leaves the government vulnerable to negative publicity. If the government allows a detainee to die in custody, the government risks drawing national attention to the incident and the message the hunger striker intended to convey.[249] If the government force-feeds a detainee, that also is subject to public backlash.[250] It would be far easier for the

242. 965 A.2d 96, 110 (Md. Ct. Spec. App. 2009).

243. *Id.*

244. *See supra* Part II.B.1.

245. *See* Gay, *supra* note 113, at 242.

246. *See* Bennett, *supra* note 170, at 1199.

247. *See* Joseph E. Paris, *Why Prisoners Deserve Health Care*, AMA J. ETHICS (Feb. 2008), https://journalofethics.ama-assn.org/article/why-prisoners-deserve-health-care/2008-02 [https://perma.cc/2EHN-25EW].

248. *See* Wendy Sawyer, *The Steep Cost of Medical Co-Pays in Prison Puts Health at Risk*, PRISON POL'Y INITIATIVE (Apr. 19, 2017), https://www.prisonpolicy.org/blog/2017/04/19/copays/ [https://perma.cc/EL8K-LF5T].

249. *See, e.g.*, MILLER, *supra* note 27, at 96 (noting fear that a death would bolster public support); Silver, *supra* note 26, at 643.

250. *See, e.g.*, Long, *supra* note 6.

government to just deter detainees from going on strike than to deal with this catch-22 scenario.

The government's concern over the release of force-feeding information highlights how concerned the government is about public relations, even though public relations is never an interest articulated in any force-feeding cases.[251] In 2014, a federal judge ordered public accessibility for videos depicting the force-feeding of Guantanamo Bay detainees.[252] After a nine-month delay, the judge chastised the Department of Justice lawyers for requesting still more time.[253] This effort highlights the government's motive in deterring the underlying detainee behavior.

2. Finding of Scienter

The government does not require that the inmate intended to engage in a hunger strike when treating the inmate as such, but intent seems to be implied.[254] The very definition of hunger striking implies competency and a motive behind the prisoner's actions—as does common sense.[255] However, incorporating that motive into the legal analysis transforms hunger striking into a pseudo crime with force-feeding as its punishment.

In *Bell*, the Court noted that if government action "comes into play only on a finding of *scienter*," that action could be considered punishment.[256] Historically, scienter—or criminal intent—formed an element of every common law crime.[257] Although BOP and ICE regulations do not *solely* come into play after the government

251. *See* Silver, *supra* note 26, at 643 (noting the absence of public relations in state interests).

252. Cora Currier, *Judge Orders Government to Release Videos of Guantanamo Force-Feedings*, INTERCEPT (Oct. 3, 2014, 4:22 PM), https://theintercept.com/2014/10/03/judge-orders-government-release-videos-guantanamo-force-feedings/ [https://perma.cc/WB8P-BLKL].

253. Sam Sacks, *"Move Forward!" Judge Slams Government Delay in Releasing Gitmo Force-Feeding Videos*, INTERCEPT (July 9, 2015, 2:24 PM), https://theintercept.com/2015/07/09/going-move-forward-judge-slams-government-delay-tactics-releasing-gitmo-force-feeding-videos/ [https://perma.cc/BQ2M-LQEZ].

254. *See* PBNDS, *supra* note 12, at 254; *supra* notes 52-57 and accompanying text.

255. Many reasons exist for hunger striking. *See* MILLER, *supra* note 27, at 167.

256. *See* Bell v. Wolfish, 441 U.S. 520, 537-38 (1979) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).

257. William J. Sloan, Note, *The Development of Crimes Requiring No Criminal Intent*, 26 MARQ. L. REV. 92, 92 (1942).

determines that the detainee intended to engage in a hunger strike, the regulations require that prison officials refer the hunger striker to medical personnel.[258] One objective in referring the hunger striker is to assess whether the detainee is acting deliberately.[259]

However, this inquiry is relatively passive; after all, intent to engage in a hunger strike is relevant for psychiatric-treatment purposes.[260] Not only are these evaluations critical to ensuring the detainee is making a competent and informed decision, but they also assist prisons in identifying and treating any potential underlying medical issues.[261] Furthermore, prisons would likely find it difficult to avoid knowing inmates' reasons for hunger striking because prisoners want their demands to be known.[262] Therefore, this inquiry may be insufficient in itself to meet the scienter requirement in *Bell*.

But the government's own policies are not the only arena in which the government interest is visible. Courts consistently mention the hunger striker's motivation in judicial opinions, revealing just how important perceived motivations are to the government's position.[263] In *Williams v. Miller*, the Tenth Circuit noted that the prisoner had previously resorted to manipulation tactics.[264] In *People ex rel. Department of Corrections v. Fort*, a state court noted that the "defendant's hunger strike was intended to manipulate [the prison] into improving his conditions while incarcerated."[265] A New York appellate court judge in *Dorsey* warned against this tendency to import scienter when she said that an intent to manipulate should not give the state license to force-feed.[266] Therefore, even if the government has not officially stated that scienter is required, courts'

---

258. *See* 28 C.F.R. § 549.61 (2010); PBNDS, *supra* note 12, at 254.

259. *See* PBNDS, *supra* note 12, at 254.

260. *See* Marlynn Wei & Rebecca W. Brendel, *Psychiatry and Hunger Strikes*, 23 HARV. HUM. RTS. J. 75, 93-95 (2010).

261. *See id.* at 87-88, 95.

262. *See, e.g.*, *Prisoners' Demands*, PRISONER HUNGER STRIKE SOLIDARITY (Apr. 3, 2011), https://prisonerhungerstrikesolidarity.wordpress.com/education/the-prisoners-demands-2/ [https://perma.cc/9BPU-MZ6N].

263. *See, e.g.*, Williams v. Miller, 696 F. App'x 862, 868 n.13 (10th Cir. 2017); People *ex rel.* Dep't of Corr. v. Fort, 815 N.E.2d 1246, 1250-51 (Ill. App. Ct. 2004).

264. 696 F. App'x at 868 n.13.

265. 815 N.E.2d at 1251.

266. *See* Bezio v. Dorsey, 989 N.E.2d 942, 960 (N.Y. 2013).

holdings indicate that scienter is implicit in force-feeding, showing that it conforms to traditional definitions of punishment.

B. Excessive Nature of the Government Response Indicates that Force-Feeding Constitutes Punishment

If the traditional definitions of punishment discussed above—deterrence and the finding of scienter—are not sufficient to qualify force-feeding as punishment, then the *Bell* test provides for a further classification.[267] Without punitive intent, the government must have a legitimate interest in force-feeding and force-feeding must not be excessive in relation to that interest,[268] as objectively determined.[269] The validity of that government interest has been discussed at length above.[270] However, even if that government interest is found to be legitimate, force-feeding is an extreme reaction. It may even rise to the level of "barbaric treatment" that Justice Stevens discussed in his *Bell* dissent.[271] This becomes particularly clear in light of medical ethics and international law.

Medical ethics make it clear that the state's reaction is objectively extreme because force-feeding is generally not authorized for any competent adult except prisoners.[272] The WMA has strongly spoken out against the practice.[273] Furthermore, physicians—who ought to develop a relationship based on trust with their patients—violate their patients' trust by participating in force-feeding:

> Creating and maintaining trust precludes any role of the physician as an agent of or acting on behalf of the authorities to convince the hunger striker to stop the strike or to threaten the striker with adverse consequences of a refusal. Any imposition by authorities of a "medicalized" solution to a hunger strike by asking a physician to seek to induce a prisoner's compliance with authorities' requirements or tell the hunger striker to either end

267. *See* Gay, *supra* note 113, at 242.
268. *See id.*
269. *See* Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015).
270. *See supra* Part II.B.
271. Bell v. Wolfish, 441 U.S. 520, 586 (1979) (Stevens, J., dissenting).
272. *See supra* note 7 and accompanying text.
273. *See supra* note 69 and accompanying text.

> the hunger strike or be force-feed [sic], undermines trust, perhaps irretrievably.[274]

Rational government action should not require physicians to violate their patients' trust. Therefore, because it is so contrary to the normal doctor-patient dynamic, force-feeding seems to indicate that the government has hijacked the medical interest of the defendant to compel an exaggerated response to the actual medical issue.[275]

In addition to violating the sacred trust between doctor and patient, the low standard of care may cause harm in contravention of the Hippocratic Oath.[276] The Hippocratic Oath instructs physicians to act only "for the *benefit* of the sick."[277] A short-hand is often used: "First, do no harm."[278] However, when ICE force-fed an asylum-seeker from Nepal, the procedure almost killed him.[279] One doctor, a professor of emergency medicine, was "horrified at the dramatically substandard care being provided," which "would never be tolerated in any other setting."[280] In fact, after reviewing ICE's policy and the record, the judge noted "the government *barely* established that the ICE policy, as applied to respondent, does not amount to punishment."[281] The judge was particularly concerned with ICE's inattention to treatment details.[282] Therefore, when the

---

274. *See* INST. ON MED. AS A PROFESSION, ETHICS ABANDONED: MEDICAL PROFESSIONALISM AND DETAINEE ABUSE IN THE WAR ON TERROR 91-92 (2013).

275. Sometimes inmates argue that doctors actually exaggerate prisoners' medical conditions in order to justify force-feeding them. *See, e.g.*, Randolph v. Wetzel, No. 19-CV-2231, 2019 U.S. Dist. LEXIS 104647, at *10 (E.D. Pa. June 21, 2019).

276. *The Hippocratic Oath*, GREEK MED., https://nlm.nih.gov/hmd/greek/greek_oath.html [https://perma.cc/DXH8-JENV].

277. *Id.* (emphasis added).

278. Robert H. Shmerling, *First, Do No Harm*, HARV. HEALTH PUBL'G (June 22, 2020, 12:00 AM), https://www.health.harvard.edu/blog/first-do-no-harm-201510138421 [https://perma.cc/2PA7-7MS4].

279. Travis Bubenik, *As Feds Force-Feed Another Hunger Striker, Judge Raises Concern*, COURTHOUSE NEWS SERV. (Mar. 5, 2020), https://www.courthousenews.com/as-feds-force-feed-another-hunger-striker-judge-raises-concern/ [https://perma.cc/3HEC-VL94].

280. Robert Moore, *ICE Has Force-Fed Asylum Seeker in El Paso for Almost 3 Months*, TUCSON SENTINEL (Mar. 4, 2020, 4:33 PM), https://www.tucsonsentinel.com/nationworld/report/030420_asylum_hunger_strike/ice-has-force-fed-asylum-seeker-el-paso-almost-3-months/ [https://perma.cc/NA8A-MHAU].

281. *See In re* Khatri Chhetri Sher Bahadur, No. EP-19-CV-00357-DCG, 2020 U.S. Dist. LEXIS 33455, at *31 (W.D. Tex. Feb. 27, 2020) (emphasis added).

282. *See id.* at *3.

treatment being provided is both brutal and poorly implemented, it is unnecessary and therefore excessive.[283]

When applied to pretrial detainees—particularly those ICE detains—other medical scenarios may also affect the detainees' decision to initiate a hunger strike.[284] Asylum-seekers, who are undergoing a rigorous review process, often present psychological symptoms, such as "anxiety, depression, and post-traumatic stress disorder."[285] The length of detention plays into these psychological concerns.[286] As discussed above, many ICE-detainee hunger strikes are actually just an attempt to resolve uncertainty.[287] Because pretrial detainees are frequently reacting out of uncertainty, the physician should address corresponding psychological issues rather than comply with the government's disproportionate force-feeding reaction.

Occasionally, the government has argued that medical ethics weighs in favor of force-feeding.[288] Some judges are unwilling to accept that argument—particularly in light of developments such as the WMA declaration.[289] However, other courts have imposed legal liability on healthcare professionals who have refused to participate in force-feeding because of their ethical responsibilities.[290] In all probability, this distinction comes down to precedent—too few courts have been willing to say that force-feeding violates medical ethics, even in the face of evidence that it does.[291]

Not only does medical ethics indicate force-feeding is an extreme reaction, international law supports this as well. On the balance, international laws do not support "force-feeding ... prisoners without

283. *Excessive*, MERRIAM-WEBSTER (2020) (defining "excessive" as "exceeding what is usual, proper, necessary, or normal").

284. *See* Wei & Brendel, *supra* note 260, at 83-84.

285. *See id.* at 83.

286. *See id.*

287. *See supra* note 10 and accompanying text.

288. *See, e.g.*, McNabb v. Dep't of Corr., 180 P.3d 1257, 1266 (Wash. 2008).

289. *See, e.g.*, *id.* at 1274 (Sanders, J., dissenting); *see also* Comm'r of Corr. v. Coleman, 38 A.3d 84, 110 (Conn. 2012) (citing *McNabb*, 180 P.3d at 1268 (Sanders, J., dissenting) among others).

290. *See* Azadeh Shahshahani & Priya Arvind Patel, *From Pelican Bay to Palestine: The Legal Normalization of Force-Feeding Hunger-Strikers*, 24 MICH. J. RACE & L. 1, 12 (2018).

291. *See Coleman*, 38 A.3d at 110 (noting that opinions citing the WMA declarations lack precedential value and do not reflect a consensus about how courts view these declarations).

medical consent."[292] Some countries—notably the United Kingdom—have officially acknowledged a prisoner's right to starve.[293] Furthermore, force-feeding as punishment violates every relevant international treaty, including the Geneva Convention.[294] If such is the international perspective, domestic force-feeding likely does not constitute a reasoned and proportional response to a hunger strike.[295]

Not only do medical ethics and international laws highlight the extremity of the government's reaction, but also the host of other issues discussed in this Note cement the fact. One court has eloquently summarized the current standard: "[I]t 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."[296] Such a comprehensive list should not be ignored. These considerations reveal that force-feeding is an extreme reaction constituting punishment under the *Bell* standard.

C. Court Hearings as Adjudication

Generally, ICE requires its officials to get a court order prior to force-feeding a detainee,[297] and prisons follow suit.[298] Some may argue that this qualifies as adjudication and therefore provides sufficient due process, even if force-feeding constitutes punishment. However, hearings as they currently stand are not sufficient because these hearings do not address the detainee's guilt.[299] Because

---

292. *See* Gordon, *supra* note 50, at 370.

293. *See* Silver, *supra* note 26, at 635 (noting that Britain officially recognizes a prisoner's right to starve).

294. *See* George J. Annas, *Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror*, 87 B.U. L. REV. 427, 431, 455-56 (2007).

295. Some scholars have called force-feeding torture. *See, e.g.*, Sumer Dayal, *Prosecuting Force-Feeding: An Assessment of Criminality Under the ICC Statute*, 13 J. INT'L CRIM. JUST. 693, 704-05 (2015).

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

297. *See* PBNDS, *supra* note 12, at 256.

298. *See, e.g.*, N.Y. STATE CORR. & CMTY. SUPERVISION, DIRECTIVE: INMATE HUNGER STRIKE (2019), https://doccs.ny.gov/system/files/documents/2020/02/4309.pdf [https://perma.cc/W5GY-BWQK].

299. *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979).

hunger striking is not a crime, these hearings cannot result in a finding of guilt.

Any court hearings currently taking place are not sufficient for due process. Punishment is prohibited prior to an adjudication of *guilt*.[300] Guilt is not a subject of these hearings.[301] Although these hearings might address issues likely to arise based on infringement of constitutional rights,[302] even if those infringements are ultimately unconstitutional,[303] the hearings do not adjudicate guilt. Using the ICE order granted in Evgenii Ivanov's case as an example, the order does not use terminology consistent with guilt and innocence.[304]

Guilt cannot be the subject of these hearings because guilt requires "[a] legal determination of criminal responsibility ... that an individual or entity has violated the criminal law."[305] Therefore, a legislative body must actually prohibit behavior before guilt becomes a possibility. There is no criminal law prohibiting competent people from refusing hydration and nutrition; if it were, such law would be out of step with *Cruzan*.[306] No person can be guilty of a crime that does not exist. Such a principle is obvious from the void-for-vagueness doctrine, under which crimes not clearly defined have no power.[307] Not only do vague laws provide reasonable citizens no warning that their actions will result in punishment, but they also allow for arbitrary actors to inflict punishment for impermissible reasons.[308] Absent some law under which to adjudicate guilt, no hearing—regardless of the thoroughness of the evidence—can

---

300. *See id.* at 535.

301. *See, e.g.*, U.S. Dep't of Homeland Sec., Immigr. & Customs Enf't v. Ivanov, No. 3:19-cv-01573-DMS-MDD, slip op. at 2 (S.D. Cal. Aug. 22, 2019). To the extent punishment is mentioned in these hearings, the government focuses on fitting the force-feeding into the non-punishment box. *See, e.g.*, *In re* Khatri Chhetri Sher Bahadur, No. EP-19-CV-00357-DCG, U.S. Dist. LEXIS 33455 (W.D. Tex. Feb. 27, 2020).

302. *See, e.g.*, *Ivanov*, slip op. at 2 ("The Court finds that [ICE] is likely to succeed in showing that its interest in preserving life and discharging its duties to care for those in its custody outweigh any interest Defendant might have in expressing himself through a hunger strike.").

303. *See supra* Part II.

304. *See Ivanov*, slip op. at 3.

305. *Guilt*, BOUVIER LAW DICTIONARY (2012).

306. *See supra* Part I.A.

307. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (noting that the void-for-vagueness doctrine is a "basic principle of due process").

308. *See id.*

find it. Because force-feeding pretrial detainees is punishment, these hearings are not enough to cloak the action in legality.

CONCLUSION

Evgenii Ivanov stopped his hunger strike within a day of the court granting ICE's request to force-feed him.[309] Ivanov is certainly not the only detainee to have stopped so abruptly.[310] Other detainees have recounted the horrible pain associated with force-feeding.[311] Such action is clearly coercive. It also violates a detainee's fundamental right to refuse lifesaving hydration and nutrition. This truly is "inherently cruel, inhuman, and degrading" treatment.[312] The practice is also tragically unnecessary with pretrial detainees because of the additional flexibility such status grants the government for problem-solving. Therefore, the government should be required to show more than just the possibility that the hunger striker will cause disruption and disorder.

Furthermore, pretrial detainees are protected from punishment prior to adjudication of guilt.[313] Force-feeding, which is brutal and painful, has obvious deterrent effect on hunger-striking and is unconstitutional. The government should not be permitted to treat detainees like convicted prisoners, without consideration for their separate status and constitutional protection. If the government does so, then defendants truly are guilty without a chance to prove their innocence. Tragically, they are guilty only of exercising their rights.

Bryn L. Clegg[*]

309. *See supra* note 235 and accompanying text.

310. Ajaj v. United States, 479 F. Supp. 2d 501, 519 (D.S.C. Sept. 7, 2006) ("Plaintiff later agreed to eat after a court order for forced feeding was obtained.").

311. *See supra* notes 60-68 and accompanying text.

312. *See supra* note 70 and accompanying text.

313. *See supra* Part III.

* J.D. Candidate 2021, William & Mary Law School; B.A., English, 2013, Brigham Young University. I am deeply thankful for my parents, Barry and Pauline Clegg, who offer me constant love and support, as well as my siblings, Natalie, Zoë, Maria, and Johnny, who give me confidence. I am also grateful to Tressa Bussio, Sarah Peck, Hannah Gourdie, and Emma Merrill for discussing ideas and drafts with me, and to the *William & Mary Law Review* staff members for assistance during the publication process.